

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT NO.**

Appeal No. C/87486/2015

(Arising out of Order-in-Original No.06/2015-16 dt.28.8.2015 passed by the Commissioner of Customs (NS-I) Nhava Sheva)

Malu Electrodes Pvt. Ltd. : Appellant

VS

Commissioner of Customs,(NS-I) : Respondent
Nhava Sheva

Appearance

Shri Prithviraj Choudhary, Advocate for Appellant

Ms. P.V. Shekhar, Jt. Commr. (A.R) for respondent

CORAM:

Hon'ble Shri Ramesh Nair, Member (Judicial)

Hon'ble Shri Raju, Member (Technical)

Date of hearing : 02/02/2018

Date of pronouncement : 22/03/2018

ORDER NO. A/85815 / 2018

Per : Ramesh Nair

Brief facts of the case are that Appellant M/s Malu Electrodes Pvt. Ltd are engaged in manufacture and export of welding electrodes and other allied products. They availed benefit of exemption of additional duty of Customs under Notification No. 4/2006- CE dt. 01.03.2006 (Sr. No.4) superseded by Notification No. 12/2012 – CE dt. 17.03.2012 (serial No.56). The Appellant were issued Show Cause Notice alleging that they were importing natural Rutile Ore/ Leucoxene Sand of different grades viz. Titanium Dioxide 95 % and 92% classifiable under the chapter heading 26.14 of the Customs

Tariff Act, 1975 whereas the said product is actually Rutile (Titanium Dioxide) Concentrate obtained by processing the naturally occurring mined Ore. That one of the supplier viz. Iluka Resources Ltd., Australia in its website in Flow chart has shown the manufacturing process of Rutile/ Leucoxene. In the said manufacturing process, it stated that the concentration of mineral sands from primary ore is carried out by wet concentration process, attrition and dry mill processing. The products thus appear to be concentrates and not as declared by the Appellant. Only the ores are exempted from duty under the subject notification supra and not concentrates. The Show cause notice also relied upon Explanatory Notes to chapter Heading 26.01 to 26.17, Section 2 (f), Circular No. 09/2012 – Cus dt. 23.03.2012 to allege that ores and concentrates are two distinct products and that concentrates suffer central excise duty being manufactured product and thus the imported item is not entitled for the exemption as it applies only to ores. That the sample retrieved from the factory and from M/s Ameya Logistics Pvt. Ltd. of live consignment were sent to ITI, Powai who reported that the product has been subject to beneficiation and concentration. Statements of Shri Surendra Gautam Yeole, Manager (Production) and Shri Venugopal Malu, Director and Shri Shrawan kumar Malu, director of Appellant concern were also recorded. It was alleged that the Appellant concern was originally paying CVD on the imported goods but from March' 2011 stopped paying the same and started availing the exemption under Notification No. 4/2006 – CE dt. 01.3.2006 and later 12/2012 – CE dt. 17.03.2012. The Appellant has misdeclared the description of goods as “Rutile Ore HYTI 90 Leucoxene Sand” even

though the same were declared as HYTI 90 Leuxocene Sand' on documents viz. Commercial Invoice, packing list, Testing certificate, Bill of Lading etc. That the director has stated that they have manipulated with the description of goods and added/ suffixed the word 'ore' with Rutile before the Customs Authority for availing the exemption. In view of above allegation it was proposed to confiscate the Leuxocene sand falling under CTH 26140039 valued at Rs. 46,72,58,290/- in terms of Section 111 (m) of the Customs Act. However since the goods were not available for confiscation it was proposed to impose fine in terms of Section 125 of the Customs Act, 1962. It was also proposed to confiscate the 143.5 Mts of seized sand valued at Rs. 1,19,24,419/- in terms of Section 111 (m) of the Act and to impose fine under section 125 as the goods were released provisionally. A differential duty of 5,76,37,224/- was proposed to be demanded and recovered in terms of Section 28 of the Act alongwith interest; Penalties was proposed under Section 112 (a) or 114 A and 114A of the Act and to encash the Bank Guarantees towards duty liabilities and penalties and fines. The adjudicating authority vide impugned order dt. 28.08.2015 issued on 03.09.2015 confirmed the demands and imposed penalties against the Appellant. Hence the present appeal.

2. The Ld. Advocate Shri Prithviraj Choudhary appearing for the Appellant submits that the imported goods are Mineral Ores and not Concentrates. The process of separation/ segregation of individual minerals from the Sea Beach sand does not amount to concentration. That only on the basis of manufacturer's broucher/ catalogue of the

product, it cannot be held to be Concentrate. He relies upon the orders in case of Collector of Customs Vs. Dura Foam Industries (P) Ltd 1986 (26) ELT 341, Trading Engineers (International) Pvt. Ltd 1997 (91) ELT 74 as affirmed in 1997 (94) ELT A240 (SC), M.M. Sintered Products 2001 (130) ELT 173 (TRI). He submits that the true meaning of the 'Ores' has been defined in chapter Note 2 to Chapter 26 of the Excise Tariff as under :

“2. For the purposes of headings 2601 to 2617, the term “ores” means minerals of mineralogical species actually used in the metallurgical industry for the extraction of mercury, of the metals of heading 2844 or of the metals of Section XIV or XV, even if they are intended for non-metallurgical purposes. Headings 2601 to 2617 do not, however, include minerals which have been submitted to processes not normal to the metallurgical industry.”

That until and unless mineral have been subjected to a process which is not normal to the metallurgical industry or which is of a special treatment category, it would retain its classification as 'ores'. He also relies upon the Explanatory Note to chapter 26 of Harmonised System of Nomenclature. He relies upon the Hon'ble Supreme Court judgment in case of Minerals & Metals Trading Corporation of India Ltd. Vs UOI 1983 (13) ELT 1542 (SC), Hyderabad Industries Vs. UOI 1989 (108) ELT 321 (SC), Commissioner Vs. Indian Rare Earths Ltd 2009 (241) ELT A70 (SC), Kerala Minerals & Metals Ltd. Vs. CCE, Kochi 2007 (214) ELT 556 (TRI). He submits that Note 4 to chapter 26 was inserted in year 2011 to create a legal fiction of treating process of conversion of 'ores' into 'concentrates' as amounting to manufacture which is only for the purpose of levy of excise duty on concentrates

manufactured within India and the same is relevant only for the purpose of determining classification of goods. However no simultaneous amendment was carried out in Customs Tariff. The Revenue has wrongly relied upon the Circular dt 12.07.2012 to arrive at the conclusion that the process undertaken by the supplier amounts to manufacture by simply relying upon note 4 to chapter 26 which is not correct and in no manner can be said to have laid down criteria for determining whether a process is one of concentration or not. That the issue is settled and cannot be changed by a circular. He relies upon the test report of India Bureau of Mines (IBM), Nagpur conducted in respect of sample drawn by the Assistant Commissioner of Customs, Nhava Sheva which indicated that the goods are naturally occurring Rutile Ore Leucoxene sand. He submits that the test report of IIT, Powai cannot be relied upon as it has been prepared without appreciation of factual matrix of the case. He submits that the report nowhere answer the specific query posted by the DRI and is thus inconsequential. That if seen the report itself clearly indicates that concentration if any has to be done based on physical properties and there has been no change or alteration in the chemical composition of the sample. He submits that in case of Classic Microtech 2012 (285) ELT 418 (TRI) the tribunal accepted the report of IBM and clearly recognized IBM as an expert in relation to opinion on the subject matter of mineral ores and same cannot be lightly brushed aside as held by the Hon'ble Supreme Court in case of Quinn India 2006 (198) ELT 326 (SC). He further submits that samples of imported goods were forwarded to IBM from three different consignments at three different points of time and the IBM has adopted a consistent stand

that the goods are “naturally occurring Rutile Ore/ Leucoxeme sand”. This finding is supported by details of metal content in the ore which has not been rebutted by the Revenue in any manner. The expert evidence would thus determine the issue. The department has not been able to counter with any cogent evidence. In rejoinder to the revenue he submits that the revenue has relied upon the manufacturer’s/ international suppliers manual/ broucher to submit that the sophisticated machinery is used for concentration whereas it is apparent that the said person has described machinery as separators and not concentrators. The reliance placed upon the statement of director by the revenue that they have added words ‘Rutile Ore’ to the Bill of Entry solely for the purpose of claiming exemption is totally wrong. The revenue has failed to appreciate the wordings of chapter 26 of the Excise Tariff. The supplier has described the products as ‘Leucoxene Sand’ which is nothing but sand containing majority rutile ore. However under CTH 2614, the wordings Leucoxene does not find any mention and accordingly the Appellant classified the same as Rutile sands which is most apt classification describing the goods imported by them. The word ‘Rutile Ore’ was used only for the purpose of classification and not with intent to wrongly claim the exemption. It is not the case of the department that supplier has described the products as “Concentrate’ and the Appellant has changed it to ‘ore’. As is evident from the shipping documents, the supplier itself did not describe the goods as concentrates, therefore the Appellant merely prefixing the word ‘ore’ in no way changed the declaration made by the supplier.

3. Ms Vinita P. Sekhar, Id. JC, AR appearing for the revenue supports the impugned order. She relies upon the explanatory note to HSN – Heading No. 26.01 to 26.17 to state that ‘concentrates’ applies to ores which has part or all of the foreign matter removed by special treatments, either because such foreign matter might hamper subsequent metallurgical operations or with a view to economical transport. She also relies upon chapter Note 4 to chapter 26 of the CETA to state that the process of converting ‘ores’ into ‘concentrate’ shall amount to manufacture. That in terms of Section 2 (f) of the Central Excise Act any process of which is specified in relation to any goods in the Section or chapter notes of the First schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as “amounts to manufacture”. That by virtue of above amendment if the imported goods are concentrate the importer is required to pay additional duty. The process undertaken by the supplier M/s Illuka Resources Ltd., Australia of Wet concentration produces a high concentration high grade mineral concentrate, maximizing the content of valuable mineral sand whilst minimizing the amount of non – valuable mineral (gangue). Attrition is carried out on heavy mineral concentrate to clean the mineral surface. Secondary concentration removes the fine quartz and non valuable heavy mineral to achieve heavy mineral content. Dry mill processing involves number of dry processing stage to separate the valuable minerals. The above process clearly establishes that the imported goods have been subjected to various processes by virtue of which most of the foreign matters have been removed to make them into a high grade heavy mineral concentrate. She submits that the impugned goods were tested by Indian Institute of

Technology, Powai which concluded that the goods has been subjected to beneficiation and concentration. That the directors in their statement admitted that the goods are concentrate. She relies upon the judgments in case of Indian Rare Earths Ltd. Vs. CCE & ST, BBSR - I 2016 – TIOL- 744, Star Industries Vs. Commissioner 2015 – TIOL – 234 – SC-CUS and Rungta Mines Ltd Vs. Commissioner 2016 (338) ELT 454 (TRI). She submitted that the CBEC vide Circular dt. 17.02.2012 had clarified the chapter note of chapter 26.01 to 26.17 and that by beneficiation process the end product of ore is concentrated or upgraded ore. That in case of V.V. Minerals Vs. Commissioner 2016 – TIOL – 141 – CESTAT – MAD and M/s Trimax Sands Pvt. Ltd. Vs Commissioner 2018 – TIOL – 164 – CESTAT the tribunal have analysed the process of beneficiation in detail following the ratio of Apex Court in case of M/s Tata Steel Ltd. Vs. UOI . She submits that the exemption notifications has to be strictly complied. She submits that the judgment in case of Indian Rare Earth 2018 (228) ELT 213 (TRI) relied upon by the Appellant issue was not whether the ore was converted into concentrate. The Tribunal had only analysed whether the process amounted to manufacture or not with respect to emergence of new product as per the definition of Section 2(f) (i) of CEA. The judgment is prior to introduction of chapter note 4 to chapter 26 and therefore no longer applicable as now the same process amounts to manufacture. That as per the statement of Director, Shri Venugopal Malu in import documents viz. Bill of Lading, Commercial Invoice, Certificate of Analysis, packing list etc the goods were mentioned as Rutile/ HYTI 91 Leucoxene sand whereas the Bill of entry showed the goods as Rutile Ore/ Rutile Ore Leucoxene sand

for the purpose of misdeclaration of goods. The words “Ore” was deliberately added in Bill of Entry.

4. We have carefully considered the submissions made by both the sides. The issue involved is whether the imported goods are ‘ore’ or concentrate and whether eligible for availing exemption under Notification No. 4/2006 – CE dt. 01.03.2006 as superseded by Notification No. 12/2012 – CE dt. 17.03.2012. The revenue has alleged that the goods are concentrate and not ores as the process undertaken by the supplier amounts to manufacture of Concentrates. Allegation has been made against Appellant that the Wet Concentration process, Attrition and Secondary concentration and Dry Mill processing amounts to manufacture of concentrates. We find that the supplier M/s Iluka Resources Ltd , Australia has described the goods as Rutile/ HYTI91 Leucoxene Sand/ Leucoxene Sand in import documents whereas in Bill of Entry filed by the Appellant the goods were described as Rutile Ore/ Rutile Ore Leucoxene/ Sand in Bill of Entry. On perusal of facts we find that the naturally Rutile/ Leucoxene is an ore found in sea sand alongwith other raw material and out of the same after segregation of sand the imported goods were derived . The chapter Note 2 to chapter 26 of the Central Excise tariff read as under :

“2. For the purposes of headings 2601 to 2617, the term “ores” means minerals of mineralogical species actually used in the metallurgical industry for the extraction of mercury, of the metals of heading 2844 or of the metals of Section XIV or XV, even if they are intended for non-metallurgical purposes. Headings 2601 to

2617 do not, however, include minerals which have been submitted to processes not normal to the metallurgical industry.”

From the perusal of the above chapter note, it transpires that unless the minerals are subjected to the process not normal to metallurgical industry or which is of a special treatment category the goods would qualify classification as ‘ores’ only. The process undertaken by the suppliers i.e Wet Concentration process, Attrition and Secondary concentration and Dry Mill processing are all normal process in mining industry and not any specialized process. It is a common process undertaken in any mining industry. The Explanatory Notes to chapter 26 of the HSN in reference to ‘Ores’ and ‘Concentrates’ is as under :

“The term “ores” applies to metalliferous minerals associated with the substances in which they occur and with which they are extracted from the mine; it also applies to native metals in their gangue (e.g. metalliferous sands).

Ores are seldom marketed before “preparation” for subsequent metallurgical operations. The most important preparatory processes are those aimed at concentrating the ores.

For the purposes of the present heading, the term “concentrates” applies to ores which have had part or all of the foreign matter removed by special treatments, either because such foreign matter might hamper subsequent metallurgical operations or with a view to economical transport.

Processes to which products of this heading may have been submitted include physical, physico-chemical or chemical operations, provided that they are normal to the preparation of the ores for the extraction of metal. With the exception of changes

resulting from calcinations, roasting or firing (with or without agglomeration), such operations must not alter the chemical composition of the basic compound which furnishes the desired metal.

The physical or physico-chemical operations include crushing, grinding, magnetic separation, gravimetric separation, floatation, screening, grading, agglomeration of powders (e.g., by sintering or pelleting) into grains, balls or briquettes (whether or not with the addition of small quantities of binders), drying, calcinations, roasting to oxidise or magnetise the ore, etc. (but not roasting for purposes of sulphating, chloridating, etc.)

From the above perusal of the Explanatory Note to chapter 26 we find that not only minerals which exists in its natural form alongwith other substances, which is either extracted or mined, will qualify as ores, but also minerals in their 'ganuage' state will also be classifiable as Ores. It further transpires from the above Notes to the HSN that for 'Ores' to transform into 'concentrates', special chemical treatment/ processes have to be carried out which alters the basic chemical composition of the mineral itself, and mere physical or physio-chemical processes aimed at extracting or segregating the mineral from the natural substances would not tantamount to concentrating the 'ores'. Thus if the chemical composition of the mineral has not been altered while undertaking any physical processes as the facts of the present case shows the goods would not fall under the category of 'concentrate'. The revenue has relied upon the test report of IIT, Powai to hold that the goods in question are 'Concentrate' and not 'Ores'. On perusal of the test report of IIT, Powai we find that during investigation the following questions were asked to the said institute :

- (i) Whether the facts pointed out by the supplier pertaining to the processes to which the beach sand has been subjected to is correct ?
- (ii) Whether the samples sent alongwith this letter is part of the beach sand which exists conjointly in nature alongwith other heavy minerals such as monazite, zircon, quartz etc.
- (iii) Whether after mining of beach sand, the percentage in the mined product of these heavy minerals like Rutile, leucoxene, monazite, zircon etc is increased by subjecting to different physical processes and segregating them on the basis of their physical property like specific gravity and magnetic property.

The Report given by the IIT, Powai was as under :

AA. In this connection, the Appellant further places reliance on the report submitted by IIT, Bombay issued vide its letter dated 03.05.2013, the relevant extract of which is reproduced hereinbelow:

"From the above studies it is clear that the Sample 1 and Sample 2 represent homogenous samples of rutile and anatase with a very narrow size distribution. The lack of any clay or quartz in the samples and their homogenous nature indicates that they have been subjected to concentration based on physical properties which may include specific gravity and magnetic or paramagnetic properties. The fine size and narrow range of size-distribution indicates that sizing may also have been carried out on these samples.

It is therefore concluded that the mined placer deposit has been subjected to beneficiation and concentration"

From the above report of IIT, Powai we find that no specific findings was given in the report in reference to questions posed by the revenue. It did not give nature of process undertaken by the supplier

nor did it state as to whether the sample are part of beach sand alongwith other heavy minerals or whether it is ore or concentrate. Thus the report does not answer the questions put to it and cannot be made basis for deciding the question whether the imported goods are 'Ores' or 'Concentrates'. On the contrary it seems that the report favours the Appellant in as much as it states that the concentration if any done was based on physical properties and there has been no change or alteration in the chemical composition of the sample. This in turn when readwith Explanatory note to the HSN substantiates the claim of the Appellant that in absence of any change in chemical composition the goods would fall into the category of 'Ores'. Thus we do not consider the report of IIT, Powai as supporting the claim of the revenue. The Ld. Counsel has also drawn our attention to the report of Indian Bureau of Mining which is the apex body so as far as standards in Mining Industry is considered. The Custom authorities at the time of importation of goods at three different times and different consignments has sent the samples for testing to Indian Bureau of Mining which has reported that the samples are "naturally occurring Rutile Ore/ Leucoxene Sand". The report also contains the details of the metal content of the ore. The adjudicating authority has contended that the report does not support the case of Appellant as it treats Rutile and Leucoxene on same footings. We find that it has to be appreciated that both Rutile and Leucoxene are 'Ores' and hence their classification would be same. We find that in the test report of IBM the Titanium content is more than 90% which shows that it matches with the Indian Standard IS 4104 - 1967 of Rutile Ore to be containing the 90% of Titanium. Thus the IBM Report gets

corroborated with the criteria of Indian Standards. In case of CLASSIC MICROTECH PVT. LTD. Vs. COMMISSIONER OF CUS., AHMEDABAD 2012 (285) E.L.T. 418 (Tri. - Ahmd.) the Tribunal has held that “since the experts in the field like Indian Rare Earths Ltd. Research Centre, Kollam and Indian Bureau of Mines has opined categorically that the goods which were imported i.e. Zircon sand are nothing but the Zircon Ore, and the said expert opinion having been not rebutted by any other opinion from any other expert, and specifications of imported goods seems to match with specification of the ISI standard for Zirconium Ore, we have to hold that the goods imported by the appellant are eligible for the benefit of Notification No. 4/2006-C.E. as the goods which are imported are nothing but Zirconium Ore.” We find that the ratio of the subject judgment equally applies in present case in as much as the report of Indian Bureau of Mining pertains to an expert report. Thus we do not find any reason to discard the report of the IBM.

5. The revenue has relied upon the judgment of Indian Rare Earth Ltd. vs. CCE & ST, BBSR – I 2016 (338) ELT 774 (TRI – KOL) (hereinafter referred as IRE-2) and Rungta Mines Ltd. Vs. CCE 2016 (338) ELT 454 that the process undertaken on sand ores like washing, magnetic separation, gravity separation to remove unwanted matters result into conversion of ores to concentrate and which activity is manufacture in view of chapter note 4 to chapter 26. Also reliance has been placed upon the judgments in case of Star industries Vs. CCU 2015 – TIOL – 234 – SC- CUS. In this context we are of the view that in the present case before blindly applying the chapter note 4 it is

imperative to peruse the goods in the light of Chapter Note 2, HSN Explanatory Notes, the process undertaken by the supplier, the nature of the imported goods in question and the report of IBM. If the process to which the goods are subjected to is not normal to metallurgical industry in that case it would not remain ores. As per the facts above show the process undertaken by the supplier of goods does not bring about any change in chemical composition nor any special treatment has been undertaken in respect of such goods. It is only a process to segregate the beach sand from the mineral sand by which the 'Ores' comes into existence. Thus in terms of Explanatory Notes the goods do not take the characteristics of 'Concentrate' and it cannot be said that there has been manufacture activity on such goods. We further find that the technical opinion would be the guiding factor in deciding the classification of goods as whether the goods are 'Ore' or Concentrate and the same can be decided only by the Experts. In case of Indian Rare Earth Ltd. find that more than eight institutes of National repute has reported that the goods are 'Ores' and such reports were not taken into consideration, hence we are not inclined to go into the ratio of said judgment as without ascertaining the characteristics of the goods in question they cannot be automatically termed as 'Concentrate' merely on the basis of chapter Note 4 supra. In the present case the process carried out by the supplier are not special treatments as it is normal to extraction of Ores. Also when read in context of Chapter Note 2, we find that in the present case the Ores were not put to any process not normal to the metallurgical industry and even the supplier has classified the goods in category of Sand only. It is coupled with the fact that on three consignments of

imports at three different point of times the samples were sent to Indian Bureau of Mines (IBM) who has reported that the goods are 'Naturally occurring Rutile Ore/ Leuxocence Sand. The report of IBM clearly shows that the imported goods even after undergoing the alleged processes has remained into stage of 'ore' or sand and does not qualify into the category of 'concentrate'. We observe that the report of IIT, Powai does not adequately answer to the queries raised whereas the report of IBM clearly shows that the goods has remained into natural form of 'ores' or 'Sand'. Such report cannot be brushed aside as held by the Tribunal in case of Classic Microtech Pvt. Ltd. Vs. Commissioner 2012 (285) ELT 418 (TRI). The impugned order has not brought any fact as to why this report of IBM is not applicable in the present case. The adjudicating authority has merely proceeded to discard the report of IBM on the basis of description of goods as given in article in Wikipedia. Even the allegation of show cause notice regarding the process undertaken by the supplier is not based upon the enquiry made by the revenue but on the basis of information available on its website which is not correct. We therefore are of the view that the ratio of Tribunal orders in IRE – 2 and Rungta Mines (supra) are not applicable to the present case. It is to be observed that Chapter Note 2 to chapter 26 which comes ahead of chapter Note 4 is relevant criteria to determine the identity of goods. The revenue has not pointed out any instance that the imported goods were submitted to processes not normal to the metallurgical industry. Thus in absence of same it cannot be said that the goods are "concentrates". It has been alleged that in import documents the supplier has described the goods in all the documents as 'Rutile/HYTI 91

Leucoxene Sand/Lecoxene Sand whereas in Bill of Entry the Appellant had prefixed the word 'Rutile Ore' with the intention to show the goods as 'Ore' and thereby claimed the exemption wrongly. We find that from the suppliers documents that the supplier has described the goods as 'Leucoxene Sand'. Nowhere the supplier has declared the goods to be 'Concentrates'. It is nowhere appearing on record that the supplier had consigned the goods as 'Concentrate' and the same has been shown as 'Ores' by the Appellant. In such case when at the supplier's end even after undertaking various processes as alleged by the revenue the goods has remained 'Sand', in that case the separation of mineral sands from Beach sand cannot be termed as process of 'Manufacture' of concentrates. The process carried out were only physical and mechanical separation process and after such process the separated mineral sand has the same form and properties which it exist before undertaking such process. When the goods has been bought and sold as 'Sand' and even the same is known as 'sand' in the commercial parlance which has not been disputed by the revenue, the goods would stand covered by the term 'Ore'. From facts it is clear that Sand at Sea shore cannot be termed as 'Mineral ore'. The supplier undertook the process of separation of mineral sand from the ordinary sand by physical and mechanical processes and no chemical or roasting of sand took place. The process did not bring upgradation of purity in the segregated sands and as the import documents show the goods in question has remained 'Sand' only. In terms of chapter Note 2 supra, the 'Ores' which have been submitted to the process not normal to metallurgical industry are excluded from category of 'Ores' whereas in the present case no such special

treatment has been shown to have been carried out. In view of the fact that the process undertaken by the supplier of goods and in view of the report of the IBM that the goods has still remained in 'Ore' form we are of the view that as the process undertaken by the supplier is only segregation of ores from beach sand the process cannot be termed as manufacture of 'Concentrate'. It is also worth to reproduce the findings of the Tribunal in case of INDIAN RARE EARTHS LTD. Vs. COMMISSIONER OF C. EX., BBSR-I 2002 (139) E.L.T. 352 (Tri. - Kolkata) wherein the Tribunal on the basis of facts of the case i.e the process of separation of mineral ores from beach sand held as under :

8. *It from the facts of the case that mineral sands freely is clear occurred on sea beach along with ordinary sand. Most of the sand on the sea beach is ordinary sand only. Mineral sands constitute less than 10% of the total quantity of sand on the sea beach dredged out by the appellants. Sand as it occurs on the sea shore cannot be called mineral ores. Such sand is also not bought and sold as mineral ores. The processes carried out by the appellants lead to separation of valuable rare mineral sands from the ordinary sand. The processes are physical and mechanical in nature. No special processes including roasting or chemical treatment is carried out. The processes do not bring about any upgradation or augmentation of purity in the mineral sands separated from ordinary sand. It is also on record that the resultant mineral sands are bought and sold as ores only and not as concentrates of ores. It is clear from note 2 of Chapter 26 of the Central Excise Tariff that only ores which have been submitted to processes, not normal to the metallurgical industries are excluded from ores. Thus, ores which have been subjected to special treatment go out of the scope of ores. No such special treatment is carried out in the present case.*

9. *The Court has held in the case of Hyderabad Industries and Ors. v. Union of Apex India & Ors. that no manufacture of a new or distinct commodity takes place on account of the processes of separation of naturally occurring asbestos from asbestos rocks. In the earlier case of Minerals & Metals Trading Corporation of India Ltd., the Apex Court held that the separating of wolfram ore concentrate from the rock to make it usable ore is a process of selective mining. It is not a manufacturing process. The important test according to the Apex Court is that the chemical structure of the ore should remain the same. Thus, the principle of law is clear that basic operations carried out to produce usable ore would not amount to manufacture of a new product. In the instant case, the appellants are carrying out certain physical and mechanical processes to separate mineral sands from ordinary sea shore sand. At the end of the processes, the mineral sands do not undergo any transformation. They remain in the same condition in which they remained along with ordinary sand on the sea beach. No upgradation or augmentation of their purity takes place. The chemical structure of the ore remained the same. The processes are not any special treatments which would take the ores out of the stage of plain and simple ores.*

10. *From what has been stated above, it is clear that no manufacturing is involved in the present case justifying demand of excise duty. The impugned order which has confirmed excise duty demand is set aside and the appeal filed by M/s. Indian Rare Earths Ltd. is allowed, with consequential relief, if any.*

Applying the ratio of the above Tribunal's order which has been upheld by the Apex Court as affirmed in 2012 (283) ELT A112 (SC). In our view the process involved in the present case is separate of minerals from beach sand i.e through which ores comes into existence. It is not the special process of roasting or change of chemical composition of goods which turns ores into 'concentrates'. Thus the goods in question does not merit classification as 'Concentrate' and hence chapter note 4 has no

application in the present case. Our views are also based upon the Tribunal's order in case of KERALA MINERALS & METALS LTD. Vs. CCE, KOCHI 2007 (214) ELT 556 (TRI) wherein the tribunal held as under :

5. *We have carefully considered the submissions and have perused the ruling of Indian Rare Earths Ltd. cited by the counsel. The said ruling refers to 2 cases. Hyderabad Industries Ltd. v. U.O.I. - [1995 \(78\) E.L.T. 641](#) (S.C.); Mineral and Metals Trading Corporation of India Ltd. v. U.O.I. - [1983 \(13\) E.L.T. 1542](#) (S.C.). In the present case, the appellants are merely carrying on the activity of separating the minerals from the beach sand. The situation is similar to the one of the cited cases viz. Indian Rare Earths Ltd. wherein also the process of separation was from the beach sand to bring out rare mineral sands by physical process and mechanical process. In the present case also, the minerals which are present in the beach sand are separated by magnetic, electrostatic and gravity process. These minerals continue to remain as minerals in the same form. They had not changed their identity nor are they known by a different name in the market. There is no chemical or physical change in the mere characteristics. Therefore, the judgment of Indian Rare Earths Ltd. case, which is based on to 2 Supreme Court judgments, clearly applies to the facts of the case. Respectfully following the same, the impugned orders are set aside and appeals are allowed with consequential relief, if any.*

6. We also find that the Tribunal in case of M/s Jains Mines and Minerals India Ltd. Vs. CCE, JABALPUR 2017 – TIOL – 3777 – CESTAT – DEL, the bench after appreciation of chapter Note 2 and 4 of Chapter 26 in reference to Iron Ore held that “improvement in content of “Fe” due to process undertaken by the Appellant by itself will not make the resultant product as iron ore concentrate”. The Tribunal while passing the order relied upon the following judgments :

- (i) **Steel Authority of India Ltd. - 2012-TIOL-52-SC-CX**
- (ii) **Bheraghat Minerals - 2000 (119) E.L.T. 271 (S.C.)**
- (iii) **Steel Authority of India - 2002-TIOL-499-CESTAT-KOL affirmed by Apex Court - 2012 (283) E.L.T. A112 (S.C.)**
- (iv) **Indian Rare Earth Ltd. - 2002-TIOL-485-CESTAT-KOL affirmed by Apex Court - 2009 (241) E.L.T. A70 (S.C.)**
- (v) **Super Engineering - 1996 (82) E.L.T. 539 (TRI)**

7. We thus find that the ratio of the above Tribunal order is absolutely applicable to the ratio of present case. The Revenue has also relied upon the Tribunal's order in case of V.V. Minerals Vs. Commissioner 2016 – TIOL – 141 – CESTAT – MAD and Trimax Sands Pvt. Ltd. vs. Commissioner 2018 – TIOL – 164 – CESTAT-HYD to contend that in line with IIT, Powai report the process undertaken by the supplier if of 'beneficiation' of the ore and thus the benefit of notification in question is not admissible to them. We find that in terms of chapter note 4, it the conversion of 'Ores' into 'concentrates' amounts to manufacture and it does not go into the process of beneficiation. Also the issue involved in both of those cases relates to classification of 'Illemnite beneficiated' based on specific wordings of the tariff. Hence the ratio of the above both judgments is not applicable in present case. The revenue has also relied upon the judgment in case of M/s Star Industries 2015 – TIOL – 234 – SC to support their claim. However on perusal of same it is found that the facts of the case are not applicable to the present case as in said case the goods itself were roasted ore and were defined as ore concentrate whereas in the present case the facts are entirely different and merit classification as 'Ores' only. In view of facts, we are of the

view that the impugned goods being 'Ores' are eligible for the exemption from CVD in terms of Notification No. 4/2006- CE dt. 01.03.2006 (Sr. No.4) as superseded by Notification No. 12/2012 – CE dt. 17.03.2012 (serial No.56). Accordingly we are of the view that the demand is not sustainable on merits. The Appellant has also challenged the demand on grounds of time bar. The demand has been raised against the Appellant by invoking extended period for the imports made during the period March' 2011 to December' 2012. However we find that the issue was in the knowledge of the revenue as in August' 2011 itself the samples were sent for testing by the Customs. Further the issue involved itself has been of interpretation of activity undertaken in respect of impugned goods, HSN notes and chapter notes. In such case we are of the view that the non payment of CVD cannot be attributed to any malafide intention on part of Appellant. We thus also hold that the demand is barred by limitation of time and are not sustainable.

8. In view of our observations and findings we hold that the impugned demand raised against the Appellant is not sustainable on merits as well as time bar. We therefore set aside the impugned order. The appeal is allowed with consequential reliefs to the Appellant, if any, in accordance with law.

(Pronounced in court on 22/03/2018)

(Raju)
Member (Technical)

(Ramesh Nair)
Member (Judicial)