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Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad

REGIONAL BENCH – COURT NO. 1

CUSTOM Appeal No. 12233 of 2014

[Arising Out Of OIA-189/COMMR-A-/JMN/2014 Dated- 15/05/2014 Passed By Commissioner of CUSTOMS-JAMNAGAR(PREV)]

Saurashtra Chemicals Division Of Nirma Ltd **.....Appellant**
Birlasagar, Porbandar
Gujarat

VERSUS

C.C.-Jamnagar(prev) **.....Respondent**
Sharda House...Bedi Bandar Road,
Opp. Panchavati, Jamnagar
Gujarat

APPEARANCE:
Shri. J C Patel & Shri. Rahul Gajera, Advocates for the Appellant
Shri. Anand Kumar, Superintendent (AR) for the Respondent

CORAM: HON'BLE MEMBER (TECHNICAL), MR. RAJU
HON'BLE MEMBER (JUDICIAL), MR. SOMESH ARORA

FINAL ORDER NO.A / 11761 /2023

DATE OF HEARING:26.07.2023
DATE OF DECISION:23.08.2023

SOMESH ARORA

In April 1995, the Appellant imported from Indonesia, a consignment of "Coking Coal" and sought in respect thereof, exemption from customs duty under Sr. No. 1 of Notification no.19/94-CUS dated 1-3-1994, which covers "Coking Coal of ash content below 12%", by filing Bill of Entry No.F-5 dated 17-4-1995, which is a page 17 of the Appeal.

2. In support of the said claim for exemption, the Appellant relied upon and submitted Load Port Test Certificate dated 10-4-1995 of independent testing agency, PT. Superintending Company of Indonesia, as per which the Ash Content in the imported goods was 9.98% (Air Dried Basis)/ 10.99% (Dried Basis) i.e. below 12%. As per the said Load Port Certificate, samples had been drawn as per Systematic Sampling method provided in BS1017. Further, at the port of Import, SGS India Ltd carried out systematic sampling during course of loading of the cargo into trucks at the port jetty and provided their Certificate of chemical analysis dated 8th May 1995, as per which also the ash content is below 12% viz 10.79%.

3. The Appellant's claim for exemption duly supported by the Load Port Certificate of Analysis was not accepted by the department despite there being no reason to doubt or reject the said Certificate as being defective, being brought on record. The assessing officer therefore resorted to provisional assessment by sending a Random sample drawn from the imported goods for test to CRCL, New Delhi under a Test Memo dated 24-4-1995.

4. Show cause Notice dated 10-7-1996 was thereafter issued to the Appellant, purportedly under Section 28 of the Customs Act 1962, which relied upon Test report dated 7-3-1996 of CRCL, New Delhi, as per which the Ash content was 21.33%. The Notice contended that since the ash content as per the said test report of CRCL, New Delhi was above 12%, the goods were not eligible for the said exemption and accordingly, the Notice demanded differential duty of Rs. 71,32,025/-, purportedly under Section 28 of the Customs Act 1962. The Appellant contested the Show Cause Notice and the CRCL Test report relied upon in the Notice.

5. By Order-in-Original dated 30-11-2004 (Page 22 of Appeal), the Assistant Commissioner of Customs confirmed the said demand for duty of Rs.71,32,025, purportedly under Section 28 of the Customs Act 1962. The said Order-in- Original, mentioned at Page 3, that the provisional assessment had been finalized on 24-3-1999. The said Order-in-Original was confirmed by the Commissioner (Appeals) by Order-in-Appeal dated 19-12-2012, against which Appellant preferred Appeal No. C/587 of 2005 to this Hon'ble Tribunal.

6. This Hon'ble Tribunal by its Order dated 19-12-2012 held that if as mentioned in the Order-in-Original the provisional assessment had been finalized on 24-3-1999 then the issue of the Show Cause Notice dated 10-7-1996 under Section 28, prior to the said finalization was premature. The Hon'ble Tribunal accordingly remanded the matter to the original authority to ascertain whether the provisional assessment had been finalized and directed the original authority to finalize the provisional assessment, if not already finalized.

7. After the matter was so remanded by the Tribunal, the Deputy Commissioner passed Order dated 31-12-2013 in which he held that no order of finalization of the provisional assessment was available on record and accordingly, by the said Order dated 31- 12-2013 he proceeded to finalize the assessment under Section 18 of the Customs Act 1962. The Deputy Commissioner relied upon the Test Report dated 7-3-1996 of CRCL to hold that the Ash content was above 12% and he accordingly denied the said exemption and demanded the differential duty of 71,32,025/- consequent upon finalization under Section 18 of the Customs Act 1962.

8. In the said Order-in-Original dated 31-12-2013, the Deputy Commissioner, in Para 5 (i) relied upon clarification dated 22-10-2013 obtained by stated to have been taken by him from CRCL. The said Clarification was stated to have been obtained behind the Appellant's back. The same was not stated to be relied upon in the Show Cause notice and no

copy of the same was provided to the Appellant and no opportunity was given to the Appellant to respond to the same.

9. The said Order-in-Original dated 31-12-2013 has been upheld by the Commissioner (Appeals) by Order-in-Appeal dated 15-5-2004. The Deputy Commissioner and the Commissioner (Appeals) have relied upon the decision of the Hon'ble Tribunal in the case of CC v Tata Chemicals Ltd-2004 (177) ELT 1038. The said decision of the Tribunal has been reversed by the Hon'ble Supreme Court in Tata Chemicals Ltd v CC-2015 (320) ELT 45

10. At the outset, the Appellant through the learned Advocate submits that the issue stands decided and concluded in the Appellant's favour by the decision of the Hon'ble Supreme Court in the case of Tata Chemicals Ltd v CC-2015 (320) ELT 45.

11. The Hon'ble Supreme Court has held in Para 14 of the said judgment that in absence of there being any reason or ground to doubt or reject the Load Port Test Certificate showing ash content below 12%, as defective, resort to provisional assessment and the entire chemical analysis of the imported goods done by the Department is ultra vires Section 18(b) of the Customs Act.

12. The said ratio and principle laid down by the Hon'ble Supreme Court squarely applies in the present case. In the present case also, the Appellant's claim for exemption as Coking Coal of ash content below 12% was duly supported by the Load Port Test Certificate, as per which the ash content was below 12%. As held by the Hon'ble Supreme Court in the said decision, in absence of any reason or ground advanced for doubting or rejecting the said certificate as defective, the assessing officer had no jurisdiction to resort to provisional assessment under Section 18 by sending the sample for test and accordingly, the entire chemical analysis of the imported goods done by the Department is ultra vires Section 18(b) of the Customs Act.

13. Further, the Hon'ble Supreme Court has in Paras 16 and 17 of the said judgment held that where admittedly sample sent for test by the department is not drawn by systematic sampling as provided in IS 436, the test report of such sample cannot be relied upon and it is immaterial that such sample was drawn in presence of the importer's representative who did not object to the manner of drawing of sample.

14. In the present case also, it is evident from the Show cause notice (page 19 of appeal) that the sample sent for test to CRCL was a random sample and not sample drawn by systematic sampling as provided in IS 436. Consequently, as held by the Hon'ble Supreme Court, the test report based on such sample cannot be relied upon.

15. As would be evident from Handbook of Coal Analysis by James G. Speight (Exhibit "B" hereto), Coal is heterogeneous by nature and therefore a random sample cannot be representative of the composition of the whole coal. This requires that sampling has to be done by way of systematic sampling so that the sample is representative of the composition of the whole coal. For that reason international standards as well as IS 436 provides for Systematic Sampling (and not a random sample). As would be evident from IS 436 (Exhibit "C" hereto), Systematic Sampling of Coal requires that a Lot while it is being discharged is divided into a number of Sub-lots of approximately equal weight. A Gross sample is drawn from each sub-lot by aggregating all increments drawn from the same Sub-Lot. An Increment is the quantity of coal taken by a single operation of the sampling implement. The increments are to be taken from the full cross-section and thickness of the stream in one operation. The material collected from all the increments in a sub-lot shall be mixed together and shall constitute a gross sample. Each of the gross samples is then subjected to reduction to obtain Laboratory sample for each sub-lot. Laboratory sample of each Sub-lot is tested for parameter

such as Ash content and then average of the test results of all sub-lots is taken.

16. The Deputy Commissioner and Commissioner (Appeals) have proceeded on the basis that the samples were drawn in presence of Appellant's representative who did no object to the method of sampling and in this behalf, they have relied on the Tribunal's decision in Hon'ble Tribunal in the case of CC v Tata Chemicals Ltd-2004 (177) ELT 1038. The said decision of the Tribunal has been reversed by the Hon'ble Supreme Court in Tata Chemicals Ltd v CC-2015 (320) ELT 45, in which the Hon'ble Supreme Court has held that if the sample has not been drawn as provided in IS 416, no reliance can be place on the test report of such sample and it is immaterial that the method of sampling had not been objected to by the importer at the time of drawl of sample.

17. The learned advocate further submitted that this Hon'ble Tribunal has in the case of Adani Exports Ltd v CC-2010 (249) ELT 93 held that unless it is evident from the record that the sample of coal was drawn by Customs in accordance with IS 436, no reliance can be placed on test report of such sample.

In any event no reliance can be placed on the CRCL Test Report on account of delay in testing and since CRCL did not have the instrument for testing prior to 2019:

18. Without prejudice to the aforesaid submissions, in any event, it is submitted that no reliance can be placed on the CRCL report for the following additional reasons:

a) Admittedly, CRCL tested the said sample after delay of 11months from the date of sending of sample to CRCL,

b) Admittedly, as per CRCL Brochure, it did not have the instrument for analyzing Ash content in coal prior to 2019, when analysis was carried out manually, as a result of which as per CRCL Brochure itself, results were not precise.

19. The admitted position is that CRCL tested the sample after delay of 11 months. This is clearly contrary to the CRCL Manual (Copy Exhibit D) which under Para 56 provides that Expedition is a vital requirement of the Laboratory and all samples should be tested and reported as quickly as possible. There is no explanation for the delay of 11 months. This clearly therefore makes the CRCL Test report suspect and unreliable.

20. By relying on a clarification dated 22-10-2013 obtained by the Deputy Commissioner behind the back of the Appellant, the Deputy Commissioner and Commissioner (Appeals) have proceeded on the basis that the delay of 11 months in testing the coal would not affect the test results. Firstly, the said clarification is not relied upon in the show cause notice and has been obtained behind the Appellant's back and no opportunity was given to the Appellant to respond to the same. Secondly, the same is not supported by any technical literature. Thirdly, the same is contrary to published technical literature. It would be evident from page 34 of the Handbook of Coal Analysis by James G. Speight (Exhibit "B" hereto), that analysis of coal sample should be carried out as soon as possible after it is received and that prolonged storage before analysis is often disadvantageous. It would be evident from the article "Effect of weathering on physico-chemical properties and combustion behavior of Indian thermal coal" by Subhajit Aich and ors (Copy Exhibit "E" hereto) that exposure of coal to the weather results in increase in the ash content.

313 In the case of Adani Exports Ltd v CC-2010 (249) ELT 93, where there was a delay of 5 months in getting the sample tested after drawing of sample, the Hon'ble Tribunal held that in absence of any explanation for such delay, the test report which was delayed by 5 months was not reliable. In the present case, the delay is of eleven months for which there is no explanation at all.

21. In any event, as would be evident from the CRCL Brochure-Exhibit ("F"), CRCL did not have the instrument for analyzing Ash content in coal prior to 2019, when analysis was carried out manually, as a result of which as per CRCL Brochure itself, results were not precise. This itself makes the CRCL test report unreliable.

22. Without prejudice to the aforesaid submission, it is submitted that the Deputy Commissioner and Commissioner (Appeals) have traveled beyond the Show cause notice and relied upon clarification dated 22-10-2013 obtained by the Deputy Commissioner from CRCL, behind the Appellant's back. The same was not relied upon in the Show Cause notice and no copy of the same was provided to the Appellant and no opportunity was given to the Appellant to respond to the same. By not providing a copy of the same before passing the Order-in-Original, the Deputy Commissioner deprived the Appellant of an opportunity to respond to/ rebut the same and to seek cross-examination of the signatory of the said clarification.

23. In view of the aforesaid submissions it was prayed by the appellants that, the impugned Order-in-Appeal is liable to be set aside.

24. In response, the AR of the department contested the appeal by firmly reiterating the points made by lower authorities. The Department sought, inter alia on the sampling procedure as laid down by the department itself in Chapter relating to appraising manual Volume-II issued by the department for sampling of Cargo same is reproduced below for ease of reference:-

6.16 6.16 Sampling of cargo

1. Call for sample-general principles:

"(1) Samples for examination or test.- In order to decide the classification of some goods or for ascertaining their value or for any other purposes of the Customs Act 1962,samples of the goods have to be drawn either for inspection or testing. The Customs Officer's powers for drawal of samples and their disposal are covered section 144 of the customs Act, 1962. Whether samples should be drawn for inspection or testing before classifying the goods or valuing them is assessing officer's discretion under sec. 17(1) & (2) of the customs Act, 1962. Obviously he must realise that calling for samples prior to assessment will delay clearance of goods hence, this must be reserved only to cases where such calling for samples is really justified, say, where the Assessing officer Appraiser is unable to classify the goods unless he has seen a sample. In other cases, like dispute in tariff classifications, he may also have to call for a sample and even make market enquiries for the purpose of classifying the goods. Since drawal of samples and market enquiries tend to delay the processing, a certain amount of mature judgment will be necessary where samples are taken to market for enquiry, the party's name should not be divulged. Apart from samples required to be drawn for purposes of chemical test in the customs laboratory, or in approved 'government laboratories like the metallurgical laboratory, jamshedpur, in cases where there is no facility to have the test done at the custom house laboratory. The guiding principle should be, before conducting a chemical test, whether the test is absolutely necessary. In such cases the parties should be encouraged to take delivery of the consignment against bonds/guarantees, or part consignments where there is no possibility of the goods being confiscated later for violation of any law. In other cases they should be encouraged to store the goods in the public bond warehouse without warehousing so that the goods need not unnecessarily incur demurrage. The attitude of the staff should be helpful, unless malafides are strongly suspected. The course of action should be generally discussed with the Asstt. Collector.

(ii) The Scrutinizing Appraiser, should avoid, as far as possible, calling for large and heavy items to be put up to him as samples. Wherever inspection0 is necessary, the scrutinizing appraiser should himself visit the docks and examine the goods. such inspection should be done on the same day. (adopted from g.i.m.i 25/5 /59-cus.(crc) dated 10-9-59 w.r.t. e.no.27/6/59-cus (crc) a.d.o.no.117/59)

(iii) In all cases of doubt, samples should also be examined by the A.C.docks, who will countersign the Appraiser's notes on the bill of entry in confirmation of the assessment.

(iv) When the A.C. or group A.O. considers that the test of any sample by the chemical examiner is necessary, he will forward the sample with the requisite memo duly filled up by the clerk and countersigned by the appraiser, to the chemical examiner under his signature in the usual manner.

(v) in the absence of any record of previous test or in cases where the strength recorded is no longer valid, samples of all preparations containing spirit should be drawn for test unless the importers expressly state on the bill of entry "not to be tested". This applies to preparations other than wines and liquors.

(vi) Samples of dyes, which have not either been already tested within the specified period or which are not already included in the standard test, shall be similarly tested at the instance of the appraiser and a.c. concerned.

(vii) When the amount of duty involved is large the Scrutinizing Appraiser should consult the A.C. concerned regarding any special arrangements desirable to ensure that representative and uncontaminated samples are drawn and are protected against tampering or substitution The Appraiser should discuss such cases with the Asstt. collector unless they are covered by general order.

(viii) It is of utmost importance that samples should be dealt with in such a way that tampering or substitution can not pass undetected. Officer concerned should take all reasonable precautions against such tampering or substitution, and officers receiving samples should examine them closely to satisfy themselves that the samples they receive are the samples actually drawn by the examining officers. 4

6.17 Reasons for Testing of Samples:

To determine whether duty is chargeable under the tariff heading and the rate claimed or under some other heading of the tariff at a higher rate, and for checking permissibility of import as to whether the import licence produced or claimed for coverage under o.g.l.etc. Is acceptable or not. although regular importers are encouraged to file continuity bonds for the clearance of goods which require test, there may be other importers whose importations are casual or who, for one reason or other choose not to file continuity bonds or do not agree to payment of duty at the higher rate pending the result of test. Further, there may be certain importers who wish to be sure about the exact amount of duty leviable before the time of payment rather than to pay extra duty on demand on receipt of the test report. In such cases, therefore, it is necessary to resort to assessment under the first appraisement system. in the case of iron and steel goods, viz., standard products or goods of recognised brands which are regularly imported and supplied by the same manufacture, a sample should be

drawn and tested only once during a specified period as prescribed in the standing instructions. In such cases facility of clearance against continuity bonds should not be denied provided that detailed specifications/test certificates/works analysis reports covering the goods described in the invoice are available to connect the goods with a particular manufacturer. This procedure is to be followed regardless of whether the goods are supplied directly by a manufacturer or by a supplier in the country of export.

Drawing of Samples avoidance of Delay-Instruction Reg.:

In order no.505/83-c to 515/83 - c dated 12-9-83 customs, central excise and gold (control) appellate tribunal, commented adversely on the department for not drawing samples with promptitude and for reviewing and recovering duty after years of completion of tests. To avoid such a situation and to safeguard revenue, it should be ensured that samples, where necessary, are drawn with utmost promptitude and that follow-up action is taken without any loss of time. (re.ministry's letter 384/85 / 8 -au dated 6 - 4 - 84)".

25. It was also submitted that the present case the appellant had imported weak coking coal with Ash content less than 12% and availed the exemption of duty under Notification No. 19/1994-Cus dated 01.03.1994 (as amended) i.e. 5% of effective rate instead of tariff rate i.e. 35%). There are various category of Coal viz. Weak Coking Coal, Steam Coal, Anthracite Coal, Bituminous Coal etc. and all the categories have different market value in international market, which bearing on govt. revenue. Hence, the proper officer had reasonable reasons to order for sampling 'as per the provisions of Section 18(1)(b) of the Customs Act, 1962. The officer of customs had drawn the sample as per the standard procedures prevailing at the material time in the presence of authorized representative of the appellant/Importer and there was no objection raised in respect of process/methods of sampling. Further, the importer had not put forth any plea in writing/orally with due legal patronage before the department that the chemical test report of load port is sufficient and there is no need of further sampling at landing port for chemical test. The challenge of method of sampling and the chemical test report of CRCL, New Delhi in question on sample drawn by the department at this stage is purely after thoughts to escape from the payment of differential duty demanded by the department in the caption case. Under the circumstances, the case law "Tata Chemicals Ltd versus Commissioner of CUS. (Preventive), Jamnagar 2015- (320) E.L.T. 45 (S.C.)" has no bearing on the instant case.

26. In rejoinder, vide letter dated 17.08.2023 the appellant replied as follows:-

26.1 That the Hon’ble Supreme Court has in Tata Chemicals Ltd v CC – 2015 (320) ELT 45 (SC) held that since no method/procedure of drawing of sample of imported Coal is prescribed in law, the applicable method/ procedure of drawing of sample of Coal is that provided in IS 436, which provides for Systematic Sampling by dividing the entire quantity of coal into sub-lots and drawing of gross sample from each sub-lot and arriving at the average of test

results of all sub-lots. As against this, it is apparent from the Show Cause Notice (Page 19 of the Appeal) that only random sample was drawn and Systematic Sampling as per IS 436 was not carried out.

26.2 In the submissions dated 11-8-2023 filed by learned AR (Copy emailed to the Appellant's Advocate on 14-8-2023), the learned AR has placed on record letter dated 10-8-2023 of the Assistant Commissioner of Customs, forwarding extract from Appraising Manual Volume II.

26.3 The Appellant's response to the same is as follows. 5. Firstly, the year of the Appraising Manual is not indicated and it is not shown that the same pertains to the year 1995, when the import in the present case took place. On this ground itself no reliance can be placed on the said Appraising Manual.

26.4 Secondly, without prejudice to the aforesaid submission, it is submitted that there is nothing in the said Appraising Manual which prescribes the method/ procedure of drawing of samples of Coal. Neither the letter of the Assistant Commissioner nor the letter of learned AR has specified any particular Para of the said Appraising Manual which prescribes the method/ procedure of drawing of samples of coal. There is no Para in the said Appraising Manual which prescribes drawing of only Random Sample of Coal as against the method of Systematic Sampling of Coal provided in IS 436, which requires dividing the entire quantity of coal into sub-lots and drawing of gross sample from each sub-lot and arriving at the average of test results of all sub-lots. In fact, at the hearing on 26-7-2023, the learned AR had produced letter from Assistant Commissioner forwarding the IS 436 as providing the applicable method for sampling of coal.

26.5 Accordingly, in terms of the said decision of the Hon'ble Supreme Court in Tata Chemicals Ltd v CC – 2015 (320) ELT 45 (SC), since no method/procedure of drawing of sample of imported Coal is prescribed in law, the applicable method/ procedure of drawing of sample of Coal is that

provided in IS 436, which provides for Systematic Sampling by dividing the entire quantity of coal into sub-lots and drawing of gross sample from each sub-lot and arriving at the average of test results of all sub-lots. Further, as held by the Hon'ble Supreme Court, when this method has not been followed by the department, no reliance can be placed on the Test report of such sample.

26.6 In the present case, it is evident from the Show Cause Notice (Page 19 of the Appeal) that only random sample was drawn and Systematic Sampling as per IS 436 was not carried out. Consequently, as laid down by the Hon'ble Supreme Court, no reliance can be placed on the Test report of the Sample drawn by the department, which was not in accordance with IS 436. 9. In his letter dated 10-8-2023, the Assistant Commissioner has contended that office of customs had drawn the sample as per the standard procedure prevailing at the material time. However, no evidence has been cited to establish that "Random Sample" procedure was the standard procedure prescribed in law at the time of import. The Appraising manual relied upon has nowhere prescribed such procedure. On the contrary, in aforesaid decision of Hon'ble Supreme Court in case of Tata Chemicals, which pertained to import of 1991, the Hon'ble Supreme Court has categorically held that no procedure/ method of sampling had been prescribed in law for Coal and therefore the procedure/ method provided in IS 436 will apply, which requires dividing the entire quantity of coal into sub-lots and drawing of gross sample from each sub-lot and arriving at the average of test results of all sub-lots. 10. The Assistant Commissioner has in the said letter dated 10-8-2023 further contended that no objection as to the method of Random sample had been raised by the Appellant's representative at the time of drawing of sample. Such a contention of the department stands rejected by the Hon'ble Supreme Court in the said decision in Tata Chemicals Ltd v CC – 2015 (320) ELT 45 (SC), in which in Para 17, the Hon'ble Supreme Court has held that there can be no

estoppels against law and since in law as laid down by the Hon'ble Supreme Court, sampling of coal ought to be as per IS 436, it had to be done in that manner only and since it was not done in that manner, it had no existence in law and merely because the Appellant did not object at the time of sampling, it will not convert the illegality into a legal act. 11. Further, the Hon'ble Supreme Court has held in Para 14 of the said judgment, that in absence of there being any reason or ground to doubt or reject the Load Port Test Certificate showing ash content below 12%, as defective, resort to provisional assessment and the entire chemical analysis of the imported goods done by the Department is ultra vires Section 18(b) of the Customs Act. 12. The said ratio and principle laid down by the Hon'ble Supreme Court squarely applies in the present case. In the present case also, the Appellant's claim for exemption as Coking Coal of ash content below 12% was duly supported by the Load Port Test Certificate, as per which the ash content was below 12%. The Show Cause Notice on Page 19 of Appeal records that the Appellant had claimed the exemption based on the Load port test report. However, no reason or ground has been mentioned for doubting or rejecting the said certificate as defective. Consequently, the assessing officer had no jurisdiction to resort to provisional assessment under Section 18 by sending the sample for test and accordingly, the entire chemical analysis of the imported goods done by the Department is ultra vires Section 18(b) of the Customs Act. 13. In fact, the Appraising Manual relied upon by the department also states that drawing of sample and resort to provisional assessment must be reserved only to cases where drawing of sample is really justified. In the present case since no reason had been advanced for doubting or rejecting the load port test certificate, as held by the Hon'ble Supreme Court in the said decision in Tata Chemicals, there was no real justification for resort to provisional assessment and drawing of samples.

27. Considered the rival submissions and arguments. We find that in this case, department was asked to disclose the sampling procedure by providing various opportunities. The department was also asked to disclose if any particular method of testing was evolved for checking of ash content in accordance with Customs Tariff or any particular procedure was formulated. It being a settled law, that if no procedure of testing is evolved the same can be done as per the ISI Standard which, in the case of coke required it be done not through random sampling but through systematic sampling as provided in IS-436 which required that a lot while it is being discharged be divided into a number of sub lots approximately of equal weight. A gross sample is then required to be drawn from each sub lots by drawing of samples from the same sub lots. The appellant therefore, submits that the sampling not having been done as per the procedure laid down in IS 436. the samples drawn and the test result obtained were rejectable. Party has also relied upon the factum of delay in sampling of 11 months. Department on the other hand has relied upon the fact that the sample were sent for test immediately and therefore the delay if any is only in the receipt of the test report which was received after 11 months. Further, they also seek to rely on a reference letter dated 18.10.2013 and which was written decades after the result from CRCL. Same however does not being on record the exact date of test in those months. The letter states that gap in testing time will not make difference in ash content. We find that the learned Commissioner (Appeals) in para 13.2 has found as follows.-

> *"13.2. It is an admitted fact that the appellant had imported a consignment of 1861.380 MT (with moisture 10.00%) of Indonesia origin at Porbander Port from Bengkulu and bill of entry No. F-5 dated 17.04.1995 was filed for clearance of the said consignment of 14861.380 MT (with moisture 10.00%) Coking Coal, declared Ash contents below 12 % (weak coking coal). The appellant had claimed assessment of Coking Coal of Ash contents below 12 % (weak coking coal) on the basis of invoice No. 95001 dated 11.04.1995 for US $ 7219665.84 at a rate of US $ 48.58 PMT C&F Porbander port. The goods was classified under sub- heading no. 2701.19 of the customs Tariff attracting Customs duty @ 5% Adv. In terms of Notification No. 21/95 - Cus. Dated 16.03.1995, on the basis of certificate of sampling*

& Analysis No. 1799287 dated 10.04.1995 issued at load port. As the commodity is subject to chemical test the bill of entry No. F-5 dated 17.04.1995 was assessed provisionally". (Emphasis supplied)

27.1 In relation to requirement of testing of Coking coal which as per the appellant required reasons to be recorded under Section 18(b) in view of decision in case of Tata Chemicals (cited supra) by the proper Officer indicating why it deemed if necessary to do the chemical test. We find that the department has not provided any reason as to why the commodity was subjected to chemical test other than the emphasized portion above. Despite affording opportunity, department has not brought on record any administrative instructions or any circular etc. which required the Coking coal was required to be subjected to chemical test. It has also not brought on record any file note indicating why Proper Officer deemed it necessary to conduct chemical test or other test. We find that through Clause 96 of Finance Act, 2022 by which various acts of Proper Officer including those taken under Chapter 5 of the Customs Act, 1962 were validated even retrospectively, is now a part of the statute. At this stage without delving on question of deficiency of recording reasons by proper officer, as matter of validity of Validation Act is sub-judice, we find the matter can still be decided. In the instant case without resorting to the decision of TATA Chemical Pvt. Ltd. Vs. C.C.E as reported in 2015 (320) E.L.T. (S.C.) in entirety about what was incumbent upon proper officer, we rely upon the portion that the decision also required that in the absence any other prescribed method, sample is required to be done as per ISI/BIS standard. There is nothing on record that the sampling was done by the department by segregating lots and sub-lots and not randomly. Further, the date of sampling by CRCL has not been indicated by the department even while seeking explanation in the year 2013 from the CRCL authorities regarding their opinion as to what will happen to ash content of coal if coals samples are tested after long gap of time i.e. more than 11th months. As against, the opinion of CRCL which was given after gap of 18 years the appellant have relied upon the decision OF ADANI EXPORTS LTD.Vs.

C.C.E as reported in 2010 (249) E.L.T 93 (Tri.-Ahd.) in which it has been held with the delay of even five months can make a difference. Decision of ADANI EXPORTS LTD in relevant portion reproduced below:-

> ***"9.*** *After carefully considering the submissions made by both the sides and after having gone through the impugned order and the other documentary evidences, we find that the dispute required to be resolved in the present appeal is as regards the Ash Contents contained in the Weak Coking Coal imported by the appellant. Undisputedly, the certificate of quality procured at the Load Port disclosed the Ash Content on air dried basis as 9.98%. In the same report total moisture on "as received basis is 13.56% and inherent moisture (Air Dried), was 7.44%. The said certificate also certified that the sample was analysed in accordance with ASTM method. Further, at the Discharge Port at Okha, samples were drawn for every 2000 Metric tones of the said goods discharged by M/s. SGS India Ltd. which showed the date of attendance as 7-4-1997 to 16-4-1997. It also revealed the method of drawing of samples. The chemical analysis of the same on air dried basis showed the inherent moisture as 6.26% and Ash to the extent of 10.20%.*
>
> *The above two test reports are showing the Ash Contents to be less than 12% and thus are in favour of the assessee.*
>
> ***10.*** *It is seen that Revenue drew the sample on 25-4-1997 and the same was sent to Chemical Examiner, Customs House Laboratory, Kandla by the Superintendent under the coverage of letter dated 8-9-97. As rightly pointed out by the learned advocate though the samples were drawn in the month of April, 1997, the same were sent for testing purposes in September, 1997. There is no explanation coming from the Revenue as to why the samples were kept in the custody of the Revenue for a period of around four months. We further note that while sending the said samples to the chemical examiner the same were described as "Low Ash Coking Coal" whereas the goods imported by the appellant were "Weak Coking Coal". The report of the chemical examiner sent on 30-9-97 is as under :*
>
> ***"Report***
>
> *The sample is coal in the form of black coloured coarse powder. Ash (ADB) 15.9% whether it is Low Ash Coking Coal could not be ascertained here. The duplicate sample may be forwarded to Central Fuel Research Institute, Dhanbad."*
>
> *As is clear from above report a suggestion was made to send the sample for further testing to Central Fuel Research Institute. Accordingly, the sample was sent and a report was received from the said institute on 13-7-1998 i.e. almost after 10 months from the report of the chemical examiner. As per the said report moisture on air dried basis was to the extent of 9.5% and Ash on air dried basis was to the tune of 13.2%. It was disclosed in the said report that "sampling not done by CFRI". Further, the said report carried remark to the effect that - "the quantity of the sample is not representative as per IS : 436 (Part-1/ Sec-I) -1964 (Part-II)-1981."*
>
> ***11.*** *The above two reports are the basis for denial of exemption notification to the appellant. As such the sole question is as to whether the said two test reports can be held to be reliable and more effective than the two certificates of Load Port and M/s. SGS India Ltd., which are in favour of the assessee".*
>
> *(Emphasis supplied)*

27.2 We find that as substantively found in the instant case also process of sampling is relevant to arrive at correct findings, we hold that the department has not been able to justify the process of sampling or the delay of more than 11 months in receipt of the report and that too by not indicating actual date of test. The belated communication by CRCL too is without any authoritative supporting material. We are therefore, inclined to accept the appeal and set aside the impugned order with consequential relief to the party.

28. Appeal is allowed.

(Pronounced in the open Court on 23.08.2023)

(RAJU)
MEMBER (TECHNICAL)

(SOMESH ARORA)
MEMBER (JUDICIAL)

PRACHI