IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

REGIONAL BENCH – COURT NO.1

C/Stay/75051/2023

in

Customs Appeal No.75128 of 2023

(Arising out of Order-in-Appeal No…150/CUS/CCP/2022 dated 14.12.2022 passed by Commissioner (Appeals) of GST & Central Excise & Customs, Bhubaneshwar)

Commissioner of CGST, C.Ex & Customs, Bhubaneshwar
C.R.Building, Rajaswa Vihar, Bhubaneswar-751007.

Appellant

VERSUS

M/s Saraogi Udyog (P) Ltd.
21 Hemant Basu Sarani, Centre Point, Suit No. 212, 2nd Floor,
Dist.-Kolkata-700001.

Respondent

APPERANCE :
Shri T.Sulaiman, Authorized Representative for the Appellant
None for the Respondent

CORAM:
HON'BLE MR.ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE MR.SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

SP/MISC. ORDER NO…75640-75641/2025..
FINAL ORDER NO. …77339/2025.

DATE OF HEARING : 25.08.2025
DATE OF DECISION : 25.08.2025

Per Ashok Jindal :

The Revenue has filed an application for staying the operation of Order-in-Appeal No. 150/CUS/CCP/2022 dated 14/12/2022 passed by Commissioner of Customs (Appeals), Kolkata.

2. Prima-facie, on-going through the impugned order, we find that the order of the ld. Commissioner (Appeals) is not, ex-facie, illegal or without jurisdiction. The Revenue's Stay Petition being filed in a routine and mechanical manner and devoid of merit, is rejected.

3. The Revenue is in appeal against the impugned order.

4. The facts of the case are that the Respondent imported 17,205.23 MT of "Coke Breeze" and filed Bill of Entry on 11.02.2014 classifying the imported material under CTH 27040030 claiming the exemption of Basic Customs Duty @0% in terms of SI No. 125 of N.F. No. 12/2012 –CUS dated 17.03.2012. The Bill of Entry was assessed provisionally.

5. The said Bill of Entry was assessed finally on 22.07.2022 classifying the imported under CTH 27040030, but without the benefit of exemption under SI No. 125 of N.F.No. 12/2012 CUS dated 17.03.2012 as per classification issued by CBEC Circular No. 56/2003-Cus dated 27.06.2003 based on the load port chemical report which is as under:

Moisture (as received basis) %	14.88
Ash (as received basis)%	11.60
Ash (dry basis) %	13.63
Volatile Matter (as received basis) %	1.19
Volatile Matter (dry basis) %	1.40
Sulphur (as received basis) %	0.84
Sulphur (dry basis)%	0.99
Fixed Carbon %	0
Size (0-10 mm) %	18.74

6. The said order was challenged by the Respondent before Ld. Commissioner (Appeal) and who examined the issue and passed the order on merit as under :

"*5.1. The central point of dispute in this appeal is the classification of the imported goods, described as "Coke Breeze" ---whether to be treated as "metallurgical coke" or otherwise and eligibility of benefit of exemption of basic customs duty @ 0% under Sl. No. 125 of N.F. No. 12/2012 –CUS dated 17.03.2012 or not? Department has decided against the appellant mainly relying on Board's Circular No. 56/2003 –Cus dated 27.06.2003, issued under F. No. 528/50/2003-CUS (TU).*

5.2. That the appellant argues that the context under which the impugned Circular No. 56/2003 –Cus dated 27.06.2003 was issued specifically for 'Metallurgical coke when imported by a manufacturer of pig iron or steel using a blast furnace or COREX technology'. The context of the applicability of the Notification in respect of the imported item under the impugned Bill of Entry was altogether different, in as much as, the impugned exemption under Sl. No. 125 of notification No. 12/2012 –Cus was for the import of metallurgical coke, without any *further qualification (unlike in the former notification) and is eligible for exemption under this entry of the notification. It is immaterial whether the imported metallurgical coke is fit for use in the blast furnace or otherwise. There is no dispute about the chemical nature of the imported goods on the point that the impugned goods are "metallurgical coke", nor has any point been ever raised on this issue. Once the context changes, a principle laid down/prescribed under a different context cannot apply to the changed context as decided in the following cases as reported in-*

RAB Prasad v STO [AIR 1961 SC 1352]

CST v Jaswant Singh [AIR 1967 SC 1454]

T Kothur v Maharashtra [AIR 1977 SC 1454]

EPLM v CCE [1989 (63) ELT 599 (T)]

5.3. That once it is so, the context having been changed with reference to earlier Notification No. 21/2002-CUS and the present impugned Notification No. 12/2012 –CUS, the earlier Circular No. 56/2003-CUS issued in the context of the former notification cannot/should not be applied to the latter unconditional exemption notification vide Sl. No. 125 of N.F. No. 12/2012-Cus. After all, the imported material continues to be the same chemically, be it of a certin fineness/particle size and there was no dispute whatsoever about the chemical nature of the impugned goods as "metallurgical coke". Accordingly, I hold that Sl. No. 125 of N.F. No. 12/2012-Cus would apply to the present import and confirmation of demand of the different duty is set aside. This automatically takes care of the alternative argument by the appellant that the demand confirmed could not be more that 18.75% of the demand confirmed under the Order-in-Original.

5.4. That the appellant has contended that the department has decided against the appellant mainly relying on Board's Circular No. 56/2003 –Cus dated 27.06.2003 issued under F. No. 528/50/2003 –Cus (TU). The said Circular states that coke breeze should be treated as 'process waste' and be allowed exemption to the extent of 5% of the total weight of the metallurgical coke. In penultimate para of the Circular No. 56/2003 –Cus dated 27.06.2003, it has been left to the

AC/DC to enquire where amount of coke breeze is more than 5% and decide on merit. In the instant case, since percentage of materials having size (0-10mm) was 18.74% so exemption has been denied. It has not been stated in the Order-in-Original as to whether presence of 18.74% of 1-10 mm size changed the essential character of Metallurgical Coke. The Note 3(b) of the General Rules for the Interpretation of Schedule to Customs Tariff, says in case of Mixture, the classification has to be determined on the basis of essential character. The presence of 18.74% of 1-10 mm size does not change the essential character of Metallurgical Coke and hence, exemption is available. It has been submitted that M/s. Durgapur Projects Limited (DPL), a Government of West Bengal Undertaking vide their letter dated 14.03.2014 (Annexure –D to the Appeal Petition is referred) confirmed that 'Coke Breeze' is Low Ash Metallurgical Coke, which is, therefore, in the form of 'Metallurgical Coke' only. I find force in the above contention and find that the AC/DC was required to enquire where amount of coke breeze is more than 5% and decide on merit but nothing has been mentined in the Order-in –Original as to whether essential character of the metallurgical coke has changed due to presence of 18.74% of 1-10 mm size of coke and hence the exemption is available.

5.5. That the appellant has contended that the Customs (Provisional Duty Assessment) Regulations, 2011, which was in force at the time of import on 11.12.2014 provides regulation for provisional assessment. Under 2(1)(b) of the above Regulation, the proper officer on account of any of the grounds specified in sub-section (1) of section 18 of the said Act, is not able to verify the self assessment or make re-assessment of the duty on the imported goods or the export goods, as the case may be, he shall make an estimate of the duty to be levied (hereinafter referred to as the provisional duty). Section 18(1) of the Act provides the circumstances under which the proper officer may direct for the provisional assessment of duty which are as follows:

- *Where the importer or exporter is unable to make self-assessment and makes a request in writing to the proper officer for assessment; or*

- *Where the proper officer deems it necessary to subject any imported goods or export goods to any chemical or other test; or*
- *Where the importer or exporter has produced all the necessary documents and furnished full information but te proper officer deems it necessary to make further enquiry; or*
- *Where necessary documents have not been produced or information has not been furnished and the proper officer deems it necessary to make further enquiry.*
- *Therefore, the provisional assessment is to be ordered onl if the conditions specified in section 18(1) of the said Act as stated above are satisfied. In Manickam Enterprises v. Commissioner of Customs, Trichy -2002 (140) E.L.T. 16 (Mad.) the Hon'ble High Court held that when statute provides for provisional assessment in certain specified circumstances, the same has to be done in the manner provided in the act and not according to the whims and fancies of the Department. As per Section 18 of the said Act, goods can be assessed provisionally pending production of information/documents or completion of test/enquiry if the exporter or importer, as the case may be, furnishes such bond/security as the proper officer deems fit for the payment of the deficiency, if any, as may accrue after finalization of the assessment. In the Order-in-Original, nothing has been stated as to why the said order has been passed after more than eight years and what are new facts/documents came to knowledge of the department. Also, provisional duty has not been adjusted from the Bond in the Order-in-Original. I find force in the above contention and observed that the lower authority could see from load port chemical test report enclosed with the B/E the presence of 18.74 % of 1-10 mm size of coke and so provisional assessment could have been finalize much earlier specially when the benefit of exemption has been denied for that reason only.*

5.6. That the appellant has submitted it is not in dispute that the appellant's B/E dated 11.02.2014 for import of 17,205.213 MT of "Coke Breeze", was provisionally assessed. The Section 18 of the Customs Act, *1962 deals with Provisional assessment of import/export goods. The said Section 18 reads as under:*

Section 18. Provisional assessment of duty-(1) Notwithstanding anything contained in this Act but without prejudice to the provisions of section 46 and section 50:

(a) where the importer or exporter is unable to make self assessment under sub-section (1) of section 17 and makes a request in writing to the proper officer for assessment; or

(b) where the proper officer deems it necessary to subject any imported goods or export goods to any chemical or other test; or

© where the importer or exporter has produced all the necessary documents and furnished full information but the proper officer deems it necessary to make further enquiry; or

(d) where necessary documents have not been produced or information has not been furnished and the proper officer deems it necessary to make further enquiry, the proper officer may direct that the duty leviable on such goods be assessed provisionally if the importer or the exporter, as the case may be, furnishes such security as the proper officer deems fit for the payment of the deficiency, if any, between the duty as may be finally assessed or re-assessed as the case may be, and the duty provisionally assessed.

(IA) Where, pursuant to the provisional assessment under sub-section (1), if any document or information is required by the proper officer for final assessment, the importer or exporter, as the case may be, shall submit such document or information within such time, and the proper officer shall finalise the provisional assessment within such time and in such manner, as may be prescribed.

Pertinent to note that the said sub-section (1A) of Section 18 was inserted vide Finance Act, 2018 with effect from 29.03.2018 and in keeping with the provisions of said sub-section (1A), ibid, the Central Board of Indirect Taxes and Customs notifies the Customs (Finalization of Provisional Assessment) Regulations, 2018 (referred to herein as 'Regulation of 2018)' for short) vide Notification No. 73/2018-Cus (N.T.) dated 14-08-2018."

7. Against the said order Revenue is in appeal before us.

8. None appeared on behalf of the respondent.

9. The Ld. Authorized Representative appeared on behalf of the Revenue and submits that the Ld. Commissioner (Appeal) erred by admitting Respondent's contention that "the context under which the impugned Circular No. 56/2003 –Cus dated 27.06.2003 was issued specifically for 'Metallurgical coke when imported by a manufacturer of pig iron or steel using a blast furnace or COREX technology'. The context of the applicability of the Notification in respect of the imported item under the impugned Bill of Entry was altogether different, in as much as, the impugned exemption under SL. No. 125 of notification No. 12/2012 –Cus was for the import of metallurgical coke, without any further qualification (unlike in the former notification) and hence, is not eligible for exemption under this entry of the notification", therefore, the impugned order is to be set aside.

10. Heard the Ld. Authorized Representative and examined the impugned order.

11. As stated herein above the Ld. Commissioner (Appeal) has examined the issue that whether "Coke Breeze" is to be treated Metallurgical coke or otherwise and is eligible for benefit of exemption in terms of Sl. No. 125 of Notification No. 12/2012 Customs dated 17.03.2005 or not and observed as above. On going through the observation made by the Ld. Commissioner (Appeal) in the impugned order we do agree with the same.

12. Further we find that in terms of Regulation (5) of Regulations, 2018 the time limit has been prescribed for finalisation of provisional assessment and admittedly in this case the import has taken place on 11.02.2014 and the said provisional assessment was finalized on 22.07.2022 without adhering the time limit prescribed under Regulation (5) of the Regulations, 2018 which are as under:

"*5.* ***Time-limit for Regulation finalisation of provisional assessment.*** *-The proper officer (1) shall finalise the provisional assessment within two months of receipt of*

(a) an intimation (a) from the importer or the exporter or his authorized representative or Customs Broker under sub-regulation (7) of regulation 4; or

(b) a chemical or other test report, where the provisional assessment was ordered for that reason; or

(c) an enquiry or investigation or verification report, where the provisional assessment was ordered for that reason.

Provided that where the documents or information required to be furnished by the importer or the exporter or requisitioned by the proper officer are made available intermittently, the time period of two months shall be reckoned from the date of last intimation referred to in clause (a) above,

Provided further that where the documents or information required to be furnished by the importer or exporter, as the case may be, or requisitioned by the proper officer are not made available or made partly available and no further extension of time has been allowed under sub-regulations (3), (4) or (5) of regulation 4, as the case may be, the proper officer shall proceed to finalise the provisional assessment within two months of the expiry of the time allowed for submission of the said documents or information.

(2) The Commissioner of Customs concerned may allow, for reasons to be recorded in writing, a further time period of three months in case the proper officer is not able to finalise the provisional assessment within the period of two months as specified in sub-regulation (1) above.

3)This regulation shall not apply to such cares of provisional assessments, where Board has issued directions to keep that pending

It is relevant to mention that prior to insertion of sub-section (IA) of Section 18 and more particularly the notification of said Regulation of 2018, neither the Section 18 nor any other provisions of the Act and/or the Rules framed there under provided for any time frame for finalization of provisional assessment. That being so, Courts & Tribunals held that provisional assessment should be finalized within a reasonable time. Issue as to what should be the reasonable time in the absence of statutory period prescribed in the Act for taking any action was considered by Hon'ble the Supreme Court in the case of State of Punjab v. Bhatinda District Co-op. Milk P. Union Limited (2007 (217) ELT. 325 (S.C.)], wherein it was opined that five years would be the reasonable period in the absence of any time prescribed in the Act. Apparently in order to remove such anomaly with regard to 'reasonable time, Section 18(1A) was inserted and so also the Regulation of 2018 was notified. After the said Regulation of 2018 came in to force, the statute is authoritatively clear that the provisional assessment under Section 18 "shall" be finalized within two months of receipt of all the documents or information required/requisitioned or receipt of chemical or other test reports or receipt of enquiry/investigation report, if any, OR within two months of the expiry of the time allowed for submission of the such documents or information or within a further time period of three months if allowed by the jurisdictional Commissioner of Customs for *reasons to be recorded in writing. However, such time line for finalization of provisional assessment shall not apply to cases of provisional assessments, where the Board has issued directions to keep that pending. It is important to note that the said sub-section (IA) of Section 18 and so also the Regulation 5 of the Regulation of 2018 all through use the expression "shall" and thereby indicating that the provisions thereof are mandatory, as has been held by the Hon'ble Supreme Court in the case of Union of India and Others v. Dharamendra Textile Processors and Others [2008 (231) E.LT. 3 (S.C.)]. Therefore, the finalization of Bill of Entry No. 4611651 dated 11.02.2014,under Order-in-Original No. CUS/PDP/DC/AMP/FA/2022/486 dated 22.07.2022, after more than eight years is arbitrary and contrary to the judgment of the apex court and hence is liable to be set aside.*

5.7. That since I have decided the appeal on merit and limitation and hence refrain myself to discuss the contention of revenue neutral point and issue of refund supported by case laws.”

13. Therefore, we hold that finalization of provisional assessment is barred by limitation. In view of this, we do not find any infirmity with the impugned order, the same is upheld and the appeal filed by the Revenue is dismissed.

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

(Ashok Jindal)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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