CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.

PRINCIPAL BENCH - COURT NO. II

Customs Stay Application No. 50547 of 2019 and
Custom Appeal No. 51587 of 2019

(Arising out of order in appeal No. CC(A)CUS/D-II/ICD/PPG/17/2019-20 dated 12.04.2019 passed by the Commissioner of Customs (Appeals), New Customs House, Near IGI Airport, New Delhi).

Commissioner of Customs **Appellant**
ICD, Patparganj, East Delhi
New Delhi -110096

VERSUS

M/s Jindal Stainless Limited **Respondent**
O. P. Jindal Marg, Hissar
Haryana-125006.

AND

Customs Stay Application No. 50548 of 2019 and
Custom Appeal No. 51589 of 2019

(Arising out of order in appeal No. CC(A)CUS/D-II/ICD/PPG/16/2019-20 dated 12.04.2019 passed by the Commissioner of Customs (Appeals), New Customs House, Near IGI Airport, New Delhi).

Commissioner of Customs **Appellant**
ICD, Patparganj, East Delhi
New Delhi -110096

VERSUS

M/s Jindal Stainless Limited **Respondent**
O. P. Jindal Marg, Hissar
Haryana-125006.

APPEARANCE:

Shri Sunil Kumar, Authorised Representative for the Department.

Shri B. L. Narasimhan, Sh. Rachit Jain and Ms. Vijaya Nandini, Advocates for the assessee.

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. C. L. MAHAR, MEMBER (TECHNICAL)

FINAL ORDER NOS.50747 – 50748/2020

DATE OF HEARING: 07.11.2019
DATE OF DECISION: 17.08.2020

ANIL CHOUDHARY:

M/s Jindal Stainless Limited is a registered manufacturer of stainless steel coils etc. In their regular course of business imported Ferro Nickel "Ni 18.89% to 21.08%" and filed Bill of Entry No. 4851539 dated 10.03.2014 under self assessment declaring the transaction value at Rs. 4,46,54,012.78 involving Custom duty of Rs.88,65,501/-.

2. While verifying the self-assessment done by the importer, the proper officer subjected the goods to testing, to ascertain –

(i) the true nature and composition of the goods and
(ii) correct percentage of Ferro Nickel content.

Therefore, this B/E was assessed provisionally by the proper officer against submission of test bond(s) under Section 18 of the Customs Act, 1962. Representative sample(s) were drawn and forwarded to the Central Revenue Control Laboratory (CRCL), New Delhi for testing.

(a) After completing the tests, the CRCL, New Delhi submitted its test report (C.No.35/CRCL/2013-14/CL-47221 dated 28.03.2014 for goods covered by B/E No.4861639 dated 10.03.2014.

> "The sample is in the form of greyish metallic lumps of irregular shapes and sizes. It is composed of an alloy of iron and Nickel (Ferror Nickel) having Nickel content = 22.4% by weight. Sealed remnant returned."

It appeared to Revenue that the above report clearly shows that the content of Nickel in respect of goods imported under Bills of Entry no.4861639 dated 10.03.2014 is at variance with that declared by the importer in the impugned B/E.

3. It was found that Overseas supplier in this case i.e. M/s Curico Marketing had determined valuation of goods on the basis of Nickel content.

In view of alleged mis-declaration of percentage of Nickel content in the imported goods, the declared transaction value of the goods appeared liable for rejection under Rule 3 read with Rule 12 of the Customs Valuation Rules, 2007. It may be seen that the supplier in this case has calculated the assessable value of goods as per following formula:-

Value = (Total weight) x (% of Nickel content) x (rate of Nickel)

Therefore, adopting the same formula but with correct content of Nickel, assessable value of the imported goods was proposed to be determined for final assessment of Bill of Entry No.4861639 dated 10.03.2014.

4. The SCN vide C. No. VIII (B) 40/ICD-GH/BE/sample/ 1353/14/ 1105 dated 4.7.2015 was issued to the importer M/s Jindal Stainless Ltd. for final assessment of the goods covered by B/E No.4861639 in the light of test report dated 28.03.2014 given by CRCL. The Adjudicating Authority passed an order No.13/JC/PPG/2016 dated 24.05.2016 whereunder he rejected the declared assessable value of Rs.4,46,54,012.78 under Rule 12 of CVR 2007 and re-determined the

assessable value as Rs.5,09,54,796.52 under Rule 4 of the said Rules. He confirmed the differential duty of Rs.12,50,942/- under Section 18(2) of the Customs Act, 1962 along with interest besides imposing penalty of Rs.1.25 lakh.

5. Aggrieved by the above Order-in-Original, the importer filed appeal with the Commissioner of Customs (Appeals), New Customs House, New Delhi, who vide Orders-in-Appeal No.CC(A)CUS/D-II/ICD-PPG/17/2019-20 dated 12.04.2019 set aside the impugned order-in-original and allowed the appeals filed by the respondent - importer. He ordered for restoring assessment of goods covered by B/E No.4861639 dated 10.03.2014 at the declared transaction value, and also set aside the penalty. While arriving at the above decision, the Commissioner of Customs (Appeals) observed the following:-

> i) The minimum Nickel content, actual content and unit price are the essential ingredients in relevant documents of the commercial invoice and purchase order. Nickel content is within the limitation of specification mentioned in the purchase order and commercial invoices.
>
> ii) The value was enhanced by the Adjudicating Authority solely on the basis of CRCL test report without any cogent evidence to prove that the transaction value was not genuine or did not represent the correct transaction value. The prices agreed between the exporter and the importer is evident from the invoices and sales contract. There is no evidence that the appellant had paid over and above the transaction value to the foreign supplier or both purchaser and supplier are related persons in terms of Rule 3 of the CVR, 2007.
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> iii) The request of the importer regarding re-testing of the samples through the same CRCL or testing in their plant has not been accepted. Samples drawn at the Customs Office show for a very small portion of materials which cannot be

taken as representative of the whole consignment of such large quantity.

iv) He placed reliance on the following judgments:-

a) Binani Cement Ltd. Vs. Commissioner of Customs, Ahmedabad (2004 (165) ELT 533 (Tribunal-Delhi)

b) Commissioner of Customs (Exp),Goa Vs. VGM Exports (2013 (291) ELT 572 (Tribunal-Mumbai)

c) CCE & ST, Noida (2018(12) TMI738 (SC)

v) The Department's action to enhance the transaction value on the basis of Nickel content as per CRCL Test results is not legally valid and proper, because such enhancement is theoretical exercise and academic in nature.

vi) Penalty is also not imposable in this case as there is no mis-declaration of value warranting confiscation of goods under Section 111 of the Customs Act, 1962.

6. Being aggrieved, the revenue have filed the present appeal inter alia on the following grounds.

(a) The Commissioner (Appeals) erred in holding that the transaction value is rejected without any cogent evidences, does not appear to be tenable. Representative samples of the goods under import was drawn and sample was sent to CRCL, New Delhi to ascertain –

(i) The true nature of composition of the goods and

(ii) Percentage of prime constituent i.e. nickel.

(b) As per the test report of CRCL, it was reported that nickel content was 22.40%, which appears higher than that the declared in the Bill of Entry at 18.89% to 21.08%.

(c) Further, as per the contract of respondent with the overseas supplier – M/s Cuirco Marketing, the value of the goods is determined on the basis of nickel content. It is evident from the invoice wherein they have mentioned the gross weight and also mentioned the net weight of nickel alongwith the percentage of nickel content. The basis of amount charged by the seller is the rate of nickel per tonne. As the Adjudicating Authority have also adopted the same formula based on the test report to CRCL and re-determined the assessable value, hence the same is justified and cannot be faulted.

(d) It is further contented that non consideration of the prayer of the respondent for retesting of goods and observation of learned Commissioner (Appeals) – that the small portion of material cannot be taken as representative of the whole consignment of such large quantity, is incorrect and without any basis. As per norm, the representative samples are always taken in small quantity for the purpose of testing. Further, such samples are drawn in presence of the importer or his representative. Admittedly, no objection was raised by the respondent – importer as regards drawal of sample. Thus, the request of retesting by the respondent is without any logic as the other sample or the representative sample was also drawn from the same consignment. Thus, the request for retesting, has been rightly rejected by the Adjudicating Authority. Reliance is placed on the Board Circular No. 43/2017 dated 16.11.2017. It was further contended that the CRCL Laboratory have the testing facility of ferro nickel and others as per letter dated 13.03.2019 of CRCL which is also corroborated by Circular No. 28/2018-Cus. dated 30.08.2018.

(e) Further, the observation of the Commissioner (Appeals) that transaction value cannot be enhanced without any cogent evidence of mis-declaration is also not tenable as the Adjudicating Authority re-determined the value of imported goods based on quantum of the prime constituent i.e. nickel as per the test report.

7. Learned Authorised Representative Shri Sunil Kumar appearing for the Revenue reiterated the grounds of appeal and have also filed written submissions after conclusion of the hearing which are in support of the grounds of appeal. It is further relied by the Revenue on Board Circular No. 43/2017-Cus as regards guidelines for testing, are not applicable for the goods imported in the year 2014 and subjected to test in the same year. It is further contended that at one point of time respondent took the stand that procedure for drawal of sample was incorrect which has lead to erroneous test report. Later on, they have requested for re-testing of the sample drawn at the same time by any other Laboratory or by CRCL. Reliance is placed on the ruling of Apex Court in the case of **Reliance Cellulose Products Ltd., vs. Collector of C. Ex., Hyderabad – 1997 (3) ELT 646 (SC)** wherein it was held that test report of chemical examiner and Chief Chemist of the Government, unless demonstrated to be erroneous, cannot be brushed aside on the basis of opinion of some private persons obtained by assessee. It is further prayed by Revenue that the appeal may be allowed by way of remand and

remanded to the original Adjudicating Authority with a direction to retest the sample and accordingly for passing of denovo adjudication order.

8. Learned Counsel for the respondent opposes the appeal on the grounds raised in the first appeal as well as in the finding on the Commissioner (Appeals). Learned Counsel states that under the prescribed procedure it is right of the assessee – importer to request for retest of the remnant sample which admittedly they have exercised. Thus, denial of retest for no cogent reason amounts to denial of natural justice vitiating the order of the Adjudicating Authority. It is further urged that the rejection of transaction value is whimsical in view of the ruling of the Hon'ble Supreme Court in the case of **Eicher Tractor -2000 (122) ELT 321 (SC), Sanjivani Metals -2019 (365) ELT 3 (SC)** and in the case of **Century Metals -2019 (367) ELT 3 (SC)**. It is further urged that the variation of about 1% or less in the stated percentage as per the invoice and test report of the shipper, is a matter of normal variation and adverse drawn by the Adjudicating Authority is arbitrary and rightly set aside. Accordingly, learned Counsel prayed for dismissing the appeal of the Revenue.

9. Having considered the rival contentions, we find that the transaction value has been arbitrarily rejected in violation of the provisions of Section 14 of the Customs Act, 1962 read with the Valuation Rules. Further, the adjudication order is vitiated for not permitting the retesting, inspite of the prayer of the importer –

assessee. Further, we find that as per the report of CRCL the variation in the declared percentage of nickel is hardly 1% which is a matter of normal variation not calling for any adverse inference. Accordingly, we find that there is no merit in these appeals. Accordingly, these appeals by Revenue are dismissed. The respondent – importer is entitled to consequential benefits, in accordance with law. Stay applications also stand disposed of accordingly.

(Pronounced on 17.08.2020)

(Anil Choudhary)
Member (Judicial)

(C. L. Mahar)
Member (Technical)

Pant