

AFR

HIGH COURT OF ORISSA : CUTTACK.

W.P.(C) No. 23073 of 2022

(in the matter of an application under
Articles 226 & 227 of the Constitution of India, 1950)

TARINI MINERALS PRIVATE LIMITED

REPRESENTED BY ITS

MANAGING DIRECTOR

SRI DIPTI RANJAN PATNAIK

AGED ABOUT 73 YEARS

SON OF

LATE BRAJA BANDHU PATNAIK

AT: A/6, COMMERCIAL ESTATE

CIVIL TOWNSHIP

ROURKELA – 769 004

...

Petitioner

Mr. Jagabandhu Sahoo,
Senior Advocate with
Ms. Kajal Sahoo & Ronit Ghosh,
Advocates

-versus-

DEPUTY COMMISSIONER, CUSTOM

HOUSE, PARADEEP CUSTOM

DIVISION, PARADEEP, ODISHA

& OTHERS

...

Opposite Parties

Mr. Radheyshyam Chimanka,
Senior Standing Counsel
(CGST, Central Excise & Customs)

Date of Hearing and Judgment : 13.09.2022

P.T.O.

CORAM:

MR. JUSTICE JASWANT SINGH
AND
MR. JUSTICE MURAHARI SRI RAMAN

JUDGMENT

Murahari Sri Raman, J.—

This matter is taken up by virtual/physical mode.

1. The Petitioner, exporter of iron ore fines to Synergy Resources HK Limited, Hong Kong City, craves for exercise of extraordinary jurisdiction under Article 226/227 of the Constitution of India to issue writ of *certiorari* to quash and/or set aside the Order-in-Original dated 28.06.2022 (Annexure-14) passed by the Deputy Commissioner, Paradeep Customs Division, Paradeep under Section 18(2) of the Customs Act, 1962 by taking into consideration test report dated 16.12.2020 submitted by the Central Revenue Control Laboratory (abbreviated, “CRCL”) of Kolkata and re-test report dated 04.01.2022 of CRCL, New Delhi and writ of *mandamus* to undertake final assessment afresh by taking into consideration subsequent codified re-test report dated 22.08.2022 submitted by CRCL, Mumbai.
2. Statement of facts outlined by the petitioner-company in the writ petition leads to say that supplies of iron ore fines of 56.07% Fe content with moisture content of 9.65%, duly certified by Mitra S.K. Private Limited of Bhubaneswar, were made to Synergy Resources HK Limited of Hong Kong City by way of export. Upon submission of shipping bill on 16.12.2020, classifying the subject goods under Customs Tariff Head 26011142, provisional

assessment under Section 18(1) of the Customs Act was framed on 22.12.2020 on the basis of said certification by applying NIL rate of duty.

- 2.1. The Deputy Commissioner, Paradeep Customs Division passed the final Assessment Order on 28.06.2022 under Section 18(2) of the Customs Act based on test report dated 16.12.2020 submitted by the CRCL of Kolkata and re-test report dated 04.01.2022 of CRCL, New Delhi. In the said Assessment Order it has been observed as follows:

“4.6. From the test result of the CRCL, Kolkata and CRCL, New Delhi against the concerned Test Memo No.465/2020-21, dated 16.12.2020, it is seen that the Iron (Fe) content of the subject Iron Ore Fines is 58.5% and 58.75% respectively. As mentioned above, the reports of CRCL, New Delhi is to be taken into account for the purpose of classification of subject export goods. The export goods were classified under Custom Tariff Item No.26011142, at the time of Provisional Assessment, as per the pre-shipment analysis submitted by the exporter, thus attracting ‘NIL’ rate of duty in terms of Sl. No.20A of the Notification No.27/2011-Cus, dated 01.03.2011, as amended. However, in the changed scenario, as discussed above, the Iron (Fe) content of the subject Iron Ore Fines is more than 58% as per CRCL, Kolkata as well as CRCL, New Delhi. Thus, the impugned Iron Ore Fines are classifiable under Customs Tariff Item No.26011143, which attracts Customs Duty @ 30% adv.”

- 2.2. Accordingly demand to the tune of Rs.8,57,60,892/- has been raised by applying Customs Duty @ 30% adv. on transaction value of Rs.39,91,58,867/- under Section 18(2)(a) of the Customs Act in terms of Serial No.21 of the Second Schedule to Export Tariff along with interest under Section 18(3) *ibid*.

3. It is stated by the Senior Counsel Mr. Jagabandhu Sahoo for the petitioner assisted by Ms. Kajal Sahoo, Advocate that on receipt of sample test report from CRCL, Kolkata, when the Assessing Authority-Deputy Commissioner sought to re-classify the commodity in question, instructed the Petitioner *vide* Letter dated 01.06.2021 to approach the Additional/Joint Commissioner of Customs for re-testing of sample in view of clause 2 of Circular No.30/2017-CUS, dated 18th July, 2021.

3.1. Circular No.30/2017-CUS, dated 18th July, 2021 is reproduced hereunder:

*“F. No. 450/15/2017-Cus IV
Government of India
Ministry of Finance Department of Revenue
(Central Board of Excise & Custom)*

*Circular No. 30/2017-Cus
New Delhi, dated 18th July, 2017*

To

*All Principal Chief Commissioners/Chief Commissioners of
Customs / Customs (Preventive),
All Principal Chief Commissioners/Chief Commissioners of
Customs and Central Excise,
All Directors General,
All Principal Commissioners/Commissioners of Customs /
Customs (Preventive),
All Principal Commissioners/ Commissioners of Customs
and Central Excise.*

Sir/Madam,

Sub: Detailed guidelines for re-testing of samples— reg.

*World Trade Organization (WTO) negotiated Trade
Facilitation Agreement (TFA), which aims at simplifying
the trade processes and bringing down barriers to trade has*

come into force w.e.f 22nd February, 2017. India is a signatory to this agreement.

2) *India has placed a number of trade related measures negotiated under the TFA in Category A. Article 5.3.1 envisages granting an opportunity for a second test in case the first test result of a sample taken upon arrival of goods declared for importation shows an adverse finding, Further Article 5.3.3 makes it obligatory to consider the result of the second test, if any, for the release and clearance of goods, and, if appropriate, may accept the results of such test. The aforementioned Articles have been placed in category A. In order to have uniformity in approach among the field formations with regard to re-testing of samples, the following procedure is prescribed:*

- a. *Customs officers may draw the samples from import consignments for testing in case of consignments wherever needed. The results of all test reports, adverse or otherwise, shall be communicated to the importer or his authorized representative/ Customs Broker immediately on its receipt.*
- b. *In case the importer or his agent intends to request the Additional/Joint Commissioner of Customs for a re-test, then the same shall be made in writing to the said officer within a period of ten days from the receipt of the communication of the test results of the first test. Customs officers may take a reasoned view in case the importer or his authorized representative Customs Broker is unable to do so for reasons beyond his control.*
- c. ***Where the Additional/Joint Commissioner of Customs grants an opportunity for a second test, he must clearly indicate in writing the name and address of the laboratory/ institution where the second test can be carried out. Such referral for re-testing may be made only after being reasonably sure that the desired re-testing facilities exist at the laboratory/ institution.***
- d. *Re-test should be made only on the remnants of the samples originally tested or on duplicate*

representative sealed samples in the custody of the Customs. Further, to avoid delays, samples for second tests shall be marked as “immediate” before sending to the laboratory. In a case it may so happen that fresh samples have to be drawn, then such sampling should be done in the presence of the importer or his representative/customs broker.

- e. The requests for re-test of samples on the ground that the original sample was not representative should be entertained only if the consignment is still in Customs control, At the time of drawing the samples, the importer or his representative shall be present and certify that the samples drawn are representative.*
- f. The competent authority shall consider the results of the re-test without prejudice to the results of the first test. In case there is a variation in the results of the first test and the re-test, the competent authority shall take the decision relying upon either of the tests specifying the grounds in writing for the decision so taken. In case the competent authority is unable to decide whether to rely upon the first or the re-test results, then it may order a second re-test provided the consignment is still within the customs control. However, this option should not be resorted to in every case of variation between the first test and re-test results.*
- g. The facility of re-testing, is a trade facilitation measure, which should generally not be denied in the ordinary course. However, there might arise circumstances where the customs officer is constrained to deny the re-testing facility. Board expects that such denial would be occasional and on reasonable grounds to be recorded in writing.*
- h. Where the re-testing procedure is done at the instance of the department instead of the importer, the above procedure shall be followed mutatis mutandis.*

- 3) Difficulties, if any, in implementation of this circular, should be brought to the notice of the Board.*

4) *Hindi version of the circular will follow.*

Yours faithfully,

(Zubair Riaz)
Director (Customs)

- 3.2. Though CRCL, New Delhi pursuant to re-testing request submitted report, the same being not on independent analysis rather based on the report of CRCL, Kolkata, the petitioner approached the Chief Commissioner of Customs for codified re-test of remnant samples pertaining to shipping bill No.7251149 and submitted representations dated 15.06.2022 and 16.06.2022 for doing the needful. Nevertheless, without awaiting such codified re-test report in order to ascertain the veracity of test/re-test reports of CRCL, Kolkata and New Delhi, the Assessing Authority had proceeded to pass the final Assessment Order on 28/29.06.2022 under Section 18(2) of the Customs Act.
- 3.3. Challenging said Assessment Order, the petitioner preferred writ petition before this Court in W.P.(C) No.19225 of 2022. During pendency of said writ petition, CRCL, Mumbai *vide* Letter dated 23.08.2022 intimated the result of codified re-test which was sent by the Customs Division, Paradeep with reference to memo dated 16.02.2021 with respect to shipping bill No.7251149, dated 16.12.2020 whereby it is declared that the sample iron ore fines has 55.6% Fe content (on dry basis) with moisture content (as received) at 3.9%.
- 3.4. Since subsequent material was to be brought on record, the counsel for the petitioner sought for liberty to file fresh writ

petition by withdrawing W.P.(C) No.19225 of 2022. This Court passed the following Order on 05.09.2022:

- “2. *The exporter is before this Court challenging the order in original dated 28th June, 2022, whereby a custom duty of Rs.8,57,60,892/- being 30% duty calculated on the transaction value of Rs.39,91,58,867/- has been imposed upon finalisation of the provisional assessment made under Section 18(2) of the Custom Act, 1962 in respect of shipping Bill No.7251149, dated 16th December, 2020 based on CRCL report, Kolkata as also CRCL report, New Delhi specifying the Fe content to be above 58% in the consignment/cargo of Iron Ore Fines.*
3. *At the time of hearing, learned counsel submits that pursuant to subsequent permission permitting second retesting of the aforesaid consignment vide memo dated 21st July, 2022, a report has been submitted by the CRCL, Mumbai specifying the Fe content in the consignment to be much below 58%, thereby rendering the classification attracting “Nil” Customs Duty. He therefore, prays for permission to withdraw the present writ petition with permission to file the same challenging the aforesaid order in original dated 28th June, 2022 and file a fresh petition with better particulars. Mr. Radheshyam Chimanka, Senior Standing Counsel for Central Excise and Customs has no objection.*
4. *In view of the above, the writ petition is withdrawn with the aforesaid liberty.”*

3.5. Hence, the present writ petition being filed, the Senior Counsel for the petitioner submitted that there is no sanctity attached to the re-test report submitted by CRCL, New Delhi as the same followed the test report of CRCL, Kolkata and subsequent re-test report of CRCL, Mumbai submitted by codified re-test method falsifies the claim of the Department. The basic foundation based on which the final Assessment Order dated 28/29.06.2022 has been passed by the Deputy Commissioner, Paradeep Customs Division being

removed, it is, thus, urged by Mr. Jagabandhu Sahoo, Senior Advocate that the impugned demand of Rs.39,91,58,867/- raised under Section 18(2) cannot be sustained.

3.6. Placing reliance on the Judgment rendered by the Hon'ble Supreme Court of India in the case of *Reliance Cellulose Products Ltd. Vrs. Collector Of Central Excise, 1997 Supp(1) SCR 485 = 1997 (93) ELT 646 (SC)*, the learned Senior Counsel for the petitioner argued that he could demonstrate that the reports of CRCL, Kolkata and New Delhi could not be held to be just and correct in view of report of CRCL, Mumbai. Said report of CRCL, Mumbai having come to his possession after final assessment order being passed, the petitioner is entitled to get an opportunity before the Assessing Authority-Deputy Commissioner to place appropriate stance. It is further submitted by said Senior Counsel that in spite of repeated requests made before the Assessing Authority not to proceed further awaiting codified re-test report from CRCL, Mumbai, the same being not acceded to, there is gross violation of principles of natural justice. Therefore, he submitted that the assessment is required to be redrawn after considering the material which came to the records after passing of final assessment order.

4. Mr. Radheyshyam Chimanka, learned Senior Standing Counsel for Customs Department could not dispute such fact as pleaded by the petitioner. He has not disputed the fact that the report of CRCL, Kolkata is contrary to report of CRCL, Mumbai.

5. Legal position with regard to acceptance of report and application thereof during the course of assessment proceeding has been

clearly laid down in *Reliance Cellulose Products Ltd. Vrs. Collector Of Central Excise*, (1997) 6 SCC 464 = 1997 Supp.(1) SCR 485 = 1997 (93) ELT 646 (SC). It has been observed in the said reported case as follows:

- “12. *These orders are now under challenge before this Court. We were referred to a number of test reports obtained by the appellant from various persons and on the basis of these opinions, the reports of the Departmental Chemical Examiner and also the Chief Chemist were assailed. We are of the view that the Assistant Collector cannot be said to have erred in relying upon the reports given by the Chemical Examiner and the Chief Chemist. It may be that in a given case, the report of the Chief Chemist may be demonstrated to be palpably wrong. In such a case, the Court may direct re-examination of the whole issue. But that is not the case here. It has not been shown that the Chemical Examiner or the Chief Chemist were in error in their analysis in any way. The views expressed by the Chief Examiner and Chief Chemist of the Government cannot be lightly brushed aside on the basis of opinion of some private persons obtained by the appellant.*
13. *Under Rule 56 of the Central Excise Rules, the Central Excise Officer is empowered to take samples for the purpose of testing the samples. He has to communicate the result of such tests to the manufacturer. If the manufacturer is aggrieved by the result of the test, he can request the Assistant Collector that the samples be retested. That procedure has been followed. Therefore, there is no procedural infirmity in the order of the Assistant Collector nor has it been established that the Assistant Collector was wrong in relying on the report of Chemical Examiner and Chief Chemist in preference to the opinion obtained by RCPL from some private individuals.*”

- 5.1. Reference may be had to *Ponds India Ltd. Vrs. Commissioner of Trade Tax, Lucknow*, (2008) 8 SCC 369 wherein it has been laid down as follows:

“72. Furthermore, an expert in the field has also given his opinion in favour of the appellant. This Court in *Quinn India Ltd. Vrs. CCE* classified a product relying, inter alia, on the report of the clerical (sic chemical) examiner as under: (SCC p. 563, para 7)

“7. The Tribunal has completely ignored the report of the Chemical Examiner dated 6-10-1981 and the final opinion of the Chief Chemist dated 2-4-1992 coupled with the classification issued by the Department regarding use of wetting agents in the textile industries falling under Sub-Heading 3402.90. Test reports of the Chemical Examiner and Chief Chemist of the Revenue unless demonstrated to be erroneous, cannot be lightly brushed aside. The Revenue has not made any attempt to discredit or to rebut the genuineness and correctness of the report of the Government, Chemical Examiner and Chief Chemist. Thus, the reports are to be accepted along with other documentary evidence in the form of classification issued by the Department regarding use of wetting agents in the textile industries to hold that the product Penetrator 4893 possessed surface active properties and, therefore, is covered by Exemption Notification No. 101/66 dated 17-6-1966 as amended from time to time.”

73. In this case also, the report of the chemical examiner is in favour of the assessee. Furthermore, in a case of this nature, where the Revenue itself has been holding the assessee to be a producer of a pharmaceutical product, the burden would be on the Revenue to establish that the goods cease to fall under a given entry. For the said purpose, no material was placed by the Revenue which was imperative.”

5.2. It transpires, therefore, in the context of the pleadings in the writ petition that this Court in exercise of powers under Article 226 is called upon to decide the legality and validity of contradictory reports by weighing the pros and cons of the test reports submitted by different CRCLs on the quality of the iron ore fines. When the

parameters and scientific analysis of the reports on which reliance is placed are contradictory, this Court would be loathe in weighing its options on such disputed questions of fact. The Court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India cannot enter into a roving inquiry on the basis of conflicting test reports to decide the validity of determination of liability.

5.3. It is borne on record that the provisional assessment has been framed on the basis of the fact that the customs duty is assessed at NIL rate on the material produced by the petitioner that the Fe content of the iron ore fines exported was within the limit specified, however, at the time of final assessment, the opposite party No.1-Assessing Authority had relied on the reports of the CRCL, Kolkata and CRCL, New Delhi which reflected that the percentage of Fe content in subject goods is more than the exemption limit. Therefore, such factual dispute is required to be resolved by the statutory authorities under the statute.

5.4. This Court may at this juncture notice the interpretation put forth by the Hon'ble Supreme Court of India in the case of *Dilip Kumar and Company & Others*, (2018) 9SCC1=2018 (361) ELT 577 (SC). In the said case it has been observed as follows:

“52. *To sum up, we answer the reference holding as under—*

- 1) *Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification.*
- 2) *When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity*

cannot be claimed by the subject/assessee and it must be interpreted in favour of the revenue.

3) *The ratio in Sun Export case (supra)[Sun Export Corporation, Bombay Vrs. Collector of Customs, Bombay, (1977) 6 SCC 564] is not correct and all the decisions which took similar view as in Sun Export case (supra) stands overruled.”*

5.5. Thus the settled legal position is that the exemption notification must, in all cases be strictly construed and any benefit of doubt must be given to the Revenue and against the assessee.

5.6. Under the aforesaid circumstances, given the law on the subject, suffice to say that since the assessing authority proceeded to finalise the assessment under Section 18(2) of the Customs Act, notwithstanding request being made by the petitioner to await outcome of codified re-test report from the CRCL, Mumbai and utilized the testing report of CRCL, Kolkata and followed by CRCL, New Delhi, the assessment order is required to be set aside. Further reason for setting aside assessment order is that the report of CRCL, Mumbai has come to the possession of the petitioner after final assessment order is passed. The petitioner, therefore, had had no opportunity to present the same before the Assessing Authority during the course of the assessment. There being invasion of principles of natural justice, the petitioner is liable to be afforded an opportunity to produce such evidence to counter the report relied upon by the assessing authority.

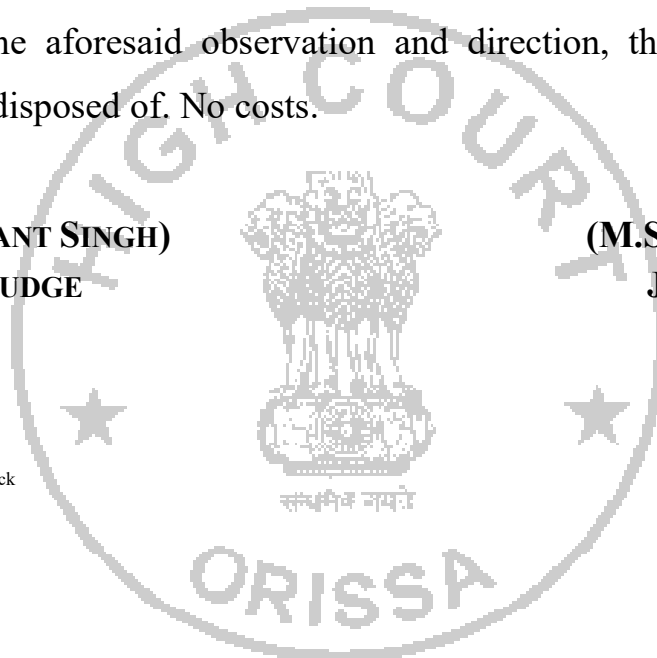
6. Faced with such situation, the assessment order cannot be countenanced in view of conflicting reports of different CRCLs and, therefore, the assessment order is hereby set aside and the petitioner is directed to appear before the assessing authority

on 26.09.2022 for necessary instructions along with certified copy of this order. The assessing authority on the appearance of the petitioner or his representative shall fix up date for hearing and the petitioner-assessee is at liberty to adduce evidence. The assessing authority weighing the scales of balance of contradictory reports furnished by CRCLs is required to take appropriate decision and pass orders of assessment after granting reasonable opportunity of hearing to the petitioner. Needless to point out that no unnecessary adjournment shall be granted to the petitioner.

7. With the aforesaid observation and direction, the writ petition stands disposed of. No costs.

(JASWANT SINGH)
JUDGE

(M.S. RAMAN)
JUDGE



Laxmikant

High Court of Orissa, Cuttack
September 13, 2022