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

REGIONAL BENCH - COURT NO.2

Customs Appeal No.75899 of 2024
And
Customs Cross Objection No.75575 of 2024

(Arising out of Order-in-Original No.CC(P)/BBSR/CUS/No.05/COMMISSIONER/2024 dated 24.01.2024 passed by Commissioner of Customs (Preventive), Bhubaneswar.)

Commissioner of Customs (Preventive), Bhubaneswar
(CR Building, Rajaswa Vihar, Bhubaneswar, Odisha.)

...Appellant

VERSUS

M/s. S.M. Nirayat Pvt.Ltd.

.....Respondent

(403, Sagar Trade Cube, 104, S.P.Mukherjee Road, Kolkata, West Bengal-700026.)

WITH

(i) Customs Appeal No.75900 of 2024 And Customs Cross Objection No.75577 of 2024 (Commissioner of Customs (Preventive), Bhubaneswar vs. M/s. S.M. Niryat Pvt.Ltd.); (ii) Customs Appeal No.75901 of 2024 And Customs Cross Objection No.75579 of 2024 (Commissioner of Customs (Preventive), Bhubaneswar vs. M/s. Disha Realcon Pvt.Ltd.); (iii) Customs Appeal No.76102 of 2024 And Customs Cross Objection No.75607 of 2024 (Commissioner of Customs (Preventive), Bhubaneswar vs. Shri Ajay Gupta); (iv) Customs Appeal No.76103 of 2024 And Customs Cross Objection No.75608 of 2024 (Commissioner of Customs (Preventive), Bhubaneswar vs. Shri Ajay Gupta); (v) Customs Appeal No.76104 of 2024 And Customs Cross Objection No.75609 of 2024 (Commissioner of Customs (Preventive), Bhubaneswar vs. Shri Ajay Gupta); (vi) Customs Appeal No.76105 of 2024 And Customs Cross Objection No.75610 of 2024 (Commissioner of Customs (Preventive), Bhubaneswar vs. Shri Manish Khemka); (vii) Customs Appeal No.76106 of 2024 And Customs Cross Objection No.75611 of 2024 (Commissioner of Customs (Preventive), Bhubaneswar vs. Shri Manish Khemka); (viii) Customs Appeal No.76107 of 2024 And Customs Cross Objection No.75612 of 2024 (Commissioner of Customs (Preventive), Bhubaneswar vs. Shri Manish Khemka);

(i) (Arising out of Order-in-Original No.CC(P)/BBSR/CUS/No.04/COMMISSIONER/2024 dated 18.01.2024 passed by Commissioner of Customs (Preventive), Bhubaneswar.)

(ii) (Arising out of Order-in-Original No.CC(P)/BBSR/CUS/No.01/COMMISSIONER/2024 dated 08.01.2024 passed by Commissioner of Customs (Preventive), Bhubaneswar.)

(iii) (Arising out of Order-in-Original No.CC(P)/BBSR/CUS/No.01/COMMISSIONER/2024 dated 08.01.2024 passed by Commissioner of Customs (Preventive), Bhubaneswar.)

(iv) (Arising out of Order-in-Original No.CC(P)/BBSR/CUS/No.04/COMMISSIONER/2024 dated 18.01.2024 passed by Commissioner of Customs (Preventive), Bhubaneswar.)

(v) (Arising out of Order-in-Original No.CC(P)/BBSR/CUS/No.05/COMMISSIONER/2024 dated 24.01.2024 passed by Commissioner of Customs (Preventive), Bhubaneswar.)

(vi) (Arising out of Order-in-Original No.CC(P)/BBSR/CUS/No.01/COMMISSIONER/2024 dated 08.01.2024 passed by Commissioner of Customs (Preventive), Bhubaneswar.)

(vii) (Arising out of Order-in-Original No.CC(P)/BBSR/CUS/No.04/COMMISSIONER/2024 dated 18.01.2024 passed by Commissioner of Customs (Preventive), Bhubaneswar.)

(viii) (Arising out of Order-in-Original No.CC(P)/BBSR/CUS/No.05/COMMISSIONER/2024 dated 24.01.2024 passed by Commissioner of Customs (Preventive), Bhubaneswar.)

APPEARANCE

Shri S.Debnath, Authorized Representative for the Revenue
Shri Alok Agarwal & Shri Prachit Mahajan, both Advocates for the Respondent (s)

CORAM: HON'BLE SHRI R. MURALIDHAR, MEMBER(JUDICIAL)
HON'BLE SHRI RAJEEV TANDON, MEMBER(TECHNICAL)

MISCELLANEOUS ORDER NO. 75526-75534/2024
FINAL ORDER NO. 77189-77197/2024

DATE OF HEARING : 25.09.2024
DATE OF DECISION : 25.09.2024

Per : RAJEEV TANDON :

The present order deals with 9(nine) appeals filed by the Revenue as per details hereinbelow:

Sl. No.	Appeal No.	PartY's Name	Order-in-Original No.	Show Cause Notice No. DIN No.
1.	C/75900/2024	M/s.S.M.Niryat Pvt.Ltd.	CC(P)/BBSR/CUS/No.04/ COMMISSIONER/2024 dated 18.01.2024	VIII(10)91 SCNSMNDRICUSP BBSR2020 dated 10.09.2021
2.	C/76103/2024	Shri Ajay Gupta	CC(P)/BBSR/CUS/No.04/ COMMISSIONER/2024 dated 18.01.2024	VIII(10)91 SCNSMNDRICUSP BBSR2020 dated 10.09.2021
3.	C/76106/2024	Shri Manish Khemka	CC(P)/BBSR/CUS/No.04/ COMMISSIONER/2024 dated 18.01.2024	VIII(10)91 SCNSMNDRICUSP BBSR2020 dated 10.09.2021
4.	C/75901/2024	M/s. Disha Realcon	CC(P)/BBSR/CUS/No.01/ COMMISSIONER/2024 dated 08.01.2024	20210276NN 000000D401 dated 01.03.2021
5.	C/76102/2024	Shri Ajay Gupta	CC(P)/BBSR/CUS/No.01/ COMMISSIONER/2024 dated 08.01.2024	20210276NN 000000D401 dated 01.03.2021
6.	C/76105/2024	Shri Manish Khemka	CC(P)/BBSR/CUS/No.01/ COMMISSIONER/2024 dated 08.01.2024	20210276NN 000000D401 dated 01.03.2021
7.	C/75899/2024	M/s. S.M. Niryat Pvt.Ltd.	CC(P)/BBSR/CUS/No.05/ COMMISSIONER/2024 dated 24.01.2024	20201276NN0000 72297D dated 28.12.2020
8.	C/76104/2024	Shri Ajay Gupta	CC(P)/BBSR/CUS/No.05/ COMMISSIONER/2024 dated 24.01.2024	20201276NN0000 72297D dated 28.12.2020
9.	C/76107/2024	Shri Manish Khemka	CC(P)/BBSR/CUS/No.05/ COMMISSIONER/2024 dated 24.01.2024	20201276NN0000 72297D dated 28.12.2020

2. The respondents have also filed Cross Objections in each of the aforesaid appeals. As the issue involved in each of the aforesaid appeals is on common lines all the said appeals as well as the Cross Objections are being taken up for consideration by way of a common order. The Revenue is aggrieved with regards to the dropping of the demands by the learned Commissioner and also for not imposing penalties under Section 114A of the Customs Act, as made out in the show cause notices, while the respondents' Cross Objections relate to imposition of penalty under Section 114AA of the Customs Act.

3. The facts of the case are that the respondents S.M. Niryat Pvt.Ltd. and M/s. Disha Realcon exported several consignments of iron ore fines during the material period. The said exports were carried out from the port of Paradeep as well as Haldia. The department's assertion is that the respondent resorted to evasion of customs duty by mixing two separate consignments/cargos after getting let export orders from the authorities.

4. For records, Iron ore fines having Fe content of 58% and above (Classifiable under CTH -26011143 and 26011149) attracted export duty @ 30% *ad valorem* while iron ore fines with iron content below 58% (classifiable under CTH 26011141 and 26011142) attracted nil rate of duty in terms of Notification No.27/2011-CUS dated 01.03.2011 read with Notification No.15/2016-CUS dated 01.03.2016, during the material period. The appellants were issued the aforesaid Show Cause Notices for the purported evasion of export duty, by way of filing two or three separate shipping bills for different consignments of iron ore fines, one declared as low grade iron ore fines (less than 58%) and the other declared as high grade iron ore fines (more than 58%) and loading them onto the same hatchet of the vessel, without any separate distinction concerning the percentage of iron ore content in the export goods. The department submits that loading of the iron ore fines of two varying types of consignments in the concerned vessel, loading them in the same hatches of the vessel brought about a mixing of different quality/grade of the export goods. It was therefore alleged by the department in the show cause notices issued, that the exporter adopted

such a unique *modus operandi* to evade export duty upon part consignments of iron ore fines, wherein the quantity of Fe content was more than 58%. In the ultimate, the contention of the department being that the export goods were so loaded in the vessel in combined form, in one and the same vessel, so that the average iron content of the 'complete consignment' having both low grade cargo as well as high grade cargo of iron ore fines became so as to be rendered dutiable.

5. Contrary to the above, the contention of the respondents is that they had exported iron ore fines, having iron content less than 58% on WMT basis, even if all the shipping bills exported in various vessels were clubbed together.

5.1 The following table brings out the details of iron ore content as exported and ascertained at the time of exports made through Haldia Port :-

Sr.No.	Name of Vessel	Goods	HALDIA					
			SHIPPER	S/B No. and Date	CERTIFICATE GIVEN FOR QNT (MT)	Fe% Content (DMT)	MOISTURE % FOUND	Fe% Content (WMT)
1	Nord Summit	Iron ore	S.M. NIRYAT	4511566/02.03.17	11000	62.13	9.10	56.48
		Iron ore		4511570/03.03.17	10651	57.50	9.39	52.10
2	Darya Brahma	Iron ore	S.M. NIRYAT	4961334/24.03.17	5000	62.21	8.05	57.20
3	Pan Spirti	Iron ore	S.M. NIRYAT	6293674/25.05.17	7200	62.35	7.50	57.67
4	Pan Spiriti	Iron ore	S.M. NIRYAT	6292877/25.05.17	1950	62.35	7.50	57.67

SR. No.	Vsl Name (MV.)	Nomination given by Overseas Buyer	Commodity	Certificate give for quality	Fe% Content (DMT)	MOISTURE % FOUND	Fe% Content (WMT)
1	MV. NORD SUMMIT	Gentrate International	Iron ore fines	59830	61.32	7.76	56.56
2	MV DARYA BRAHMA	Gentrate International	Iron ore fines	54653	60.82	7.2	56.44
		Gentrate International	Iron ore fines				
3	MV PAN SPRIT	Gentrate International	Iron ore fines	55200	61.07	6.21	57.28
		Gentrate International	Iron ore fines				

5.2 As for the shipments exported out of Paradeep Port the learned Commissioner has detailed & reflected thereon in Para 4.6 of his Order-in-Original No.CC(P)/BBSR/CUS/No.4/Commr./2024 dated 18.01.2024, indicating the loading of the cargo in each hatch as per storage plan of the various vessels and in Para 4.2 of Order-in-Original No.CC(P)/BBSR/CUS/NO.5/Pr.Commr./2021 dated 08.01.2024 and are not being reiterated herein. Likewise Table II in para 1.46 of the order-in-original gives details of all cases of export from Paradeep Port that had an element of demand of duty or otherwise.

6. Show Cause Notice dated 01.07.2021 was issued to the respondent Disha Realcon Pvt.Ltd. for re-classification/re-valuation with the regard to shipping bills already finalized vide Order dated 29.11.2019. The following table gives details thereof.

Sl. No.	Shipping Bill	Name of Vessel	Final assessment Order No./date
1.	9361293 dated 17.10.17	Unity Explorer	Finalised on 29.11.2019 vide F.No.S41(G)-186/2019 Exp (Misc)
2.	9361299 dated 17.10.17	Unity Explorer	Finalised on 29.11.2019 vide F.No.S-41(G)-186/2019 Exp (Misc)

7. The Revenue's contention thus being, that due to the apparent mixing of different grades of cargo the entire cargo had become liable for payment of Customs duty. Investigations were initiated culminating in the issuance of the show cause notice to the two exporters M/s.S.M.Niryat Pvt.Ltd. and M/s.Disha Realcon Pvt.Ltd. and Director Shri Manish Khemka and Manager Shri Ajay Gupta respectively. The adjudicating authority dwelt on the entire aspect of the matter extensively and dropped the demands. He however imposed penalty on the appellants under section 114AA of the Customs Act on the respondent as already indicated in foregoing paras. The respondents too have filed Cross Objections disputing the penalty imposed on them under Section 114AA of the Customs Act.

8. It is borne out from records as well as the adjudication order that wherever the noticee had declared iron content more than 58% appropriate export duty was paid by the respondent at the time of the export of the said goods. The Revenue's contention only being that as high grade cargo was mixed with that of low grade iron content and

that the full cargo loaded in the vessel became more than 58% in the vicinity of 61%, complete cargo loaded in the vessel ought to have suffered appropriate export duty. Citing the various test reports, the learned Commissioner has given an elaborate finding. The department has however based its case on the basis of local test reports that ascertained the Fe content in the IOF on Dry weight basis. The adjudicating authority arrived at the inevitable conclusion that the export cargo was not attracting export duty when Fe percentage was computed on WMT basis, and therefore neither liable for confiscation nor imposition of penalty under section 114(ii)/114A. He has recorded clear findings on all the facets of the issues involved in the matter. Besides above to the contention of undervaluation, the invoice as found in the electronic device of the employee Sri Ajay Gupta not being relevant to the impugned exports and not backed by any contract, the overseas remittances as per the BRCs and the fact of determination of Fe Content on DMT basis in the chemical analysis reports of Private testing agencies, are all aspects dwelt upon in extenso.

9. In arriving at the iron content of the various shipments the adjudicating authority has applied the formula as laid down by the hon'ble Bombay High Court in the case of **V.M. Salgaonkar and Brothers Pvt.Ltd. in W.P. No.216/2022** read along with the decision of the apex court in the case of **Gangadhar Narsingdas Agarwal [1997 (87) ELT 19(SC)]**, to determine "Fe Content" of the export iron ore on WMT basis and the Board's Circular No.04/2012 dt. 17.02.2012 on the subject. While adjudicating the matter the

ld.Commissioner has *inter alia* taken note of several rulings of the court in the matter and applied the same. Notable aspects of the Commissioner's order are as under:

> *(i) The CBIC Circular No.04/2012-Cus dated 17.02.2012 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.*
>
> *(ii) Hon'ble High Court of Bombay at Goa, while deciding the Writ Petition No.216 of 2022, categorically held that the assessments pertaining to the period prior to 01.05.2022 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, as clarified by the aforesaid CBEC Circular dated 17.02.2012. This order of the Hon'ble High Court has also discussed about a universal formula to obtain Fe% on WMT basis. This judgement of Hon'ble High Court of Bombay at Goa has already been accepted by the competent authority of the Department.*
>
> *(iii) CESTAT vide Final Order No.76645/2023 dated 15.09.2023 in the case of Bagadia Brothers Pvt.Ltd. has ordered that –*
>
> > *"convert the % of Fe in DMT basis to %age on WMT basis by applying the universally recognized 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"*
>
> *(iv) The Commissioner of Customs (Port), Kolkata accepted the Hon'ble CESTAT Final Order No.76644-76645/2023 dated 15.09.2023 in Customs Appeal No.75008 of 2021 in the matter of M/s. Bagadiya*

Brothers Pvt.Ltd. On 29.12.2023 with the concurrence of the Chief Commissioner of Customs, Kolkata, Kolkata Zone.

(v) The Commissioner of Customs (Prev.), Customs (Preventive) Commissionerate, Bhubaneswar has also accepted the aforesaid Order of the Hon'ble CESTAT Final Order No.76644-76645/2023 dated 15.09.2023 in Customs Appeal NO.75008 of 2021 in the matter of M/s. Bagadiya Brothers Pvt.Ltd. with the concurrence of the Chief Commissioner GST, Central Excise and Customs Zone.

(vi) The Commissioner of Customs, Mangalore, in case of M/s. Dream Logistics Co.India Pvt.Ltd., who vide OIO NO.04/2010 (Commr.) dated 28.04.2010, F.No.VIII/10/14/2009/Adjn, at Para 22, has relied upon the opinion dated 22.01.2009 of Central Revenue Control Lab, New Delhi, as per which, Fe content in samples in as received basis can be calculated from Fe content on dry basis if the moisture content in samples in as received known; by using the following formula;

Fe Content - $\frac{Fe \times (100-M)}{100}$

Where Fe is %age of Iron content on dry basis

M is the moisture content in the sample

The said OIO NO.4/2010 dated 28.04.2010 has also been accepted by the Committee of Chief Commissioner on dated 16.07.2010 vide File NO.VIII/48/89/2010 CCU as per letter C.No.VIII/10/14/2009-Cus-adjn dated 07.04.2014 of Dy.Commissinoer (Review), Mangalore]

(vii) CRCL, Visakhapatnam vide its letter F.No.34/VSKP/T.O/2023-24 dated 11.09.2023 also provided for adopting the said formula as discussed above.

10. It is interesting to mention that the demands in the show cause notices are a cumulative effect of the declarations made by the respondents in the shipping bills and the chemical test results of surveyors appointed by the exporters at the time of export of iron ore

fines with iron content below 58% (CTH-26011141 and 26011142) and that with iron content above 58% (CTH – 26011143 and 26011149), purely on account of mixing of the goods exported vide different shipping bills but stored in common hatches of the merchant vessels. As for the test reports, it is pointed out by the adjudicating authority that in essence there were three different stages of Load Port Test Reports :

(i) Test reports based on which export invoices were raised.

(ii) Test reports by private testing agencies based on nomination of shipper.

(iii) Test reports issued by private test agency based on nomination of overseas buyer.

He thereby clearly hints at the dilemma of the various options. However, a detailed point by point analysis of the said test reports as undertaken by the adjudicating authority clearly brings out the fact that in all cases of analysis Fe content/percentage in the export shipment, Bill of Entry wise/full cargo wise stood well below 58% on WMT Basis.

11. While arriving at his findings concerning the determination of the iron percentage content in the export cargo, the adjudicating authority has specifically noted that on WMT basis the iron ore content in various consignments of the export cargo stood below 58% both shipping bill wise as well as on the entire/full cargo load basis and therefore the question of demand of differential duty on entire/full cargo loaded on the basis of private test agencies deriving iron content on DMT basis

would not hold good. Guided by settled law and the apex court's ruling the adjudicating authority has determined the iron content on WMT basis below dutiable thresholds and we see nothing wrong in so doing. The question of adoption of the said principles, formula, computation on WMT basis, its ascertainment through DMT data are all matters that are since well settled by way of orders passed by several judicial authorities as well as the Circular issued by the Board. Based on the said premise the adjudicating authority has dismissed the department's proposal and claim for a revised classification and valuation of the subject goods. We are in agreement with the adoption of the aforesaid mechanism by the adjudicating authority in arriving at his findings. It also be noted that the department has not been able to rest its case based on any concrete evidence or principle. Further, there is no claim of receipt of higher payments for the goods exported by the respondent. No other justifiable reasoning is made out in the notice, in support of the department's plea.

11.1 We are of the view that the department's premise in the matter for determination of iron content in the iron ore without considering moisture content i.e. on DMT basis is against the settled law as indicated supra. Multiple pronouncements by various authorities on the subject have reckoned the determination of iron content on WMT basis and the department is bound therewith. On the valuation aspect the Ld.Commissioner has exhaustively discussed the matter in his impugned orders. It is further on record that the BRCs concerned with the shipments establish nothing more than the transaction value as declared by the exporters.

11.2 We also note that an identical issue was considered by the Coordinate Bench of the Tribunal in the case of **CC(Prev.), BBSR. V. Chamong Tea Exports Pvt.Ltd.** decided vide Final Order No.76765/2024, whereto the appeal filed by the Revenue was dismissed and the entire consignments, were even though held as consolidated consignments, the iron content arrived at on WMT basis being less than 58% were held to be not non-dutiable. Consequently, liability for payment of duty, penalty etc. were all dismissed. Exactly similar is the case herein. Even in the Respondent’s own case in Appeal No.C/75455/2022, filed by the department, it was categorically held that the valuation has to be arrived at based on the iron content in the iron ore fines exported in terms of guidelines laid down in the case **Gangadhar Narsinghdas Agarwal** case (referred supra) and the Tribunal concurred with the directions for remand as issued by the first appellate authority to arrive at a finding accordingly, thereby dismissing the department’s appeal.

12. We are of the strong view that merely on the premise of mixing of the cargo, post the issuance of the let export order cannot justify the claim for demand of duty on the entire lot, when there is nothing contrary to hold Fe% being more than the dutiable threshold, when arrived at on WMT basis. For the reason we find no merit in the learned adjudicating authority, imposing penalty under Section 114AA on the respondents herein. Moreover, there is no discussion in the order

passed by the learned Commissioner, with regard to justification for imposition of such a penalty on the respondents. For this reason alone, being bereft of any basis or argument, other than stating that the Director failed to inform the steve-doers, Customs brokers of the fact of the export lot comprised of distinct consignments, as per S/B filed and the fact of provisional/final invoices of the buyers, we see no merit in the imposition of penalty supra. As for the employee Ajay Gupta the crucial reason for imposition of penalty, is that he was found to be in possession of invoices pertaining to export of iron ore fines that were loaded into the vessels. This is no plausible reason and the penalty imposed is liable to be set aside, as the said invoices could not be connected to the impugned shipment. . Having found commissioning of no wrong we fail to appreciate the logic for imposition of any such penalty on each of the respondents. In view of our findings above, we see no reason in the proposal of the Revenue to impose penalty under Section 114A of the Customs Act on the respondents. There is nothing on record, intentional or otherwise, to establish the usage of such material that has been found to be false or incorrect in any material particular, therefore any penalty on that account is certainly not imposable in the matter.

13. In view of aforesaid we are not in agreement with the adjudicating authority imposing penalty under Section 114AA of the Customs Act on the respondents and the same is required to be set aside.

14. In view of what is stated above, the Revenue's appeals are liable to be quashed and are therefore dismissed. We also set aside the imposition of penalty under Section 114AA as imposed on the respondents by the adjudicating authority. The Cross Objections filed by the respondents are accordingly disposed of in the aforesaid terms.

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

Sd/
(R. MURALIDHAR)
MEMBER (JUDICIAL)

Sd/

(RAJEEV TANDON)
MEMBER (TECHNICAL)

sm