CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI
PRINCIPAL BENCH, COURT NO. 1

CUSTOMS APPEAL NO. 54710 OF 2023

[Arising out of Order-in-Original No. 06/Manish Saxena/Commr./Adj)/Delhi/NCH/2022-23 dated 30.11.2022 passed by the Commissioner of Customs, (Adjudication) Delhi Zone, New Delhi]

M/S DISHA REALCON PVT LTD **……APPELLANT**

402, Sagar Trade Cube
104, S.P. Mukherjee Road, Kolkata,
West Bangal-700026

Vs.

COMMISSIONER OF CUSTOMS-ADJUDICATION **…..RESPONDENT**

Delhi Zone, Room No. 214,
New Customs House, Near IGI Airport,
New Delhi-110037

With

C/54711/2023, C/54712/2023, C/54835/2023

Appearance:

Shri Alok Aggarwal, Shri Sharad Shrivastava, Shri Prachit Mahajan, Shri Mohit Kalra and Ms. Saumya Srivastava, Advocates for the Appellant

Shri S.K. Rahman, Authorised Representative for the Department

CORAM:
HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P. V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO'S. 50285-50288 /2025

Date of Hearing : 07/11/2024
Date of Decision : 07/02/2025

P.V. SUBBA RAO:

These four appeals have been filed for setting aside the Order dated 30.11.2022 passed by the Commissioner of Customs

(Adjudication), New Delhi[1] as the common adjudicating authority appointed by notifications no. 23/2020- Cus (N.T./CAA/DRI) dated 20.03.2020 and 23/2022-Cus (NT) dated 31/3/2022 and CBEC's Circular no. 7/2022-Cus dated 31.3.2022 to decide the proposals made in the **Show Cause Notice dated 3.1.2020**[2] issued by the Principal Additional Director General of **Directorate of Revenue Intelligence**[3]**.**

2. **M/s. Disha Realcon Pvt. Ltd.**[4] filed appeal **C/54710/2023** to assail the confirmation of demand of duty and imposition of penalty upon it.

3. **Shri Ajay Gupta**[5] filed appeal **C/54711/2023** to assail the imposition of penalty on him.

4. **Shri Manish Khemka**[6] filed appeal **C/54712/2023** to assail the imposition of penalty on him.

5. **M/s. S.M. Ayat Niryat, Pvt. Ltd.**[7] filed appeal **C/54713/2023** to assail the confirmation of demand of duty and imposition of penalty.

5. In the SCN, DRI proposed re-determination of the export duty on iron ore fines exported by the Disha Realcon and SM Niryat through several Shipping Bills filed in custom houses falling under the jurisdictions of Commissioner of Customs,

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1 Impugned order
2 SCN
3 DRI
4 Disha Realcon
5 Ajay Gupta
6 Manish Khemka
7 SM Niryat

Bhubaneshwar and the Commissioner of Customs, Kolkata, recovering the differential export duty and imposing penalties. The appellants were asked to show cause to the two Commissioners in respect of the respective Shipping Bills. Notifications dated 20.3.2020 and 31.3.2022 appointed the Commissioner (Adjudication) New Delhi as the common adjudicating authority who decided the proposals in the SCN through the impugned order.

Submissions on behalf of the appellants

6. Learned counsels for the appellants made the following submissions:

(i) Disha Realcon and SM Niryat had exported iron ore fines whose Fe content was below 58% under some Shipping Bills and iron ore fines whose Fe content was above 58% under some other Shipping Bills.

(ii) Iron ore fines with less than 58% Fe content were exempted from payment of export duty by notification no. 15/2016-Cus dated 1.3.2016.

(iii) DRI issued the SCN proposing to calculate the Fe content of the consignments exported under two or more Shipping Bills but which were loaded in the same vessel considering the overall Fe content of the goods in the vessel.

(iv) In reckoning the Fe content, in gross violation of the law laid down by Supreme Court in **Union of India** vs.

Gangadhar Narsingdas Aggarwal[8]**,** the Fe content was calculated on dry basis instead of on wet basis in the impugned order.

(v) After the judgment of Supreme Court in **Gangadhar Narsingdas,** Central Board of Excise and Customs[9] issued Circular No. 4/2012-Cus dated 17.2.2012 directing that Fe content be determined on wet basis and this Circular was also not followed while issuing the SCN.

(vi) In the impugned order, the Commissioner confirmed the proposals in the SCN in gross violation of **Gangadhar Narsingdas** as well as the CBEC's circular.

(vii) Even if the Fe content of exported under two or more Shipping Bills but loaded in the same vessel was taken together the Fe content will be below 58% on wet basis.

(viii) In the case of SM Niryat, on an identical issue, the Commissioner, Bhubaneshwar decided the case in favour of the assessee and Revenue's appeal against the order was dismissed by CESTAT, Kolkata bench in **Customs Appeal No. 75899 of 2024 and others by Final Order No. 77189-77197/2024 dated 25.9.2024.**

(ix) In view of the above, the impugned order may be set aside and all these appeals may be allowed.

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8 1997 (87) ELT 19 (SC)
9 CBEC

Submissions on behalf of the Revenue

7. Shri S.K. Rahman, learned authorized representative for the Revenue made the following submissions:

(i) Disha Realcon and SM Niryat had adopted a unique modus operandi to evade paying export duty. They would file two Shipping Bills for two different consignments of iron fines - one consignment declared as low-grade iron ore fines with Fe content below 58% (light brown/red colour) and the other consignment declared as high grade iron ore fines with Fe content above 58% (dark brown/red colour).

(ii) After getting the **Let Export Orders**[10] from Customs for the two Shipping Bills, they would load both consignments of iron ore fines in the same hatch (Hold of Vessel, for storage of cargo) of the Vessel without any distinction as to the quality of cargo and all the fines were being mixed.

(iii) The average Fe content of the entire consignment was more than 58%. However, in order to evade export duty, they were filing two Shipping Bills such that part of the iron ore fines are covered in one Shipping Bill which has less than 58% Fe content and no duty was paid on it.

(iv) Panchama dated 07.12.2017 which was enclosed as **Relied Upon Document**[11]**-1** shows that heaps of iron ore of low grade iron ore fines with Fe content below 58% (light brown/red colour) and high grade iron ore fines with Fe

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10 LEO
11 RUD

content above 58% (dark brown/red colour) were being unloaded from trucks at the jetty area, were being blended into each other by JCB machines and then the mixture of the two types of the heaps were loaded into the hatches of the vessel.

(v) After loading, a single Bill of Lading was being issued by the Master of the vessel or shipping line. Thus, it is essentially the same consignment, split up so as evade export duty on part of the consignment by filing two Shipping Bills.

(vi) Goods must be assessed as they are traded. The invoices were issued on dry basis and not on wet basis. The unit price multiplied by the quantity on duty basis gives the value of goods which is paid by the foreign buyer to the Indian exporter. Thus the transaction value paid and payable is on dry basis. As per Section 14 of Customs Act, 1962[12], the duty has to be charged on the transaction value which is dry basis.

(vii) The testing method prescribed by Bureau of Indian Standards, as per IS-1493-1959 (Reaffirmed 2016) provides for determining Fe content on Dry Metric Ton basis. No standard national or international methodology prescribes WMT basis for determining Fe content on "as received basis/ wet basis/ natural basis" in any category of Iron ore.

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12 the Customs Act

(viii) There is not even a mention of the Fe content on the so called WMT basis in any of the international test certificate reports.

Findings

6. We have considered the submissions advanced by learned counsel for the appellant and learned authorized representative for the Revenue and perused the records.

7. The undisputed facts are that the appellant exporters had exported iron ore fines which were leviable to export duty but if the Fe content of the iron ore fines was below 58%, they were exempted from export duty.

7. The appellant exporters had exported iron ore fines under various Shipping Bills and after the Shipping Bills were processed and after LEO were given by the Customs, consignments covered by two or more Shipping Bills were loaded in the same hatch (hold of Vessel) of the Vessel without any distinction as to the quality of cargo and all the fines were exported. In those Shipping Bills, where the Fe content was below 58%, the appellant exporters had claimed exemption and did not pay duty but paid export duty in other Shipping Bills.

8. DRI felt that the appellant exporters had evaded duty by splitting the consignment into different Shipping Bills and availing the benefit of exemption on some Shipping Bills.

9. DRI also felt that the Fe content of the exported iron ore fines must be determined on dry weight basis and not on wet basis as was done by the appellant. For instance, if 100 kg of wet iron ore fines has, say, 10 kg moisture and 57 kg iron, the Fe content on wet basis shall be 57/100 x100 =57% and the export consignment would be exempted from duty. However if it is calculated on dry basis, it shall be 57/90x100 = 63.33% and export duty would have to be paid.

10. Before issuing the SCN, DRI had issued a pre-consultation notice and in response, the appellants, inter alia, explained that the Supreme Court decided in **Gangadhar Narsingdas** that Fe content should be determined on wet basis only and not on dry basis. After this decision, the CBEC Circular no. 04/2012-Cus dated 17.02.2012 directing that Fe content should be determined on wet basis in view of **Gangadhar Narsingdas.**

11. The SCN was issued proposing to consider the overall Fe content of the consignments of Fe exported in each vessel (on dry basis) and thereby denying the benefit of the exemption and recovering differential duty. While calculating the Fe content to determine the duty, the law laid down by the Supreme Court in **Gangadhar Narsingdas** and the CBEC's Circular were not followed and Fe content was reckoned on dry basis for the following reasons:

a) In **Gangadhar Narsingdas,** the facts were different and there was no mixing of low grade and high-grade iron ore fines.

b) The testing method prescribed by Bureau of Indian Standards, as per IS-1493-1959 (Reaffirmed 2016) prescribes determination of Fe content on dry basis.

c) No standard national or international methodology prescribes WMT basis for determining Fe content on "as received basis/ wet basis/ natural basis".

d) The invoices were issued on dry basis and not on wet basis.

e) There is no indication of Fe content on wet basis in any of the international test reports.

12. In some cases, the export goods were seized and their value was re-determined. In other cases, the goods were already exported and they were not seized but the value of the exported goods was also re-determined. The details are as follows:

(A) PARADEEP PORT:

Type of goods	**Ref**	**Shipping Bills**
Seized Declared value: Rs. 8.35 cr. Re-determined value: Rs. 17.40 cr.	Table 51 Annex P to SCN Pg 274	03 S/B 17.11.2017 and 27.11.2017
Non-seized Declared value: Rs. 177.77 cr. Re-determined value: Rs. 242.41 cr.	Table 50 Annex A-O to SCN Pg 273-274	15 S/B 12.01.2017 to 25.10.2017

(B) HALDIA PORT:

Type of goods	**Ref**	
Non-seized	Table 52 Annex F,G,H to	3 S/B

Declared value: Rs. 4.62 cr. Re-determined value: Rs. 5.51 cr.	SCN Pg 275	23.03.2017 to 06.05.2017

II. DISHA REALCON:
(A) HALDIA PORT:

Type of goods	**Ref**	
Seized Declared value: Rs. 7.95 cr. Re-determined value: Rs. 9.35 cr.	Table 53 Annex F,G,H to SCN Pg 275	04 S/B 23.03.2017 to 05.05.2017

Summary: At table 54 pg 275, for total differential duty of Rs 55.25 crs (SM Niryat- Rs 52.45 cr and Disha realcon- Rs 2.80 cr)

13. The proposals in the SCN were decided in the impugned order, the operative part of which is as follows:

ORDER

"4.1) The transaction value declared in 48 shipping bills of tables 50 to 53 of the notice as Rs. 192,69,34,321/- is held as reassessed to Rs. 274,68,13,494/- under section 14 of Customs Act read with rule 6 of Customs Valuation (Determination of Value of Export Goods) Rules.

4.2) I confirm the demand of duty of Rs 52,44,55,725/- (rupees fifty two crore forty four lakh fifty five thousand seven hundred twenty five) (shipping bills and worksheet in table 50, 51 and 52 of the notice) as export duty on M/s SM Niryat Pvt Ltd under section 28(4) of Customs Act 1962. The interest on duty short paid is also recoverable under section 28AA of Customs Act from the date of Let export order in each shipping till the payment of the differential duty. The additional amount of Rs 7,72,11,419/- (rupees seven crore seventy-two lakh eleven thousand four hundred nineteen) as differential duty paid during the investigation is appropriated against the duty short paid and accordingly the interest on delayed payment of duty shall be adjusted.

4.3) I confirm the demand of duty of Rs 2,80,66,728/- (rupees two crore eighty lakh sixty six thousand seven hundred twenty eight) (shipping bills and worksheet in table 53 of the notice) as export duty on M/s Disha Realcon Pvt. Ltd under section 28(4) of Customs Act 1962. The interest on duty short paid is also recoverable under section 28AA of Customs Act from the date of Let export order in each shipping till the payment of the differential duty.

4.4) The seized goods of reassessed value 17,40,41,596/- (rupees seventeen crore forty lakh forty-one thousand five hundred ninety-six) in three shipping bills of table 51 of the notice, are held as confiscated under section 113 (h) of Customs Act. The confiscated goods are released with redemption fine of Rs 1,43,42,849/- (rupees one crore forty-three lakh forty-two thousand eight hundred forty-nine) in lieu of confiscation under section 125 of Customs Act. The fixed deposit of Rs 1,43,42,849/- is held appropriated against the redemption fine.

4.5) A penalty of Rs 52,44,55,725/- (rupees fifty-two crore forty-four lakh fifty-five thousand seven hundred twenty-five) is imposed on S. M. Niryat Pvt. Ltd. (IEC No. 0206005644) under section 114A of Customs Act. No penalty is accordingly imposed under section 114 of Customs Act.

4.5) A penalty of Rs 52,44,55,725/- (rupees fifty-two crore forty-four lakh fifty-five thousand seven hundred twenty-five) is imposed on S. M. Niryat Pvt. Ltd. (IEC No. 0206005644) under section 114A of Customs Act. No penalty is accordingly imposed under section 114 of Customs Act.

4.6) A penalty of Rs 2,80,66,728/- (rupees two crore eighty lakh sixty-six thousand seven hundred twenty-eight) is imposed on M/s DishaRealconPvt. Ltd under section 114A of Customs Act.

4.7) A penalty of Rs 1 crore (rupees one crore) is imposed on S. M. Niryat Pvt. Ltd. (IEC No. 0206005644) under section 114AA of Customs Act.

4.8) A penalty of Rs 10 lakh (rupees ten lakh) is imposed on M/s Disha Realcon Pvt. Ltd under section 114AA of Customs Act.

4.9) A penalty of Rs 1 Crore (rupees one crore) is imposed on Sh. Manish Khemka under section 114AA of Customs Act. No personal penalty is imposed on ShKhemka under section 114A of Customs Act.

4.10) A penalty of Rs 1 lakh (rupees one lakh) is imposed on Sh Ajay Gupta under section 114AA of Customs Act. No personal penalty is imposed on ShKhemka under section 114A of Customs Act."

14. We find that the following issues arise for consideration in this case:

a) Whether two or more Shipping Bills can be assessed together to determine the duty or to demand differential duty?

b) Whether the Commissioner was correct in not following the law laid down by Supreme Court in **Gangadhar Narisnghdas** and also the instructions in CBEC's Circular?

15. Section 50 of the Customs Act requires the exporter to 'make an entry' of the export goods by filing the Shipping Bill or Bill of Export (in case of exports by land) and section 51 of the Customs Act empowers the proper officer to give clearance for the export consignments. The Shipping Bill is not only a declaration of the goods to be exported but is also the document through which export duty, if any, is assessed. Duty must be self-assessed by the exporter and it can be re-assessed by the proper officer under section 17 of the Customs Act. 'Assessment' is defined in section 2(2) of the Customs Act. These provisions are reproduced below:

> **"Section 2**
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> (2) **'assessment'** means **determination of the dutiability of any goods and the amount of duty, tax, cess or any other sum so payable**, if any, under this Act or under the Customs Tariff Act, 1975 (51 of 1975) (hereinafter referred to as the Customs Tariff Act) or under any other law for the time being in force, **with reference to**—
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> (a) the tariff classification of such goods as determined in accordance with the provisions of the Customs Tariff Act;
>
> (b) the value of such goods as determined in accordance with the provisions of this Act and the Customs Tariff Act;
>
> (c) **exemption or concession of duty, tax, cess or any other sum, consequent upon any notification issued therefor under this Act or under the Customs Tariff Act** or under any other law for the time being in force;
>
> (d) **the quantity, weight, volume, measurement or other specifics where such duty, tax, cess or any other sum is**

leviable on the basis of the quantity, weight, volume, measurement or other specifics of such goods;

(e) the origin of such goods determined in accordance with the provisions of the Customs Tariff Act or the rules made thereunder, if the amount of duty, tax, cess or any other sum is affected by the origin of such goods;

(f) any other specific factor which affects the duty, tax, cess or any other sum payable on such goods,

and includes provisional assessment, self-assessment, re-assessment and any assessment in which the duty assessed is nil;

Section 50.

Entry of goods for exportation.—(1) The exporter of any goods shall make entry thereof by presenting electronically on the customs automated system to the proper officer in the case of goods to be exported in a vessel or aircraft, a shipping bill, and in the case of goods to be exported by land, a bill of export in such form and manner as may be prescribed.

Provided that the Principal Commissioner of Customs or Commissioner of Customs may, in cases where it is not feasible to make entry by presenting electronically on the customs automated system, allow an entry to be presented in any other manner.

(2) The exporter of any goods, while presenting a shipping bill or bill of export, shall make and subscribe to a declaration as to the truth of its contents.

(3) The exporter who presents a shipping bill or bill of export under this section shall ensure the following, namely:—

(a) the accuracy and completeness of the information given therein;

(b) the authenticity and validity of any document supporting it; and

(c) compliance with the restriction or prohibition, if any, relating to the goods under this Act or under any other law for the time being in force.

Section 51.

Clearance of goods for exportation.—(1) Where the proper officer is satisfied that any goods entered for export are not prohibited goods and the exporter has paid the duty, if any, assessed thereon and any charges payable under this Act in respect of the same, the proper officer may make an order permitting clearance and loading of the goods for exportation:

Provided that such order may also be made electronically through the customs automated system on the basis of risk evaluation through appropriate selection criteria:

Provided further that the Central Government may, by notification in the Official Gazette, permit certain class of

> exporters to make deferred payment of said duty or any charges in such manner as may be provided by rules.
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> (2) Where the exporter fails to pay the export duty, either in full or in part, under the proviso to sub-section (1) by such due date as may be specified by rules, he shall pay interest on said duty not paid or short-paid till the date of its payment at such rate, not below five per cent and not exceeding thirty-six per cent per annum, as may be fixed by the Central Government, by notification in the Official Gazette."

16. The Customs Act does not empower any officer to compel anyone to file a Shipping Bill (or Bill of Entry) or to file it in any manner or forbid anyone from filing a Shipping Bill. Once a Shipping Bill is filed, the proper officer can give clearance as per section 51 if he is satisfied that the export goods are not prohibited goods and that if any export duty is to be paid, it has been paid.

17. Nothing in the Customs Act requires a single Shipping Bill to be filed in respect of all the goods exported in the same vessel- whether the goods are stored separately or in a single hatch in the vessel.

18. Bill of Lading is not a document issued under the Customs Act but it is a document issued by the Master of the vessel or his representative to the exporter acknowledging that the goods stated therein have been received. It is a document of title which the exporter sends to the importer so that he can claim the goods from the Master of the vessel or shipping line or someone else who has custody of the goods at that time. Nothing in the Customs Act requires that a single Shipping Bill must be filed for all the goods indicated in a Bill of Lading.

19. Therefore, the appellants were fully within their rights and committed no error in filing two or more Shipping Bills in respect of the goods exported in a single vessel and for which a single Bill of Lading was issued by the Master of the vessel.

20. The next question is whether two or more Shipping Bills could be considered together and assessed. We find no provision in the entire Customs Act for such an assessment. The exporter who wants to export goods must file a Shipping Bill (under section 50) and also self-assess the duty payable (under section 17) and the proper officer can re-assesss the duty and if the proper officer who is authorised to give clearance under section 51 (or LEO) is satisfied that the goods were not prohibited goods and the duty has been paid, he can give clearance.

21. In assessing any tax, there is, among other things, a unit of assessment. For instance, income tax is assessed on the income earned during the financial year. If 'A' has substantial income which is taxable under the highest bracket of income tax during a financial year, he will be taxed accordingly. If next year, he has very little income, he will be taxed accordingly – at low rates or nil. The income in the second year cannot be treated as if it is the income in the first year and taxed at a higher rate. Conversely, the assessee cannot claim to treat income of the first year to be treated as income in the second year and lower his taxes. Any adjustments between financial years can be made only as provided in the law (for instance, carrying forward depreciation or losses).

22. Similarly, in Customs, each Bill of Entry or Shipping Bill has to be assessed. If an importer, for instance, paid excess duty in one Bill of Entry and short paid duty in another, Revenue can raise a demand under section 28 in the Bill of Entry where the duty was short paid and the importer can claim refund of the duty paid in excess under section 27 and it will have to be processed accordingly.

23. Two or more Bills of Entry or Shipping Bills cannot be taken together and assessed. The only exception made in the law are the Project Imports under Project Import Regulations, 1986. If the importer claims and is allowed imports under these regulations, all goods imported under various Bills of Entry under the project are assessed together under a single tariff heading 98.01. All assessments are kept provisional and at the end all assessments are finalised together.

24. There is no provision under the Customs Act under which various Shipping Bills filed by an exporter can be assessed together with respect to specifics such as weight, volume, or as in this case, Fe content and with respect to determining the eligibility of any exemption notification. If the exporter is entitled to the benefit of a notification in one Shipping Bill, that benefit cannot be taken away by combining the goods exported under that shipping Bill with the goods exported under another Shipping Bill, drawing a sample of the mixture of the two goods and testing it for Fe content. The fact that the goods under both Shipping Bills were loaded in the same vessel or even in the

same hatchet of the vessel or exported to the same party would make no difference. It does not give the department the power to re-determine the duty. Conversely, if after mixing the goods exported under different Shipping Bills and drawing a sample, the Fe content falls below the threshold, the exporter cannot claim exemption for all the Shipping Bills. Each Shipping Bill must be assessed individually.

25. Similarly, if several goods which together constitute an incomplete or unfinished or disassembled or unassembled article are sought to be cleared in a Bill of Entry or Shipping Bill, they should be classified, as per the General Rules of Interpretation of the Customs Tariff Act, as complete or finished articles. However, if several Bills of Entry are filed for various goods, each Bill of Entry must be assessed accordingly. The goods imported under different Bills of Entry cannot be classified together.

25. **The Additional Director General of DRI who had issued the SCN and the Commissioner (Adjudication) who issued the impugned order completely mis-understood the provisions and assumed that they had the power to re-assess the goods exported under two or more Shipping Bills together. Nothing in the Customs Act confers such power on any officer. The impugned order deserves to be set aside on this ground alone.**

26. The second issue is regarding the basis for determination of the Fe content- whether the Fe content should be reckoned on

wet basis or on dry basis. It must be pointed out that iron ore fines have been subjected to export duty and an exemption was made to those with low Fe content. The reason appears to be to discourage export of iron ore fines of high Fe content. The rates of duty and exemptions and whether the duty was on ad valorem or specific basis varied from time to time but there was always a question of determination of Fe content.

27. In **Gangadhar Narisnghdas,** the Supreme Court decided that it should be determined on wet basis. This judgment is reproduced below:

> "1. Delay condoned.
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> 2. Special leave granted in all the Special Leave Petitions.
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> 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 thesecond 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**.
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> 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.
>
> 5. In the result, the appeals fail and are dismissed with no order as to costs. The question of refund will be considered in accordance with law where refund is not already given."
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> **(emphasis supplied)**

28. It is evident from the above that the case before the Supreme Court was on identical issue and the ground taken by the Revenue that the standard testing method prescribed by ISI (now BIS) provides for determination of Fe content on dry basis were considered and rejected by the Supreme Court. When issuing the SCN, the Additional Director General and while

passing the impugned order, the Commissioner of Customs (Adjudication) violated the norms of judicial discipline in not following **Gangadhar Narsingdas.**

29. After the above judgment of Supreme Court, CBEC issued Circular No. 04/2012-Cus dated 17.02.2012 directing this decision of the Supreme Court to be followed. The Additional Director General, while issuing the SCN and the Commissioner (Adjudication) while passing the impugned order, also violated the directions of the CBEC. The reasons given for not following the Supreme Court and the CBEC are:

a) In **Gangadhar Narsingdas** the facts were different and there was no mixing of low grade and high-grade iron ore fines.
b) The testing method prescribed by Bureau of Indian Standards, as per IS-1493-1959 (Reaffirmed 2016) prescribes determination of Fe content on dry basis.
c) No standard national or international methodology prescribes this kind of basis (WMT) for determining Fe content on "as received basis/ wet basis/ natural basis".
d) The invoices were issued on dry basis and not on wet basis.
e) There is no indication of Fe content on wet basis in any of the international test reports.

30. None of the above reasons can justify not following the decision of the Supreme Court and the directions of the Board. The facts of any case and whether goods cleared under different Shipping Bills were exported in the same vessel or the same hatchet of the vessel has no bearing whatsoever on how the Fe

content should be tested (wet or dry basis). The testing methodology prescribed by ISI (now BIS) had been already taken as a ground to determine Fe on dry basis by the Revenue and was rejected by the Supreme Court in **Gangadhar Narsingdas.** The fact that invoicing was done on dry basis also is not relevant to the testing method because the eligibility of exemption notification cannot depend on how the invoice was issued.

31. To sum up:

a) Each Shipping Bill or Bill of Entry has to be assessed and the Customs Act does not provide for assessing two or more Shipping Bills together;

b) Consequently, the classification, valuation or determination of any other parameter relevant to assessment also has to be for each Shipping Bill or Bill of Entry;

c) No officer of Customs including the DRI officers and the Commissioner of Customs has any power under the law to assess two or more Shipping Bills together or determine the Fe content or any other parameter combining goods covered by two or more Shipping Bills, even if they are loaded in the same vessel;

d) The Bill of Lading is the document of title issued by the Master of the vessel or the shipping line to the exporter and the fact that a single Bill of Lading is issued in respect of two or more Shipping Bills does not confer any right on any officer of customs

to assess two or more Shipping Bills together or to demand consequential differential duty; and

e) Fe content of iron ore fines for export has to be determined on wet basis as per the judgment of Supreme Court in **Gangadhar Narsingdas** and the CBEC's Circular that followed and the Commissioner erred in reckoning the Fe content on dry basis.

32. The impugned order dated 30.11.2022 passed by the Commissioner cannot, therefore, be sustained and needs to be set aside. The impugned order is, accordingly, set aside and all the four appeals are allowed with consequential relief(s) to the appellants.

(Order pronounced on **07.02.2025**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P. V. SUBBA RAO)
MEMBER (TECHNICAL)

Tejo