CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO.3

Customs Appeal No. 10115 of 2024
(Arising out of OIO No. MUM-CUSTM-000-COM-025-23-24 dated 27.02.2024passed by Commissioner of Customs -Mundra)

M/s Shah Foils Ltd. **...Appellant**
B-26, 3rd Floor, Galaxy Signature, Science City Road,
Sola, Ahmedabad, Gujarat – 380 060

VERSUS

C.C. – Mundra **...Respondent**
Commissioner of Customs, Custom House
AP & SEZ, Mundra

(i) Customs Appeal No. 10116/2024 (Shri Kartik Ramesh Shah);
(ii) CustomsAppeal No. 10137/2024 (Suncity Sheets Pvt Ltd);
(iii) Customs Appeal No. 10138/2024 (Mukesh Agarwal);

(Arising out of OIO No. MUM-CUSTM-000-COM-022-23-24 dated 15.02.2024passed by Commissioner of Customs -Mundra)

APPEARANCE:
Shri Manish Jain, Advocate appeared for the Appellant
Shri Tara Prakash, Deputy Commissioner with Shri P. Ganesan, Superintendent(Authorized Representative) for the Respondent

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

FINAL ORDER NO. 10979-10982 /2024

DATE OF HEARING: 15.04.2023
DATE OF DECISION: 01.05.2024

RAMESH NAIR

All the appeals involved common issue on merit, therefore, all the appeals are taken up for disposal.

1.1 The issue pertains to the Custom Tariff classification of "Hot/Cold Rolled Stainless Steel Coils Grade 13" (hereinafter referred to as "subject goods") under the Custom Tariff Act, 1975 and consequent exemption under Sr. No. 734 of customs Notification No. 50/2018- Cus dated 30.06.2018. Present SCN has invoked extended period of limitation under section 28(4) of Customs Act for demanding customs duty demand and has also proposed penalty.

1.2 During the period from FY 2018 to FY 2020 (Annexure-1) appellants have imported stainless steel coils and classified under CTH 7220 90 22. The Appellant have claimed benefit of the exemption from customs duty under Sl. No. 734 of the Notification No. 50/2018-Cus dated 30.06.2018 on imports of the subject goods. The composition of imported goods is as under-.

Elements	**Symbol**	**Composition %**
Nickle	**Ni**	**1.010-1.060 %**
Chromium	**Cr**	**≥12.5**
Carbon	C	≤0.14
Manganese	Mn	≥9
Sulfur	S	≤0.03
Phosphorus	P	≥0.03
Silicon	Si	≤1
Copper	Cu	≥0.5

1.3 It is the case of the department that the Appellant has misclassified the subject goods under CTH 7220 90 22 as subject goods doesn't have the sufficient amount of nickel content to be classified as Nickel-Chromium Austenite Steel. According to department to qualify as nickel austenitic stainless steel the nickel content should be ranging from 4.5% to 12%. Since in the present case nickel content is approx. 1%, according to department imported goods are not nickel austenitic stainless steel.

1.4 The show cause notice dated 19.04.2023 issued to appellants for rejecting the classification and reclassifying the imported goods under CTH 72209090./CTH 72201290.Vide the SCN also proposed to reject the exemption under Sr. 734 of customs notification No. 50/2018-cus in respect of some import consignments on the ground that exporters on record are not a manufacturer of the said goods.

1.5 The adjudicating authority confirmed the duty demand by changing the classification as well as denying the exemption notification along with demand of interest and imposition of penalties, therefore, the present appeals filed by the appellant.

2. Shri Manish Jain, learned counselappearing on behalf of the appellant, at the outset,submits that the appellant have correctly classified the subject goods under Chapter Tariff Heading 7220 9022 as “Nickel-Chromium Austenite Type”. The Autenitic stainless steel is variety of stainless steel alloys which generally contains Chromium, Nickle, Manganese, Carbon, Nitrogen at times other alloying elements such as titanium, copper, etc depending upon the grade and application it is intended for. The Austenitic Stainless Steel is further divided into two subgroups: the Chromium-Nickel AISI 300 series type and the Chromium-Nickel-Manganese 200 series type. It is his submission that it is evident from the composition of imported goods that the element ‘Chromium’ predominates by weight over all the other elements, i.e., 13.006-13.050%. Further, the subject goods have sufficient content of nickel to render it completely austenitic. Thus, imported goods would fall under the category of "Nickel Chromium Austenitic type" and are therefore correctly classified by the Appellant under CTH 7220 90 22.

2.1 It is his submission that department's contention for changing the classification is that the imported stainless steel does not have nickel content from range of 4.5% to 12% which, accordingly to department is primary requirement for treating the goods as nickel austenitic stainless steel. In this regards department has relied upon websites of M/s Aalco metals ltd. (England and Wales) and M/s ASM international Ltd.This basis of challenging the classification decalred by the appellant is not correct on the face of IS Standards of Stainless Steel 'nickel austenitic stainless steel’ which can have nickel content as low as 0.20%.As per IS standard 15997; 2012 as amended N1 to N6 series of grade which are treated as nickel austenitic stainless steel for which the nickel content needs to be 1% to 6% and further for N4, N5, N6 series it can have Nickel from 0.20% to 0.95%.

2.2 Ld. Commissioner of customs has in the impugned order has also relied upon copper content and held that since the copper content in the subject goods is ranging from .80% to .85% only which is less than 1.5% as provided in N1, N2, N3 grade. Thus on that basis Ld. Commissioner of customs has held that subject goods are not nickel austenitic stainless steel. It is submitted that impugned order has gone beyond the SCN to that extent.

2.3 In any case, it is submitted that Ld. Commissioner of customs has ignored the other grade of nickel austenitic stainless steel such as N5, N6, N7 provides that the Nickel (Ni) content 0.20% to 0.95% and Copper (Cu) content 0.4% to 2.5%. Thus, it is submitted that as per the Bureau of Indian Standards (BIS), even Nickle with 1% or less than 1% and copper with .80% is classified as Austenitic Steel. It has following chemical composition:

Name	Ni	Cr
N5	0.45% - 0.95%	14.0% TO 16.5%
N6	0.25% - 0.95%	13.5% TO 16.0%
N7	0.20% - 0.95%	13.5% TO 16.0%

2.4 Without prejudice to the above, the learned Commissioner of Customs did not agree with the show cause notice for reclassifying the goods under Chapter Tariff Heading 7220 9090, therefore, he could not have decided the third classification which is not proposed in the show cause notice. Accordingly, the impugned on this ground alone is liable to be set aside.

2.5 Without prejudice to above submissions, It is submitted that in the chemical composition of the subject goods Chromium predominates by weight overall the other elements, i.e., 13- 15% and a sufficient Nickel content, so even if the subject goods are not classifiable under CTH

7220 90 22 under the category of Nickel- Chromium Austenitic Type, they will be classifiable under CTH 7220 90 21 under the "Chromium type". Reliance in this regard is placed on Note 5 of Section XV, which states that that the alloy of the base metal will be classified as an alloy of the metal which predominates by weight over other metals. The weight of Chromium predominates other metals in the subject goods and therefore the subject goods fall under the category of "Chromium type" and should be classifiable under CTH 7220 90 21.

2.6 He further submitted that as regard the eligibility of notification 50/2018-Cus, the same is denied to the appellant merely because foreign supplier is not actual manufacturer, benefit of exemption cannot be denied as the goods are admittedly covered by the COO Certificate issued. He further submits that Rules of Determination of Origin of Goods under Asia Pacific Trade Agreement Rules, 2006, it is provided that exporter need to be manufacturer.

2.7 Without prejudice to the above, he further submits that the demand is barred by limitation. Section 28(4) of the Customs Act is not invokable in the present case as there is no suppression. The period of import is from Financial Year 2018 to Financial Year 2020. The Show Cause Notice is issued on 19.04.2023 i.e. beyond two years from the date of imports. The whole case is made out based on composition of goods as provided in the Mill Test Certificate which are submitted by the appellants at the time of imports thus there is no question of suppression or mis-declaration of goods therefore, demand is barred by limitation. He further submits that the claim of classification or claim of exemption cannot be treated as mis-declaration as the issue relates to interpretation of law. In this regard he placed reliance on the case of **Daxen Agritech India Pvt. Ltd.** 2023 (12) TMI 1080 (Tri. Del.), **Commissioner of Customs**

Hyderabad vs Riddi Siddhi Bullions Ltd. 2017 (355) ELT 585 (Tri. Hyd.), **Granite India Limited** 1997 (92) ELT 84 (Tri. Mad.). He also submits that the subject goods are not liable for confiscation under Section 111(m) of the Customs Act, 1962, therefore, redemption fine is not imposable.

3. On the other hand, Shri Tara Prakash, Learned Deputy Commissioner (Authorized Representative) with Shri P. Ganesan, Learned Superintendent(Authorized Representative) appearing on behalf of the Revenue reiterates the findings of the impugned order.

4. We have carefully considered the submissions made by both the sides and perused the records.

5. We find that in the entire case there is no dispute about the fact such as the nature of goods, documentation etc. The whole case was made out for change of classification on the basis that the 1% Nickel content in the product will not qualify the imported goods as 'Nickel Chromium Austenitic Stainless Steel'. The contention of the Revenue is that to qualify as Nickel Austenitic Stainless Steel, nickel content should be ranging from 4.5% to 12%, therefore as per the department, goods are not classifiable under 7220 9022. The important point to be examined is to qualify the product namely, Nickel Chromium Austenitic Stainless Steel whether it is mandatory to have Nickel content of 4.5% to 12% or otherwise. The Revenue has solely relied upon the information available on websites of M/s Aalco metals ltd. (England and Wales) and M/s ASM international Limited wherein the range of Nickel shown is 4.5% to 12% for a product namely Chromium Nickel Austenitic Stainless Steel. However that information does not further confirm that even if the Nickel percentage is less than that the same will be categorized as Chromium Nickel

Austenitic Stainless Steel or otherwise. In this regard, the appellant have produced various authorities to substantiate their claim that even the lower percentage of Nickel content will not change, the category of the product as Nickel Chromium Austenitic Stainless Steel. In this regard, the appellant have relied upon the Indian Standard IS 15997; 2012, the said Indian Standard is reproduced below:

IS 15997 : 2012

Indian Standard

LOW NICKEL AUSTENITIC STAINLESS STEEL SHEET AND STRIP FOR UTENSILS AND KITCHEN APPLIANCES — SPECIFICATION

1 SCOPE

This standard covers the requirements for low nickel austenitic stainless steel sheet and strip for manufacture of utensils and kitchen appliances.

2 REFERENCES

The following standards contain provisions which through reference in this text, constitute provisions of this standard. At the time of publication, the editions indicated were valid. All standards are subject to revision and parties to agreements based on this standard are encouraged to investigate the possibility of applying the most recent editions of the standards indicated below:

IS No.	*Title*
228 (in various Parts)	Methods for chemical analysis of steels
1387 : 1993	General requirements for the supply of metallurgical materials (*second revision*)
1608 : 2005/ ISO 6892 : 1998	Metallic materials — Tensile testing at ambient temperature (*third revision*)
1762 (Part 1) : 1974	Code for designation of steels: Part 1 Based on letter symbols (*first revision*)
1956 (Part 4) : 1975	Glossary of terms relating to iron and steel: Part 4 Steel sheet and strip
10175 (Part 1) : 1993/ISO 8490 : 1986	Mechanical testing of metals — Modified Erichsen cupping test — Sheet and strip: Part 1 Thickness up to 2 mm (*first revision*)

3 TERMINOLOGY

For the purpose of this standard, the definitions given in IS 1956 (Part 4) shall apply.

4 SUPPLY OF MATERIAL

4.1 General requirements relating to the supply of material shall conform to IS 1387.

4.2 The particulars to be specified by the purchaser while ordering for steels covered by this standard shall be as given below:

a) Grade designation;
b) Form;
c) Nominal dimensions — Thickness, width and length (for cut length);
d) Surface finish (*see* **11**); and
e) Edge condition (*see* **13**).

5 MANUFACTURE

Unless otherwise agreed to in the order, the processes used in making the steel shall be left to the discretion of the manufacturer. However, when so desired, the purchaser shall be informed of the steel making process.

6 FREEDOM FROM DEFECTS

Stainless steel product shall be free from harmful defects, such as scale, rust, blisters, laminations cracked edges and seams, pipes and segregation.

7 HEAT TREATMENT

Material shall be supplied in solution annealed condition.

8 CHEMICAL COMPOSITION

8.1 The ladle analysis shall be as given in Table 1. The analysis of steels shall be carried out either by the method specified in IS 228 and its relevant parts or any other established instrumental/chemical method. In case of any dispute the procedure given in IS 228 and its relevant parts shall be referee method. However, where method is not given in IS 228 and its relevant parts, the referee method shall be as agreed to between the purchaser and the manufacturer.

8.1.1 *Check Analysis*

The check analysis shall be carried out on the finished product. The permissible variation of the check analysis for the limit specified in Table 1 shall be as given in Table 2.

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Table 1 Chemical Composition
(*Clauses* 8.1, 8.1.1 *and* 10.1)

Sl No.	Letter Symbol [*see* IS 1762 (Part 1)]	Grade Designation	Constituents, Percent								
			C *Max*	Si *Max*	Mn	Ni	Cr	S *Max*	P *Max*	Cu	N
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)
i)	X10Cr15Mn9Cu2Ni1N	N 1	0.12	0.75	8.5-10.5	1-2	14.5-16.0	0.03	0.08	1.5-2.5	0.08-0.2
ii)	X8Cr16Mn8Cu2Ni2N	N 2	0.10	1.00	6.5-9.0	1.5-3.5	15.5-17.0	0.03	0.07	2-4	0.10-0.25
iii)	X8Cr16Mn7Cu2Ni4N	N 3	0.09	0.75	6-8	4-6	16.0-17.5	0.03	0.07	1.5-2.5	0.05-0.15

NOTE — Elements not specified shall not be intentionally added to the steel without the agreement of purchaser except for the finish of the cast. All precautions must be taken to avoid addition of elements from scrap metal and raw material used in production of elements likely to affect Mechanical characteristics as well as the suitability for use of steel for utensils.

Table 2 Permissible Variation Between Specified Analysis and Check Analysis
(*Clauses* 8.1.1 *and* 10.1)

Sl No.	Element	Permissible Variation in Product Analysis, Percent
(1)	(2)	(3)
i)	Carbon	+0.01
ii)	Silicon	+0.05
iii)	Manganese	±0.06
iv)	Nickel	±0.07
v)	Chromium	±0.20
vi)	Sulphur	+0.005
vii)	Phosphorus	+0.01
viii)	Copper	±0.10
ix)	Nitrogen	±0.01

NOTE — In one cast the deviation may occur over the upper value or under the lower value of the specified range in Table 1.

9 MECHANICAL PROPERTIES

9.1 Sample Plan

At least one sample shall be taken from each cast per heat treatment batch as per 7.

9.2 Tensile Test

Test samples shall be cut in such a manner that deformation is avoided as far as possible.

9.3 When tested in accordance with IS 1608, the mechanical properties shall be as given in Table 3.

9.4 Erichsen Cupping Test

9.4.1 One Erichsen cupping test as per IS 10175 (Part 1) shall be carried out, if agreed to between the purchaser and the supplier.

9.4.2 Cupping test shall be applicable only for thickness from 0.20 to 1.25 mm.

9.4.3 *Requirements*

The minimum Erichsen values shall be as given below:

Thickness mm	*Average Depth of Cupping* mm, *Min*
0.20 to 1.25	10.0

10 RE-TESTS

10.1 Re-tests for Product Analysis

If the results of the product analysis do not meet the composition requirements given in Tables 1 and 2, unless otherwise agreed to between the purchaser and the manufacturer, two new samples shall be taken from different pieces from the same cast. Should the two analysis satisfy the requirements, the lot represented shall be accepted. Should either of the samples fail, the material shall be taken as not complying with this standard.

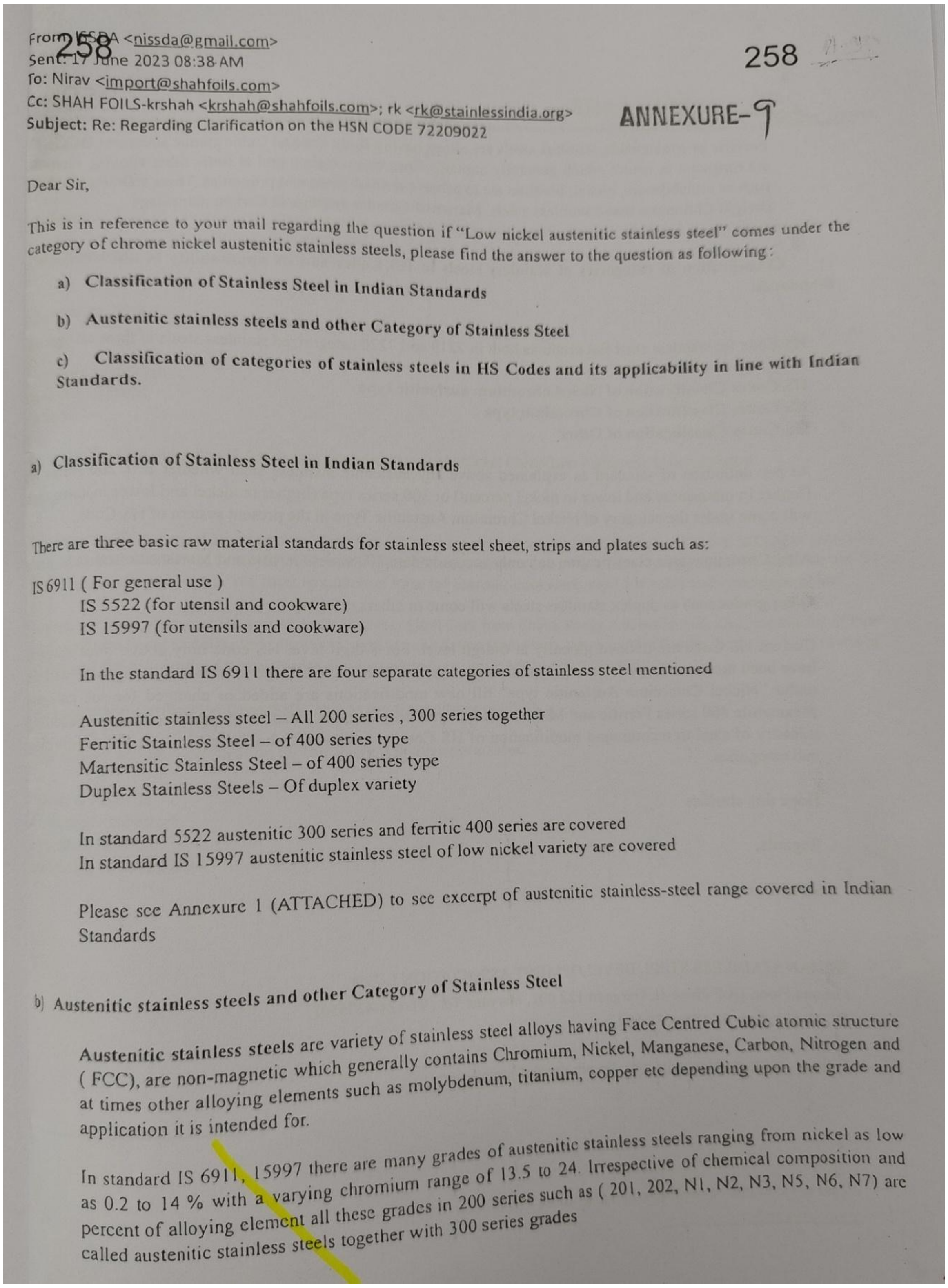
10.2 Re-tests for Mechanical Properties

If the sample selected under **9.1** fails to meet the requirement as given in Table 3, two further samples

Table 3 Mechanical Properties in Annealed/Softened Condition
(*Clauses* 9.3 *and* 10.2)

Sl No.	Letter Symbol [*see* IS 1762 (Part 1)]	Grade Designation	0.2 Percent Yield Strength MPa, *Min*	Tensile Strength MPa, *Min*	Percentage Elongation *Min* GL= 50 mm
(1)	(2)	(3)	(4)	(5)	(6)
i)	X10Cr15Mn9Cu2Ni1N	N 1	345	650	40
ii)	X8Cr16Mn8Cu2 Ni2N	N 2	310	650	40
iii)	X8Cr16Mn7Ni4Cu2N	N 3	275	600	40

In the above Indian Standard and table appended thereto in Serial No. I against the goodsdesignation N1 the Nickel content is shown as 1-2%. Therefore, on the basis of this most authentic Indian Standard on Austenitic Steel, the Nickel content can also be 1% to 2% against N1, therefore, the contention of the Revenue that the only those steel which contain 4.5% to 12% is austenitic steel is incorrect as the said contention is contrary to the specification provided under Indian Standard IS 1597:2012. The appellant have also relied upon an E-mail clarification given by India Stainless Steel Development Association which is scanned below:



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ANNEXURE-9

From: ISSDA <nissda@gmail.com>
Sent: 17 June 2023 08:38 AM
To: Nirav <import@shahfoils.com>
Cc: SHAH FOILS-krshah <krshah@shahfoils.com>; rk <rk@stainlessindia.org>
Subject: Re: Regarding Clarification on the HSN CODE 72209022

Dear Sir,

This is in reference to your mail regarding the question if "Low nickel austenitic stainless steel" comes under the category of chrome nickel austenitic stainless steels, please find the answer to the question as following:

a) **Classification of Stainless Steel in Indian Standards**

b) **Austenitic stainless steels and other Category of Stainless Steel**

c) **Classification of categories of stainless steels in HS Codes and its applicability in line with Indian Standards.**

a) **Classification of Stainless Steel in Indian Standards**

There are three basic raw material standards for stainless steel sheet, strips and plates such as:

IS 6911 (For general use)
IS 5522 (for utensil and cookware)
IS 15997 (for utensils and cookware)

In the standard IS 6911 there are four separate categories of stainless steel mentioned

Austenitic stainless steel – All 200 series , 300 series together
Ferritic Stainless Steel – of 400 series type
Martensitic Stainless Steel – of 400 series type
Duplex Stainless Steels – Of duplex variety

In standard 5522 austenitic 300 series and ferritic 400 series are covered
In standard IS 15997 austenitic stainless steel of low nickel variety are covered

Please see Annexure 1 (ATTACHED) to see excerpt of austenitic stainless-steel range covered in Indian Standards

b) **Austenitic stainless steels and other Category of Stainless Steel**

Austenitic stainless steels are variety of stainless steel alloys having Face Centred Cubic atomic structure (FCC), are non-magnetic which generally contains Chromium, Nickel, Manganese, Carbon, Nitrogen and at times other alloying elements such as molybdenum, titanium, copper etc depending upon the grade and application it is intended for.

In standard IS 6911, 15997 there are many grades of austenitic stainless steels ranging from nickel as low as 0.2 to 14 % with a varying chromium range of 13.5 to 24. Irrespective of chemical composition and percent of alloying element all these grades in 200 series such as (201, 202, N1, N2, N3, N5, N6, N7) are called austenitic stainless steels together with 300 series grades

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6/26/23, 2:05 PM Mail - Samarth Katare - Outlook

Ferritic or Martensitic stainless steels are alloys having Body Centred Cubic atomic structure (BCC) and are magnetic in nature which generally contains Chromium, carbon and at times other alloying elements such as molybdenum, nickel, titanium etc to achieve desired grade and properties. These stainless steels are straight Chromium based stainless steels. Martensitic grades are high in Carbon percentage

c) Classification of categories of stainless steels in HS Codes and its applicability in line with Indian Standards.

HS Code for stainless steel flat products both in 7219 and 7220 categorized stainless steels in three categories

HS Codes Classification of Nickel chromium austenitic type
HS Codes Classification of Chromium type
HS Codes Classification of Other

As per definition of standard as explained above any austenitic stainless steel whether it is 200 series type (higher in manganese and lower in nickel percent) or 300 series type (higher in nickel and lower in manganese) will come under the category of Nickel Chromium Austenitic Type in the present system of HS Code.

Also, Chromium type classification can only accommodate 400 series (ferritic and Martensitic stainless steels)

Other grades such as duplex stainless steels will come in others category

Current HS Code are defined globally at 6-digit level. For 8-digit level HS code only above three categories have been mentioned. All austenitic type stainless steels whether low or high in nickel or manganese will come under "Nickel Chromium Austenitic type" till new modifications are added or changed for sub categories. Meanwhile 400 series Ferritic and Martensitic type can only come in Chromium type. We have proposed to the ministry of steel to recommend modification of HS Code to further add the 8 digit lines for better division of sub categories.

Hope this clarifies

Regards,

Rohit Kumar

INDIAN STAINLESS STEEL DEVELOPMENT ASSOCIATION L-22/4,
Ground Floor, DLF Phase-II, Gurgaon 122 002, Haryana Tel : 91-124-4375501,
502 & 503, Fax: 91-124 4375 509

Website: www.stainlessindia.org , Email: nissda@gmail.com

From the above clarification particularly second para in para b, it was clarified that in IS 15997:2012, there are many grades on Austenitic Stainless Steel ranging from Nickel as low as 0.2% to 14% with a varying Chromium range of 13.5% to 24%. It was further clarified that irrespective of chemical composition and percentage of alloying element of these grades in 200 series. (such as 201, 202, N1, N2, N3, N5, N6, N7 are called austenitic stainless steels together with 300 series grades). With this specific clarification, it is seen that in austenitic stainless steel, the Nickel content can vary as low as 0.2% to 14%, whereas in the present case the goods contain 1.010-1.060% and Chromium is 12.5%, therefore, it is clearly in compliance to the specification for classifying the product as 'Austenitic Nickel Chromium Stainless Steel'. We find that department's reliance on the websites of M/s Aalco metals ltd. (England and Wales) and M/s ASM international Limited cannot be a conclusive factor to classify the product as other than Austenitic Nickel Chromium Stainless Steel for the reason that from the said evidence it is clear that not only those products which contain 4.5% to 12% Nickel will fall under Austenitic Stainless Steel but even the low content Nickel in Stainless Steel will also fall under Austenitic Stainless Steel. Therefore, the mere reliance on the websites of M/s Aalco metals ltd. (England and Wales) and M/s ASM international Limited is incorrect for arriving at classification. Therefore, on the fact of the case which is not under dispute and on the authority mainly Indian Standards, the goods imported by the appellant are correctly classifiable under Chapter Tariff Heading 7220 9022 as Nickel Chromium Austenitic Type.

6. Without prejudice to the above, we also find that the adjudicating authority has not confirmed the classification proposed in the show cause notice. The department in the show cause notice in respect of Hot Rolled Nickel Chromium Austenitic Type was proposed to be classified under 7220 1090 and Cold Rolled Nickel Chromium Austenitic Type was proposed to be classified under 7220 9090 whereas the adjudicating authority decided the classification of both the product under 7220 1229 and 7220 2029 respectively. It is a settled legal position that if the goods cannot be classified under a classification which has been proposed in the show cause notice, then even if its correct classification is different than the classification claimed by the assessee, the entire show cause notice fails on this point itself. In this regard, we take support from following judgments:

- Sedna Impex India Pvt Ltd. 2017 (347) ELT 317 (Tri. Chennai)
- Maruti Fabrics Impex 2016 (343 ELT 963 (Tri.)
- Ravi Dyeware Co. Ltd. 2014 (301) ELT 421 (Tri.)
- Samar Polytex Ltd. 2009 (238) ELT 621 (Tri. Del.)

In view of the above judgments, it is settled that the department cannot travel beyond the proposals made in the show cause notice. In the present case the impugned order travelled completely beyond the classification proposed in the show cause notice. Therefore, on this ground also, the impugned orders are not sustainable.

As regard the submission made by learned counsel regarding demand being time barred, we find that the entire case is based upon Mill Test Certificate or the documents produced by the appellant. The Nickel content was very much available in the Mill Test Certificate, therefore there is no suppression on the part of the appellant. Since the case was made out on the basis of Nickel content which was available before the department, the department could have taken the action within the normal period. In these facts, since no suppression of fact is there and the show cause notice was issued beyond two years from the import, the entire demand is time barred. In this regard, the judgments cited by the appellant support their case on limitation also. Some judgments are reproduced below:

- **DaxenAgritech India Pvt. Ltd. vs Principal Commissioner of Customs, New Delhi [2023-TMI-1080-CESTAT-DEL]**

9. The next question which arises in the present appeal is the invocation of the extended period of limitation under section 28(4) of the Act. The submission of the learned Counsel is that the issue of classification of the products in question was within the knowledge of the department at the time of clearing of the subject goods at the relevant time of imports as the department itself had filed an appeal against the Order-in-Appeal dated 17.02.2014 before the Tribunal and therefore the allegations of suppression are not made out and so the extended period of limitation cannot be invoked. The learned Authorised Representative for the revenue have submitted that the period of limitation has been rightly invoked and cited several judgements in support thereof.

10. We find that show cause notice was issued on 2.7.2018 for the period 03.07.2013 to 03.03.2018, covering several bills of entries as given in Table-A above which is per Annexure-A to show cause notice. In the appeal filed against the first assessment order dated 27.07.2012, *the Commissioner (Appeals) vide order dated 16.08.2012 remanded the matter to the adjudicating authority to pass suitable order. On remand, the Adjudicating Authority vide order dated 24.05.2013 once again confirmed the classification under CTH 21069099, however, the appellant challenged the said order and the Commissioner (Appeals) vide order dated 17.02.2014, set aside the Order-in-Original and classified the products under CTH 30039011 and thereafter till the final order dated 10.01.2018 was passed by the Tribunal that the product in question is to be classified as food supplements, the appellant was under a bonafide belief and filed the bills of entry, accordingly in terms of the order of the Commissioner (Appeals) dated 16.08.2012 and thereafter the order dated 17.02.2014. In view of the proceedings which was pending since 2012 and the department itself had preferred an appeal, it cannot be said that the department was not aware of the classification of the products as declared in the instant bills of entry by the appellant and therefore no fault can be found on the part of the appellant as 9 out of the 10 bills of entries were filed before the final order was passed by the Tribunal on 10.01.2018 and the Order-in-Appeal by the Commissioner (Appeals) was holding the field. In this regard we would like to refer to the observations made by this Tribunal in an appeal filed by the Customs Broker of the appellant against the present impugned order as under:*

> *"11. In the order, the Principal Commissioner obfuscated the fact that the final order of this Tribunal was passed on an appeal by the revenue as the Commissioner (Appeals) had decided the classification in favour of the importer. Until the final order was passed by this Tribunal on 10.1.2018, the order of the Commissioner was binding on both sides. Of the bills of entry listed in the impugned order, all except one were filed before the final order was passed by this Tribunal. The last one was filed soon after the final order was passed. There is nothing on record to show that appellant was made aware of this order by the revenue and told to classify the goods accordingly. It is not unlikely that it took some time for the appellant to come to know about the final order. It may be pointed out that the SCN dated 02.07.2018 was issued in the present proceedings six months after the final order. Therefore, in respect of nine bills of entry, the importer and the appellant were correct in classifying the goods as per order of the Commissioner (Appeals) and the officers were correct in clearing the goods for home consumption accordingly. The Principal Commissioner is in error in holding in the impugned order that the importer and the appellant (in importer"s behalf) should have filed bills of entry contrary to the order of the Commissioner in good faith.*
>
> *12. There is a well established practice in the department to deal with cases with the order which holds the field is against the revenue and an appeal is pending with the superior court or Tribunal. SCN are issued periodically to protect revenues interest and they are transferred to the call book which are then decided after the order of the superior Court or Tribunal is received. In these bills of entry also, after the order of the Commissioner (Appeals), SCNs could have been issued and transferred to Call Book and decided after this Tribunal passed the final order. However, until the final Order of this Tribunal was issued, the order of Commissioner (Appeals) was binding both on the importer and the officers."*

11. The aforesaid observations of the Tribunal (against the present impugned order), holds the field that the appellant was justified in adopting the classification while filing the bills of entry. This is sufficient to turn down the revenue"s contention about the existence of wilful suppression of facts or deliberate mis-statement on behalf of the appellant. For these reasons, the revenue was not justified in invoking the extended period of limitation to fasten the liability on the appellant when the revenue is aware of the litigation with the appellant on the issue of classification of the very same products and taking steps to challenge the same before the higher forum. Thus it cannot be said that the appellant has in any manner, suppressed or mis-stated the facts wilfully to evade the payment of duty.

12. The law on invocation of extended period of limitation is well settled. Mere omission or merely classifying the goods/services under incorrect head does not amount to fraud or collusion or wilful statement or suppression of facts and therefore the extended period of limitation is not invocable. Reliance is placed on the decision of the Tribunal in Incredible Unique Buildcon Private Ltd. 2022 (65) GSTL 377.

> *"17. We are unable to find any proof of show cause notice or from the impugned order. intent to evade either from the Mere omission or merely classifying its services under an incorrect head does not amount to fraud or collusion or wilful misstatement or suppression of facts. The intention has to be proved to invoke extended period of limitation. Supreme Court has delivered the judgment in the case of Larsen & Toubro dated 20 August, 2015, prior to which there was no clear ruling that services which involved supply or deemed supply of goods could only be classified under WCS. The appellant had been classifying its services (which also involved supply/use of goods) under the CICS and Revenue never objected to it and, therefore, the appellant could have reasonably believed it to be the correct head and continued to file returns accordingly and paying duty. Once the returns are filed, if Revenue was of the opinion that the self-assessment of service tax and the classification was not correct, it could have scrutinized the returns and issued notices within time. The show cause notice was issued on 30 September, 2015 for the period covered October, 2010 to June, 2012, which is clearly beyond the normal period of limitation. Therefore, although Revenue is correct on merits, the demand is time barred and, therefore, cannot sustain. For the same reason, the penalties imposed upon the appellant under Sections 77 and 78 also cannot be upheld."*

13. The Supreme Court in Nizam Sugar Factory 1995 (78) ELT 401 has categorically laid down that where facts are known to both the parties, the omission by one to do what he might have done, and not that he must have done, does not render it suppression. Thus when all the facts are before the department as in the present case then there would be no wilfulmis-declaration or wilful suppression of facts with a view to evade payment of duty. The relevant para from the judgement in Nizam Sugar Factory (supra) is quoted below:-

> *"4. Section 11A empowers the Department to re-open proceedings if the levy has been short-levied or not levied within six months from the relevant date. But the proviso carves out an exception and permits the authority to exercise this power within five years from the relevant date in the circumstances mentioned in the proviso, one of it being suppression of facts. The meaning of the word both in law and even otherwise is well known. In normal understanding it is not different that what is explained in various dictionaries unless of course the context in which it has been used indicates otherwise. A perusal of the proviso indicates that it has been used in company of such strong words as fraud, collusion or wilful default. In fact it is the mildest expression used in the proviso. Yet the surroundings in which it has been used it has to be construed strictly. It does not mean any omission. The act must be deliberate. In taxation, it can have only one meaning that the correct information was not disclosed deliberately to escape from payment of duty. Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression."*

13.1 Without multiplying too many decisions on the principle justifying or rejecting the invocation of the extended period of limitation, we would just refer to the citations:

- *2004 (166) ELT 151 (SC) - Hyderabad Polymers (P) Ltd., vs. Commissioner of Central Excise, Hyderabad*
- *2006 (197) ELT 465 (SC) – Nizam Sugar Factory vs. Collector of Central Excise, Andhra Pradesh*

- *2004 (164) ELT 236 (SC) – ECE Industries Ltd., vs. Commissioner of Central Excise, New Delhi.*
- *2003 (153) ELT 14 (SC) P&B Pharmaceuticals (P) Ltd., vs. Collector of Central Excise*
- *2015 (324) ELT 8 (SC) – Caprihans India Ltd., vs. Commissioner of Central Excise, Surat*

14. We have also considered the decisions cited by the learned Authorised Representative for the revenue on the issue of extended period of limitation, however, we feel that in the facts of the present case the same would not be applicable for the simple reason that the earlier proceeding on the subject matter (Order in Original dated 27.7.2012 annexed as „Annexure B" in the Appeal paper book) was decided without allegation of suppression and mis-statement of material facts, then in the subsequent show cause notice, it cannot be said that there was any suppression on the statement of facts by the appellant. We, therefore conclude that the revenue cannot invoke the extended period of limitation under section 28(4) of the Act, hence the show cause notice dated 2.07.2018 is barred by limitation for the period beyond the normal period."

- **Granite India limited vs Collector Central Excise, Coimbatore – 1997 (92) ELT 84 (Tri. – Mad.)**

"6. *We have considered the submissions of both the sides. We find that in order to constitute a wilful suppression, there must be the material to show that the appellant knowing fully well that he was required to furnish a particular fact to the Department, failed to furnish the same with an intention to evade payment of duty. In this case, it is seen that there are divergence of views as to whether this activity carried out by the appellant amounts to manufacture or not. It is also seen that when this decision of the Collector (Appeals) was taken up before the Tribunal, the Tribunal while holding against the assessee took note of an earlier decision of the Tribunal reported in 1995 (80) E.L.T. 145. In that decision, one of the member in fact had held that this does not amount to manufacture as could be seen from Para 5 of the abovesaid order. Para 5 of the order reads as follows :-*

> *5. We have considered the submissions made by both sides with reference to the facts and perused the records. We also take note of the submissions made by the appellant's Counsel that the period of dispute relates to prior to 17-3-1985 since the new Tariff Entry 23E was introduced from 17-3-1985. We find that this issue was considered in the case of Fine Marble and Minerals (P) Ltd. (supra) and this view was upheld by the Supreme Court since the appeal filed by the Department was dismissed as it was rightly argued by the appellant's Counsel. It is not confined to slabs but also the marble tiles. Because in Para 7 of the order, it was clearly held that the original identity continues despite the several processes undergone. In the trade circles, marble slabs or the marble tiles that are manufactured after cutting the edges, trimming, polishing and other processes continue to be known as marble. Unless it is proved that by virtue of the sawing process, a different or distinct commodity comes into existence, the process cannot be equated to manufacture. Further, in Para 8 of the said order, it was observed that the manufacture of an article known as marble could be said to be complete only after all or most of these processes are undergone to result in a distinctly different commodity. The issue was decided in favour of the assessee mainly on the ground that Department has not established with any material evidence to show that marble slabs could be considered as a different and distinct commercial commodity. It the instant case also the Deptt. has not established with any evidence how it is understood in commercial parlance to show that the items are different and distinct from the original and it is not mere cuttings, edging or trimming but something more than has taken place to consider as the process of manufacture and altogether new item emerged. We are not concerned with*

> *the logical analysis or the personal opinion of the authorities below in considering the issue but material evidence. Even after passing the order in the case of Fine Marble & Minerals and same was approved by the Supreme Court, the Department has not taken any steps to substantiate its contention with evidence. In the case of Indian Granite Ltd. referred to by the Departmental Representative, we find in that matter the party pleaded that it does not amount to manufacture and alternatively it was pleaded that if it amounts to manufacture and it should be deemed as handicrafts. The Tribunal in Para 14 of the said judgment had dealt with at length and in the last line in Para 14, the Tribunal has observed that "we may note that the consultant for the appellants also did not put forward any serious arguments in this regard before us." Hence, the facts and ratio are distinguishable as it was rightly considered in the case of Associated Stone Industries.*

It is further seen that the Karnataka High Court in the case of M/s. Foredg Granite Pvt. Ltd. v. State of Karnataka also held that this activity does not amount to manufacture. In these circumstances, the appellants certainly had grounds to entertain a bona fide belief that the goods were not excisable. We, therefore hold that for this reason, it cannot be said that there was a wilful suppression on the part of the appellant.

7. *In regard to valuation, it is seen that the District Industrial Officer had given a certificate and the appellants were guided by the abovesaid certificate while declaring that the value of the plant and machinery is below Rs. 20 Lakhs. With respect to the imported machinery certain items were shown as surplus and spares. Therefore, they had not taken the same into reckoning on the bona fide belief that the value of the same is not required to be added to the value of the machine in question. As it is, we find on a perusal of the invoice that the value of all those parts could not have been included and only certain items were required to be included. He had also referred us to the decision of the Government of India in order in revision No. 299/1978 dated 6-4-1978 reported in 1979 (4) E.L.T. (J 105) (G.O.I.) wherein the Government of India stated that one of the determining factor for exemption will be the certificate issued by the District Industrial Officer. In this view, we find that the appellants also had not kept back any information from the notice of the Department with respect to the machinery installed as they had maintained all their records. In view of the above facts, we are of the view that it cannot be said that there was any wilful suppression on the part of the appellant and no mala fide can be attributed to the appellants in the facts and circumstances of this case which we have already narrated above.*

8. *In the premises, we are of the view that since the demand is not contested on merits for a period within six months, we confirm the duty with respect to the period which is within a period of six months from the date of receipt of Show Cause Notice. But the duty beyond the period of six months from the date of receipt of Show Cause Notice is barred by limitation and the demand of the same in terms of the impugned order is hereby set aside. In the facts and circumstances, we have already come to the conclusion that there are no mala fide on the part of the appellant. We set aside the penalty imposed on the appellants. The appeal is allowed partially in the above terms."*

From the above decisions, coupled with the discussion made on the facts of the case, we are of the view that the demand is not sustainable on limitation also.

7. As per our discussion and finding made herein above, the impugned orders are not sustainable, hence, the same are set aside. Appeals are allowed with consequential relief, if any, in accordance with law

(Pronounced in the open court on 01.05.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Neha