



सीमा शुल्क आयुक्त का कार्यालय

11 सीमा शुल्क गृह : पणंबूर : मंगलूर - १०

**OFFICE OF THE COMMISSIONER OF CUSTOMS  
NEW CUSTOM HOUSE: PANAMBUR: MANGALORE-10**

C.No.VIII/10/01/2008 अधिर्णया/AdjnPassed on : 26.3.2010  
क्रम सं./Sl.No.01/2010Commr) Issued on : 26.3.2010

**मूल आदेश**

**ORDER-IN-ORIGINAL**

Passed by Shri M.Ajit Kumar, Commissioner of Customs,  
New Custom House, Mangalore, 575 010.

**उद्देशिका**

**P R E A M B L E**

१. यह प्रति उस व्यक्ति के व्यक्तिगत उपयोग के लिए बेशुल्क दी जाती है, जिसके लिए जारी की जाती है।

1. This copy is granted free of charge for the private use of the person to whom it is issued.

२. कोई भी व्यक्ति जो इस आदेश से व्यथित है, वे इस आदेश के विरुद्ध, सीमा शुल्क और केंद्रीय उत्पाद शुल्क (अपील्स) नियम 1982 के साथ संलग्न प्रपत्र फार्म सी.ए.-3 (चार प्रतियों में) में सीमा शुल्क अधिनियम 1962 की धारा 129(1) के अधीन संगठित अपलेट ट्रीब्यूल, जो पहली मंजिल, डब्ल्यू.टी.सी. भवा, एफ.के.सी.सी.आई. कॉम्प्लेक्स, के.जी. रोड, बंगलूर-560 009 में स्थित है, उाको अपील कर सकते हैं। इस आदेश के पावती के 3 महीनों के अंदर अपील दायर कराा चाहिए। इस अपील में यायालय शुल्क स्टॉप रु.4/- (रुपये चार मात्र) लगााा चाहिए।

2. Any person deeming himself aggrieved by this order may appeal against the order in Form C.A-3 (in quadruplicate) appended to the Customs and Central Excise (Appeals) Rules, 1982 to Appellate Tribunal constituted under Section 129(1) of the Customs Act 1962, situated at 1<sup>st</sup> Floor, WTC Building, FKCCI Complex, K.G. Road, Bangalore-560009. The appeal must be filed within 3 months from the date of communication of this order. An appeal should bear a Court Fee Stamp of Rs.4/- (Rupees Four only).

जिसके साथ मिलिखित ज़रूरी है:

It must be accompanied by:

a) आदेश (मूल) के दो प्रतियाँ, जिसमें एक प्रमाणित प्रति होा चाहिए और जिसपर यायालय शुल्क नियम, 1870 के खंड मुद्दे सं. 6 में विीर्दिष्ट के आुसार 0.5 रुपये (पचास पैसे मात्र) की यायालय शुल्क स्टॉप होा चाहिए।

a) Four copies of order in original (one copy of which shall be a certified copy) and must bear a court fee stamp of 0.50 paise only as prescribed under Schedule I, Item 6 of the Court Fees Act 1870.

b) रु.1,000/- की क्रॉस की गई बैंक ड्राफ्ट, जहाँ बेंच स्थित है, उस स्था के कोई भी राष्ट्रीय बैंक में ट्रिब्यूल के सहायक रजिस्ट्रार के नाम हों और डिमांड ड्राफ्ट के साथ अपील प्रपत्र होना चाहिए।

b) A crossed Bank draft of Rs.1000/- drawn in favour of the Assistant Registrar of the tribunal on a branch of any Nationalised Bank located at the place where the Bench is situated and the demand draft shall be attached with the form of Appeal.

३. इस आदेश के विरुद्ध अगर कोई व्यक्ति अपील कराना चाहते हैं तो वे अपील करो के पहले लगाये गये दंड तथा माँगे गये शुल्क को भुगतान करें और अपील के साथ ऐसे भुगतान के साक्ष्य प्रस्तुत करें, यहाँ तो सीमा शुल्क अधिनियम, 1962 की धारा 129 ई के उल्लंघन के कारण अपील अस्वीकृत किया जा सकता है।

3. Any person desirous of appealing against this order shall pending the appeal, deposit the duty demanded or penalty levied therein and produce proof of such payment along with the appeal, failing which the appeal is liable to be rejected for non-compliance of the provisions of Sec 129 E of the Customs Act 1962.

**BRIEF FACTS OF THE CASE**

1. M/s Friends Salt Works and Allied Industries, Maitri Bhavan, Plot No. - 8, Sector 8, Gandhidham, Kutch - 370 201 (hereinafter referred to as the Exporter) filed Shipping Bill No. 465/07 dated 21.05.2007 through M/s Alwares & Thomas, Custom House Agents, Karwar (hereinafter referred to as the CHA) for the export of 22500 WMT (20250 DMT) of Iron Ore Fines which was later amended to 23357 WMT (21021.3 DMT) valued at Rs 4,65,67,902/- (FOB) declaring the Fe content of the Iron Ore as 63.5%.

2. As per Export Import Policy 2004-2009, iron ore having Fe content above 64% has to be exported through MMTC Ltd. (Sl. No. 73) or under a license issued by DGFT in this regard. As the Exporters had declared the Fe content of the goods covered under the Shipping Bill to be 63.5% (i.e. less than 64%) a representative sample of the consignment was drawn in the presence of the representative of CHA and export was allowed provisionally, on accepting Bond No.52/07 dated 21.5.2007 for an amount of Rs.4,48,59,263/-, pending test of sample for actual Fe content. The sample was then sent for chemical analysis to the Chemical Examiner, Customs House, Cochin under Test Memo No.29/2007 dated 29.5.2007.

3. The Chemical Examiner, Central Revenue Laboratory, Custom House, Cochin, after analysis of the sample covered under Test Memo 29/2007 dated 29.5.2007 reported vide .S-10/11/2007-08 Lab Cus. dated 28.9.2007 that the Fe content of the sample was 65.3%.

4. Since the Fe content of the Iron Ore exported vide Shipping Bill No. No.465/07 dated 21.05.2007 was more than 64% as reported by the Chemical Examiner, Custom House, Cochin, and as the subject consignment was exported directly by the

exporter without any licence, the export made under the said Shipping Bill appeared to be in contravention of the provisions of Export-Import Policy 2004-2009. The goods appeared to be liable for confiscation under Section 113 of Customs Act, 1962 read with Section 3 of the Foreign Trade (Development and Regulation) Act, 1962 and the Exporter appeared to be liable for penalty under Section 114 of the Customs Act, 1962.

5. Accordingly, a Show Cause Notice C.No. VIII/10/01/2008 Adjn. dated 21.01.2008 was issued to the M/s Friends Salt Works and Allied Industries, Gandhidham asking them to show cause as to why:

(i) the iron ore with Fe content above 64%, exported by them, vide Shipping bill No. 465/07 dated 21.5.2007 valued at Rs. 4,65,67,902/- should not be treated as illegal export, under Section 11 H(a) of the Customs Act, 1962 and should not be treated as export of prohibited / restricted goods as per Section 3 and 5 of Foreign Trade (Development and Regulation) Act, 1992;

(ii) iron ore exported vide Shipping Bill No. 465/07 dated 21.5.2007 should not be confiscated under Section 113(d) and 113(i) of the Customs Act, 1962; and

(iii) Penalty under Section 114 of the Customs Act, 1962 should not be imposed on them.

Order-in-Original 13/2008 dt.29.10.08 was passed and penalty of Rs. One crore was imposed on the party under Section 114 of Customs Act, 1962. Aggrieved by the above order the party preferred an appeal before the CESTAT, Bangalore Bench. CESTAT vide Final Order No.1155/2009 dated 28.10.09, has remanded the matter to the Adjudicating Authority stating that in the absence of any finding of the Adjudicating Authority in respect of non applicability of the case laws and in not

considering the test report of SGS in respect of the Iron Ores separately, the issue needs reconsideration by the Adjudicating Authority. In light of the direction of the CESTAT, Bangalore Bench the case is now taken up for denovo adjudication.

**DEFENCE :**

6. The Exporter filed their reply dated 15.2.2010 and 3.3.10 through their Advocate Shri.R.N.Viswanath. Their defence is summarized as below :

(i) The Chemical Examiner had determined the Fe content in the dried sample of iron drawn from the export goods. In the SCN dated 21.1.08 the Fe content had been applied directly to determine the Export Policy in respect of the iron ore exported. The exporter had submitted that the form /condition it was exported, the iron ore was moist and hence dried iron did not represent the export goods. Accordingly, they had pleaded for conversion of the Fe in the dried iron sample determined by the Chemical Examiner into equivalent Fe in the moist iron ore exported, to determine the Export Policy in respect of the iron ore exported. In addition, the exporter had also contended that in view of the delay of more than three months in testing of the samples by the Chemical Examiner, his Test Report was unreliable. In support of their contention, the exporter had cited the following judgements;

- (a) UOI vs Gangadhar Narasingdas Aggarwal reported in 1997(89) ELT 19(SC)
- (b) *UOI vs Gangadhar Narsingdas Aggarwal UOI vs Gangadhar Narsingdas Aggarwal reported in 1988(33) ELT 673 (BOM)*

- (c) *UOI vs Gangadhar Narsingdas Aggarwal reported in 1986(26) ELT 918 (Del)*
- (d) *Sociedade De Fomento Industrial Pvt. Ltd. Vs. K. C. Lakiri reported in 1987 (30) ELT 686 (Goa)*
- (e) *Alpine International vs. Commissioner of Customs, Mangalore reported in 2008 (224) ELT 331-Tri,B'lore*
- (f) *CC,Chenna Vs.KTV Oil Mills-2005(182)ELT 376 (Tri-Chennai)*

In all the cases referred to at Sl.No.(a) to (e) above, iron ore had been exported and the issue involved was manner of determination of Fe in the iron ore so exported. In the above judgements have firmly held that ;

(a) the Customs Tariff, Customs Notfn and rate of duty have to be determined in respect of the export goods in the form or condition they are exported.

(b) the iron ore is exported in moist conditions and hence the dried sample of iron ore does not represent the iron ore exported.

(c) the moisture present in the iron ore exported has to be necessarily taken into account while determining the applicable Customs Tariff or Customs Notfn or rate of duty for iron ore.

(d) the dried sample do not represent the form or condition in which the iron ore is exported and Fe in dried sample cannot be applied to determine the Customs Tariff or Customs NOTfn or rate of duty for moist iron ore exported.

(e) to arrive at Customs Tariff or Customs Notfn. Or rate of duty for the moist iron ore exported, , the Fe determined by testing of the dried samples of iron ore has to be converted, by application of a prescribed

formula, into equivalent Fe in the moist iron ore exported.

(ii) It is further submitted that Hon'ble Tribunal (B'lore Bench) in the case of **Alpine International vs. Commissioner of Customs, Mangalore** reported in 2008 (224) ELT 331-Tri,B'lore cited above is directly on the issue involved in the present case. The said order has been accepted by Commissioner of Customs, Mangalore vide letter C.No.VIII/48/03/2007 Pt.IV dated 21.8.09 and hence reached finality and is the most relevant to this case.

(iii) It is submitted that the sample drawing procedure followed by SGS was in strict conformity with BIS Specification IS 1405 which is laid down specifically for the purpose of sampling of iron ore and followed all over the world. The competence, credibility and integrity of SGS as an inspection and testing agency has also been accepted and confirmed by the Hon'ble CESTT in the judgement passed in the case of Alpine International vs. Commissioner of Customs, Mangalore reported in 2008 (224) ELT 331-Tri,B'lore wherein the Hon'ble CESTAT rejected the test report of the Chemical Examiner and instead, preferred the test report of SGS. Fe content in iron ore certified by SGS is 63.3%. In the OIO No.13/2008 29.10.08, though the learned Commissioner has declined to accept the SGS's Certificate on the ground that the Customs Officer did not associate with the SGS when the samples were drawn, the reasons as to why the Customs Officer was required to associate with SGS are not spelt out in the above referred OIO. In the Alpine International case also, the Customs Officer did not associate with SGS when Iron ore export consignment was inspected and samples drawn. In their judgement, the Hon'ble CESTAT over ruled the learned

Commissioner's objection and accepted the SGS's certificate. In the light of the above, the non-association of Customs Officer with SGS cannot be a ground for rejection of the SGS's certificate.

(iv)By the judgement in the case of M/s.Alpine International, the CESTAT set aside the order of the learned Commissioner confiscating the Iron ore exported and imposing penalty under Section 113(d) and 114 of Customs Act,1962.

7. Shri.R.N.Viswanath, Advocate appeared for personal hearing on behalf of M/s.Freinds Salt Works and Allied Industries,Kutch. He re-iterated the submission made in his reply dated 15.2.10 and 3.3.2010

FINDINGS:

8. I have carefully gone through the records of the case, reply to the Show Cause Notice and additional submissions made during personal hearing. This is a matter arising out of the remand made by the Hon'ble CESTAT vide Final Order No 1155/2009 dated 27/08/2009, wherein it was observed;

*"8. In the absence of any finding of the Adjudicating Authority in respect of non applicability of the case laws and in not considering the test report of SGS in respect of the Iron Ores separately, we find that the issue needs reconsideration by the Adjudicating Authority."*

9. The issue in brief is that as per Export Import Policy 2004-2009, iron ore having Fe content above 64% has to be exported through MMTC Ltd. (Sl. No. 73) or under a license issued by DGFT in this regard. As the Exporters had declared the Fe

content of the goods covered under the Shipping Bill to be 63.5% (i.e. less than 64%) a representative sample of the consignment was drawn in the presence of the representative of CHA and export of the goods was allowed provisionally, on accepting Bond No.52/07 dated 21.5.2007 for an amount of Rs.4,48,59,263/-, pending test of sample for actual Fe content. The sample was then sent for chemical analysis to the Chemical Examiner, Customs House, Cochin under Test Memo No.29/2007 dated 29.5.2007. The Chemical Examiner, Central Revenue Laboratory, Custom House, Cochin, after analysis of the sample covered under Test Memo 29/2007 dated 29.5.2007 reported vide .S-10/11/2007-08 Lab Cus. dated 28.9.2007 that the Fe content of the sample was 65.3%. Since the Fe content of the Iron Ore exported vide Shipping Bill No. No.465/07 dated 21.05.2007 was more than 64% as reported by the Chemical Examiner, Custom House, Cochin, and as the subject consignment was exported directly by the exporter without any licence, the export made under the said Shipping Bill appeared to be in contravention of the provisions of Export-Import Policy 2004-2009. The goods appeared to be liable for confiscation under Section 113 of Customs Act, 1962 read with Section 3 of the Foreign Trade (Development and Regulation) Act, 1962 and the Exporter appeared to be liable for penalty under Section 114 of the Customs Act, 1962. OIO.13/2008 dt.29.10.08 was accordingly passed after following the procedures of natural justice and a penalty of Rs. One crore was imposed on the party under Section 114 of Customs Act,1962. The said order has been subsequently set aside by the Hon'ble CESTAT and the matter remanded for de-novo consideration on the terms mentioned in the said order.

10. Aggrieved by the departments position the exporter has held that the Chemical Examiner had determined the Fe content in the

dried sample of iron drawn from the export goods. In the SCN dated 21.1.08 the Fe content had been applied directly to determine the Export Policy in respect of the iron ore exported. The exporter had submitted that the form /condition it was exported, the iron ore was moist and hence dried iron did not represent the export goods. They have referred to the test report given by SGS where the Fe content in the Iron Ore portion of the consignment exported from Karwar port was 63.1% which is well below the limit of 64% laid down at Sl no 76 of the Export Licencing Schedule, 2004-09 for free export of iron ore. Accordingly, they had pleaded for conversion of the Fe in the dried iron sample determined by the Chemical Examiner into equivalent Fe in the moist iron ore exported, to determine the Export Policy in respect of the iron ore exported. In addition, the exporter had also contended that in view of the delay of more than three months in testing of the samples by the Chemical Examiner, his Test Report was unreliable. The exporter has relied on a host of judgments, of which the Hon'ble Supreme Courts judgment in **UOI Vs Gangadhar Narsingdas Aggarwal [1997 (89) ELT 19 (SC)]** which is based on similar facts, the Apex Court upheld the decision of the Hon'ble High Court which had referred to a mathematical formula by which the iron content in moist iron ore could be determined after making allowance for the percentage of moisture even though chemical test had been conducted on dry iron ore, and at para 4 held 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 purpose of charging duty."

11. The Chemical Examiner, Custom House, Cochin vide his letter F.No. S-10/66/08-09/Lab Cus. Dated 19.11.09 in reply to the exporter's Advocate and Tax Consultant's R.N.Viswanath's letter

dated 4.11.09 (which covers SB No 465 dated 25/05/2007) under the RTI has stated as under:

*["4(iii) Central Revenue Control Laboratories are not research laboratories nor are they recognized as scientific institutions. Samples are tested in these laboratories purely for Customs and Central Excise purpose and hence testing is carried out only to answer the queries raised by the forwarding authorities, and to verify the declaration made by the party to help the authorities to classify and assess the goods under Customs and Central Excise Tariff Act. Thus in the case of the two samples under reference only iron content was asked for and hence the same is determined and reported.*

*4(iv) The samples have been analysed for their "Fe" content on oven and dry basis. However, the moisture content of the samples was not recorded as it was not asked for in the query raised.*

*4(v) As per the Indian Standard on methods of chemical analysis of iron ores (IS-1493/1959) the result of analysis of samples of iron ore are to be reported on the dried sample. Hence the analysis of these samples have been carried out on oven dry basis. Moreover moisture is not an inherent part of iron ore and hence moisture content of iron ore never remains constant; it varies from time to time depending on the atmospheric and climatic condition. Percentage of iron ore in the samples on "samples as received basis" was not determined as moisture content was not separately determined.*

4(vi) *There is no formula prescribed in the Indian Standard(IS-1493/1959) for the conversion of iron ore in a dried sample into its equivalent in the moist sample.”]*

12. The Hon'ble Tribunal in its remand order had desired that the Adjudicating Authority consider the test report of SGS in respect of the Iron Ores. The exporter has stated that they had tested the Fe content in the iron ore at mine head and based on the report declared the Fe content to be 63.5%, and that for convenience the consignment of 54171 WMT was split into two portions and one shipped from Karwar vide Shipping Bill No.465/07 dated 21/5/2007 and the other through Mangalore vide Shipping Bill No.1024673 dated 23/7/2007. Subsequently the Chemical Examiner has reported the Fe content of the two shipments to be 65.3%(Karwar) and 62.5%(Mangalore). The exporter has stated that the samples were tested after about four months from the date of drawal and hence the reduction in moisture has led to the discrepancy. The Fe content in the iron ore when tested at the port of discharge at Rizhao, China by SGS-CSTC was 63.24% and moisture was 3.2%.

13. Hon'ble Tribunal (B'lore Bench) in the case of **Alpine International vs. Commissioner of Customs, Mangalore** reported in 2008 (224) ELT 331-Tri, B'lore, wherein similar issues were involved had held that M/s SGS was a reputed testing company and the fact that the samples were not drawn in the presence of a departmental officer is not a very strong ground to reject the test result.

14. To resolve the issue relating to the moisture content in the sample in lieu of the various judicial pronouncements and to retain the relevance of the test report given by the Chemical Examiner, Custom House, Cochin this office had earlier written

to the Central Revenue Control Lab, New Delhi who has opined vide his letter dated 22.01.2009 that the iron content in samples as in received basis can be calculated from iron content on dry basis if the moisture content in the samples as received basis is known:

$$\text{Iron content} = \text{Fe} \times (100-M)/100$$

(as on sample received basis)

Where FE is %age of iron content on dry basis

**M is moisture content in the sample.**

This method although not the best, has temporarily adopted by the department in previous orders on similar matter so as to meet the requirements of various judicial pronouncements. Since the moisture content is not being recorded at the time of taking the sample, the moisture content as figuring in the SB 465/07 dated 21/05/2007 and pre-shipment invoice is given as 10%, whereas SGS-CSTC Certificate No MN2007/0367QD dated 12/07/2007 issued at the port of discharge shows the moisture to be 3.2%. If we apply the above formula using the moisture content as recorded at the port of discharge, the following result emerges;

$$\begin{aligned} \text{Iron Content} &= 65.3 \times (100-3.2)/100 \\ &= 63.21 \end{aligned}$$

(Where FE is %age of iron content on dry basis as given by the Chemical Examiner, Custom House, Cochin and M is the moisture content as recorded at the port of discharge by SGS-CSTC.)

Since the iron ore is having a Fe content below 64% it need not be exported through MMTC Ltd. nor is a license required to be issued by DGFT in this regard as per Export Import Policy 2004-2009.

15. I therefore, find that the Fe content determined in line with the Supreme Court judgment in **UOI Vs Gangadhar Narsingdas Aggarwal [1997 (89) ELT 19 (SC)]** wherein the Apex Court upheld the decision of the Hon'ble High Court which had referred to a mathematical formula by which the iron content in moist iron ore could be determined after making allowance for the percentage of moisture even though chemical test had been conducted on dry iron ore. Applying the formula as given by CRCL, New Delhi it is seen that Iron ore content, is less than 64%, and accordingly, the export is not in contravention of Notification No. 62/2007 Cus dated 3.5.2007

16. In view of the foregoing facts I pass the following order in the light of the remand made by the Hon'ble CESTAT vide Final Order No 1155/2009 dated 27/08/2009:

ORDER

I drop further proceeding initiated in Show Cause Notice C.No. VIII/10/01/2008 Adjn. dated 21.01.2008 seeking to confiscate the goods under Section 113 and impose penalty under Section 114 of the Customs Act, 1962 on the exporter.

**(M.AJIT KUMAR)**  
**COMMISSIONER**

To :  
M/s Friends Salt Works  
and Allied Industries, (BY SPEED POST)  
Maitri Bhavan, Plot No. - 8,  
Sector 8, Gandhidham,  
Kutch - 370 201

Copy submitted to: The Chief Commissioner of Customs,  
Bangalore Zone, Bangalore (Review Section).

Copy to: The Asst. Commissioner of Customs , Customs Division,  
Karwar.

Master File