CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT No. I

Customs Appeal No.70025 of 2023

(Arising out of Order-in-Appeal No.784-Cus/APPL/LKO/2022 dated 03/10/2022 passed by Commissioner (Appeals) Customs, Central Excise & CGST, Lucknow)

Commissioner of Customs (Preventive), Lucknow

.....Appellant

(Customs, Commissionerate, Lucknow)

VERSUS

M/s Accumen Laminators LLP, **....Respondent**

(Khasra No.529, Araji No.2283,
Vishayakpur, Rania, Kanpur-209206)

APPEARANCE:

Smt Chitra Srivastava, Authorised Representative for the Appellant
None, for the Respondent

CORAM: **HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)**

FINAL ORDER NO.70276/2025

DATE OF HEARING & DECISION : 20 February, 2025

SANJIV SRIVASTAVA:

This appeal is directed against Order-in-Appeal No.784-Cus/APPL/LKO/2022 dated 03/10/2022 passed by Commissioner (Appeals) Customs, Central Excise & CGST, Lucknow. By the impugned order following has been held:-

> *"05. I have carefully gone through the case records and the submissions of the appellant. In the present appeal, it is to decide whether the test report of IIT, Kanpur prevails over the CRCL, New Delhi's test report or otherwise.*
>
> *06. The appellant had imported 'Aluminium Foil' vide Bill of Entry No. 4685607 dated 05.01.2018. As per Notification*

No. 23/2017-Customs (ADD) dated 16.05.2017, Anti-Dumping Duty was leviable on 'Aluminium Foil', having thickness ranging from 5.5 micron to 80 micron.

07. In order to ascertain the thickness of the Aluminium foil, sample of the imported goods was sent to IIT, Kanpur. After necessary testing of the sample, the Department of Mechanical Engineering, IIT, Kanpur in their test report dated 25.01.2018 reported the thickness of the said imported goods ie. Aluminium Foil' as 6.152 micron. Accordingly the goods under import was assessed levying anti dumping duty and imposing penalty for mis declaration of goods. On party's request the samples were also sent to the CRCL, New Delhi for re-testing. I find from records that in the test report dated 21.03.2018 of CRCL, New Delhi, the thickness of the Aluminium Foil was found as 5.3 micron.

08. In view of the above, I am of the considered view that IIT, Kanpur's said test report was more reliable and authentic based on scientific method/calculation as compared to CRCL, New Delhi's test report. Therefore, the adjudicating authority had rightly finalized the assessment of the said Bill of Entry No. 4685667 dated 05.01.2018 on the basis of IIT, Kanpur's said test report, resulting in levying of Anti-Dumping Duty & IGST on the import consignment and appropriately confirmed the said demand of differential duty.

09. Now the question is, which of the two reports should be given credence? In my considered view had the importer agreed to the test report of the IIT, credence could have been given such report for finalization of the test report but if the importer did not agree to this report of IIT and sought re-testing from CRCL, New Delhi, it was incumbent upon the department to accept the re-test *report of the CRCL, New Delhi and not the report of IIT, Kanpur. Or still better would have been to refer the testing to the referral lab of the CRCL at Ghaziabad for conclusive third test, in view of the differing reports of the IIT, Kanpur and CRCL, New Delhi, which has not been done in this case. In view of this giving credence to the report of the CRCL, New Delhi, I find that this is not a case of levying anti dumping duty. As regards the penalty I find it very strange that penalty has been mechanically imposed in a matter such as this, where the appellant had declared the thickness of the foil as 5.3 micron on the basis of the invoice of the foreign exporter, thus, had not committed any impropriety. Needless to say that when the very demand of duty does not sustain the question of imposition of penalty too does not sustain."*

2.1 Respondent imported consignment of 35764.40 kgs of Aluminum Foil vide Bill of Entry No.4685677 dated 05.01.2018 through ICD Panki, Kanpur. A sample of imported goods was drawn and was sent to IIT, Kanpur to ascertain thickness of aluminum foil, who vide test report dated 25.01.2018 reported that thickness of aluminum foil is 6.152 microns. Another sample was sent to CRCL, New Delhi for testing and CRCL vide their report dated 21.03.2018 reported that thickness of aluminum foil to 5.3 microns.

2.2 Respondent vide letter dated 07.02.2018 informed that they have imported the same goods from the same supplier vide Bill of Entry No.3828393 dated 01.11.2017 from ICD JRY, Kanpur wherein samples were drawn and sent to CRCL, New Delhi. CRCL in respect of this consignment found the thickness of the sample to 5.3 microns. Party therefore requested for re-testing of the samples. Additional Commissioner (P) Customs is competent authority in terms of Circular No.30/2017-Cus dated 18.07.2017 allowed retesting and CRCL, New Delhi was approved for re-testing. The second sample was send to CRCL, New Delhi for re-testing. Vide Test memo dated 14.03.2018 CRCL, New Delhi has submitted their report.

2.3 On the basis of report of IIT, Kanpur the assessment was finalized resulting in levy of Anti-dumping duty totaling to Rs.44,36,906/- on the import consignment. This amount was realized vide challan dated 21.05.2018 by en-cashing Bank guarantee finalized by the respondent. Respondent filed writ petition before Hon'ble High Court of Allahabad and High Court directed to issue a show cause notice for finalizing the assessment.

2.4 Show cause notice dated 20.10.2021 was issued to the appellant proposing to finalize the assessment of the Bill of Entry on the basis of report submitted by IIT, Kanpur. The said report and recovery of the aforesaid differential duty along with interest under Section 28 and Section 28AA of the Customs Act, 1962, amount already realized was proposed to be appropriated against the said differential duty and penalty was also proposed.

2.5 The said show cause notice was adjudicated as per the Order-in-Original dated 11.02.2022 by holding as follows:-

"ORDER

> *(i) I finalized assessment of Bill of Entry No. 4685677 dated 05.01.2018 on the basis of report of the Department of Mechanical Engineering, IIT, Kanpur wherein the thickness of the Aluminium foil was found to be 6.152 microns.*
>
> *(ii) I confirm the demand of differential Duty amounting to Rs. 44,36,906/- (Rs. Forty four lakh thirty six thousand nine hundred and six) in terms of Notification No. 23/17-Customs (ADD) dated 16.05.17 alongwith interest under Section 28AA of the Customs Act, 1962.*
>
> *(iii) Since Rs. 44,96,972/- as already has been realized against the differential duty amount to Rs. 44,36,906/-(Rs. Forty four lakh thirty six thousand nine hundred and six), hence I order for appropriation of the same.*

(iv) I impose penalty of Rs. 44,36,906/-under Section 114A of the Customs Act, 1962."

2.6 Aggrieved respondent have filed appeal before Commissioner (Appeals) which has been allowed as per the impugned order.

2.7 Aggrieved revenue have filed this appeal basically stating that the assessment should have been finalized on the basis of test report of IIT, Kanpur.

3.1 I have heard Smt Chitra Srivastava learned Authorised Representative appearing for the revenue. Despite notice none appeared for the respondent.

4.1 I have considered the impugned orders along with the submissions made in appeal and during the course of argument.

4.2 Revenue have raised the following grounds for preferring this appeal:-

"a. No objection was raised by the party when the sample of first test was forwarded to IIT-Kanpur.

b. Para 2 (f) of the Circular No 30/2017-Cus dated 18.07.2017 authorises the adjudicating authority for accepting report of re-testing. This para is reproduced as under-

"The competent authority shall consider the results of the re-test without prejudice to the results of the first case .In case there is a variation in the result of first test and re-test, the competent authority shall take the decision relying upon either of the tests specifying the grounds in writing for decision so taken. In case the competent authority is unable to decide whether to rely upon the first or the re-test results, then it may order a second re-test provided the consignment is still within the customs control, However, this option should not be resorted to in every case of variation between the first test and re-test results.

The competent authority/the adjudicating authority in the instant matter has the option to accept one of the two *tests reports after specifying ground of acceptance, Here the adjudicating authority found that test report of the Department of Mechanical Engineering, IIT, Kanpur was detailed and exhaustive in nature. As such thickness of the sample of Aluminum foil was determined in the Department of Mechanical Engineering of IIT Kanpur by using standard methods:-*

1. Gravimetric Method

2. Field Scanning Electron Microscopy (FSEM)

The value of foll thickness was determined by using Field Scanning Electron Microscopy (FSEM) After performing several test, the average thickness was found to be '6.152 microns' (uncertainty = ± 3%). Hence, the average density of the foil sample was found to be p= 2.345 g/cm³ Since the average density was found to be smaller than pure Aluminum, the percentage composition of the foil was also tested. It was found that there are traces of other chemicals such as carbon, oxygen, iron and silicon in the foil sample. For calculating thickness of Aluminum foll, IIT Kanpur had referred IS 15392:2003,IS 8970:1991, Bureau of Indian Standards Doc:MTD7(4981), 2009 which is a BIS Standard for following a uniform policy for independent testing of Aluminium and Aluminium Alloy Bare Foil.

Accordingly, the adjudicating authority had finalized the assessment of Bill of Entry No.4685677 dated 05.01.2018 on the basis of test report of IIT, Kanpur and had not sent the sample for third testing.

Hence, in the light of above, in the instant case, it is not incumbent upon the department to accept the re-test report of the CRCL, New Delhi. The report submitted by the IIT, Kanpur appears not to be questionable."

4.3 Admittedly, the request for re-testing was as per Circular No.30/2017 dated 18.07.2017 was allowed by the Competent Authority and CRCL was approved for retesting vide their letter No.VIII (25)100-Tech/Exemption-Waivers/2017-18 dated 14.03.2018 and thereafter the sample was sent to CRCL vide test memo dated 14.03.2018. The fact that appellant has objected to the report off the IIT, Kanpur is quite evident as per letter dated 07.02.2018 vide which respondent has informed that in respect of import of same goods from the same supplier through Kanpur. The samples has been tested by CRCL, New Delhi and it has been reported that the thickness of aluminum foil was 5.3 microns. Taking note of the above objection raised and competent authority allowed for retesting of the samples at CRCL, New Delhi and the resting of the samples by CRCL reported the thickness of consignment of aluminum foil imported at ICD Panki, Kanpur found to be 5.3 microns.

4.4 No cogent ground has been stated by the adjudicating authority in Order-in-Original or by the revenue in their appeal for not accepting the CRCL report. It is also not understood why in the first time the samples drawn were sent to IIT, Kanpur whereas the samples drawn at the same time at ICD JRY was sent to CRCL for testing. When the test facilities are available at the CRCL, New Delhi - A laboratory of the Customs for the purpose of causing such tests then in case test should have been got conducted by the said laboratory only. Neither IIT Kanpur nor the imported goods got tested from their find mention in the Annexure attached to the circular No 43/2017-Cus dated 16.11.2017 or 11/2018-Cus dated 17.05.2018. By these circulars Board has specified the laboratories other than CRCL from where these specific goods could have been tested in absence of testing facilities at CRCL. Board has vide Circular No 28/2018-Cus dated 30.08.2018 clarified as follows:

> *"2. It is clarified that in the aforementioned Circulars, it was very categorically indicated that up-gradation of the Revenue Laboratories is an on-going process. Therefore laboratories earlier not equipped with testing facility for a specific item have since acquired the testing facilities consequent to up-gradation.*
>
> *3. Field formations may therefore first ensure with their respective laboratories that the testing facilities for any particular items listed in the said Circulars are not available*

with them before forwarding such samples to outside Laboratory(s) listed therein.

4. In case the jurisdictional laboratory does not have testing facility for a given sample, it would be open to the field formations to send such samples to one of the other revenue laboratories which have the facility to test the given sample, instead of availing services of an outside Government. CRCL should also continuously update the list of testing facilities available on its webpage or on the web link of each laboratory so that there are no delays in testing merely on account of ascertaining as to which of the labs has the relevant testing facility."

4.5 In case of Polyglass Acrylic Mfg. Co. Ltd [2003 (153) E.L.T. 276 (S.C)] Hon'ble Supreme Court while referring to the report of IIT, has observed that such report could be relied for the reason that CRCL had opined that they did not had have test facilities to test the sample and give conclusive opinion. Hon'ble Supreme Court observed as follows:

> ***"12. An important fact overlooked by the Tribunal is that because of an earlier report of the CRCL with respect to the Delhi consignment to the effect that it was unable to test the samples for regenerated second grade MMM, the department had sent samples from the Delhi consignment to the IIT, Delhi and the IIT, Delhi vide its report dated 18-7-1996 had opined that the goods were of regenerated second grade quality. This report had been placed on record.*** *The CEGAT accepted the fact that the goods forming part of the Delhi consignment were identical to the goods in question that is goods of the Ludhiana consignment. This IIT report left no scope to sustain the stand of the department. In our view the report obtained at the instance of the department itself had great force and it should not have been ignored."*

4.6 In the present case the request for retest was allowed only for the reason that CRCL had the facility to determine the thickness of imported Aluminium Foil. In fact they had actually tested the consignment imported by the same importer at ICD JRY, Kanpur. In case of samples drawn from ICD JRY, Kanpur or from ICD Panki, Kanpur CRCL had concluded that the thickness of aluminum foil was 5.3 microns.

4.7 Hence, I do not find any reason as to why the test report of IIT, Kanpur could have give preference over the test report given by the CRCL in respect of these consignments. As CRCL is an in-house laboratory of Customs was having requisite test facilities its report should have been relied and preferred over any other test report. In the present appeal it seems that revenue is doubting the in house test facility in comparison to the test facility of IIT Kanpur.

4.7 In view of the above, I do not find any merits in the appeal filed by the revenue.

5.1 Appeal is dismissed.

(Operative part of the order pronounced in open court)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

akp