Andreza

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 216 OF 2022

1. V. M. Salgaocar and Brother Pvt. Ltd., a Company incorporated under the provisions of the Companies Act, 1956, having its registered office at Salgaocar House, off Dr. F.L. Gomes Road, Post Box No. 14, Vasco-da-Gama, Goa 403 802. Represented by its General Manager-Export, Mr. Ajay R. Borkar, s/o Rajendra R. Borkar, Indian National, 51 years of age, residing at Taleigao, Panaji, Goa.

2. Mr. Shivanand V. Salgaoncar, s/o. Late V. M. Salgaocar, Indian National, 69 years of age, Shareholder and Chairman & Managing Director of V. M. Salgaocar & Brother P)vt. Ltd., r/o H. No. 186/1, 'Sagar Vilas', Samudra Darshan Colony, Cacra, Tiswadi 403 206. ... Petitioners

Versus

1. The Assistant Commissioner of Customs (Export) , Customs House, Marmagoa, Goa 403 803.

2. Directorate of Revenue Intelligence, Central Board of Indirect Taxes & Customs,

Ministry of Finance, Government of India, through the Principal Director General, 7th Floor, D Block, I.P. Bhawan, I.P. Estate, New Delhi 110 002.

3. Union of India, Ministry of Finance Department of Revenue through the Secretary (Revenue) North Block, New Delhi 110 001. ... Respondents

Mr. Rohan Shah *with Mr. Srisabari Rajan and Ms. Neha Shirdokar, Advocates for the Petitioners.*

Ms. Asha Desai, Standing Counsel *with Ms. Natasha Volvoikar, Advocate for Respondent No. 1.*

Mr. Pravin Faldessai, Deputy Solicitor General of India *for Respondent Nos. 2 and 3.*

CORAM: **G. S. KULKARNI &**
BHARAT P. DESHPANDE, JJ.

RESERVED ON: **16 September 2022**
PRONOUNCED ON: **23 September 2022**

JUDGMENT : (*Per G. S. Kulkarni, J.***)**

1. The judgment has been divided into the following sections to facilitate analysis:-

SECTIONS	HEADING	PARA NOS.
A	PRELUDE	3
B	PETITIONERS' CASE	6
C	REVENUE'S REPLY AFFIDAVIT	15
D	PETITIONERS' REJOINDER AFFIDAVIT	18
E	SUBMISSIONS ON BEHALF OF THE PETITIONERS	21
F	SUBMISSIONS ON BEHALF OF THE REVENUE	22
G	DISCUSSION AND CONCLUSION	23

2. Rule. Respondents waive service. By consent of parties heard finally.

A. PRELUDE:

3. This petition under Article 226 of the Constitution of India, *inter alia* challenges the legality of the General Alert Circular no. 02/2019 dated 12/15th April 2019 (for short, '*GA Circular*'), issued by the Directorate of Revenue Intelligence (DRI) and two orders-in-original dated 17.03.2022 and 31.03.2022, passed by the Assistant Commissioner of Customs. The petitioners contend that in passing the impugned orders-in-original, the Assessing Authority has been guided by the GA Circular which, according to the petitioners, is illegal and could not be taken into consideration by the Assessing Officer to pass the impugned orders-in-original to levy customs duty on the export of iron ore as undertaken by the petitioners. It would be relevant to note the prayers in the Writ Petition, which read thus :

> *i. declare that the General Alert Circular No. 02/2019 dated 12/15 April 2019 is illegal, unsustainable and without authority of law;*
>
> *ii. declare that the finalization of assessments of the five Shipping Bills under consideration filed by the Petitioner No. 1 on the basis set out in the Impugned Order dated 17.03.2022 and the Impugned Order dated 31.03.2022 is illegal and is unsustainable in law;*
>
> *iii. declare that no liability of export duty can be imposed upon the exports of Petitioner No. 1, consequent to the Impugned Order dated 17.03.2022 and the Impugned Order dated 31.03.2022;*
>
> *iv. issue a writ of certiorari or a writ in the nature of certiorari to call for and examine the records of the proceedings before the Respondent No. 1, and to quash and set aside-*
>
> > *a. the Impugned Order dated 17.03.2022 and Impugned Order dated 31.03.2022;*
> >
> > *b. the Impugned General Alert Circular No. 02/2019 dated 12/15 April 2019.*
>
> *v. declare that the Provisional Duty Bonds of Rs.74,44,98,912/- and Bank Guarantees of*

Rs.20,38,78,646/- furnished by the Petitioner No.1 are not enforceable by the Respondents or their officers;

vi. issue a writ of mandamus or a writ in the nature of mandamus directing the Respondents to -

a. withdraw the Impugned Order dated 17.03.2022 and the Impugned Order dated 31.03.2022;

b. not act on or in consequence to the Impugned Order dated 17.03.2022 and the Impugned Order dated 31.03.2022;

c. withdraw the General Alert Circular No. 02/2019 dated 12/15 April 2019;

d. not act on or in consequence of the General Alert Circular No. 02/2019 dated 12/15 April 2019;

e. assess the exports effected by the Petitioner No. 1 covered under the Impugned Order dated 17.03.2022 and the Impugned Order dated 31.03.2022 under CTH 2601 11 21, CTH 2601 11 22 and CTH 2601 11 41, as declared by the Petitioner No. 1, and confirm levy of 'Nil' rate of export duty under the Notification No. 27/2011-Cus. dated 1 March 2011, as amended.

vii. Pending the hearing and final disposal of this Petition-

a. stay the operation of the Impugned Order dated 17.03.2022 and the Impugned Order dated 31.03.2022;

b. direct the officers of the Respondents not to act on or in consequence of the Impugned Order dated 17.03.2022 and the Impugned Order dated 31.03.2022; and

c. direct the officers of the Respondents not to act on or in consequence of the General Alert Circular No. 02/2019 dated 12/15 April 2019;

d. direct the Respondents not to encash the Bank Guarantees provided by the Petitioner No. 1 in the instant matter or take any other coercive action as a consequence of the Impugned Order dated 17.03.2022 and the Impugned Order dated 31.03.2022

viii. Grant ad-interim reliefs in terms of prayer clause (vi) above; and

ix. grant such further and other reliefs or directions as this Hon'ble Court may deem fit and necessary in the facts of the present case."

4. At the outset, it needs to be observed that as the challenge raised by the petitioners is also to the orders-in-original against which the petitioners have an alternate remedy of an appeal under Section 129-A of the Customs Act, 1962, a preliminary objection on the maintainability of the petition, on such ground was raised on behalf of the respondent-Revenue. It was hence suggested to Mr. Shah, learned Counsel for the petitioners as to why the issues as raised in the petition cannot be raised in a statutory appeal. Mr. Shah responding to such query, would however submit that this Court ought to entertain this Petition as the petitioners have raised a challenge to the legality and validity of the GA Circular no. 02/2019 on the ground of it being *ultra vires* to the Constitution, which according to him cannot be decided by the Appellate Authority. Mr. Shah would submit that also the impugned orders-in-original are illegal and *ultra vires* to the Constitution, being contrary to the law laid down by the Supreme Court in ***Union of India Vs. Gangadhar Narsingdas Agarwal & Anr.***[1]. Mr. Shah would hence submit that the petitioners would urge that such issues be adjudicated by this Court in the present petition, as the alternate remedy of an appeal would not be an efficacious remedy, in the facts and circumstances of the case. Having considered the submissions of Mr. Shah as also having given our anxious consideration to the nature of the issues as raised in the petition, we are not inclined to non-suit the petitioners on the ground of alternate remedy, the reasons for which, we would also dismiss hereafter.

5. We have accordingly heard the learned Counsel for the parties on the issues as raised in the Petition. With these prefatory words, we proceed to state the facts on which the petitioners espouse their cause.

[1] 1997 (10) SCC 305

B. Petitioner's case :

6. Petitioner no.1 is stated to be engaged in the business of mining and allied operations including exploration, extraction, processing, etc., of mineral ores. In the course of its business, petitioner no.1, inter alia, exports iron ore from India. There is a levy of customs duties on the export of the iron ore, as classified in the First Schedule to the Customs Tariff Act, 1975, (for short, '*The Tariff Act'*) 'for the rates of export duty as prescribed under the Second Schedule of the Tariff Act. The following is the rate of duty in regard to iron ore lumps and iron ore fines:

CHAPTER 26

Ores, slag and ash

Tariff Item		Description of goods	Unit	Rate of duty	
				Standard	Prefer-ential Areas
(1)		(2)	(3)	(4)	(5)
2601		IRON ORES AND CONCENTRATES, INCLUDING ROASTED IRON PYRITES			
	-	Iron ores and concentrates, other than roasted iron pyrites :			

2601 11	-	Non-agglomerated :			
	--	Iron ore lumps (60% Fe or more)			
2601 11 11	--	60% Fe or more but below 62% Fe	kg	10%	-
2601 11 12	--	62% Fe or more but below 65% Fe	kg	10%	-
2601 11 19	--	65% Fe and above	kg	10%	-
	--	Iron ore lumps (below 60% Fe, including black iron ore containing upto 10% Mn)			
2601 11 21	--	Below 55% Fe	kg	10%	-
2601 11 22	--	55% Fe or more but below 58% Fe	kg	10%	-
2601 11 29	--	58% Fe or more but below 60% Fe	kg	10%	-
	--	Iron ore fines (62% Fe or more)			
2601 11 31	--	62% Fe or more but below 65% Fe	kg	10%	-
2601 11 39	--	65% Fe and above	kg	10%	-
	--	Iron ore Fines (below 62% Fe)			

2601 11 41	--	Below 55% Fe	kg	10%	-
2601 11 42	--	55% Fe or more but below 58% Fe	kg	10%	-
2601 11 43	--	58% Fe or more but below 60% Fe	kg	10%	-
2601 11 49	--	60% Fe or more but below 62% Fe	kg	10%	-
2601 11 50	--	Iron ore concentrate	kg	10%	-
2601 11 90	--	Others	kg	10%	-
2601 12	--	Agglomerated :			
2601 12 10	--	Iron ore pellets	kg	5%	-
2601 12 90	--	Other	kg	5%	-
2601 20 00	-	Roasted iron pyrites	kg.	5%	-

The petitioners have classified that the iron ore/ore fines being exported by them under Tariff items 2601 11 21, 2601 11 22, 2601 11 41 and 2601 11 42.

7. The present petition concerns three shipping bills of March 2018 followed by two provisional shipping bills of June 2020 relating to export of iron ore, which were filed by the petitioners under CTH No. 2601 11 21 and CTH 2601 11 22 (iron ore lumps) and CTH 2601

11 41 (iron ore fines) undertaken by the petitioners from the Mormugao Port, seeking benefit of "Nil", rate of export duty, under an exemption notification dated 01.03.2011, (for short, '*the exemption notification*'). The petitioners have contended that provisional duty bonds and bank guarantees corresponding to the said shipping bills were submitted at the time of provisional assessment under Section 18 of the Customs Act. In the intervening period, the respondent no.2-Directorate of Revenue Intelligence (DRI), issued the impugned GA Circular dated 12/15 April 2019 by which although the export of iron ore was to be classified on 'Wet Metric Ton' (WMT) basis, such circular *inter alia* mandates the "Dry Metric Ton" (DMT) method to be applied to determine the Fe (iron) content for the purpose of classification, inter alia, on the basis of testing standards prescribed by the Bureau of Indian Standards, which according to the petitioners was patently contrary to law laid down by the Supreme Court in ***Union of India Vs. Gangadhar Narsingdas Agarwal & Anr***[2] (for short, ***'Gangadhar Agarwal's'*** case*)* as also the Revenue's own Circular dated 17 February 2012.

8. In regard to the said exports of the petitioners, the office of respondent no.1 issued letters for finalization of assessment under

[2] 1997 (10) SCC 305

Section 18 (2) of the Customs Act between May 2021 to December 2021, seeking to deny classification claimed by the petitioners on the "Wet Metric Ton" (WMT) basis and to recover export duty at the rate of 30% as prescribed under the Second Schedule to the Tariff Act.

9. By its various letters/replies filed with the office of respondent no.1, the petitioners reiterated the classification adopted by them citing circulars and precedents to contend that the appropriate basis for determination of the Fe (iron) content in the iron ore exported by the petitioners was required to be done only using Wet Metric Ton (WMT) method, in accordance with the decision of the Supreme Court in ***Gangadhar Agarwal's*** case, which approved the decision of the learned Single Judge of this Court in ***Gangadhar Narsingdas Agarwal Vs. A.C. Martins & Ors.***[3]**,** as confirmed by the Division Bench in its judgment in ***Union of India & Ors. Vs. Gangadhar Narsingdas Agarwal & Ors.***[4]. In such decisions, the Courts throughout approved the Wet Metric Ton (WMT) method to determine the percentage of iron ore, which included taking into account all the impurities including moisture in the iron ore lump or fines,

3 Misc. Civil Petition No. 1120/1974 decided on 4.10.1979

4 1986 SCC OnLine Bom 506

10. The petitioners contend that the Assessing Officer, however, did not agree with the petitioners' case that the WMT method needs to be followed. The petitioners contend that the Assessing Officer applied the Dry Metric Ton (DMT) method on the basis that the levy of export duty was required to be made on *ad valorem* rates of duty. According to the petitioners, the Assessing Officer classified the petitioners' export by applying the Dry Metric Ton (DMT) method whereby the goods were classified under headings CTH 2601 11 29 and CTH 2601 11 49 and not under the headings CTH 2601 11 21 and CTH 2601 11 22.

11. It is the petitioners' case that the impugned orders-in-original as they apply the Dry Metric Ton method (DMT) are ex facie contrary to the law as laid down by the Supreme Court in ***Gangadhar Agarwal's*** case, as also they are contrary to the Revenue's own circular dated 17.02.2012. It is the petitioners' case that the orders-in-original are passed by the Assessing Officer only on the basis of the GA Circular dated 12/15th April 2019. The petitioners contend that the classification of iron ore under the First Schedule of the Tariff Act, is with regard to the percentage of Fe (iron) content therein. It is the petitioners case that once the controversy as to whether the determination of iron (Fe) content for export is to be undertaken on a "Wet Metric Ton" (WMT) basis or a "Dry Metric Ton" (DMT) basis was settled by the Supreme Court there could neither be a deviation much less any breach of what was laid down by the Supreme Court.

12. The petitioners contend that in ***Gangadhar Agarwal's*** case, the Supreme Court considering the contention of the Revenue and of the exporter/assessee held that the correct basis for determination of the Fe (iron) content in the iron ore being exported was on the WMT basis, being the natural form in which the iron ore is exported. It is, hence, the petitioners' contention that the law declared by the Supreme Court being binding on all Courts and Authorities under Article 141 of the Constitution, the Revenue in the present case could not have in any manner deviated from such settled norms on classification. It is the petitioners' case that the impugned GA Circular as issued by the DRI which is stated to have been issued to alert the Revenue to follow the 'Dry Metric Ton" (DMT) method, is contrary to the law laid down by the Supreme Court in ***Gangadhar Agarwal's*** case. The petitioners hence contend that impugned orders-in-original which, according to the petitioners, apply the contents of the GA Circular, are bad and illegal being contrary to law as laid down by the Supreme Court in ***Gangadhar Agarwal's*** case as also of the CBEC Circular no.04/2012-Cus dated 17 February 2012, issued by the Board in exercise of its powers under Section 151-A of the Customs Act, which according to the petitioners, prescribe the WMT method for determination of the iron content in the iron ore to be exported, for the purpose of its classification for levy of duty, as per the decision of the Supreme Court in ***Gangadhar Agarwal's*** case.

13. The petitioners contend that the Revenue also cannot justify adopting the "Dry Metric Ton" (DMT) method on the ground that there is a change in the basis of the levy namely that the rate of export duty from 13.06.2008 being changed from the per ton rate basis to *ad valorem* basis. It is the petitioners case that such change in the rate of tariff is no justification so as to alter and/or nullify the norms as laid down by the Supreme Court in ***Gangadhar Agarwal's*** case which had found acceptance by the Revenue even after the amendment of the Second Schedule of the Tariff Act so as to prescribe levy of duty at the *ad valorem* rates w.e.f. 13.06.2008.

14. The petitioners have contended that the determination of Fe (iron) content on WMT basis was considered to be an acceptable norm in the prior assessments, which was clear from the fact that by virtue of the Finance Act 2022, for the first time an amendment to the First Schedule to the Tariff Act, has been incorporated by adding a supplementary note in Chapter 26 to the effect that for the products of

CTH 2601, the percentage of Fe (iron) content wherever specified, shall be calculated on the 'Dry Metric Ton' (DMT) basis to be effective from 01.05.2022. Hence, according to the petitioners there could not have been any adoption of the DMT method in respect of any assessment for the period prior to 1st May 2022.

C. Revenue's Reply Affidavit:

15. A reply/affidavit has been filed by Shri Rebbapragada Srinivasa Rao, Assistant Commissioner (Legal Cell), Custom House, Mormugao. At the outset, the reply/affidavit takes an objection to the maintainability of the petition on the ground that the petitioners have an alternate remedy of filing a statutory appeal to challenge the orders-in-original. It is contended that the petition involves a fishing inquiry/fact finding, which is within the jurisdiction of the statutory Appellate Tribunal. It is stated that there arises no question of law to be decided by this Court. However, a without prejudice, reply on merits of the petition has also been furnished, to contend that the impugned orders-in-original are based on merits and are not passed on the basis of GA Circular no. 02/2019 dated 12/15th April 2019. Insofar as the GA Circular is concerned, it is contended that it is an internal communication and administrative in nature as also an advisory and not binding on the lower authorities of the department. It is contended that the impugned order was passed on the available material on record and nowhere in the impugned orders-in-original, a reference has been made to the GA Circular. It is contended that, in any event, the GA Circulars are not in any manner illegal or *ultra vires* with the provisions of the Customs Act or the Constitution of India and no ground whatsoever in that regard has been made out in the petition. The petitioners attempt is only to short circuit the statutory provisions under the law. It is contended that the determination of iron content in iron ore being classified in Finance Bill 2021 is to be undertaken on DMT basis and not on WMT basis is mostly clarificatory in nature and it does not alter the already existing statutory position.

16. It is next contended that the case of the petitioners that the issue in the matter is covered by the decision of the Supreme Court in the case of ***Gangadhar Agarwal*** (supra), is not correct, as the petitioners have misinterpreted the law in that regard. Hence the petitioners' case that the determination of the iron (Fe) content should be on the WMT method and not as per DMT method, is untenable. It is contended that there is a specific method for testing iron ore as prescribed by the Bureau of Indian Standards IS 1493-1953 [IS 1493-1(1981), which is followed for the purpose of calculating the iron content. The Revenue has next contended that Section 14 of the Customs Act defines the value in case of export of goods as a transaction value of such goods. This was the reason that the value of the goods in all shipping bills relating to export of Iron Ores declared by the exporters is the value of goods arrived on Dry Metric Ton (DMT) basis. It is contended that in all shipping bills, the quantity of the goods as declared is the weight of the iron ore on dry basis. It is contended that also the unit price of the goods exported is as per DMT of iron ore exported. Therefore, the value of the goods which has been declared in the shipping bill is taken as the transaction value for the purpose of levy of export duty on DMT. It is contended that since the duty is chargeable on *ad valorem* basis, as the petitioners in their shipping bill have valued the said goods based on Dry (DMT) basis, hence, while calculating the applicability of duty, the petitioners cannot contend that the Fe (iron) content must be calculated on WMT basis and all these issues can be agitated by the petitioners before the Appellate Authority, as the issues raised by the petitioners are required to be examined by the fact finding authority only in a statutory appeal and not by this Court in its writ jurisdiction.

17. It is next contended that DRI is a wing of CBIC which administers the Customs Act and the impugned GA Circular issued by the DRI is based on the inputs to the other wings of the department, which is in the nature of advice and not an instruction issued under section 151A of the Customs Act. It is contended that the petitioners are misinterpreting the decision of the Supreme Court in ***Gangadhar Agarwal's*** case as the same is not applicable to the facts of the present case, as the issue before the Supreme Court in the said case was levy of export duty on the "volume of the quantity of iron ore", exported during the relevant period which was chargeable @ Rs. 6/-, Rs.5/-, and Rs.4/-per metric ton (PMT) depending on the iron content in the iron ore or the iron ore fines. It is stated that also the issue before the Supreme Court was not in regard to the classification of iron ore based on the iron (Fe) content but the weight which was required to be considered for calculation of duty, namely whether the duty was to be levied on the actual quantity to be exported or the net iron content in the consignment. It is stated that in these circumstances, the Supreme Court ruled that the duty is chargeable on the actual quantity of the iron ore exported notwithstanding the composition of the consignment. It is contended that the iron ore is classifiable under 6 tariff entries of chapter 26 of the Tariff Act based on the Fe (iron) content as under:-

Tariff Item		Description of goods	Unit	Rate of duty	
				Standard	Prefer-ential Areas
(1)		(2)	(3)	(4)	(5)

		Iron ore fines (62% Fe or more)			
2601 11 31	----	62% Fe or more but below 65% Fe	kg.	10%$	-
2601 11 39	----	65% Fe and above	kg.	10%$	-
	----	Iron ore fines (below 62% Fe)			-
2601 11 41	----	Below 55% Fe	kg.	10%$	-
2601 11 42	----	55% Fe or more but below 58% Fe	kg.	10%$	-
2601 11 43	----	58% Fe or more but below 60% Fe	kg.	10%$	-
2601 11 49	----	60% Fe or more but below 62% Fe	kg.	10%$	-

Referring to the above Tariff items, it is stated that the classification of the goods, which is iron ore, can only be decided after arriving at the Fe (iron) content of the consignment. It is stated that the methodology to arrive at the Fe (iron) content, a sample has to be removed for determination of the moisture and the other impurities which are quantified only after testing the sample on DMT basis, as per the procedure laid down in the BIS standard (IS: 436 (Part1/Section I) 1964). It is stated that thus, the decision of the Supreme Court in

Gangadhar Agarwal's case is not applicable in the instant case. It is contended that the petitioners cannot randomly pick up the WMT method subject matter of the facts, in the said case so as to avoid payment of legitimate duty due to the Government, which would amount to misleading the Court. It is next contended that the petitioners' contentions to apply the decision of the Supreme Court in ***Gangadhar Agarwal's*** case, is unfounded for the reason that the said decision of the Supreme Court was rendered during a regime when the duty was charged on total weight including moisture (WMT), when the Fe (iron) content was to be calculated on the total weight for the levy of duty, however, presently the duty is determined on *ad valorem* basis. Thus, the decision in ***Gangadhar Agarwal's*** case is not relevant to the facts of the present case, inasmuch as the duty today is no longer chargeable or relateable on weight basis. It is contended that the exemption from customs duty is governed by Chapter 5 of the Customs Act, the relevant provisions being Section 12 and 14 read with the Tariff classification under the Tariff Act, under the heading 2601 of schedule I, the rate of duty as prescribed under Schedule-II. The Revenue has emphasized that in all the shipping bills, the quantity of the goods which has been declared is the weight of the iron ores on dry (DMT) basis, as also, the unit price declared for the goods exported is as per DMT on iron ores exported. This according to the Revenue invariably signifies that the value is quoted/negotiated and declared after considering the Fe (iron) content on DMT basis. It is stated that this corroborates the facts and the value of the goods as declared in the shipping bills, which is in terms of Section 14 of the Tariff Act, should be taken as the transaction value, for the purpose of levy of export duty, under the Second Schedule to the Tariff Act, being the value of the goods arrived on Dry (DMT) basis. It is stated that it cannot be disputed by the petitioners that the petitioners have negotiated/fixed the value of the exported iron ores on DMT basis i.e. without considering the moisture content. Hence, the duty is chargeable on *ad valorem* basis. It is next contended that for the purpose of classification, the percentage of Fe (iron) content has to be considered as on the standard method of DMT basis. It is stated that however for the purpose of determining the percentage on the WMT basis, a formula was fixed in terms of the WMT analysis, the Fe (iron) content to be determined on "as received basis/Wet basis/Natural basis" which was being determined by not implying any technical test analysis, but was derived from the Fe (iron) content determined on such Dry (DMT) basis, by applying a simple arithmetical calculation under a formula. The Revenue has denied the case of the petitioners relying on several decisions to contend that none of the said decisions are applicable in the facts of the present case, inasmuch as, there is no contravention of any orders of any Courts or of the provisions of the Constitution of India or the CBIC circulars, while passing the impugned orders-in-original and the impugned GA Circular. On such contentions, it is prayed that the petition be dismissed.

D. Petitioners' Rejoinder Affidavit:

18. There is a detailed rejoinder affidavit filed on behalf of the petitioners, *inter alia*, contending that in the reply/affidavit, the respondent has proceeded on a fundamentally erroneous appreciation of the scheme of levy and assessment of export duty. The Revenue's contention that the WMT basis of determination of Fe (iron) content as per the decision in the case of ***Gangadhar Aggarwal,*** is no longer applicable to the present period of export, is a contention contrary to law and the scheme of levy and assessment of duty. It is contended that the scheme of levy and assessment follows a sequential determination of relevant factors from the moment when the goods are presented for export. It is stated that the process of assessment of export duty on iron ore entails a determination by undertaking different steps as set out in paragraph 5 of the rejoinder affidavit. The second step being the classification of the iron ore under the Second Schedule of the Tariff Act to enable determination of the appropriate headings and subheadings of the classification which establishes whether the goods are taxable and permitted for export. It is contended that in the present case, the classification under the different sub-headings of the First Schedule is based on the Fe (iron) content in the ore and based on such appropriate classification (headings or sub-headings), the applicable basis of levy under the Second Schedule to the Tariff Act is specified. It is only after determination of the basis of levy under the Second Schedule to the Tariff Act, it is to be examined whether there is an applicable exemption notification related to either the description of the goods and/or classification (heading or subheading) of the goods, as regards the levy of duty on the export of iron ore; and lastly, it is only when there is no prevailing exemption and the prescribed levy of duty as determined under the earlier step, is on the *ad valorem* rate, the issue of valuation of export goods for the purposes of levy of duty arises. It is stated under Entry 20 A of the exemption notification, as amended, the iron ore lumps/fines having Fe content less than 58% are exempted from levy of export duty.

19. It is next contended that the question in regard to whether to follow the WMT or DMT, is no more res integra in view of the decision of the Supreme Court in ***Gangadhar Agarwal's*** case.

20. It is further contended that it is not correct for the Revenue to take a position contrary to the applicability of the Circular dated 17.02.2012. That the Revenue's apprehension that there is an efficacious remedy available to the petitioners is also misconceived as in the facts and circumstances of the case, a statutory appeal would not be an efficacious remedy. The other contents of the rejoinder/affidavit are not required to be discussed, suffice it to observe that, the petitioners have dealt with the reply/affidavit in detail in supporting the prayers as made in the petition contending that the petition needs to be allowed.

E. Submissions on behalf of the Petitioners:

21. Mr. Shah, learned Counsel for the petitioner has made the following submissions.

(i) The principal contention of Mr. Shah is that the basis for duty demand relevant for the assessment in question, necessarily ought to have been, as to what was laid down by the Supreme Court in ***Gangadhar Agarwal's*** case, which confirmed the view taken by the learned Single Judge of this Court and as confirmed by the Division Bench, namely that the export of iron ore was required to be assessed by the WMT method and not the "Dry"/ DMT method.

(ii) It is submitted that in passing the impugned orders-in-original the Assessing Officer has ignored in its entirety the statutory scheme namely that the classification under the first schedule, which enabled determination of the appropriate subheading of classification, which classification is based on the percentage (Fe) content of the iron ore and it was at such stage it was incumbent for the Assessing Officer to apply the WMT method and such determination leading to an appropriate classification, the applicable/prescribed rate of levy under the second schedule to the Tariff Act was to be applied.

(iii) It is his submission that the Assessing Officer has confused the issue of classification by erroneously co-relating it to the basis of levy namely by comparing it on a per ton basis and the *ad valorem* basis. It is submitted that the respondents have failed to appreciate that for the issue of classification the determination of the (Fe) content was required to be made only on the WMT basis, irrespective of the basis of the levy.

(iv) It is submitted that the impugned orders-in-original dated 17 March 2022 concerned the shipping bills, for the period from 9 March 2018 to 23 March 2018 and in respect of the second impugned order-in-original dated 31 March 2022 the shipping bills pertained to the period from 2 June 2020 to 10 June 2020. It is submitted that such bills were provisionally assessed and finalization of the assessment was undertaken by passing impugned orders-in-original. In such context, it is submitted that the *ad valorem* basis for levy of export duty on the iron ore was brought into effect from 13 June 2008 and even after such period, it is Mr. Shah's submission that the department was consistently following the WMT basis for determining (Fe) content which was in compliance with the law declared by the Supreme Court in ***Gangadhar Agarwal's*** case.

(v) It is submitted that this apart, even in Circular no.4/2012 dated 17 February 2012 issued by the CBEC, the basis for determining (Fe) content as prescribed and recognized is on the WMT basis. However, despite this position, only on the basis that the General Alert Circular no.2/2019 dated 12.4.2019 was issued by the Directorate of Revenue Intelligence (DRI), the Assessing Officer has deviated from the settled course of action being consistently followed, namely to assess the export duty by following WMT method, as per the law laid down in ***Gangadhar Agarwal's*** case.

(vi) It is submitted that the impugned General Alert Circular insofar as the adjudication of the duty demand is concerned is totally irrelevant apart from being illegal, for the reason that it is not a circular issued in exercise of the powers conferred under Section 151A of the Customs Act. It is also illegal as it deviates and/or nullifies the accepted norms of classification in regard to the determination of the percentage of iron ore, as per the decision of the Supreme Court in ***Gangadhar Agarwal's*** case. Thus, a circular which is totally alien to the adjudication, which has found an implied recognition in the orders-in-original being passed, is required to be held illegal and unconstitutional being violative of Articles 14, 19(1)(g), 21, 141 and 265 of the Constitution of India.

(vii) It is submitted that the DRI could not have issued the General Alert Circular which would be in conflict with a circular issued under Section 151A of the Customs Act. For such a reason when an apparent conflict is brought about, it would be necessarily required to be held that the General Alert Circular is illegal and contrary to Section 151A of the Customs Act. It is submitted that to avoid such conflict the Government of India in the Ministry of Finance (Central Board of Indirect Taxes and Customs) had issued instructions No.19/2021(Customs) dated 17 August 2021 clarifying that the Directorates/Commissionerates/audit shall not issue any circular/ report/alert which is in the nature of interpretation/clarification/ prescription so that uniformity of matters covered under Section 151A of the Customs Act is maintained. It is thus submitted that the impugned General Alert Circular in no manner whatsoever can be resorted in adjudication in relation to the levy of duty.

(viii) It is submitted that from the reading of the impugned orders-in-original it is clearly seen that the Assessing Officer without referring to the General Alert Circular, has in fact applied the said Circular, which was certainly not applicable in the facts in hand and more particularly when the assessment in question was squarely governed by the norms as recognized by the Supreme Court in ***Gangadhar Agarwal***'s case.

(ix) It is submitted that this is a clear case where the mandate of the law laid down by the Supreme Court under Article 141 of the Constitution has been breached by the Assessing Officer accepting the DMT method of classification of iron ore and that too on the basis that the Bureau of Indian Standard (BIS) norms become applicable. It is submitted that the stand of the Revenue that the WMT methodology/classification is subject matter of the decision of the Supreme Court in ***Gangadhar Agarwal's*** case has ceased to be relevant, when from the year 2008 the basis for calculation of the duty was changed to *ad valorem* basis, is totally unfounded, inasmuch as the basis for classification of the iron ore in the first schedule has not undergone any change and for such purpose the classification necessarily has to be on the WMT basis. It is submitted that it is for such reason that even after the introduction of the *ad valorem* levy of export duty on iron ore as brought into effect from 13/06/2008 the Revenue had consistently followed the WMT method for determining the Fe content in the iron ore. It is submitted that this was also subject matter of recognition in the Revenue's circular dated 17 February 2012.

(x) It is submitted that, in any event, it is only by the incorporation of an amendment as brought about by the Finance Act, 2022, that the DMT method has been introduced, hence, necessarily the regime prior to such amendment that is prior to 1 May 2022, only the WMT method was applicable.

(xi) In supporting the above submissions Mr. Shah has placed reliance on the decision of the learned Single Judge of this Court in **Gangadhar Narsingdas Agarwal Vs. A.C. Martins & Others** (supra) and the decision of the Division Bench of this Court in ***Union of India and others V/s Gangadhar Narsingdas Agarwal*** (supra), decision of the Supreme Court in ***Union of India v/s. Gangadhar Narsingdas Agarwal*** (supra), the decision of the learned Judicial Commissioner Goa, Diu and Daman in ***Sociedade De Fomento Industrial Pvt. Ltd. vs K.C. Lakiri And***

Another[5], ***Paper Products Limited V/s. Commissioner of Central Excise*** [6] and ***Pioneer Embroideries Ltd v/s. Commissioner of Customs, Mumbai*** [7].

F. Submissions on behalf of the Revenue:

22. On the other hand, Ms. Asha Desai, learned Counsel for the Revenue has made the following submissions:-

(i) It is her preliminary submission that the petitioners have an alternate remedy available under the provision of Section 129-A of the Customs Act, of an appeal to be filed before the Appellate Authority to assail the impugned order-in-originals. It is her submission that the questions which are raised by the petitioners are all questions of facts which can be effectively dealt only by the Appellate Authority and no case of any extraordinary nature, has been made out by the petitioners that this Court should exercise jurisdiction under Article 226 of the Constitution.

(ii) Without prejudice to her preliminary submission Ms. Desai has submitted that the petitioners have filed this petition on a fundamentally incorrect premise, for the reason, that the methodology which fell for consideration of the Supreme Court in ***Gangadhar***

[5] 1982 SCC Online GDD 5

[6] (1999)7 SCC 84

[7] (2020)20 SCC 457

Agarwal's case namely that the classification under the First Schedule for determination of the Fe content of the iron ore would be by the WMT test, has ceased to exist, as presently the duties levied are on *ad valorem* basis and not on a fixed rate per ton as previously imposed. It is her submission that hence it would be not correct for the petitioners to contend that the method of classification of iron ore, as set out in the First Schedule with regard to the percentage of Fe (iron) content did not undergo any change. It is her contention that such interpretation and reading of the First and Second Schedule of the Tariff Act by the petitioners is wholly unfounded.

(iii) Without prejudice to the above contention it is her submission that the decision in ***Gangadhar Agarwal's*** case would be required to be considered in the facts of such case and it would not be correct for the petitioners to cull out any conclusive proposition in law that necessarily for all assessments, the WMT method of classification is sacrosanct.

(iv) In supporting the above submission Ms. Desai would submit that the applicability of the ISI standards [now the Bureau of Indian Standard (BIS)] must be held to be applicable to the present assessments. It is her submission that the Supreme Court has not held that the applicability of the ISI norms for the purpose of classification is not acceptable, hence the BIS norms to determine the iron content become applicable so as to determine the iron content in the iron ore under the DMT method.

(iv) It is her submission that it is clearly seen that the duty levied on iron ore ***Gangadhar Agarwal's*** case was on the basis of weight (per metric ton) and it is in such context the rate of levy was considered by the Court accepting the WMT test.

(v) Insofar as the circular dated 17/02/2012 is concerned, it is submitted that the circular is required to be read in its entirety and is mis-interpreted by the petitioners to contend that it interprets as to what was held by the Supreme Court in ***Gangadhar Agarwal's*** case. It is her submission relying on the extensive contentions as taken in the reply affidavit that even the Supreme Court had recognized the applicability of the ISI standards, which are now succeeded by the BIS norms. There is no other standard method acceptable to the Government of India for the determination of the iron ore content in the iron ore lumps/iron ore fines. The petitioners have also not suggested any alternative method.

(vi) It is also her submission that the Finance Act, 2022 as referred by the petitioners is only clarificatory in nature, inasmuch as, what has been incorporated is only a clarification which in no manner whatsoever is in contradiction to what was applicable under the Customs Tariff Act read with the Schedule thereunder. It is submitted that even from a plain reading of the relevant headings and sub-headings as prevailing in the first schedule to the Tariff Act, there is nothing to infer that the classification had to be on the Wet Metric Ton (WMT) basis. It is submitted that in view of the duty now being required to be levied on *ad valorem* basis what is relevant is only the iron content and which can be ascertained only by the DMT method. It is on such submissions Ms. Desai would submit that no interference is called for and the petition deserves to be dismissed.

G. Discussion and Conclusion:

23. We have heard learned counsel for the parties and with their assistance we have perused the record.

24. At the outset we may observe that the present proceedings concern iron ore being exported by the petitioners out of India, which was subject to levy of export duty, being dutiable goods within the meaning of Section 12 of the Customs Act. For the purpose of levy of duty on export, the provisions of the Customs Tariff Act and the schedules under the said Act became applicable. As noted above, Chapter 26 is the Chapter which deals with the various tariff items.

Item no. 2601 provides for iron ores and concentrates, including roasted pyrites which include iron ore lumps (60 per cent Fe or more) and iron ore fines (62 per cent Fe or more) and the rates of duty on the variable percentages of (Fe) iron percentage. The contents of the said schedule are already extracted above.

25. At this stage it is required to be noted that by notification dated 01.03.2011(Notification No.27/2011-Customs) in regard to tariff items no. 2601 11 11, 2601 11 22, 2601 11 41 and 2601 11 42, duty has been exempted by prescribing rate of duty to be "Nil".

26. The dispute which has arisen in the present proceedings is in regard to the method by which the iron (Fe) content in the iron ore is required to be determined for the purposes of levy of duty on the petitioners' export under the bills in question. The petitioners intend to take recourse to the WMT wet method to be the only method to determine the iron ore content, relying on the decision of the Supreme Court in ***Gangadhar Agarwal's*** case. On the other hand, the Revenue contends that the Fe content would be required to be determined only by the "dry"/DMT method as the duty is required to be levied on *ad valorem* basis. The rival contentions can be examined thus:

27. The principal bone of contention of the petitioners is premised on the decision of the Supreme Court in ***Gangadhar Agarwal's*** case. As the plinth of the petitioner's case is on this decision of the Supreme Court it is imperative to note the very genesis of this case in some detail and how it stood concluded, travelling from two Benches in the Bombay High Court, and ultimately the Supreme Court.

28. Gangadhar approached the learned Single Judge of the Bombay High Court in proceedings under Article 226 of the Constitution (Miscellaneous Petition no.1120 of 1974) contending that he was engaged in the business of export of lumpy iron ore and iron ore fines. He contended that by notification dated 02.08.1966 item no.28 and 29 were introduced in the Second Schedule to the Indian Tariff Act, 1934 whereby customs duty @10% per metric ton was levied on the exports of lumpy iron ore and customs duty @Rs.5/- per metric ton on the export of iron ore fines. He contended that Government of India had issued a notification dated 24.07.1967 under the powers conferred under Section 25(1) of the Customs Act exempting iron ore fines falling under item 29 of the Second Schedule to the Indian Tariff Act, 1934 when exported out of India from so much of the duty of customs leviable thereon under the Indian Tariff Act in the following manner:

(a) Where the iron content in such iron ore fines was less than 62 per cent as was in excess of Rs.3/- per ton and;

(b) Where the iron ore content in such iron ore fines was 62 per cent or more, as was in excess or more, as was in excess of Rs.4/- per ton.

29. Gangadhar contended that by another notification dated 21.08.1968 the Central Government exempted lumpy iron ore falling under item 28 of the Second Schedule to the Indian Tariff Act when exported out of India, from so much of the duty of customs leviable thereon, as was in excess of duty leviable at the rates specified in the corresponding entry in column 3 of the table which read thus:

Sr. No.	Description of Article	Rate of duty
1	Lumpy iron ore having 60 percent or more but less than 63 per cent of iron content	Rs.6/- per tonne
2	Lumpy iron ore having 58 per cent or more but less than 60 per cent of iron content.	Rs.5/- per tonne.
3	Lumpy iron ore having less than 58 per cent of iron content.	Rs. 4/- per tonne.

30. Gangadhar exported an aggregate quantity of 11,399.520 tonnes of lumpy iron ore and 29,480.80 tonnes of iron ore fines between August 1970 and December 1972 by ten shipments, which were in fulfillment of contracts dated 01.08.1968 and 15.12.1971 entered between Gangadhar and the foreign buyers. Concerning such export complying with the formalities of Continuity Bond, Gangadhar informed the Customs Authorities by letter dated 20.08.1970 that a vessel S. S. Giannizeta was expected to arrive at Mormugao Port on 22/08/1970 and would take the full cargo of his iron ore. It was also informed that sampling and analysis would be carried out by M/s. Italab (Goa) Pvt Ltd. The iron ore and the iron fines exported by Gangadhar were in a moist condition on the date of export. Gangadhar recorded in the shipping bills that the iron content was 62.38% as determined by M/s. Italab (Goa) Pvt Ltd on analysis of sample dried at 105° Centrigrade. Such statement was made in the shipping bill on the basis of certificate issued by Italab (Goa) Pvt Ltd. On 02.09.1970. Gangadhar paid customs duty of an aggregate amount of Rs.3,17,599.84 in respect of exports between August 1970 to December 1972. The duty was paid on the basis that iron ore content was 62.38%. Such fact is significant, as the case unfolds.

31. Gangadhar contended that on the date of export of the lumpy iron ore and iron ore fines they were in a moist condition and it was not proper to determine the iron content in that condition. Such claim of Gangadhar was not disputed by the Customs Department. Gangadhar informed M/s Italab (Goa) Pvt. Ltd. and requested to give the percentage of iron contents on natural basis or in a moist condition. Italab (Goa) Pvt. Ltd. (Industrial Testing and Analytical Laboratory) which was a recognised Government laboratory informed Gangadhar by its letter dated 30.09.1971 that the iron content on natural basis was 57.23% in respect of the consignment exported by Gangadhar. On receipt of such letter Gangadhar filed several applications for refund of the excess duty paid by him. He filed an application on the ground that iron ore content on the date of the export was only 57.23% hence he had become entitled to better advantage under the notification and the customs duty levied on the basis of the iron content being 62.38% was excessive. Such refund application of Gangadhar was considered by the Assistant Collector, Customs and Central Excise, who rejected Gangadhar's claims by different orders. The Assistant Collector was of the opinion that the claim made by Gangadhar and supported by letter of Italab (Goa) Pvt. Ltd., if granted, would lead to an absurd conclusion that the content of iron is dependent on moisture. It was held that moisture not being a component of iron ore cannot be taken into account for determination of iron content.

32. Aggrieved by such decision of the Assistant Collector, Gangadhar carried number of appeals before the appellate authorities, however all these appeals came to be dismissed. The appellate authorities held that the correct method of analysis to determine the grade of iron ore for levy of duty should be the standard method and Gangadhar's contention that percentage of iron ore content should be arrived at in the natural condition had no force. In these circumstances, Gangadhar approached the Bombay High Court in a Petition which was filed on 28.11.1974 praying for a writ of certiorari for setting aside the ten impugned orders, refusing the refund and directing the respondents to return a sum of Rs.3,17,599.84 being the excess export duty recovered from the petitioners.

33. In adjudicating such a petition, the learned Single Judge observed that it was not in dispute that on the date of export the goods were in moist condition and that the iron content of the lumpy iron ore fines could not be determined in a moist condition. It was observed to be not in dispute between the parties that the iron content of the goods exported was found to be 62.38% on analysis of samples dried at 105° C. Thus, the dispute before the Court was whether iron content is to be found out on the date of the export in the condition as the goods stood or whether the dried sample analysis should be conclusive in determining the custom duty. It is in such context the court considered Gangadhar's contention that liability to pay the duty arose on the date of the export and it was essential to find out iron content, on that date only. Such contention of Gangadhar was disputed on behalf of the Revenue. The Revenue urged that there was no method or a scientific test to determine the iron contents in iron ore while in moist condition. The Revenue contended that every export is regulated by the provisions of the Customs Act and the rules framed thereunder relying on provisions of Section 17 of the Customs Act to submit that duties are levied on export of goods after the goods are examined and tested by the proper officer. It was contended that the petitioners had obtained a certificate from a recognized office of the Government Italab (Goa). Pvt. Ltd and such certificate unmistakably indicated that iron content was 62.38% and therefore recovery of duty was perfectly appropriate. This was not disputed on behalf of the petitioner Gangadhar. However, Gangadhar argued that the iron contents were mentioned in the certificate after analysis of sample dried at 105° C. He contended that the said certificate would not truly reflect the iron content in the exportable goods on the date of the export. The submission being that the contents of iron in a sample dried at 105° C is excessive than what is found in moist conditions.

34. In the above circumstances, the Court observed that the question which required an answer on the petition was whether it was open for the petitioner Gangadhar to claim that iron content in the exported goods was only 57.23% even though the certificate indicated it to be 62.38%.

35. Gangadhar supported his contention by placing reliance on letter issued by Italab Private Limited dated 30.09.1971 to contend that the iron content on natural basis or moist condition was only 57.23%. The Court observed that it was not in dispute that there was no method or formula to determine the iron content while the goods were in moist condition. The Court also observed that Italab Private Limited had issued a certificate after analyzing the goods as per the Indian Standard formula. It was observed that the Indian Standard methods of analysis of iron ore is a publication by the Indian Standard Institution. The Revenue had relied on paragraph 2.2 of the said publication, which provided preparation of samples. Such paragraph indicated that chemical analysis is possible only after moist sample is dried in an air oven at 105° C to 110° C. The Court also referred to paragraph 4.2 of the said publication, which referred to the method of reporting to say that it is usual practice to report the results of analysis on the dried sample (laboratory sample dried at 105° C to 110° C to constant weight).

36. The Revenue also contended that Italab Private Limited had adopted such formula provided by Indian Standard Institution and there was no other formula to determine the iron content in goods which are in moist condition and hence, the letter dated 30.09.1971 written by Italab Private Limited to Gangadhar was of no value whatsoever. The Court, however, did not accept such submissions of the Revenue observing that only in the first instance, it was not possible to ignore the letter dated 30.09.1971 of Italab Private Limited as the laboratory has informed Gangadhar that iron content on natural basis or in a moist condition was 57.23% and that conclusion was arrived at on the basis of the recognized practice prevalent all over the world. The Court also took into consideration a letter dated 23.06.1978 received by Gangadhar from Pattinson & Stead, a recognized 'Analytical and Consulting Chemist', from England, which the Bench observed that it unmistakenly indicated that the iron content in a moist condition is calculated on natural basis by adopting a certain formula. The Court observed that it was undoubtedly true that the formula had no scientific backing and the formula was based on an "approximate conclusion", however observing that it could not be ignored that the formula was recognized not only in our country, but also overseas.

37. The Court also did not accept the contention of the Revenue that the notification under which Gangadhar was making a refund claim was published, and it must hence be assumed that the Government had in mind that the iron content should be determined only after analysis of dry sample at 105° C and not the proportionate determination while in moist condition. The Court observed that from the material on record, it would have to be held that it is a recognized practice to determine the iron content in the moist condition on a proportionate basis by finding out the iron content in the dried sample analysis. The Court also recorded satisfaction from the letter dated 30.09.1971 issued by Italab Private Limited and letter dated 23.06.1978 of Pattinson & Stead that it is a recognized practice to ascertain the iron content in the goods in moist condition. There was one more peculiarity, the Court also observed that Gangadhar had in fact adopted proceedings to claim that the weightment of the exportable goods should be done and custom duty should be charged on dry tonnage basis. Gangadhar also claimed that on the date of the export of the goods, the goods being in moist condition, the weightment included also the moisture and the weightment was required to pay higher rates and therefore, the price of the consignment should be determined on dry tonnage basis. However, such claim of Gangadhar was turned down by Joint Secretary to the

Government of India by order dated 06.03.1974 by exercising revisional jurisdiction. The Revenue held that the department was justified in computing the quantity liable to duty in the condition in which the ore is presented to the custom authorities for export and no allowance could be made for the moisture. In such context, the submission was made on behalf of Gangadhar that the Government had accepted one principle while determining the weightment by holding the exporter to the condition of the goods on the date of the export, but a different principle was adopted while determining the customs duty and applying the provisions of the notification.

38. Such case as urged on behalf of Gangadhar was accepted by the Court when it was observed that when the weightment of the exportable goods was made while in the moist condition, then it was difficult to appreciate why the iron content cannot be determined while the goods are in moist condition. The Court observed that the customs authorities were not right in binding Gangadhar to the certificate issued by Italab Private Limited on the strength of analysis of sample dried at 105° C. It was observed that the customs authorities ought to have accepted the claim of Gangadhar that the iron content in the exportable goods was only 57.23%. The Court accordingly held that the authorities below were in an error in turning down the refund application and held that the conclusion arrived at by the custom authority was clearly erroneous and unsustainable on the material available on record and allowed the Petition.

39. The Revenue assailed the decision of the learned Single Judge in an intra Court appeal. A Division Bench of this Court in ***Union of India & Ors. vs. Gangadhar Narsingdas Agarwal & Ors.***(supra), confirmed the view taken by the learned Single Judge and dismissed the Appeal. The observations of the Division Bench are significant and are required to be noted:-

> *"5. Now, the only submission urged by Mr. Rege, learned Counsel for the appellants was that it is not possible by a physical analysis to determine the iron ore contents in moist lumpy iron ore or moist iron ore fines, because such moist iron ore fines and moist lumpy iron ore has to be dried for finding out the iron contents. It was urged by him that this is the only method of analysis accepted by the Indian Standard Institute, and hence the result of that analysis must be made applicable directly or straightway to determine the percentage of iron contents in the iron ore exported by the petitioners. In our view, the submission has no merit whatever. Although it is true, as submitted by Mr. Rege, that moist lumpy iron ore and moist iron ore fines have to be dried for the purpose of determining the iron contents, there is a mathematical formula by which, on the basis of the*

results of these aforementioned analysis, the iron content in moist lumpy iron ore and moist iron ore fines can be easily determined. That formula has been in fact explained in a letter dated 23rd June 1978 addressed by Toman Trading Co. Ltd., a copy of which is at Exh. 'A' to the petition. It appears that following this very method, Italab (Goa) Pvt. Ltd. have issued certificates as to the iron content in the moist iron ore fines and moist lumpy iron ores exported by the petitioners, and these certificates show that the iron content in these iron ores was to the extent of about 57 per cent. Merely because in respect of moist iron ore the iron content cannot be determined directly by physical analysis this cannot lead to the result that the iron ore content cannot be determined at all or that the petitioners should be deprived of their just claim on that footing which is totally unwarranted by law. The submission of Mr. Rege must, therefore, fail."

(emphasis added)

40. The Revenue carried Gangadhar's case to the Supreme Court. The Supreme Court observed that the duty was required to be determined on the weight of the commodity at the relevant point of time, namely, in the case of lumpy iron ore where the percentage of iron was 60% or more but less than 63%, the duty was restricted to Rs.6/- per metric ton; where it was 58% or more but less than 60%, it was restricted to Rs.5/- per metric ton and where it was less than 58%, it was restricted to Rs.4/- per metric ton. It was observed that under both the notifications i.e. notification dated 24.07.1967 and notification dated 31.08.1968, the Government exempted lumpy iron ore duty relatable to weight depending on the iron content in iron ore fines. The Supreme Court observed that the question before the High Court was whether the percentage of iron content had to be determined after ignoring moisture in the lump or the percentage had to be determined taking into account all the impurities including moisture. The Supreme Court observed that the Revenue opted for the first method whereas Gangadhar/the assessee contented that the percentage had to be determined taking all the impurities including moisture into account. The Supreme Court recorded the Revenue's contention that the method of determining the iron ore content and the iron fines was to first eliminate the moisture and then the other impurities and ascertain the iron content and determine its percentage taking moisture into consideration. The Revenue contended that this being the method which was normally employed under the Indian Standard as well as the chemical analysts, who were called upon to determine the iron content in lumpy iron ore or iron ore fines. The Supreme Court in such context observed that it was immaterial what method one adopts for the purposes of separating the iron content from the lumpy iron ore, but the percentage had to be determined from the total weight which was available at the given point of time when the iron content was determined. That was because the duty was relatable to weight and therefore, once the iron content is determined keeping in mind the total weight, the percentage can be determined from the iron content from the rest of the impurities inclusive of moisture and thereafter, ascertain in which category the lumpy iron ore would fall for the purposes of charging duty under the aforesaid notifications.

41. The Supreme Court accordingly confirmed the view taken by High Court observing that if the content of the iron ore is determined after ignoring the moisture, the percentage would be relatable to the lumpy iron ore weight at the relevant point of time for the purposes of charging duty. The Supreme Court observed that even if two views were possible the view taken by the High Court being a plausible one would not call for intervention by the Supreme Court order. The relevant observations of the Supreme Court are required to be noted, which read thus:

> *"3. By Notification No. GSR 1152, dated 24th July, 1967 issued under Section 25(1) of the Customs Act, the Government exempted iron ore fines falling under Item 29 of the Second Schedule to the Tariff Act when exported out of India from so much of the duty leviable thereon as is in excess of Rs. 3/- per metric ton, where the iron*

content in the iron ore fines was below 62% and where it exceeds 62% so much of the duty as is in excess of Rs. 4/- per metric ton. By another Notification dated 31st August, 1968 the Government exempted lumpy iron ore falling under Item 28 of the Second Schedule to the Tariff Act when exported out of India from so much of the duty as was in excess of the duty shown in Column (iii) depending on the iron content in the iron ore. It may here be mentioned that the duty had to be determined on the basis of weight of the commodity at the relevant point of time. In the case of lumpy iron ore where the percentage of iron was 60% or more but less than 63% the duty was restricted to Rs. 6/- per metric ton, where it was 58% or more but less than 60% it was restricted to Rs. 5/- per metric ton and where it was less than 58% it was restricted to Rs. 4/- per metric ton. It will thus be seen that under both the Notifications referred to above the duty was relatable to weight depending on the iron content in the ore or the ore fines. The question which was posed before the High Court was whether the percentage of iron content had to be determined after ignoring moisture in the lump or the percentage had to be determined taking all the impurities including moisture into account. The Revenue opted for the first method whereas the assessees contended that the percentage had to be determined taking all the impurities including moisture into account. The learned Single Judge in the High Court ruled in favour of the assessee and the Division Bench agreed with the view taken by the learned Single Judge and hence these appeals.

4. Mr. Baypayee, the learned Counsel for the Revenue, strongly contended that the method of determining the *iron content in the iron ore and the iron fines is to first eliminate the moisture and then the other impurities and ascertain the content of iron and determine its percentage without taking the moisture into consideration. This, he submitted, was the method which is normally employed under the ISI standard as well as by Chemical Analysts who are called upon to determine iron content in lumpy iron ore or iron ore fines. It is immaterial what method one adopts for the purposes of separating the iron content from the lumpy iron ore but the percentage has to be determined from the total weight which was available at the given point of time after the iron content is determined. That is because the duty is relatable to weight and, therefore, once the iron content is determined keeping in mind the total weight the percentage can be determined separating the iron content from the rest of the impurities inclusive of moisture and thereafter ascertain in which category the lumpy iron ore would fall for the purposes of charging duty under the aforesaid Notifications. This view which the learned Single Judge took and which came to be affirmed by the Division Bench of the High Court appears to us to be the correct view to take, for the reason that if the percentage of iron content is determined after ignoring the moisture the percentage would not be relatable to the lumpy iron ore weighed at the relevant point of time for the purposes of charging duty. We, therefore, do not think that the High Court committed any mistake in the view it took. Even if two views were possible the view taken by the High Court being a plausible one would not call for intervention by this Court.*

42. It is thus clear that the Supreme Court in affirming the view of the learned Single Judge as also the learned Division Bench in the case of ***Gangadhar Agarwal*** (supra) has approved the WMT method considering the fact that the goods (iron ore) is required to be considered in its natural form at the time of its export which contain the moisture and other impurities. The following are the principles which can be culled out from the said three judgments in ***Gangadhar Agarwal's*** case in regard to the classification of the Fe (iron) content in the iron ore for the purpose of levy export duty:-

> *(i) The iron ore when subjected to export, is exported in its natural condition so as to include impurities and moisture.*
>
> *(ii) It is not in dispute that there is no method or formula to determine the iron contents while the goods are in moist condition. The percentage of iron content in the iron ore is calculated by adopting a certain formula such formula has no scientific backing and the formula is based on approximate conclusion. Such formula is recognized not only in our country but also universally.*
>
> *(iii) It is a recognized practice to determine iron content in the goods (iron ore) in moist condition on an appropriate basis by finding out the iron content in dry sample analysis. What is relevant is the condition in which iron ore is presented to the*

customs authorities for export namely, the condition of the goods on the date of the export. If the condition of the goods on the date of the export is such, that it contains impurities and moisture and that it is not purely only iron ore then, in that regard, the universally applied formula would become applicable to determine the percentage of iron ore in the condition of the goods on the date of the export.

(iv) The Government having accepted one principle in holding the exporter to the condition of the goods on the date of the export, a different principle cannot be adopted while determining the customs duty. Thus, if the weightment of the exportable goods is made while it is in moist condition, then it cannot be accepted that the iron content cannot be determined while the goods are in moist condition.

(v) It is not correct for the Revenue to take a position that as it is not possible by a physical analysis to determine the iron ore content in moist lumpy iron ore or moist iron ore fines, because moist iron ore fines and moist iron ore has to be dried for finding out the iron contents to be determined by the method of analysis extended by the Indian Standard Institute and the result of such analysis, by applying such method must be made applicable directly or straight away to determine the iron content in the iron ore being exported, as it is not the practice that lumpy iron ore and moist iron ore fines are dried for the purpose of determining the iron contents.

(vi) Although it is true that there is a mathematical formula by which on the basis of the result of such analysis, the iron content in moist lumpy iron ore

and moist iron ore fines, can be easily determined. Such formula is being regularly applied by the expert laboratories not only in India but also other countries. A certificate issued by such laboratories in regard to the iron content in the moist iron ore and moist lumpy iron ore being exported, indicating the percentage of the iron content in the goods subject matter of export, needs to be accepted.

(vii) Merely because in respect of moist iron ore, iron content cannot be determined directly by physical analysis, this cannot lead to a result that the iron ore content cannot be determined at all or that the assessee should be deprived of its just claim on such footing.

(viii) It is immaterial what method one adopts for the purpose of separating the iron content from the lumpy iron ore but the percentage has to be determined from the total weight which was available at the given point of time "after the iron content is determined." This is because the duty is relatable to weight and therefore once the iron content is determined, keeping in mind the total weight, the percentage of iron ore can be determined separating the iron content from rest of the impurities inclusive of moisture and thereafter to be ascertained in which category the lumpy iron ore would fall for the purpose of charging duty under the Tariff items/notification.

(ix) The percentage of iron ore content is determined after ignoring the moisture, the percentage would not be relateable to the lumpy

iron ore weighed at the relevant time for the purpose of charging duty.

43. Having noted the above principles as culled out from the said three decisions in ***Gangadhar Agarwal's*** case, we need to consider whether there is any deviation or modification in the nature the iron ore under the Tariff Act and the Schedules read thereunder as they presently stand. Mr. Shah has submitted that the only change which is effected from the year 2008 is in the rate of the duty, which earlier being at the per ton basis is now changed to *ad valorem* and not the classification.

44. In our opinion, the petitioners in the present context are correct in contending that in the process of determination of the appropriate rate of export duty on iron ore, it entails a determination of three issues, **firstly**, the classification of the iron ore under the Second Schedule of the Tariff Act to be undertaken based on the scheme of classification namely the headings and sub headings under the First Schedule to the Tariff Act, **secondly,** the classification under the First Schedule would enable determination of the appropriate sub headings of classification, which is based on the percentage of Fe (iron) content in the iron ore. This is the stage where the Wet method would be required to be adopted; **thirdly,** based on the appropriate classification (headings or sub headings), the appropriate prescribed basis of levy under the Second Schedule to the Tariff Act is required to be determined; and **fourthly,** it would be required to be examined whether there is applicable exemption notification related to either description of the goods and/or the classification (headings or sub headings) of the goods as regards the levy of export duty on the export of iron ore.

45. It appears to be not in dispute that during the period prior to 13 June 2008, the prescribed rate of levy was Rs.300/- per ton and post 13 June 2008, the prescribed rate of levy was 20% *ad valorem,* which was modified to 30% *ad valorem.*

46. We, therefore, find much substance in the contention as urged on behalf of the petitioners that the Fe (iron) content of the iron ore was required to be determined at the second stage as noted above, to be undertaken on the basis the iron ore as it naturally stood at the time of export, namely, on the Wet method as in such condition the iron ore would contain moisture and other impurities.

47. Thus, it needs to be stated that the iron ore being exported is not iron ore in its pure form, which can be determined only by applying the dry method i.e. when the lumpy iron ore is dried at a temperature of 105° C to 110° C, and by such process, the impurities/moisture are weeded out. This can happen only in a laboratory, on a sample of iron ore being submitted for such analysis. Thus, when the iron ore is dried in the laboratory, it is certainly not in the natural form, that is containing moisture and other impurities. It is in these circumstances, a well established method of determining the percentage of Fe (iron) content, when the iron ore is in such original (natural) condition, namely, containing moisture and other impurities, by applying the wet (WMT) method, the percentage of iron content is determined essentially for the purposes of sale and purchase. It is for such purposes, for determination of the iron content in relation to the export of iron ore, a mathematical formula being universally recognized is being followed for determination of the iron content in the natural lumpy iron ore or the iron fines. Thus, it appears that there was never a confusion in determining the iron content by two different standards, **firstly**, a standard whereunder by applying the wet (WMT) method the iron content in the iron ore for the purpose of classification of the iron ore for levy of export duty being adopted; and **secondly**, an analysis of the iron content in the iron ore for the purpose of trade and commerce by applying the dry method, which is recognized for the purposes of trade on the basis of which invoicing would take place between the parties. It is for such reason, it is not correct for the Revenue to contend that the dry method which is being used for the purpose of trade and commerce be made applicable for the purpose of determination of its classification for the purposes of levy of export duty on export of raw iron ore in its natural form. Such hypothesis insofar as tariff entries are concerned, appears to be totally unacceptable as recognized by Supreme Court in its decision in ***Gangadhar Agarwal's*** case. In any case, there cannot be any confusion that the iron ore of which the iron content is determined in the laboratory as reflected in the certificate issued by the laboratory is not the form of the actual iron ore being exported. The export of the iron ore is in a natural form containing moisture and impurities.

48. The respondents thus could not have discarded the wet (WMT) method purporting to co-relate the same to the rate of levy namely, the tariff rate being changed which earlier was on a per ton basis to the *ad valorem* basis. On a comparison of the tariff headings as it stood earlier and at present which we have already noted above, there is no change whatsoever in the "description of the goods" except for a minor variation in the percentage of iron ore (Fe) classified in different categories. What has undergone a change is only the rate of the duty which, when the Courts decided in ***Gangadhar Agarwal's*** case, it was at a rate per ton basis and which has now been changed to an *ad valorem* duty. Except for such change, not only the classification but the basis of classification as appearing in the different headings and sub-headings appears to have remained the same. There is also no material placed on record by the Revenue to the effect that what was accepted to be an established practice in ***Gangadhar Agarwal's*** case, till the assessment in question was being undertaken in any lawful manner was discarded even between the period from June 2008 to April 2022. We thus find much force in the contention of Mr. Shah that even after the new regime of the rate of tariff was modified to *ad valorem* basis w.e.f. 13 June 2008, there is no denial that the department was consistently following the basis of determination of the Fe (iron) content by the Wet (WMT) method as recognized and approved by the Supreme Court in ***Gangadhar Agarwal's*** case.

49. Moreover, we find that there is a reason for the Revenue to do so inasmuch as when the legislature has found it appropriate that the goods are required to be classified on dry weight basis, it has been accordingly categorically provided for in the relevant schedule under the Tariff Act. This is clear from the fact that the iron ore as categorized under 2601 and the sub headings thereunder, there is no mention whatsoever of any "dry weight" as being canvassed on behalf of the Revenue. However, comparatively if the immediate heading 2602 under which "manganese ores" have been classified, there is a specific inclusion of a dry weight method. It is necessary to extract heading 2602 pertaining to the manganese ore, which reads thus:

2602		**Manganese ores and concentrates, including ferruginous manganese ores and concentrates with a manganese content of 20% or more, calculated on the dry weight**			
2602 00	-	*Manganese ores and concentrates, including ferruginous manganese ores and concentrates with a manganese content of 20% or more, calculated on the dry weight :*			
2602 00 10	--	Manganese ore (46% or more)	kg.	5%$	-
2602 00 20	--	Manganese ore (44% or more but below 46%)	kg.	5%$	-
2602 00 30	--	Manganese ore (40% or more but below 44%)	kg.	5%$	-
2602 00 40	--	Manganese ore (35% or more but below 40%)	kg.	5%$	-
2602 00 50	--	Manganese ore (30% or more but below 35%)	kg.	5%$	-
2602 00 60	--	Ferruginous (10% or more but below 30%)	kg.	5%$	-
2602 00 70	--	Manganese ore sinters,	kg.	5%$	-

		agglomerated			
2602 00 90	--	Other	kg.	5%$	-

(emphasis added)

50. There is another factor which in our opinion would support the petitioners' contention namely that the wet (WMT) method was consistently followed even after the new regime on the *ad valorem* basis was introduced w.e.f. 13 June 2008 for all these years from the time the principles of law recognizing the Wet method, had found approval of the Supreme Court in ***Gangadhar Agarwal's*** case in the year 1995 (9 August 1995). It was not thought appropriate by the legislature to take any legislative steps to have a regime different from what was recognized and followed, as laid down in the said decision of the Supreme Court or in other words to substitute the Wet (WMT) method. This is clear from the fact that such modification from the Wet method to the Dry method, has been very recently introduced by an amendment which is brought about w.e.f. 1st May 2022, by the Finance Act 2022, when a supplementary note has been incorporated in the Third Schedule in relation to the products under the heading 2601 to provide that the percentage of Fe (iron) content wherever specified shall be calculated on the Dry weight or Dry Metric Ton (DMT) basis. The amendment reads thus:

"(20) in Chapter 26,-

(i) in clause (f) of Note 1, for the brackets, word and figures "(heading 7112)", the brackets, words and figures "(heading 7112 or 8549)" shall be substituted;

(ii) after Sub-heading Notes, the flowing Supplementary Note shall be inserted,namely :-

"Supplementary Note :

For the products of heading 2601, the percentage of Fe content, wherever specified, shall be calculated on the Dry Weight or Dry Metric Tonne (DMT) basis."

(emphasis added)

51. The aforesaid discussion, in our opinion, would show that the Wet method necessarily was applicable till 1 May 2022. The Dry Metric Ton (DMT) basis cannot relate back to any assessment which pertains to the period prior to the amendment, taking effect. Thus, in passing the orders-in-original in question, which pertain to a period prior to 1 May 2022, the Assessing Officer was bound to follow the wet (WMT) method and not otherwise.

52. Insofar as the applicability of the GA Circular no. 2/2019 dated 12/15 April, 2019, issued by the DRI is concerned, in our opinion, the Assessing Authority is required to be consistent in its approach. Insofar as the applicability of the Circular is concerned, the Revenue had taken a categorical position in ***Vedanta Ltd., Thr. Its Aut. Sign. Benicio Menezes vs. Union of India, Thr. The Secretary, Dept. of Revenue, Ministry of Finance, Govt. of India***[8]**,** decided by a co-ordinate bench of this Court in which the assessment was in relation to the export bills which were of the year 2018. In such context, the Revenue took a categorical stand before this Court that, the assessment would be undertaken without taking recourse to the GA Circular dated 12/15 April 2019. In the present case also, the order-in-original dated 17 March 2022 is in regard to the bills of the year 2018. This would be equally true in respect to the second order-in-original dated 22 March 2022 which pertains to the bills which are of the year 2020. Hence, such circular in no manner could be resorted in passing the orders-in-original or for that matter, such circular could not have been even impliedly applied as contended by the petitioners. We may also note the submission of Ms. Desai on the basis of what has been stated in paragraph 3 of the reply affidavit that the GA circular dated 12/15 April 2019, is an internal communication and administrative in nature and it is only advisory and not binding on the lower authorities of the department and that the impugned orders-in-original are passed on the available materials on record. She would not dispute that the GA

[8] **Stamp Application Main No. 1721 of 2020 (F) decided on 16 September 2022**

Circular is not a circular issued under Section 151-A of the Customs Act providing for instructions to Officers of the Customs as issued by the Board and that such a circular is for administrative guidance of the customs authorities. Thus, issuance of the GA circular cannot mean that GA circular in any manner would guide the course of adjudication, as if it takes a character of a binding rule or law, when the assessment/adjudication is required to be undertaken by the Assessing Officers applying the provisions of the Customs Act read with the Tariff Act and the principles of law laid down in the decisions of the High Courts and the Supreme Court, in relation to interpretation of the headings/sub-headings under the respective schedules prescribed under the Tariff Act. Be that as it may, we are not required to make any further clarification in this regard as we have already come to a conclusion that in regard to the assessments prior to 1 May 2022, the assessment would be required to be undertaken under the wet method basis. We put the issue on the GA circular at rest accepting such contention as urged on behalf of the Revenue and our above observations in this regard. In view of such observations, the GA Circular, in any event, cannot be relevant to guide the assessment in respect of the period prior to 1 May 2022.

53. In view of the above discussion, we are certain that the principles of law as laid down in ***Gangadhar Agarwal's*** case were in regard to classification of the iron ore under heading 2601 for the purpose of determination of export duty on iron ore being on the wet (WMT) method basis and the dry (DMT) method would be applicable with effect from 1 May 2022 by virtue of the Finance Act, 2022.

54. In our above discussion, we have dealt with the primary concern of the petitioners in regard to the applicability of the principles insofar as the method of classification relevant to the assessments in question was required to be applied in determination of the duty levy on iron ore falling under heading 2601 on the touchstone of the law as laid down by the Supreme Court in ***Gangadhar Agarwal's*** case. We are thus not persuaded to accept Ms. Desai's contention, that the Dry weight method would be required to be applied to the assessments in question on account of a change in the rate of Tariff w.e.f. 13 June 2008 namely, that now the rate prescribed is on *ad valorem* basis, and for such reason, the decision of the Supreme Court in the ***Gangadhar Agarwal's*** case, is not applicable. As observed by us above, the change from the rate per metric ton being modified to *ad valorem,* in our opinion, has not brought about any change in the classification as insofar as determination of Fe(iron) content is concerned for the purpose of the levy of the export duty. Such change to introduce the dry method is brought about only w.e.f 1 May 2022 by the Finance Act, 2022. It cannot be that the peculiar (natural) form in which the goods are subjected to export would be ignored.

55. Ms. Desai's next submission that what would be relevant to be seen is that the contract itself is on Dry Metric Ton (DMT) and hence the contention of the petitioners that the duty should be on the Wet Metric Ton (WMT) is not well founded. It is clearly seen that this was the identical situation in ***Gangadhar Agarwal's*** case namely that the export duty was paid by Gangadhar on the Dry method and subsequently a refund application was made by him contending that the export of the iron ore being in the natural form, the Wet method ought to have been followed and such contention of Gangadhar was allowed by Single Judge as confirmed by the Division Bench and ultimately by the Supreme Court. Thus, in our opinion, Ms. Desai's contention on the contract itself being on Dry Metric Ton (DMT), would not be of any relevance. We have sufficiently discussed this issued in the foregoing paragraphs.

56. Ms. Desai's next contention is referring to the GA Circular No. 2/2019 dated 12/15 April 2019 and a Circular dated 17 November 2014 that the Bills of Indian Standard (BIS), testing method are required to be applied for determination of the iron (Fe) content in the iron ore. Her contention is that even the Supreme Court as also the Division Bench of the High Court in ***Gangadhar Agarwal's*** case, have not barred the applicability of the ISI method and now succeeded by the BIS testing method for determination of the percentage of the iron ore. We find that the recognition of the BIS method has been discussed in the GA Circular no. 2/2019 dated 14/15 April 2019 and in regard to its applicability, to the assessment in question, we have already held that the GA circular would not be applicable for assessments for a period prior to 1 May 2022. We may clarify that it may be that the ISI or for that matter the BIS testing method for determining the iron content in the iron ore may be one of the acceptable methods, however, the same would be required to be applied in the manner as accepted by the Supreme Court in ***Gangadhar Agarwal's*** case for determination of the iron ore content on the Wet method (WMT) basis in regard to the period prior to 1st May 2022.

57. We may also observe that after the introduction of the *ad valorem* basis in June 2008 the Revenue through its Senior Technical Officer, Tariff Unit, by a Circular dated 17 February 2012, addressed to all the Chief Commissioners of Customs and other officials, has recorded in regard to uniformity to the customs procedure for calculating the content of iron ore and has set out a clarification in that regard, to apply the law as laid down by the Supreme Court in ***Gangadhar Agarwal's*** case. The contents of such communication are required to be noted, which read thus :

Circular – **Customs**

CIRCULAR NO. 04/2012-Cus

F. No. 450/93/2011-Cus.IV

Government of India

Ministry of Finance

Department of Revenue

Central Board of Excise & Customs

Customs-IV Section

****

New Delhi, 17th February, 2012

To

All Chief Commissioners of Customs,

All Chief Commissioners of Central Excise,

All Director Generals/Chief Departmental Representatives (CESTAT)

All Commissioners of Customs,

All Commissioners of Central Excise and

All Commissioners of Central Excise & Customs

Sir/Madam,

Subject : Adoption of uniform Customs Procedure for calculating

the contents of Iron Ore – clarification regarding.

****

Several references have been received in the Board highlighting divergent practices for calculation of iron contents from Iron Ore being followed at different Ports for charging Export duty. In this regard two types of calculation methods are being followed i.e. on the basis of Wet Metric Ton (WMT) and other on the basis of Dry Metric Ton (DMT).

2. Hon'ble Supreme Court in the matter of Civil Appeal no. 7539 of 1995 in case of Union of India Vs. Gangadhar Narsingdas Aggarwal [1997 (89) ELT 19(SC) in order to arrive at the Iron (Fe) contents out of Iron Ore, had held that-

'that is because the duty is relatable to weight and therefore, once the iron content is determined keeping in mind the total weight, the percentage can be determined separating the iron contents from the rest of the impurities inclusive of moisture and thereafter ascertain in which category the lumpy iron would fall for the purpose of charging duty.....'

3. In light of the observation by the Apex Court that export duty is chargeable according to Fe contents, and to maintain uniformity all over the custom houses, it is clarified that for the purpose of charging of export duty the assessment of Iron ore for determination of Fe contents shall be made on Wet Metric Ton (WMT) basis **which in other words mean deducting the weight of impurities (inclusive of moisture) out of the total weight/Gross Weight to arrive at Net Fe contents.**

4. In case of any difficulty in arriving at the net Fe content, assessment may be based on test result which directly determines the Fe contents.

5. Pending assessments on the issue, if any, should be finalized accordingly.

6. Difficulties, if any, faced in the implementation of this circular, may be immediately brought to the notice of the Board.

Yours faithfully

(A.K. Goel)
Senior Technical Officer
Tariff Unit

(Empasis added)

58. It is thus quite clear that such communication is categorically in regard to the applicability of the decision of the Supreme Court in ***Gangadhar Agarwal's*** case (supra) and by quoting the observations as made by the Supreme Court, it is stated that export duty is chargeable according to Fe (iron) content so as to maintain uniformity all over the customs. It is clarified that for the purpose of charging the duty, the assessment of iron ore for determination of Fe (iron) content shall be made on Wet Metric Ton (WMT) basis. There is some confusion created in the wordings as underscored by us in paragraph 3 of the Circular (supra) when the Revenue further clarifies to say that, "*in other words, it means deducting the weight of impurities (inclusive of moisture) out of the total weight/gross weight to arrive at Net Fe(Iron) contents.*" We may at the outset endeavour to remove any such ambiguity, as created by observing that the Circular has clearly observed by quoting the relevant extract of the decision of the Supreme Court to state that the Wet Metric Ton (WMT) becomes applicable. The Circular has not stated that it is the Dry Metric Ton (DMT) method, which would become applicable. In any event, such a confusion ought not to arise in view of the clear position in law as laid down by the Supreme Court in ***Gangadhar Agarwal's*** case and the consistent practice being followed by the Revenue following such decision till the introduction of the recent amendment as brought about by the Finance Act, 2022.

59. Insofar as Ms. Desai's contention that the orders-in-original cannot be challenged before this Court in the present Writ Petition, when an alternate remedy is available to the petitioners under Section 129-A of the Customs Act, in our opinion, such contention in the facts and circumstances of the case, cannot be accepted in view of our conclusion that in passing the impugned orders the Revenue has acted in patent breach of the law as laid down of Supreme Court in **Gangadhar Agarwal's** case and its own circular dated 17 February 2012. Once, we have concluded that the impugned orders are illegal as also are rendered unconstitutional, on such count, we cannot accept the contention as urged on behalf of the Revenue that the petitioners would nonetheless be required to be directed to take recourse to an alternate remedy and the jurisdiction of this Court under Article 226 of the Constitution be not exercised. The law in this regard is well settled in (*See.* ***Radha Krishan Industries Vs. State of Himachal Pradesh & Others***[9].

60. Now applying the position in law as we have discussed in the foregoing paragraphs to the impugned orders-in-original, it is seen from the bare perusal of these orders that the Assistant Commissioner of Customs (export) was conscious of the purport of the decision of the Supreme Court in ***Gangadhar Agarwal's*** case. He has infact in several paragraphs of the impugned order has referred to the said decision, which was also relied before him by the petitioners. However, what is glaring is that despite such clear position in law, the Assistant Commissioner overlooking the clear position in law as laid down by the Supreme Court in the said decision as also recognised by the revenue in its own circular dated 17-02-2012, nonetheless classified the (Fe) content in the iron ore as exported by the petitioners on the dry method (DMT) basis. This is clear from the reading of impugned orders as also the conclusion in the said orders, when the Assistant Commissioner in finalization of the provisional assessment of the shipping bills considers the (Fe) content as per the Dry method. The operative order is similar

[9] (2021) 6 SCC 771

in both the orders-in-original wherein the Assistant Commissioner of Customs (export) has observed thus :

ORDER

> *(i) I order Iron Ore Fines/Lumps exported vide Shipping Bills are classified under CTH as per the Fe content of Dycc report on **dry basis** as given below Table – X.”*
>
> *(emphasis added)*

61. It is thus clear that the Assistant Commissioner in passing the impugned orders in accepting the dry method, has acted contrary to the settled principles of law as laid down by the Supreme Court in **Gangadhar Agarwal's** case. It cannot be countenanced that any Custom Authority would act contrary to the law as laid down by the Supreme Court as discussed above. The principles of law in that regard are well settled in the case of ***Union of India vs. Kamlakshi Finance Corporation Ltd.***[10] In these circumstances, the orders-in-original cannot be sustained being contrary to the basic tenets of law as laid down by the Supreme Court in **Gangadhar Agarwal's** case. We would be accordingly required to quash and set aside the impugned orders-in-original.

[10] 1992 Supp (1) SCC 443

62. Before parting, we may note that although the decisions in regard to the position in law on the binding force of the decisions of the Supreme Court are cited by Mr. Shah, we have thought it appropriate not to burden the judgment as these decisions reiterate the principles of law which are well settled, that decisions of the Supreme Court are binding on all Courts and authorities under Article 141 of the Constitution of India. Also the decisions as cited by Mr. Shah on the question that the circulars issued by the Board under Section 151-A would be binding, the position in law in that regard is also well established.

63. In the light of the above discussion, the petition is partly allowed in terms of the following directions :

> (i) Insofar as the assessments in relation to the period prior to 1st May 2022 are concerned, they shall be governed by the principles of law in regard to the classification as laid down by the Supreme Court in ***Union of India vs. Gangadhar Narsingdas Aggarwal*** (supra), as clarified by the communication dated 17 February 2012, of the Tariff unit of the Ministry of Finance Department of Revenue (CBEC) Customs-IV Division.

(ii) The GA Circular no. 2/2019 dated 12/15 April 2019, being not issued under Section 151-A of the Customs Act, same cannot form the basis of any assessment.

(iii) In view of our above conclusion, we set aside the impugned orders-in-original dated 17 March 2022 and 31 March 2022 passed by the Assistant Commissioner of Customs.

(iv) We order a remand of the matter in both the cases to the Assistant Commissioner of Customs, who shall hear the petitioners and pass a fresh order in accordance with law, in the light of the principles of law as discussed by us in this judgment. Such exercise shall be undertaken within a period of three months from today.

64. Rule is made absolute in the above terms. No costs.

BHARAT P. DESHPANDE, J. **G. S. KULKARNI, J.**