Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad
REGIONAL BENCH- COURT NO.3

Customs Appeal No.176 of 2011

(Arising out of OIO-KDL/COMMR/23/2010-11 dated 22/02/2011 passed by Commissioner of CUSTOMS-KANDLA)

Lucky Steel Industries **.....Appellant**
Mama Kharniya,
Amba Chowk, Bhavnagar, Gujarat

VERSUS

C.C.-Kandla **.....Respondent**
Custom House,
Near Balaji Temple,
Kandla, Gujarat

WITH

Customs Appeal No.11917 of 2017

(Arising out of OIA-KDL-CUSTM-000-APP-033-17-18 dated 10/08/2017 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-AHMEDABAD)

Lucky Steel Industries **.....Appellant**
(ship Breaking Division), Amba Chowk, Khojawad,
BHAVNAGAR, GUJARAT

VERSUS

C.C.-Kandla **.....Respondent**
Custom House,
Near Balaji Temple,
Kandla, Gujarat

APPEARANCE:
Shri Rahul Patel, Advocate for the Appellant
Shri Vijay G. Iyengar, Assistant Commissioner (AR) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU

Final Order No. A/10801-10802 /2023

DATE OF HEARING: 14.12.2022
DATE OF DECISION: 06.04.2023

RAMESH NAIR

The present appeals are before the Tribunal for *de novo* decision as per the order dated 14.11.2022 passed by the Hon'ble Supreme Court of India in Civil Appeal No (S). 3237-3238 of 2019.

2. Both the present appeals are filed by the appellant against the Order-In-Original No. KDL/COMMR/23/10-11 dated 22.02.2011 passed by the Commissioner of Customs, Kandla; and Order-In-Appeal No. KDL-CUSTM-000-APP-033-17-18 dated 10.08.2017 passed by the Commissioner of Customs (Appeals), Ahmedabad. Since the issue is identical in both the appeals, they are disposed of by this common order.

Appeal No. C/176/2011

2.1 The brief facts of the case are that Appellants have imported four consignments vide Bills of Entry No. 259764, 259765, 259766 and 259767, all dated 01.10.2008 by declaring the goods as re-rollable plate scrap of CTH 72044900. They also imported another consignment declaring the goods as Re-rollable plate scrap & pipes in respect of Bill of entry No. 259768 dated 01.10.2008. On examination of the imported cargo, it was found that the goods were mis-declared and the same were second and defective plates/ pipes/ waste. Plates of width more than 600 mm are classifiable under CTH 7208 and Plates of width less than 600 mm are classifiable under CTH 7211. As per the licensing note 4 of chapter 72 of the EXIM Policy, such seconds and defective are allowed for imports only through the Sea Ports of Mumbai, Chennai and Calcutta, and the same cannot be imported at Kandla. Appellants have classified the subject items under the Heading 7204 49 00. The Department wants to classify the same under the Heading 7208 /7211 as "plates". The assessee-Appellants have claimed the benefit of Notification No. 21/2002-Cus., dated 1-3-2002 at Serial No. 190B. But the Department has denied the same. It was alleged that the importer has mis-declared the goods for evading Customs duty as subject goods are second/defective steel plates and not as declared in the Bills of Entry by the importer, therefore, the transaction value of the subject goods is also liable for rejection. In view of the aforesaid mis-declaration, it appears that the value declared in the bill of entry for mis-declaration of goods is liable for rejection and required to be re-determined under the Customs Valuation Rules, 2007 and provisions of Section 14 of the Customs Act, 1962. During the investigation department also recorded the statement of Shri Mahesh Padia, authorized representative of the importer and Shri Ashfakhusen Sabirali Masani, proprietor of the importer. After the detail investigation a show cause notice dated 26.11.2009 was issued to the Appellant for confiscation of seized goods and rejection of declared CTH 72044900 and declared value under Bill of entry and denial of the benefit of Notification No. 21/2002. The show cause notice

also proposed the differential customs duty demand and imposition of penalty. In adjudication Learned Commissioner vide impugned order –in-original No. KDL /COMMR/23/10-11dated 22.02.2011 confirmed the proposal of classification of disputed goods as made in the show cause notice and also confirmed the differential duty demand along with penalty. He also ordered for confiscation of goods with an option to redeem the same on payment of fine of Rs. 40 lakhs. Being aggrieved by the impugned order, Appellant have filed present appeal No. C/176/2011.

Appeal No. C/11917/2017

2.2 As regard the Appeal No. C/11917/2017 brief facts of the case are that the Appellant filed Bills of Entry No. 262730 and 262731 both dated 24.10.2008. Appellant classified the imported goods under CTH 72044900 of the Customs Tariff Act by claiming the benefit of Basic Customs duty under Sr. No. 190B of Notification No. 21/2002-Cus dated 01.03.2002 as amended. During the course of examination in respect of bill of entry No. 262730 dated 24.10.2008 it appeared that the said imported cargo contained second and defective pipe, re-rolled HMS materials scrap and second and defective plates of width less than 600 mm. In respect of Bill of Entry No. 272731 dated 24.10.2008 it was found to be second and defective steel plate of width both less and more than 600 mm. The sample from the imported goods were drawn and got tested from the National Test House, Ghaziabad, wherein it was reported that the sample meet the requirement of mild steel and it was confirmed that sample was mild steel. It therefore appears that the Appellant mis-declared the subject goods in respect of value, classification, description and duty structure in the said Bill of entry. Accordingly SCN dated 17.06.2009 was issued in respect of which Order-In-Original No. KDL/ADC/PMR.49/2016-17 dated 15.11.2016 was passed wherein second and defective MS Plate having width more than 600 mm and less than 600 mm were classified under CTH 7208 and 7211 respectively. Second and defective pipe were classified under CTH No. 7206. Differential duty amount of Rs. 8,40,609/- was confirmed after re-determining value of the goods in question under Customs Valuation (Determination of Value of Imported goods) Rules 2007. Goods was ordered to be released on payment of redemption fine amounting to Rs. 19,11,000/- in lieu of confiscation under Section 125 of the Customs Act, 1962. Penalty amounting to Rs. 16,74,221/- was imposed under Section 112 of the Customs Act, 1962. Being aggrieved with the order appellant filed appeal before the

Commissioner (Appeals), Ahmedabad, who vide impuged Order –In-Appeal No. KDL-CUSTM-000-APP-033-17-18 dated 10.08.2017 uphold the Order-In-Original dated 15.11.2016. Being aggrieved by the impugned order –in-appeal dated 15.11.2016 Appellant have filed present appeal No. C/11917/2017.

03. Shri Rahul Patel, Learned Counsel appearing on behalf of the appellant submits that whereas, the panchnama was drawn on 05.11.2008 in 3 hours from 15:00 hours to 18:00 hours, in their cross examination, Shri UP Kale, Preventive Officer Customs House, Kandla admits that it takes 2 to 3 hours to just segregate the sheet and weighment of 252.640 Mts. of 600 mm plates 240.515 Mts. of less than 600 mm plates took about 2 to 3 hours. This is an addition to time required to draw the Panchnama and getting it typed and signed by the Panchas. Thus, at the very outset it is asserted that the Panchnama itself couldn't have been drawn within the stated time period.

3.1 He also submits that the superintendent, Customs House, Kandla also stated during cross –examination that Kandla not being an eligible port was the only reason for the seizure of the goods. However as per the Public Notice No. 16/2004-09 dated 15.10.2004, the Import Policy was amended to include Kandla port where such similar goods could be imported and cleared. Therefore, the liability of the goods to confiscation as proposed in the notice is required to be not upheld and seizure arrived at is required to be vacated and set aside. This sole reason that such goods not permissible to be imported at Kandla Port is self-defeated as there are other imports by the very same importer in the same month at the same valuation at the same Port.

3.2 He further submits that according to Panchnama, the total mis-declared cargo is 190.275 Mt. and 212.905 Mts. of defective steel plate of varying length, thickness and width. But the department has not produced any material to substantiate these allegations. The only material relied upon by the department is lab report from National Test House. The report merely indicate that the sample cut in equal sizes are mild steel as per Indian Standard, IS: 2062-2006. The lab report relied by the department has no consequence on the claim by the appellant that the import of scrap. Scrap or seconds/ defective may have the same chemical composition and hence

this lab report merely reiterates that the imported goods are chemically mild steel.

3.3 He argued that the best test differentiation between scrap and second/defective is the end use. Seconds/ Defectives can be used for the same purposes for which it was manufactured albeit at as lower efficiency than non-defectives. Scrap can never be used as such by very definition. The goods herein, were on provisional release transferred to their sister concern where they have not been used as such, but have been used for further manufacture of CTD bars etc., in this case, by the process of heat melting and slitting etc.

3.4 He further submits that Re-rollable steel scrap has been classified by IS 2549:1994 under clause 13.1. However this has been amended by BIS Notification dated 02.08.2008. Therefore, there is no reason to accept Second and Defective rejected Shapes and Sections of flat rolled products suitable for re-rolling without melting. There is no bar to consider them as other than Prime Quality Goods known to persons dealing in such goods or using the same as raw material after heating, softening, melting them and converting them to CTD bars.

3.5 He also submits that Ferrous waste /scrap has been defined in note 8 to Section XV, applying the same there is no mis-declaration in the description of the goods imported. The classification was claimed under CTH 72044900- others. A reading of the above would only result in that effective duty on Seconds and Defective would be 10% if they are covered by Sl. No. 190B i.e. All goods falling under heading 7203 to 7217. In this case the conditions of Notification 21/2002 as amended which are met herein. Since, the goods are found to be as Seconds and Defective Scrap Plates, Pipes, sheets etc., they would not be classified under any other heading but CTH 72044900(--other), as they are not covered by any of the sub heading 72041000 to 72044100.

3.6 He also argued that the importer has traded in International Market and procured the goods imported as re-rollable Steel Scrap which is accepted at the port of export and has paid the charges not for prime Sheets Plates, Pipes etc., There is no material to indicate any payment over and above the transacted value, there is admittedly no like or similar goods import at Kandla port. The contents on the two B/E are not identical in as

much as on examination BE No. 262730 consisted of Seconds and Defective Pipes and re-rollable HMS melting scrap along with defective steel plate while the other BE of the same date consist only of Second and Defective plates. It is Commercial reality that consignment of Waste and Scrap cannot consist of exactly identical or similar items. In fact, in this case one of the Bills of Entry is reported to be having a large quantity of Re-rollable scrap while in the other BE no re-rollable scrap has been reported by the Customs Examiners at Kandla Port. The Customs Examiners are not expert in metallurgy and qualified to established the fine difference. In fact, it is only an opinion not supported by any expert. Therefore, there cannot be any reason to mis-declare the consignment and violate the provisions of Section 111(m). There is no reason also to establish any under valuation as scrap consignments cannot be compared among each other.

3.7 He also submits that the show cause notice does not bring out any material of the importer having paid any amounts in excess of the valuation declared and transacted by them. Since there is no mis-declaration and there is no material as to how and on what basis the value was proposed to be enhanced, there is no reason to reject the transaction value. There is no evidence or allegation of any additional payment over and above the transaction value. The transaction value has been rejected without having any reason. It is also well –known commercial reality that scrap material contents cannot be uniform they are sold in 'Lots' of different weight. As it has been found that such scrap of plates, pipes, smaller cut pieces have been supplied have the same valuation.

3.8 He further submits that there can be no charge of violation of Section 111(m) for reasons of undervaluation and confiscation and penal liabilities thereunder in the facts of the case. He relied on the decision of Apex court in the case of CC Vs South India Television (P) Ltd. 2007(214)ELT 3 (SC).

04. Shri Vijay G. Iyengar, learned Assistant Commissioner (AR) appearing on behalf of the revenue reiterates the findings in impugned orders.

05. We have heard both sides and perused the records of the case. We find that the appellant filed Bills of Entries for clearance of the imported goods and declared as Re-rollable plate & Pipe material scrap under CTH 72044900 of the Customs Tariff Act. They claimed the benefit of concessional rate of duty under Notification No. 21/2002-Cus., dated 1-3-

2002 (Sl. No. 190B of the Table) as amended. Whereas department noticed and found that the goods apart from re-rollable HMS material scrap also contained second and defective Plates having width of less than 600 mm as well as more than 600 mm and Second and Defective Pipes. The department's view was that the goods imported was not scrap classifiable under CTH 7204 but in fact Second and Defective Plates having width of less than 600 mm as classifiable under CTH 7211 as well as more than 600mm CTH 7208 and second and defective pipes classifiable under CTH 7206. In the present matter after an investigation conducted by revenue, the samples were got tested at National Test House, Ghaziabad, which has reported that the sample meet the requirements of the mild steel as per the standards laid down in the IS: 2062-2006 and that all the physical examination, chemical composition and mechanical testing of samples confirm that the sample are mild steel. Accordingly, the present proceedings have been initiated against the Appellant.

5.1 We find that during the relevant period the entry No. 190B of Notification No. 21/2002-Cus. dated 01.03.2002 provide as under:

S.N.	*Chapter or Heading No. or sub-heading No.*	*Description of goods*	*Standard rate*	*Additional duty rate*	*Condition*
(1)	*(2)*	*(3)*	*(4)*	*(5)*	*(6)*
190B	*7204*	*All goods other than second and defectives.*	*5%*	*-*	*-*

Further the relevant chapter heading 7204 and 72044900 provide as under : -

7204 - Ferrous waste and Scrap; remelting scrap Ingots of Iron or Steel

720410000 – Waste and scrap of cast iron

- Waste and scrap of alloys steel:

720421 - - Of Stainless Steel :

- Other waste and scrap :

72044100 -- Turning, shavings, chips, milling waste, saw dust, fillings, trimming and stamping, whether or not in bundles

72044900 -- Other

5.2 Appellant had classified the goods under Customs Tariff heading 72044900 and claimed exemption under Notification 21/2002-Cus. at S. No. 190B. This exemption was available to "All goods other than seconds and defectives" falling under Customs Tariff Headings 7204. However the notification nowhere defines the term second and defective. On examination of the goods, the customs officers felt that the goods were secondary or defective because they were contained Second and Defective Plates having width of less than 600 mm as well as more than 600 mm and second and defective pipes. However the documents submitted by the appellant during the import of goods nowhere mentions that the goods are seconds and defective plates and pipes. In our view second and defectives means the goods have prime material but have some defect and can be used as a prime material. However in the present matter there is no dispute on the facts that the disputed goods were used as re-rollable scrap/ melting scrap. Further we also noticed that the test report issued by the National Test House, Ghaziabad has determined the composition of the impugned goods which confirms that it is material of Mild Steel. The said test report nowhere confirms that the impugned goods are second and defectives. The revenue has not considered the disputed goods as scrap on the basis test report. The test report does not specify that the subject goods are scrap. However on the basis of test report it cannot be decided that the disputed goods were not scrap. Scrap whether used or cut pieces by virtues of its physical properties will contain composition of its prime material. Merely by using or cutting the material will not alter its chemical composition. In such case there is no surprise that the chemical parameters of prime material and scrap grade material may be same but externally the goods may be different in quality and use. Therefore without accepting, even if the chemical composition is same of both quality of goods, the scrap material cannot be construed as prime material or seconds materials and on this basis benefit of notification cannot be denied.

5.3 We also find that in the impugned matter both the adjudicating authority nowhere disputed the claim of Appellant that the goods were provisionally released on execution of bond and they have been transferred to their sister concern where they have not used the disputed goods as such but have been used for further manufacture of CTD bars etc. by the process of heat melting and slitting etc. The end use of the disputed goods was

"melting scrap or re-rollable scrap". Hence on the basis of end use of disputed goods also the goods are classifiable under chapter hearing 7204 and eligible for benefit of notification. Further, we find that the Hon'ble Supreme Court in the case of *Tata Iron & Steel Company Ltd.* reported in 1995 (75) E.L.T. 3 (S.C.), (supra) held that the old and used rails, billets, plates, axles, channels etc, are to be treated as scrap. The Tribunal in the case of *Global Shiptrade (P) Ltd.* reported 2002 (142) E.L.T. 152 (Tri.-Del.). (supra) held that the old and used rusty pipes in the absence of any evidence are serviceable, are to be treated as melting scrap.The Tribunal in various decisions involving import of re-rollablescrap has upheld classification under 72.04 as may be seen in the following decisions :-

- SUJANA STEELS AND PIPES LTD. V. CCE - 2000 (115) E.L.T. 539 (TRI.)
- CCE V. RIMJHIMISPAT LTD. - 2005 (183) E.L.T. 283
- SHIVA ISPATUDYOG V. CC - 2010 (254) E.L.T. 297 (TRI.-KOL.)

5.4 The imported goods are correctly classifiable under Heading 7204 of the Customs Tariff Act and are eligible for exemption under Notification No. 21/2002-Cus. In the present matter the entire consignment was re-rollable and melting scrap only 'scrap' bought as stock lot is bound to contain articles in different shapes and forms including some serviceable material which are considered as scrap in the exporting country, it does not mean that the entire lot will be considered not as scrap or segregated within serviceable and scrap. In the present matter department nowhere disputed that the consignment imported has not indeed been used in the manufacturer of rolled products. In these circumstances, it cannot be said that the appellant has mis-declared the goods and consequently the goods are not liable for confiscation.

5.5 We observed that in the present matter the revenue did not adduce any evidence except the test report and chemical examiner report to support the allegation that the goods is not re-rollable plate & pipe material scrap but an article of steel. It may be possible that the goods appear to be article of steellike plate and pipe but if it is not usable in their original form and the same has been used as re-rollable scrap / Melting Scrap, merely because the scrap is in the form of used article of steel it is not sufficient to deny the classification as Scrap. Further in the present matter, the supplier treated the same as scrap only. It is a matter of fact that the said scrap was utilized

as re-rollable/ melting scrap only. Therefore, denying the classification and the exemption are bad in law.

5.6 In the present case revenue classified the disputed goods under chapter heading 7211 (Plates having width of less than 600mm), 7208 (Plates having width more than 600 mm) and 7206 (Pipes). However between the different competing chapter headings 7204 is more appropriate because the goods are more in the nature of scrap and not in the nature of Plates and Pipes. Further the disputed goods are not suitable for use as Plates and Pipes. Therefore order of both the authority classifying the disputed goods under CTH 7211, 7208 and 7206 legally not correct.

5.7 We also find that one of the issue involved in this matter was that the Kandla Port was not notified port for the purpose of import of disputed goods. However we have gone through the Public Notice No. 16/2004-2009 dated 15.10.2004 submitted by the appellant before us and noticed that import policy was amended and to permit the Kandla port for import of metallic waste and scrap in unshredded, compressed and loose from.

5.8 We also find that in the present matter the only reason for increase in value made is mis-declaration in description of goods. No evidence of additional remittance of money is brought out. Also there is an issue that scrap is not a type of goods which can be easily compared. The appellants have also taken objection that the value adopted for assessment has no legal basis. We also find that, there is no admission of Appellant admitting to undervaluation, or any evidence of any extra financial consideration apart from the declared transaction value, paid to the overseas supplier. Further, there is no evidence that the appellant and overseas supplier are related parties or that the invoice value was not the transaction value. The Department has failed to show any contemporaneous evidence of higher price, and thus the transaction value cannot be rejected, as held by the Hon"ble Apex Court in Commissioner Central Excise v. Sanjivani Non-Ferrous Trading Pvt. Ltd. - (2019) 2 SCC 378 = 2019 (365) E.L.T. 3 (S.C.) and Commissioner of Customs v. South India Television Pvt. Ltd. - (2007) 6 SCC 373 = 2007 (214) E.L.T. 3 (S.C.). Further, in the present case, particularly, when the invoice price of the appellant was not disputed on the basis of any evidence of wrong declaration of the value, the enhancement in the present case is illegal and incorrect. We find that there is no dispute that the customs has power to reject the transaction value and enhance the

assessable value in terms of Customs Valuation Rules. However, such rejection of transaction value and enhancement of assessable value has to be on the basis of some evidence on record. Contemporaneous imports have to be considered in reference to quality, quantity and country of origin with the imports under consideration. For any enhancement in assessment value, the transaction value has to be first rejected based on legal permissible ground as indicated in the valuation Rules. We find that in the present matter, Revenue has not advanced any such evidence to support their case inasmuch as, no evidence of rejection of transaction value was produced by the department.

5.9 As regard quality of the imported goods in question, we find that there is clear understanding between the supplier and the appellant importer that the goods in question is 'scrap' and therefore the quality of goods is Scrap and on that basis the supplier agreed to sell the goods at agreed price. As against this fact, the revenue could not adduce any evidence to reject this fact. In this fact on the quality of the goods, obviously the price cannot be the same of the prime grade material. Hence the price negotiated and finalised as sale price between the supplier and the appellant importer and declaration of the same cannot be disputed.

06. As per our above discussion and findings, the impugned orders cannot be sustained. Accordingly, the impugned orders are set aside and the appeals are allowed with consequential relief, if any arise, in accordance with law.

(Pronounced in the open court on 06.04.2023)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Mehul