

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
MUMBAI**

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 86384 OF 2018

[Arising out of Order-in-Appeal No: PUN-CT-APPII-000-353 & 354-17-18 dated
30th January 2018 passed by the Commissioner (Appeals), Central Tax, Pune – II.]

Apple Sponge & Power Limited

C/4, Five Star Kagal Industrial Area,
Kolhapur, Maharashtra

...Appellant

Versus

Commissioner of Customs & Central Excise

Pune – II

GST Bhawan, 41A , Sassoon Road, Pune – 411001

...Respondent

WITH

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APPEARANCE:

Shri Prakash Shah, Advocate for the appellant

Shri Deepak Sharma, Assistant Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)

HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDERNO: 85078-85079/2024

DATE OF HEARING:	21/11/2023
DATE OF DECISION:	13/02/2024

PER: C J MATHEW

Impugning order¹ of Commissioner Central Tax (Appeals), Pune–II, which upheld finalization of two provisional assessments under section 18 of Customs Act, 1962 by the original authority, M/s Apple Sponge & Power Ltd is before us challenging the discard of their claim of imports being in conformity with description corresponding to tariff item 2601 1119 only to be saddled with rate of duty corresponding to tariff item 2601 1150 of First Schedule to Customs Tariff Act, 1975 which has had the effect of recovery of differential duty, along with applicable interest under section 18(3) of Customs Act, 1962, owing to ineligibility for exemption extended to ‘ores’ by notification issued under section 25 of Customs Act, 1962. The appellant, a manufacturer of ‘sponge iron’, ‘mild steel (MS) billets’ and ‘TMT bars’, imported ‘iron ore lump’ from Khumani mine in South Africa claiming assessment accordingly with eligibility for exemption from additional duty of customs permitted by notification no. 12/2012-CE dated 17th March 2012 which customs authorities held to be otherwise for having

¹[order-in-appeal no. PUN-CT-APPII-000-353 & 354-17-18 dated 30th January 2018]

undergone process for removal of 'foreign matter' rendering those to be 'concentrate' which, admittedly, was not covered by the exemption.

2. The 'ore' had been imported in two consignments of 60,000 metric tons against bill of entry no. 013/JGD/Into-Bond/16-17/01.08.2016 for warehousing and of 30,903 metric tons against bill of entry no.166/JGD/16-17/01.08.2016 for home consumption with provisional assessment sought in both as the contract provided for consideration to be determined on ascertained 'ferrous content' in imported material at destination. The warehoused goods were cleared against nine bills of entry between 18th August 2016 and 27th September 2016 with duty of ₹ 1,88,85,933 as liability for the first consignment and on assessment to duty of ₹ 97,28,200, at 2.5% *ad valorem* prescribed in notification no. 12/2014-Cus dated 11th July 2014 (at serial no. 117) for the purposes of section 12 of Customs Act, 1962, with additional duty of customs under section 3(1) of Customs Tariff Act, 1975 foregone by recourse to notification no. 12/2012-CE dated 17th March 2012 (at serial no. 56) for 'ores' within heading 2601 to 2617 of Schedule to Central Excise Tariff Act, 1985.

3. In connection with assessment, importer was 'queried' on processes undertaken at supplier's end as other imports from the same source were said to have been cleared without availing the said exemption. It would also appear that the decision of the Hon'ble

Supreme Court in *Star Industries v. Commissioner of Customs (Import), Raigad* [2015 (324) ELT 656 (SC)], denying eligibility of exemption to ‘concentrates’ that were sought to be cleared by claiming benefit of notification no. 4/2006-CE dated 1st March 2006 which was said to be predecessor of the exemption impugned in the present dispute, was also instrumental in prompting customs authorities to subject the imported goods to detailed scrutiny beyond that warranted for finalization of assessable value. The importer, by communication of 8th August 2016, furnished certificate from M/s Assmang Proprietary Ltd, South Africa that ‘ores’, and not ‘concentrates’, had been contracted for supply and that mined material had merely been ‘crushed’ and ‘screened’ before shipment. The report of 1st September 2016, pertaining to samples drawn and tested in the departmental laboratory, described the imported goods as

‘reddish brown lumps ... composed of oxides of iron together with oxides of ... iron content ... 66.0%.’

4. Thereafter, the provisionally assessed bills of entry were taken up for finalization. Provisional assessment of both consignments had been resorted to on the request of importer for ascertainment of content for valuation and, while finalizing the assessment, the proper officer found no fault in the declaration of content of ‘Fe’ as well as the declared assessable value. However, the finalization also included re-determination of classification for which the only prelude was the ‘query memo’ that, to the ‘proper officer’, appeared to suffice for re-

determination of 'rate of duty' for purposes of section 12 of Customs Act, 1962, commonly referred to as classification. 'Query memo' is a tool devised to assist 'proper officer' in assessment of imported goods wherein statutory provisions contemplating seeking of clarifications or for expressing doubts about the correctness or completeness of information furnished for assessment is resorted to. Even where rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 empowers rejection of declared value, either from non-response or from unsatisfactory response to query envisaged therein, revision for assessment must necessarily be preceded by notice of intention to resort to specific alternative, in accordance with the Rules, before onus is shifted to importer for discard of such proposal. It cannot but escape our attention that it is not denial of exemption on claimed classification which is in dispute here but non-entitlement to exemption consequent upon change in classification. In the light of provisions of Customs Tariff Act, 1975, re-classification is an exercise of much more procedural rigour.

5. It has been held by the Hon'ble Supreme Court in *HPL Chemicals v. Commissioner of Central Excise, Chandigarh* [2006 (197) *ELT* 324 (SC)] that

'28. This apart, classification of goods is a matter relating to chargeability and the burden of proof is squarely upon the Revenue. If the Department intends to classify the goods under

a particular heading or sub- heading different from that claimed by the assessee, the Department has to adduce proper evidence and discharge the burden of proof. In the present case the said burden has not been discharged at all by the Revenue.....’

and in *Hindustan Ferodo Ltd v. Commissioner of Central Excise, Bombay [(1997) 2 SC 677]* that

‘3. It is not in dispute before us as it cannot be, that onus of establishing that the said rings fell within Item No. 22-F lay upon the Revenue. The Revenue led no evidence. The onus was not discharged. Assuming therefore, the Tribunal was right in rejecting the evidence that was produced on behalf of the appellants, the appeal should, nonetheless, have been allowed.’

We have doubts that a process which has not endeavoured to secure for itself the certainty of an alternative classification, set out in clear terms with reasons afforded by the General Rules for Interpretation of the Import Tariff in Customs Tariff Act, 1975, is acceptable as being in consonance with the prescription in these decisions to serve adequate discharge of onus. The rigour of a justified proposal for resort to alternative tariff item certainly cannot be found in the generality of communication of doubts, even if documented, about declarations made in a bill of entry. The absence of show cause notice setting out a case that tariff item 2601 1150 of First Schedule to Customs Tariff Act, 1975 is apt classification, of itself, jeopardizes the impugned order. Nonetheless, we proceed to evaluate the merit of the impugned order

which upheld the legality of revision of classification in finalizing the provisional assessment.

6. The original authority enunciated the scope of finalization of assessment thus

‘14. As regards the second issue, regarding, whether crushing, grinding, washing, grading etc to ‘Iron Ore’ results into ‘Iron Ore Concentrate’, I find it necessary to understand meaning of words, namely, “Ores”, “concentrates” and “beneficiation”

for which the purported definition of ‘ores’ in note 2 in chapter 26 of Central Excise Tariff Act, 1985, the purported meaning of ‘concentrates’ in Explanatory Notes relating to headings and sub-headings in chapter 26 of Harmonized System of Nomenclature (HSN) Code, as well as in Kirk-Othmer’s *Encyclopaedia of Chemical Technology*, and of ‘beneficiation’ in McGraw Hill *Dictionary of Scientific and Technical Terms* (6th edition) were drawn upon to conclude that

‘14.5 This, I find that, if any one or more processes, which would result in removing a part or all of the foreign matter, so as to make it fit for metallurgical operation or economical for transport, would result into “concentrate”. In short, the term “concentrate” is applicable to ores which are made free of impurities through the application of certain processes by which part or all of the foreign matter are removed for the reason that such foreign matter might hamper subsequent metallurgical operations or such foreign matter

would not help in economical transport.’

and, further, after examining note 4 in chapter 26 of Schedule to the Central Excise Tariff Act, 1985, along with circular no. 332/1/2012-TRU dated 17th February 2012 of Central Board of Excise & Customs (CBEC), to render the outcome that

‘15.2. it should be considered as manufacture such processed ore when imported are to be deemed as manufacture in India and hence liable to pay Countervailing Duty (in lieu of Excise duty.....’

7. Certain decisions and judgements that laid emphasis on distinction between ‘ore’ and ‘concentrate’ and on the object of levying of additional duties of customs were cited by the lower authorities to support the distinguishing parameters for inferring - from facts such as the admitted subjecting of mined material by supplier to ‘crushing’ and ‘screening’— that processing at site was intended for ease of transportation and that the nature of transformation, inferred from information available on web-site of supplier about activities, including that of ‘Parsons Beneficiation Plant’, at site that reflect the details in the schedule to the contract for purchase of material, by removal of foreign matter to the extent specified was sufficient to conform to ‘manufacture’ as deemed in the Schedule to Central Excise Tariff Act, 1985.

8. We cannot help but note that liberties were taken with words and

expressions occurring in cited authoritative texts for contriving a context. That is as repugnant to exercise of classification as the cross-fastening of statutory intent in two different laws – one for levy on domestic manufacture of goods and the other for levy of impost on trans-national commerce which, incidentally, authorized collection of additional duty on that very occurrence though, for measure, at the rate for domestic levy – only muddying an already churning maelstrom. We intend to address these presently and, at this stage, merely content ourselves with the observation that negation of converse of declarations in the Explanatory Notes is not the responsibility of the assessee for lack thereof to be construed as confirmation of the other, viz., concluding that the goods are other than ‘ores’ if the importer is unable to, or does not, establish that these are not ‘concentrates’ as the boot should be on the other side. Neither should ‘ease of transport’ be inferred as the intent of the expression ‘economical transport’ in the Explanatory Notes as expressions have been selected, and exactly crafted, in the Explanatory Notes in pursuit of precision for ease of interpretation of the heading groups.

9. Thus, the liability was fastened on, and upheld against, the appellant on the finding that ‘ores’ and ‘concentrates’ are distinguishable, owing to meaning assigned in the First Schedule to Customs Tariff Act, 1975 that replicated Explanatory Notes and in the Explanatory Notes respectively, for ferrous extractions, that the

contents of web-site of supplier is, in the context of particulars in contract, more reliable authority on processes that mined material has been subjected than a certificate produced on prompting of assessing officer and, owing to which, the disadvantage of excise duty leviable upon occurrence of similar activity in India would have to be neutralized through additional duty of customs at like rate for having been manufactured in South Africa.

10. Yet another caveat would not be out of place here. The headings in the Harmonized System of Nomenclature (HSN) Code are scientifically clustered, and progressively ordered, groups of goods for transnational applicability through adoption by participating States and the Explanatory Notes are intended, first and foremost, to afford framework for national governments in evolving tax strategy on imports and the placement of particular goods therein. The elaborations in the Explanatory Notes do aid, in the context of this dispute, in segregation of 'ores and concentrates' should that be a policy imperative and, once segregated at the tariff item level, cease to serve as point of reference for fastening duty liability on import. It may, at best, aid the tax administrator in ascertaining the intent of the Central Government in opting for segregation should that be relevant for classification though, more often than not, the infusion of monetary consequences has the effect of insinuating value judgement in a value neutral exercise such as classification. It must also be recalled that the

Harmonized System of Nomenclature (HSN) Code was adopted, a decade later, also for an entirely different impost – on domestic manufacture. That the relevant Explanatory Notes were not sufficient to distinguish it for this purpose is evident from the need to insert note 4 to bring it within the ambit of Central Excise Act, 1944 - superimposing effect over cause. The present dispute is over such a levy for which the Explanatory Notes were found to be inadequate.

11. The hazard of tax rates – a manifestation of policy – being prioritized over best fitment within the tariff cannot also be ignored. For the purposes of tax, domestic production of ‘concentrates’ are taxed at 2.5% while extraction of ‘ores’ are not subject to tax and, to give effect to that intent of levying duties of excise, the transformation has been deemed to be ‘manufacture’ by incorporation of note 4 in the tariff attending on section 3 of Central Excise Act, 1944. Impliedly, these are different forms of minerals and metals even though the distinction be unfamiliar as process upon, which levy of central excise is erected, warranting statutory deeming for that purpose. The intent of ‘additional duty of customs’ is the elimination of tax arbitrage in commercial choice between import or to procure domestically. It is, therefore, the form that should be subject to tax on import – both for basic and additional duties - and it is only form that is sufficient, as well as necessary, condition for assessment. Congruity of activity for transformation - within and outside the country - are not germane to

determination under the two tariff schedules, even by ignoring deeming of manufacture, as such activity is relevant only for determining taxable event and not the rate of duty; attempt by the tax administrator to venture thereto for fastening parity in tax burden on that premise is the improper arrogation of the exclusive preserve of the Central Government by an instrument of that government. It is here that the compartmentalization of judicial interpretation in the two contexts, precluding cross-over and an aspect that should have made its brooding presence felt in assessment to duty, has not received due acknowledgment in the impugned order.

12. According to Learned Counsel for appellant, the finalization relied on description of activities in the web-site of supplier to hold that processing at the site of mining – washing, screening, crushing, jigging – for removal of foreign matter, to make fit for metallurgical operations and economic transportation, sufficed for categorizing as ‘concentrates’ which the first appellate authority upheld to thus limit the scope of the dispute to determination of conformity with ‘concentrates’, as tariff item, in chapter 26 of First Schedule to Customs Tariff Act, 1975. Challenging the conclusion that ‘beneficiation’ had occurred on the ‘ore’ before import, it was contended that there is no material on record to establish that these had undergone anything beyond ‘crushing’ and ‘screening’ before shipment to India. In support of this proposition, the glaring lack, in the finalization order, of challenge to the certificate

issued by the mining company was highlighted along with finding, for the first time, at the appellate level that discarded it for being, ostensibly, an 'after thought', which, according to Learned Counsel, was in excess of the ground proposed in the 'query memo' by the original authority and, thereby, erroneous. According to him, the only authority competent to issue such certification is the miner and the contents of the web-site do not refer either to the entirety of 'ore' sold by the producer or to the specific consignments involved in the dispute rendering reliance thereon to be purely speculative.

13. It was further argued that the goods intended by the contract to be transacted, as well as the trigger for consideration, is 'iron ore' and that the lower authorities have neither ascertained deviation from contract nor touched upon value thereof for assessment despite finding the goods to be different from that contracted. It was contended that, in view of the elaboration of 'concentrates' in chapter 26 of the Explanatory Notes to the Harmonized System of Nomenclature (HSN), which employs 'special treatment', such re-classification was defective. Reference was also invited to circular no. 9/2012-Cus dated 23rd March 2012 of Central Board of Excise & Customs (CBEC) which mirrored the 'special treatment' *supra* without any further elucidation of such treatment that could distinguish the rival descriptions. Reference was also made to circular no.332/1/2012-TRU dated 17th February 2012 of Central Board of Excise & Customs (CBEC) which,

relying upon expert inputs, distinguished ‘ores’ and ‘concentrates’ in terms of processes. Reliance was also placed on the distinction elaborated upon in Kirk-Othmer’s Encyclopedia of Chemical Technology. It was argued that the ruling of the Tribunal, in *Amba River Coke Ltd v. Principal Commissioner of Customs (Preventive)*, *Mumbai [2022 (381) ELT 704 (Tri-Mumbai)]*, had also drawn upon the process of ‘beneficiation’ which, as set out in the notice therein, was far removed on facts from the stand taken by the lower authorities in the proceedings now before us.

14. According to Learned Authorized Representative, the imported goods, by having undergone a process beyond that described in the certificate, were more aptly classifiable as ‘concentrates’ and that even the certificate, for not having been produced at the time of import, did not suffice to support claim of the appellant in the face of web-site of the supplier having elaborately set out the activities undertaken by them to leave no room for doubt that the goods were indeed ‘concentrates’ not conforming to claim in bills of entry. It was pointed out that ‘washing’ and ‘jigging’, in addition to ‘crushing’ and ‘screening’, were intended for removal of foreign matter from the mined material. He drew upon the information on the web-site to submit that any process after extraction could only be for production of ‘concentrates’ with the ISO 9001:2015 certification corroborating that conclusion. Reliance was placed on the decisions of the Tribunal in *Rungta Mines Ltd v.*

Commissioner of Central Excise, Customs and Service Tax, Bhubaneswar-II [2016-TIOL-717-CESTAT-KOL] and of the Hon'ble Supreme Court in *Star Industries v. Commissioner of Customs (Imp), Raigad [2015-TIOL-234-SC-CUS]*.

15. It is common ground that the rival claims on eligibility for exemption from additional duties of customs has been distilled from dispute over classification of imported goods. There is no dispute that the imported goods are 'iron ore' produced in South Africa. The appellant claimed the goods as conforming to

'65% Fe and above'

corresponding to tariff item 2601 1119 within

'-- Non-agglomerated'

comprising

'--- Iron ore lumps (60% Fe of more)'

corresponding to sub-heading 2601 11 of First Schedule to Customs Tariff Act, 1975, and which was eligible for exemption (at serial no. 56) in notification no.12/2012-CE dated 17th March 2012, and

'--- iron ore concentrate'

corresponding to tariff item 2601 1150 of First Schedule to Customs Tariff Act, 1975, and which, as proposed by the customs authorities at the time of finalization, was not entitled to the exemption, as well as

'--- Others'

corresponding to tariff item 2601 1190 of First Schedule to Customs Tariff Act, 1975.

16. It may not be out of context, or for that matter premature, to consider the judicial decisions cited on behalf of the respondent-Commissioner of Central Excise and Service Tax for its applicability to the case at hand. It needs noting that the decision in *re Rungta Mines Ltd* pertained to determination of liability of duties of central excise on ascertainment of impugned process as amounting to ‘manufacture’ which has no bearing on a levy concerned with goods crossing the frontiers and, particularly, when attributed to deeming fiction that finds place, through a note, in chapter 26 of Schedule to Central Excise Tariff Act, 1985. The source – actual or fictional - of the liability, intended as the objective of Central Excise Act, 1944, is not material to duty that emanates from the authority of section 3(1) of Central Excise Tariff Act, 1975 prescribing levy, equivalent that of duty of excise chargeable, solely for being akin to goods emerging from manufacturing process; the process of emergence, whether in domestic production or activity overseas, is, of itself, irrelevant to the charging of this duty and rate thereof. The decision of the Tribunal does not support the case of the lower authorities as no provision of either Customs Act, 1962 or Customs Tariff Act, 1975 requires determination of ‘manufacture’ at place unknown to these statutes for assessment to duty on import; indeed, it is settled law that the rate of duty would be such as is

applicable to goods ‘as presented’ and any assessment to

*‘(1)....duty.. equal to the excise duty for the time being leviable
on a like article if produced or manufactured in India’*

in section 3 of Customs Tariff Act, 1975, that applies to imported goods akin to manufactured goods, is tested on similarity of description and not on the process by which these emerge.

17. In *re Star Industries Ltd*, the issue before the Hon’ble Supreme Court was not about classification of the imported ‘molybdenum’ which, admittedly, was ‘roasted’ but about eligibility for exemption notifications intended for ‘ores’ that the importer pleaded to be inclusive of ‘concentrates’ also owing to heading 2613 of First Schedule to Customs Tariff Act, 1975 being applicable to

‘Molybdenum ores and concentrates’

and, therefore, were interchangeable. Furthermore, the description was also evocative of a process that was akin to manufacture prompting the Hon’ble Supreme Court to hold that

‘34. The Tribunal in the impugned judgment has also examined the issue keeping in view the objective behind the levy of CVD. Such a discussion proceeds as under:

"It will be useful at this juncture to examine the object of levy of additional Customs duty (CVD). This issue was examined at great length by this Court in the case of Hyderabad Industries Ltd. v. Union of India 1999 (108) ELT 321 (SC) = 2002-TIOL-369-SC-CUS-CB and this Court held as follows:

"15. The Customs Tariff Act, 1975 was preceded by the Indian Tariff Act, 1934. Section 2A of the Tariff Act, 1934 provided for levy of countervailing duty. This section stipulated that any article which was imported into India shall be liable to customs duty equal to the excise duty for the time being leviable on a like article if produced or manufactured in India. In the notes to clauses to the Customs Tariff Bill 1975 with regard to clause 3 it was stated that "Clause 3 provides for the levy of additional duty on an imported article to counter-balance the excise duty leviable on the like article made indigenously, or on the indigenous raw materials, components or ingredients which go into the making of the like indigenous article. This provision corresponds to section 2A of the existing Act, and is necessary to safeguard the interests of the manufacturers in India." Apart from the plain language of the Customs Tariff Act, 1975 even the notes to clauses show the legislative intent of providing for a charging section in the Tariff Act, 1975 for enabling the levy of additional duty to be equal to the amount of excise duty leviable on a like article if produced or manufactured in India. Even though the impost under Section 3 is not called a countervailing duty, there can be little doubt that this levy under Section 3 of the Customs Tariff Act has been enacted to provide for a level playing field to the present or future manufacturers of the like articles in India."

(emphasis supplied)

This object of levy has to be kept in mind while interpreting notification No. 4/2006-CE for the purposes of levy of CVD on concentrates. If the domestic manufacturer of concentrates is liable to pay excise duty on conversion of 'ores' into 'concentrates' in terms of Note 4 to Chapter 26, can his interests be sub-served when concentrates imported into India are not levied to CVD at the same rate by interpretation of Notification No. 4/2006 so as to construe that ores includes 'concentrates' and, therefore, no CVD is leviable. In our humble view, such an interpretation militates against the interests of domestic producers and also the plain language of the notification. Accordingly we hold that the benefit of exemption under Notification No. 4/2006-CE will not be applicable to 'concentrates' imported from abroad."

to, effectively, approve the finding of the Tribunal on the intent of duties leviable under section 3(1) of Customs Tariff Act, 1975 after noting that

'28. According to us, it is very clear from the reading of the judgment in Hindustan Gas case that basic and the common

thread which runs throughout the decision is that subjecting ore to the process of roasting does not amount to manufacture. This very basis gets knocked off with the amendment carried out in the year 2011 with the insertion of Note 4. Note 4 now categorically mentions that the process of converting ores into concentrates would amount to 'manufacture'. Therefore, it cannot now be argued that roasting of ores and converting the same into concentrates would not be manufacture. For the same reason, the judgment in MMTC becomes inapplicable and reliance upon Kirk-Othmer's Encyclopedia becomes irrelevant. With the addition of Note 4, a legal friction is created treating the process of converting ores into concentrates as manufacture. Once this is treated as manufacture, all the consequences thereof, as intended for creating such a legal friction, would automatically follow. Following shall be the inevitable implications:

(a) It is to be treated that Molybdenum Ore is different from concentrate. That is inherent in treating the process as 'manufacture' inasmuch as manufacture results in a different commodity from the earlier one. Section 2(f) defines this term as under:

"manufacture" includes any process,-

(i) incidental or ancillary to the completion of a manufactured product;

(ii) 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 amounting to manufacture; or

(iii) which, in relation to the goods specified in the Third Schedule, involves packing or repacking of such goods in a unit container or labelling or re-labelling of containers including the declaration or alteration of retail sale price on it or adoption of any other treatment on the goods to render the product marketable to the consumer."

(b) The purpose of treating concentrate as manufactured product out of ores is to make concentrates as liable for excise duty. Otherwise, there was no reason to deem the process of converting ores into concentrates as manufacture.

29. *Once the aforesaid legal repercussions are taken note of, as a fortiori, it becomes obvious that Notification No. 4/2006-CE which exempts only ores would not include within itself 'concentrates' also because of the reason that after the insertion of Note 4, concentrate is to be treated as a different product than ores, in law for the purposes of products of Chapter 26.'*

while setting out the issue in dispute. In the matter before us, the structuring of the entries in the First Schedule of Customs Tariff Act, 1975 reflects national policy prescription to disaggregate, at the 'tariff item' level, a description that, at the 'heading' level was combined similarly; here it is the outcome of a classification question that has had the effect of denial of notification. The ascertainment of legislative intent to afford level playing ground to indigenous production and foreign import is not of relevance here. The outcome of a dispute that was restricted to the description at the 'four digit', and 'heading', level in which authority of Explanatory Notes could have been drawn upon may not find resonance in a dispute that arises from policy driven segregation of similar heading at the 'eight digit', and 'tariff item', level transcending the utility of those very Explanatory Notes common to the two, as well as other, minerals once the national policy has deemed 'ores' and 'concentrates' of 'iron' to be distinct for amenability to

separate rates of duty. The resolution against the appellant in the claim, of the appellant in *re Star Industries Ltd*, of both being ‘ores’ is too patently contextual to have any bearing on the dispute before us.

18. Learned Counsel has placed before us the decision of the Tribunal, in *re Amba River Coke Ltd*, with particular reference to the interpretation of ‘beneficiation’, or enriching process by which the metal content is enhanced, in the show cause notice, as demonstrating inconsistent stand by customs authorities. Doubtlessly, it does, but such positing before different appellate authorities is vastly at variance, as far as consequence is concerned, from proposals of different jurisdictions for triggering adjudicatory process. Such is the issue of notice leading to the impugned order which, even if different from the one in *re Amba River Coke Ltd*, does not acquire any measure of approaching finality to warrant inference on inconsistent stand by the department. Nonetheless, the relevance of the decision of Tribunal that, notwithstanding the blending that the imported goods had undergone, the benefit of notification is available for ‘iron ore’ could not be denied.

19. Before we take up the rival tariff items for determination in accordance with rules – statutorily prescribed and judicially enumerated– of engagement, it may not be out of place to examine the First Schedule to Customs Tariff Act, 1975 as it is with reference to relevant Explanatory Notes that the lower authorities arrived at the

conclusion that ‘concentrate’ had been imported. The Explanatory Notes, so referred, are not part of the First Schedule and

‘.... do not form an integral part of the Harmonized System Convention. However, as approved by the WCO Council, they constitute the official interpretation of the Harmonized System at the international level and are an indispensable complement to..’

according to World Customs Organization (WCO) in its elaboration on *The International Convention on the Harmonized Commodity Description and Coding System (HS Convention)*. From this Convention has emerged the *Harmonized System of Nomenclature (HSN)*, and intermittently updated, for the benefit of use by governments of the contracting States by replication, at the ‘six digit level’, as Tariff Schedule for classification of imported goods. This, of itself, is a limitation on the resort to the Explanatory Notes for interpretation of the Tariff.

20. Moreover, such replicated Tariff has all the appearances of a ‘sterile’ museum exhibit that acquires the robustness of flesh and blood only upon infusion of national policy that is manifested as tax rates to right of the corresponding descriptions in the schedule prescribed by the country concerned. In a manner of speaking, it acquires a personality when the tariff enumeration is expanded to the ‘eight digit level’ and it is only then that the stamp of the intent of the Central Government to be different is made apparent by building upon the

resource that *The International Convention on the Harmonized Commodity Description and Coding System (HS Convention)*, along with supplements and complements including the Explanatory Notes, provides. Evident here is another limitation of the Explanatory Notes because of congruity only in relation to descriptions upto the ‘sub-heading’, or ‘six digit’, level.

21. To the extent that there is no variance in tax rates at the ‘eight , or ‘tariff item’, level, the corresponding descriptions make for distinction without difference. Therein lies the nub: a tax policy that admits of tax preferences among the enumerations within a sub-heading which is bereft of methodology – either inherent or insinuated – to isolate and distinguish fails to communicate the intent and offers, thereby, little scope for judicial determination from having to steer clear of intervention in tax policy. It cannot, therefore, be conceived that the tax collection or assessment machinery have been endowed with competence to portray, or arrogate, such intent. In the absence of strict construction of executive empowerment, the potential for discrimination and discard of twin principles, constancy and continuity, of tax administration is rife. It is not the case of customs authorities that they find support for the classification adopted for finalization of provisional assessment in a declaratory provision of the First Schedule to Customs Tariff Act, 1975 or the General Rules for the Interpretation of the Import Tariff. It is the Explanatory Notes that are harped upon in

the impugned order as well as in the submissions before us.

22. On perusal of chapter 26 of the Harmonized System of Nomenclature (HSN), we take note that the relevant entries exist as

‘26.01 Iron ores and concentrates, including roasted iron pyrites.

- Iron ores and concentrates, other than roasted iron pyrites:

2601.11 - Non-agglomerated

2601.12 - Agglomerated

2601.20 - Roasted iron pyrites’

leaving no scope for distinguishment of ‘iron ores’ and ‘iron ore concentrates’ except where national policy declared it to be so under the first of the sub-headings at the ‘tariff item’ level which was done. However, while doing so, the imperative warranting separate treatment of the two was, probably, presumed to be obvious enough to obviate prescription of objective criteria for distinguishment, and not accompanied by any elaboration thereto; the consequent difficulty does not find aid from the Explanatory Notes for resolution. Even if it could be gainsaid that a clear perception of the two did exist in the market, we observe that there is neither such evaluation in the impugned order nor scrutiny of post-import transactions to suggest so.

23. From a concatenation of the findings of the lower authorities and the contents of the Explanatory Notes, we are unable to appreciate the

logic by which the dots were connected. Indeed

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

therein, appears to have been misconstrued to arrive at a conclusion far removed from the reality asserted therein. To us, contrarily, it indicates that the material, as excavated, is rarely, if ever, dispatched for commercial deployment and some sort of discarding occurs at the mine. In distinguishing ‘ores’ and ‘concentrates’, the emphasis is not on just ‘process’ but ‘special process’ without any explanation attending thereon. It would also appear that ‘concentration’ is a question of degree than an absolute. We may safely posit that such distinguishment is left to the preferences of national policy formulation attending upon intent to segregate the two for fastening different rates of duty thereto. This is further evident from the placement of ‘oxides’ of the metal concerned in chapter 28 of the Schedule thus

‘Concentrates of ores obtained by treatments, other than calcining or roasting, which alter the chemical composition of crystallographic structure of the basic ore are excluded. Also excluded are more or less pure products obtained by repeated physical changes (fractional crystallisation, sublimation, etc.), even if there has been no change in the chemical composition of the basic ore.’

making it apparent that chapter 26 of the Schedule is intended to be

restricted in coverage to inputs for further processing after mining. The logic of the lower authorities would stultify ‘ores’ in the heading entirely; the absence of objective criteria for differentiating ‘ores’ and ‘concentrates’ cannot weigh against imports merely for resorting to revenue advantage. We are also struck by the applicability of the Explanatory Notes not just to ‘iron’ but across the spectrum of metals extracted from ‘ore’ mined from the earth. Hence, the Harmonized System of Nomenclature (HSN) relevant to the impugned goods and the corresponding Explanatory Notes do not assist in classification of ‘iron ore and concentrates’ as occur below heading 2601 in First Schedule of Customs Tariff Act, 1975.

24. Neither do the notes in chapter 26 in First Schedule of Customs Tariff Act, 1975 set out ‘special process’ to distinguish ‘ores’ from ‘concentrates’; however, with that distinction not being cause for preference on the part of importer or Revenue, it is the lack in the exemption notification that is more proximate cause of difficulty. From the progression of descriptions at the ‘tariff item’ level – on basis of ‘Fe’ content and size – it would appear that processing yields fineness and content of ‘iron’ more suited to deployment without further working. This has implications of physical appearance and pricing. We see from the record of proceedings that the lower authorities had not, in the absence of any other ground for distinguishment, ventured in either or both of those directions. Notwithstanding the conclusion of more

sophistication inhering in the impugned goods, the assessable value was left untouched; not was any attempt made to establish that the goods were not lumps. We may infer that the process by which 'ores' becomes 'concentrates' should make for finer form with high, and well above the base of 65 per cent, content that is designated as the threshold of the highest category of 'ores' incorporated in the Tariff. It is the absence of such evaluation with unwarranted reliance on inapplicable Explanatory Notes that outrightly jeopardizes the findings in the impugned order.

25. Learned Counsel has adverted to circular no. 9/2012-Cus dated 23rd March 2012 and circular no.332/1/2012-TRU dated 17th February 2012 of the Central Board of Excise & Customs (CBEC) as indicative of intent of tax policy to leave the impugned goods, as imported, untaxed on import. The emphasis in these, reflecting the distinguishment envisaged in the Explanatory Notes, is processing of mined material to enable ready deployment by users with minimal extraction. This is evident from

'3. Hence, it is clarified that the levy of excise duty is attracted only in cases where the product meets the definition of concentrate as per HSN notes, 'that is, 'ores which have had part or all of the foreign matter removed by special treatments either because such foreign matter may hamper subsequent metallurgical operations or with a view to economical transport'

in circular of 17th February 2012 which has drawn upon

‘2.From the above definition, it is clear that removal of part or all of foreign material is envisaged for conversion of ores into concentrates. Ministry of Mines have "clarified that no special treatment is involved in the crushing and screening of ore and the end product can be termed as a concentrate only when the grade of ore is sufficiently improved through beneficiation. Federation of Indian Mineral Industries have also pointed out that several processes (in addition to crushing and screening) such as milling, hydraulic separation, magnetic separation, floatation & Concentrate thickening have to be undertaken for ores to be converted into concentrate.’

therein. Furthermore, in circular of 23rd March 2012, the impact of ‘deemed manufacture’ in conversion of ‘ores’ to ‘concentrates’, by incorporating note 4 in chapter 26 of Schedule to Central Excise Tariff Act, 1985, as well as the available elaboration in the Explanatory Notes was examined to conclude that

‘3. In view of Chapter Note 4 to Chapter 26 of CETA, 1985 inserted vide Finance Act 2011, Ores and Concentrates are two distinct products. Thus, Concentrates suffer Central Excise duty being a manufactured product. The implication for imported Concentrates is that the benefit of exemption of additional duty of Customs leviable under Section 3 of Customs Tariff Act, 1975 in terms of a notification that applies only to Ores is no longer available to Concentrates, even if Concentrates and Ores fall under the same tariff heading.

4. Thus, it is concluded in the Conference that the benefit of exemption notification under Sr. No. 4 of the

Notification 04/2006-CE dated 1.3.2006 will be available only to imported Ores and not to imported Concentrates. '

These efforts of the Central Board of Excise & Customs (CBEC) to enable customs authorities to apply their mind to fastening duty liability on one while exempting the other that, together, comprised one heading in chapter 26 of First Schedule to Customs Tariff Act, 1975 appears to have been conveniently ignored by the lower authorities in the proceedings now impugned before us. No attempt was made to appreciate the process, if any, by which the impugned goods reached the 'Fe' content therein or conformity to any prescription attending upon the segregation, as well as differentiation by rates of duty, of 'ores' and 'concentrates' for levy of duties of central excise. Instead, a theoretical exposition of the nature of activities that the supplier claimed, in the public domain, to be proficient in was presumed, and speculatively so, as extending to the impugned goods without alluding to cause for arriving at such conclusion.

26. It is not appropriate to classify imported articles by inferring from web-sites, even if of the supplier, or from quality certification awarded to supplier without subjecting the imported goods to analysis and conformity to acceptable, or prescribed, standards.

27. For the above reasons, we hold that the lower authorities have not conformed to the approved manner of arriving at classification of

the impugned goods and that the impugned order must be set aside. The classification adopted by the appellant is not incorrect and, thence, eligibility for exemption from additional duty of customs follows. Appeals are, accordingly, allowed.

(Order pronounced in the open court on 13/02/2024)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*