



सीमा शुल्क आयुक्त का कार्यालय  
1व सीमा शुल्क गृह : पणंबूर : मंगलूर - १०  
**OFFICE OF THE COMMISSIONER OF CUSTOMS**  
**NEW CUSTOM HOUSE: PANAMBUR: MANGALORE-10**

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सी.सं./C.No.VIII/10/12/2009 अधिर्णिया/Adjn Passed on :28.3.2010  
क्रम सं./Sl.No.02/2010 (Commr) Issued on : 28.3.2010

**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, बेंगलूर-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 जरूरी है:

It must be accompanied by:

a) आदेश (मूल) के दो प्रतियाँ, जिसमें एक प्रमाणित प्रति होना चाहिए और जिसपर यायालय शुल्क नियम, 1870 के खंड मुद्दे सं. 6 में विनिर्दिष्ट के अनुसार 0.5 रुपये (पचास पैसे मात्र) की यायालय शुल्क स्टॉप होना 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 करा चाहते हैं तो वे अपील करो के पहले लगाये गये दंड तथा माँगे गये शुल्क को भुगता करें और अपील के साथ ऐसे भुगता के साक्ष्य प्रस्तुत करें, वही 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**

M/s Sri.Srinivasa Mineral Trading Co.Yelaminchilli Complex,Hospet (hereinafter referred to as the Exporters) filed Shipping Bill No. 536/09 dated 18.5.09 through M/s Alwares & Thomas, Custom House Agents, Karwar (hereinafter referred to as the CHA) for the export of 22000 WMT (20240 DMT) of Iron Ore Fines valued at Rs 4,97,43,342/- (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.49/2009 dated 22.5.2009.

3. The Chemical Examiner, Central Revenue Laboratory, Custom House, Cochin, after analysis of the sample covered under Test Memo No.49/2009 dated 22.5.2009. reported vide .Report.Lab No.126(K.W) dated 22.6.09 that the Fe content of the sample was **64.7%**.

4. Since the Fe content of the Iron Ore exported vide Shipping Bill No. 536/09 dated 18.5.09 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/10/12/2009 Adjn. dated 23.9.2009 was issued to the M/s Sri.Srinivasa Mineral Trading Co.Yelaminchilli Complex,Hospet asking them to show cause as to why:

- (i) the iron ore with Fe content above 64%, exported by them, vide Shipping bill No.536/09 dated 18.5.09 valued at Rs. 4,97,43,342/- /- 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) the iron ore exported vide Shipping Bill No. 536/09 dated 18.5.09 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.

**DEFENCE :**

6. The Exporter filed their reply dated 15.12.09 through their Advocate Shri. Saiprasad, . Their defence is summarized as below :

- (i) The provisions of Section 11H(a) is a part of Chapter IVB of the Customs Act,1'962 and that the provisions of Chapter IVB is applicable only to 'specified goods as defined in Section 11H(e) of the Act. The diron ore exported are not specified goods and therefore invoiking the provisions o f Section 11 H(a) is not correct and relevant to the issue. The report of the Chemical Examiner reporting th e Fe content as 64.7% is not proper .The following facts are brought out;
  - (a) The notice has entered into Sales & Purchase Agreement with Sundial Metals and Minerals Trading Co.Hong Kong, there would be price adjustment for variation of Fe content.

(b)As the above agreement there would be price adjustment for variation I n Fe content.

(c )Letter of credit was opened for export of iron ore with Fe content 63.5%.

(d)The export consignment were tested by Govt. approved inspecting agencies recognized by the Ministry of Commerce & Industry viz. Inspectorate Griffith India Pvt Ltd,Hospet & Intertek India Pvt.Ltd,Hospet who have reported the Fe content to be 63.51% & 63.21% respectively

(e)Shipping Bill was filed duly declaring the goods exported was on wet/moisture basis.

7. The exporter had submitted that the form /condition it was exported, the iron ore was moist and hence and the goods have to be assessed in the condition and at the time of export/condition in which the same had been exported. Hence the report of the Chemical Examiner on dry basis cannot be relied upon.

8. The test report of Chemical Examiner is opposed to the International practice of testing iron ore which should be on moist basis and not on dry condition. In support of their contention, the exporter had cited the following judgements;

(i)UOI vs Gangadhar Narasingdas Aggarwal reported in 1997(89) ELT 19(SC)

(ii)UOI vs Gangadhar Narsingdas Aggarwal UOI vs Gangadhar Narsingdas Aggarwal reported in 1988(33) ELT 673 (BOM)

(iii)Tribinal,Bangalore in Mineral Enterprises Ltd Vs.CC,Manglore in F.O No.1058/2009 dt.15.7.2009.

(iv)Sociedade De Fomento Industrial Pvt. Ltd. Vs. K. C. Lakiri reported in 1987 (30) ELT 686 (Goa)

(v)Alpine International vs. Commissioner of Customs, Mangalore reported in 2008 (224) ELT 331-Tri,B'lore

(vi)Tri,Bangalore in Taurion Iron & Steel Co.Ltd Vs.CCE 2009(241)  
ELT 390.

9. They have stated that the iron ore is exported in moist conditions and hence the dried sample of iron ore does not represent the iron ore exported. 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. 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. 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 mathematical formula, into equivalent Fe in the moist iron ore exported.

10. They also submitted that the SCN is opposed to the decision of the Tribunal in Alpine International Vs.CC, 2008(224)ELT 331(T-B'lore), wherein it was held that iron ore content tested on dry condition basis cannot be the basis for assessment and test reports produced by the assessee were from reputed companies and same cannot be ignored. The above decision would also support their stand that the testing of samples of iron ore conducted by the Govt. approved surveyors should be accepted by the Dept.. They also referred to the CESTAT, B'lore Bench Final order No.1058/2009 dated 15.7.2009 wherein it was held that the report of the Chemical examiner on dry condition cannot be relied upon and set aside the

order of the Commissioner of Cutoms,Mangalore.

11. They further stated the Dept. erred in ignoring and omitting the Test certificates issued by the Govt. approved surveyors/assayers. The Chemical examiner's report is liable to be ignored the same being contrary to law and not admissible on evidence and therefore the SCN is unsustainable.

12 They stated that the report of Chemical examiner, Cochin being impermissible as the goods were not tested in the condition in which they were loaded on vessel the time of exportation, the proposal to confiscate export goods under Section 113(d) and 113(i) of Customs Act,1962 is not sustainable and same is without any basis and provisions of the above referred section is not applicable to the facts of the case and consequently the proposal to impose penalty under Section 114 of Customs Act,1962 is also not sustainable in law.The following cases laws are cited in defence;

(i)CIT Vs.Khoday Eswarsa & Sons 1971(83)ITR 369(SC)  
and CITVs.Anwar li, 1970(76)ITR696(SC)

(ii)CIT Vs.Chandalata BAhuji, 1980(125)ITR700(Raj)

(iii)Ananthram Veerasingaiah & Co. Vs.1980 (123)  
ITR 457 (SC)

13. They further submitted that when the goods were exported on "provisional basis" in terms of Section 18 of the Customs Act,1962 there is no question of the noticee having resorted to mis-declaration since all the facts and documents would be within the knowledge of the Dept.

14. . Shri.Saiprasad, Advocate appeared for personal hearing on behalf of M/s. s Sri.Srinivasa Mineral Trading Co.Yelaminchilli Complex, Hospet. He re-iterated the submission made in his reply dated 24.12.2009. They have contested the issue on two grounds, firstly that the iron ore exported by them are specified goods as per Section 11H(e) of CA,1962. Thus invoking of provisions of Section 11H(a) of the Act is not proper nor legal. The test report given by the Chemical Examiner reports Fe content of the export consignment on the basis of dry weight whereas the consignment was shipped on wet basis.

**FINDINGS:**

15. I have carefully gone through the records of the case, reply to the Show Cause Notice during personal hearing.

16. 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.59/09 dated 18.5.09 for an amount of Rs.4,97,43,342/-(FOB), 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.49/2009 dated 22.5.09. The Chemical Examiner, Central Revenue Laboratory, Custom House, Cochin,

after analysis of the sample covered under Test Memo 49/2009 dated 22.5.09 reported vide Lab No.126(kw) dated 22.6.09 that the Fe content of the sample was 64.7%. Since the Fe content of the Iron Ore exported vide Shipping Bill No. No.536/09 dated 18.5.09 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.

17. 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 23.9.09 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 Inspectorate Griffith India Pvt.Ltd and Intertek India Pvt Ltd wherein the Fe content in the Iron Ore exported from Karwar port was 63.51 and 63.21% respectively 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. 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."

18. In the case of *UOI vs. Gangadhar Narsingdas Agarwal*, the Supreme Court had held that allowance should be made for the fact that iron ore is exported in a moist condition and that the test is conducted on the sample in a dry state. The Court held that as a result, the sample may reflect Fe content which would be higher than what it would be in the actual goods being exported. The Court had held that if the percentage of iron ore is determined after ignoring the moisture content, the percentage of Fe content so determined, would not be relatable to the condition of iron ore at the time of export. The facts of this case are similar to the *Sociedade De Fomento Industrial Pvt. Ltd. Vs K.C.Laliri* case and also to *UOI vs. Gangadhar Narsingdas Agarwal* case. The Supreme Court has clearly directed that

the moisture contained in the iron ore as exported should be factored in while determining Fe content.

19. 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 test reports produced by the assessee were from reputed companies and same cannot be ignored.

20. CESTAT, Bangalore vide Final order No.1058/09 dated 17.8.09 in the case of M/s.Mineral Enterprises Vs.CC,Mangalore has held that Fe content in the iron ore has to tested in the condition in which goods were exported and set aside the order of Commissioner of Customs,Mangalore(OIO 6/2006 dated 24.11.06).The said final order of the CESTAT has been accepted in review.

21. Chemical Examiner, Custom House,Cochin vide letter F.No.S-10/66/08-09/Lab Cus dated 19.11.09 in reply to a RTI query 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."]*

22. 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 matters 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 536/09 dated 18.5.09 is given as 8, whereas Certificate No C/IGI/M&MGOA/09-10/34146 dated 27.5.09 of Inspectorate Griffith India Pvt Ltd No.OCAM/GOA/OP-1544/09 dated 3.6.09 moisture to be 4.43. If we apply the above formula using the moisture content as recorded at the port of loading as per the said certificate, the following result emerges

$$\begin{aligned} \text{Iron Content} &= 65.3 \times (100-4.43)/100 \\ &= 61.83 \end{aligned}$$

(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.

23. 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 the iron content is less than 64%, and accordingly, the export is not in contravention of Notification No. 62/2007 Cus dated 3.5.2007

24. In view of the foregoing facts I pass the following order

ORDER

I drop further proceeding initiated in Show Cause Notice C.No. VIII/10/12/2009 Adjn. dated 23.9.2009 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 Sri Srinivasa Moneral Trading Co.  
Yelaminchilli Complex, Hospet.

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

