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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 1187 OF 1993

1. India Steel Industries
A partnership firm registered under the provisions of the Indian Partnership Act, and having its registered office at Railway Gate No.4, Antop Hill, Wadala, Bombay – 400 037.
2. Shri H.B. Gupta of Bombay
Indian Inhabitant and a partner in M/s. India Steel Industries Railway Gate No.4, Antop Hill, Wadala, Bombay – 400 037. **…Petitioners**

Versus

1. Union of India

2. The Asstt. Collector of Customs Drawback Department,
3rd Floor, Annexe Building, New Customs House, Ballard Estate, Bombay – 400 038.
3. The Collector of Customs (Judicial),
New Customs Hosue, Ballard Estate, Bombay – 400 038. **…Respondents**

Mr. Anand with Mr. A.K. Gopalan, i/b Haresh Mehta & Co., for the Petitioners.
Mr. Pradeep S. Jetly, for the Respondents.

CORAM: A.S. OKA &
RIYAZ I. CHAGLA, JJ.

JUDGMENT RESERVED ON 31ST AUGUST 2017

<u>JUDGMENT PRONOUNCED ON</u> 13TH OCTOBER 2017

O R A L J U D G M E N T :- (Per Riyaz I. Chagla J.)

1. The Petitioners have filed this Writ Petition under Article 226 of the Constitution of India challenging order dated 23rd December 1992 passed by the first Respondent in a review application filed by the third Respondent under Section 129 DD of the Customs Act, 1962.

2. The short point which arises for determination in the present Writ Petition is whether the “Stainless Steel Bright Bars of Austenitic Variety” is classifiable as “Bright Steel Bars” for the purpose of drawback schedule under the Customs and Central Excise Duties Drawback Rules, 1972 (for short “**the Rules**”) i.e. whether the same will go under sub serial No.3606 or 3803 of schedule 'F' of the Rules.

A brief background of facts in the present Petition is necessary.

3. The Petitioners are manufacturers of “Stainless Steel

Articles" which conforms to the standards prescribed for grade AISI 304 of "Austenitic Variety". The Petitioners have exported between July to October 1988 various quantities of stainless steel bright bars of grade AISI 304. The Petitioners had filed drawback claim in respect of four shipping bills pertaining to the export effected between 6th June 1988 and 21st June 1988 for amount of Rs.2,76,122/-. A public notice had been issued on 31st May 1988 by the Ministry of Finance, Government of India, Department of Revenue, wherein *inter alia* SS No. 3606 and 3803 were included under item Nos. 36 & 38 respectively in the duty drawback schedule of the Rules. The Respondents initially admitted the drawback claim of the Petitioners but by a letter dated 29th July 1988 paid a sum of Rs.12,254/- by classifying the exported goods under sub-serial No. 3606 rather than sub-serial No. 3803 to the said drawback schedule. The Petitioners filed supplementary claim on 6th September 1988 for balance amount to Rs.2,63,868/- and filed detailed written submissions in support of the supplementary claims. The supplementary claims of the Petitioners initially came to be allowed on 1st March 1989 and the Petitioners received a balance claim of Rs.2,63,868/-. However, the new Assistant Collector (Drawback) issued a short levy notice dated 4th May 1989 and demanded Rs.2,63,868/- which had been paid to the Petitioners on the ground of erroneous payment. The Petitioners replied to the said notice and disputed the claim of the department that the goods exported would come under sub-serial No. 3606 rather than sub-serial No. 3803 to the drawback schedule. On 28th November 1989, the second Respondent directed the Petitioners to repay the amount of Rs.2,63,868/- by holding the goods to be classifiable under sub Serial No. 3606. A second claim of the Petitioners pertaining to export of goods under 11 shipping bills and for which the Petitioners were entitled to receive the drawback payment under sub-serial No. 3803 came to be rejected vide order dated 26th September 1988 on the ground that the goods are classifiable under serial No. 3606 and the claim is less than 2% of the FOB value of the goods. The claim was hit by the provisions under Rule 7A of the Rules. The third claim of the Petitioners regarding the export of gods under 9 shipping bills was rejected on 11th April 1990 on the same ground that the claim assessed under sub-serial No. 3606 was less than 2% of FOB value and therefore, hit by Rule 7A of the Rules. The Petitioners had filed Appeals against all three orders before the Collector (Appeals) and submitted that the goods are classifiable under sub-serial No. 3803 and not sub-serial No. 3606 of the schedule to the Rules and public Notice dated 31st May 1988 as the goods are "Stainless Steel Bright Bars of Austenitic Variety". The Collector (Appeals) vide order dated 25th September 1990 allowed the Appeal of the Petitioners by holding that the "Stainless Steel Bright Bars of Austenitic Variety" are classifiable under sub-serial No. 3803 and drawback should be allowed accordingly.

4. The Petitioners thereafter received show cause notice under Section 129 DD of the Customs Act, proposing to review the order of the Collector (Appeals) dated 25th September 1990 and to set aside the said Order-in-Appeal and restore the Order-in-Revisional dated 28th November 1990 from the Joint Secretary to the Government of India.

5. The Petitioner filed reply to the show cause notice

issued by the Central Government and opposed the review proposal. The Joint Secretary of the Central Government vide order 23th December 1992 (the impugned order) set aside the order of the Collector (Appeals). The Assistant Collector Drawback Department issued letter dated 10th March 1993 demanded Rs.2,63,868/- from the Petitioner. The Petitioners have challenged the impugned order dated 23rd December 1992 and the order dated 10th March 1993 issued by Assistant Collector Drawback Department by the present Writ Petition. The Writ Petition came to be admitted by order dated 28th June 1993 passed by Division bench of this Court and interim relief was granted in terms of prayer clause (c) of the Writ Petition.

6. Mr. Anand the learned counsel for the Petitioners had first sought to raise a contention that the impugned order was without jurisdiction as it reviewed the order of the Collector (Appeals) which the Central Government was not authorised under Section 129DD of the Customs Act, 1962. An application for review can be made only by “any person aggrieved” and that the Collector of Customs (Judicial)

Bombay upon whose application the show cause notice to review the order was issued is not a person aggrieved. He has also relied upon Section 3 of the Customs of Act in contending that the Collector of Customs is declared as a officer of the Customs and not a person. He had, therefore, contended that show cause notice was defective and had no force of law. Mr. Anand thereafter restricted his arguments to the classification of the goods viz. “Stainless Steel Bright Bars of Austenitic Variety” exported by the Petitioners as classifiable under sub-serial No. 3803 to the drawback schedule of the Rules and not under sub-serial No. 3606 which included all types of bright steel bars and shafting. He has stated that stainless steel bright bars involved ingredients in its manufacturing which are Nickel and Chromium.

7. Mr. Anand has submitted that from a plain reading of these entries the stainless steel bright bars are specifically placed under sub-serial No. 3803 and come within the heading “manufacture of metals not elsewhere specific”. This is distinguished from sub-serial No. 3606, which comes under

the heading “Iron and steel except ingots and other primary forms (including blanks for tubes and pipes) of iron and steel”. He has contended that in sub-serial No. 3606 steel bars of all types would mean Round, Hexagon, Octagon, flat steel bars but this cannot mean bright steel bars made of all grades of steel including bright bars of stainless steel. He has stated that under Rules, neither the term steel nor stainless steel have been defined in under the Rules. It is settled law that where the definition of a particular expression is not given, it must be understood in its popular or common parlance i.e. in the sense how that expression is used every day by those who use or deal with those goods. In common and commercial parlance steel and stainless steel are understood and traded differently. He has submitted that from the heading itself it is clear that stainless articles are metals not elsewhere specified in counter distinction to bright steel bars and shafting which clearly come within the heading of iron and steel. He has contended that it is a well settled principle of classification that the heading which provides mere specific description shall be preferred to the heading providing mere general description. The “Austenitic Variety” of the product i.e. stainless steel is specifically covered under sub serial 3803 cannot be classified elsewhere. He has then sought to explain the manufacturing process of "Stainless Steel Bright Bars of Austenitic Variety" which is a specialised process and has a distinct identity on is own and can be used directly with minimal machining work as a part of Automobile Machinery, Agricultural machinery, Textile Machineries etc. He has then given a chart of comparison of entries where drawback is provided for different articles made from the same or similar raw material which establish that drawback is to be granted on the basis of the raw material and not the general description of the article. In the chart he has also referred to safety razor blades made from stainless steel strips which are classified under sub-serial No. 3816 having drawback at 25% of FOB value and therefore the article of stainless steel cannot be classified under sub-serial No. 3606 wherein the drawback is only Rs.395 per M.T. and the correct entry would be sub-serial No. 3803 where the drawback allowed is of Rs.8.90 per kg. He has submitted that with effect from 1st June 1989, the "Stainless Steel Bright Bars" was listed in sub-serial No. 3606 and entry No. 3803 was left vacant clearly establishing that the "Stainless Steel Bright Bars of Austenitic Variety" fell within sub-serial No. 3803 prior to the amendment. After the amendment, the duty drawback was Rs.1090 MT for Stainless Steel Bright Bars and this is more in line with the duty drawback of 8.90 per kg in sub-serial No. 3803 prior to amendment. Whereas, the duty drawback in respect of the "Bright Steel Bars and shafting" under sub-serial No. 3606 was Rs.3.95 per MT prior to amendment. After the amendment for other bright bars and shafting have a duty drawback of Rs.540/- per M.T. lower than that for stainless steel at Rs.1090/- Per MT. This goes to show that the articles of stainless steel of austentic variety has been treated on a different footing from other bright bars and shafting under sub-serial No. 3606 prior to amendment and could only have been classified under sub-serial No. 3803. Mr. Anand also contended that import of stainless steel had a much higher duty liability as they comprised of nickel and chromium in comparison to pure steel and the Petitioners could not be denied the benefit of higher drawback for manufacturing and exporting stainless steel. Mr. Anand has also relied in the submission on judgments of the Supreme

Court as well as this Court on interpretation of taxing statutes and on the principle that where two views are possible in classification of goods, the one favourable to the assessee in the matter of taxation has to be preferred.

8. Mr. Jetly, learned counsel appearing for the Respondent has supported the impugned order passed by the first Respondent. He has contended that the Petitioners themselves had considered their goods viz. "Stainless Steel Bright Bars of Austenitic Variety" to fall under sub-serial No. 3606 and had sought duty drawback at the rate prescribed under that entry. It was only thereafter that the Petitioners made supplementary claims on the ground that the goods ought to have been classified under sub-serial 3803. He has submitted that "Stainless Steel Bright Bars of Austenitic Variety" falls within the definition of "steel" and that stainless steel would be covered under "bright steel bars" under SS No. 3606 at the relevant time. He has also mentioned that subsequent to the change effected form 1st June 1989 stainless steel has been brought under bright steel bars and

shafting, which could only mean that stainless steel has at all times been considered as a type of bright steel bars and hence the impugned order of first Respondent in classifying stainless steel under a type of bright steel bar is an appropriate classification under sub serial No. 3606 and cannot be found faulted with.

9. After careful considering arguments on both sides, we are of the view that "Stainless Steel Bright Bars of Austenitic Variety" had been treated in a manner differently from that of bright steel bars and shafting at the relevant time. Stainless steel comprises of ingredients which are Nickel and Chromium, both imported items used in manufacturing of stainless steel. The duty drawback has also been treated differently for stainless steel articles from that of all types of bright steel bars and shafting. The duty drawback of stainless steel articles of "Austenitic Variety" was Rs.8.90 per kg. as against Rs.395/- PMT for bright steel bars and shaftings. This distinction has also been carried forward in the change effected in the schedule of duty drawback of the Rules from 1st June 1989. The duty drawback of stainless steel with

effect from 1st June 1989 was Rs.1090 PMT as against Rs.540 PMT for other varieties of bright bars and shafting. Item No. 3803 subsequent to the change has been kept vacant. This only goes to show that at the relevant time there was a clear distinction made between stainless steel articles of "Austenitic Variety" as against bright steel bars both in terms of the classification and the duty drawback rate. The headings under which sub-serial No. 3606 and sub-serial No. 3803 comes, along with the entries at the relevant time. The two sub-serial Nos.3603 and 3803 at the relevant time (with effect from 1st June 1988) read thus:-

"36. Iron and steel except ingots and other Primary forms (including blanks for tubes and pipes) of iron and steel.

Sr.No.	Item	Rates	Remark
3606	All types of Bright Steel Bars and Shafting	Rs.395/- (Rupees three hundred and ninety five only) per M.T.	All Customs

"38. Manufacture of Metals not elsewhere specified.

Sr. No.	Item	Rates	Remark
3803	Articles made of stainless steel casting,	Rs.8.90 (Rupees eight and paise	All Customs

	not otherwise specified, made of Austenitic variety of stainless steel"	ninety only per Kg.)	

10. A plain reading of the headings would make it apparent that stainless steel articles made of stainless steel Austenitic Variety are part of metals which are manufactured and not elsewhere specified as in the manufacturing of stainless steel, Nickel and Chromium are used. Hence, stainless steel articles were treated differently from articles of steel and came under a separate classification since other metals go into its manufacturing. We are of the view that the Collector (Appeals) in the order which was reviewed had appreciated this distinction and had also appreciated the distinction between the different duty drawback rates which were dependent on the duty inputs which in the case of stainless steel comprised of Nickel and Chromium, both of which are imported items. Hence, in the duty drawback rate prescribed, there was a substantial difference between stainless steel of austentic variety and bright steel bars. We are of the view that the words "all types of bright steel bars" would necessarily to

apply to the dimensions of steel bars such as round, hexagon, octagon, flat but would not mean include all grades / variety of steel. This would therefore, not include stainless steel at the relevant time. It would also appear from the revised drawback schedule effected from 1st June 1989 that SS No. 3606 was divided into two different categories and Sub-serial No. 3803 was kept vacant and read thus:-

3606	***All types of bright bars and shaftings***	***:***
	(i) of stainless steel	***: Rs.1,090/- PMT***
	(ii) All others	***: Rs.540/- PMT***

11. This could only mean that prior thereto "Stainless Steel Bright Bars of Austenitic Variety" were classified under a specific entry viz. sub-serial No. 3803 and after the change, sub-serial No. 3803 has been kept vacant. There are also rates prescribed, one for stainless steel (higher rate) and another for all other bright bars (lower rate) after the change. Thus, bright stainless steel bars of austentic variety has at all times been treated differently.

12. We are, therefore, inclined to concur with view taken by the Collector (Appeals) that "Stainless Steel Bright Bars of

Austenitic Variety" could classify only for inclusion in sub-serial No. 3803 at the relevant time. It is a settled law that where there are two views possible, the one favourable to the assessee in the matter of taxation has to be preferred. We are of the view that the impugned order of the first Respondent has incorrectly arrived at a finding that the scheme of drawback schedule at the relevant time was such that the words "Steel" mentioned in sub-serial No. 3606 would include stainless steel also. We are of the view that the first Respondent has erroneously held in the impugned order that the goods exported are bright stainless steel bars and are appropriately classifiable under sub-serial No. 3606. We are not going into issue as to whether the first Respondent has validly exercised power under Section 129DD of the Customs Act 1962 in reviewing an order of the Commissioner (Appeals) pursuant to an application made by the Collector Customs (Judicial) as we find on merits itself that the impugned order is unsustainable and is required to be quashed and set aside.

13. We accordingly pass the following order:-

(a) The impugned order dated 23rd December 1992 passed by the first Respondent and the letter dated 10th March 1993 issued by second Respondent are quashed and set aside.

(b) We order and direct that the Respondent to pay the Petitioners the differential duty drawback at the rate determined by the Collector of Customs (Appeals) vide Order dated 25th September 1990 within a period of three months.

(c) There shall be no order as to costs.

(d) The Petition is made absolute on the above terms.

(RIYAZ I. CHAGLA J.) **(A.S. OKA, J.)**