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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
CUSTOMS APPEAL BRANCH

Appeal No. C/737 /2005-738 /2005 - CU[DB]

Date 04/08/2009

Assistant Registrar
C.E.S.T.A.T, New Delhi

To: 1. SHRI SUDHANSHU MITTAL
2. M/S CHIRAG ENTERPRISES
D-15/108, SECTOR 3 ROHINI, DELHI.

SHRI SUDHANSHU MITTAL

Appellant

THE COMMISSIONER OF CENTRAL EXCISE, DELHI
IV FARID

Vs
Respondent

I am directed to transmit herewith a certified copy of Final order No. C/330-331/ 2009 CU[DB] dated 31.07.09
passed by the Tribunal under Section 129, (B) of the Customs Act, 1962 & Financial Act 1994 relating to Service Tax

Assistant Registrar
(Customs Appeal Branch)

Copy to :

1. Respondent

THE COMMISSIONER OF CENTRAL EXCISE, DELHI IV,
NEW C.G.O. COMPLEX, NH-IV, FARIDABAD

2. Adv. / Consult

MR.PIYUSH KUMAR,ADV

B-25,LAJPAT NAGAR-III,N.DELHI

3 S.D.R

4 J.C.D.R.

5 Bar association, CESTAT, New Delhi

6 Director Publications, Customs, Excise. I.P. Estate, New Delhi

7 M/s Centax Publications Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi - 3

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12 Taxindiaonline.com Pvt.Ltd, B-XI/8183, Vasant Kunj, New Delhi - 110070

13 Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026

14 Easy Service Tax Online Dot Com Pvt.Ltd.407A, Iscon Mall, Above Star India Bazar, Satellite Road, Ahmedabad-15

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Assistant Registrar
(Customs Appeal Branch)

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi**

**COURT NO. II
Customs Appeal Nos. 737-738 of 2005**

[Arising out of the Order-in-Original No. 03/RH/Adj./2005-06 dated 29/04/2005 passed by The Commissioner, Central Excise Delhi – IV, Faridabad.]

For Approval and signature :

Hon'ble Shri D.N. Panda, Judicial Member

Hon'ble Shri Rakesh Kumar, Technical Member

1. Whether Press Reporters may be allowed to see :
the Order for publication as per Rule 27 of the
CESTAT (Procedure) Rules, 1982?
2. Whether it would be released under Rule 27 of :
the CESTAT (Procedure) Rules, 1982 for
publication in any authoritative report or not?
3. Whether their Lordships wish to see the fair :
copy of the order?
4. Whether order is to be circulated to the :
Department Authorities?

1. Shri Sudhanshu Mittal	]	Appellant
2. M/s Chirag Enterprises	]	

Versus

CC, Delhi – IV, Faridabad

Respondent

Appearance

Shri Piyush Kumar, Advocate – for the appellant.

Shri A.K. Madan, Authorized Representative (SDR) – for the Respondent.

CORAM: Hon'ble Shri D.N. Panda, Judicial Member
Hon'ble Sh. Rakesh Kumar, Technical Member

DATE OF HEARING : 18/05/2009.
DATE OF DECISION: 31-07-2009.

Final Order No. C/330-331/08 Dated : 31/7/09

Per. Rakesh Kumar :-

The facts giving rise to these appeals are, in brief, as under:-

1.1 On 26/03/99, in pursuance of information, the officers of Directorate of Revenue Intelligence, New Delhi examined ten containers imported by M/s Hindustan Overseas, A-313, Chandgi Ram Block, Khel Gaon, New Delhi at ICD, Ballabgarh, Haryana. In the import documents for these containers, the goods were declared as zinc slabs "scull" with the declared CIF price @ U.S. \$ 575 per M.T. The quantity declared was 201.866 M.T. and the country of origin as declared was Netherlands. However, on examination the goods were found to be prime quality zinc ingots of Russian origin, wrapped in pallets with iron strips and as per laboratory test certificates sent by the supplier, the purity was 99.995%. The actual quantity of the goods was found to be 269.79 MTs as against the declared quantity of 201.866 MT. The goods

had been supplied by M/s American Trade Link Inc., Texas, U.S.A. [hereinafter referred to as M/s ATL] whose proprietor is one Shri Naresh Mittal. The goods in the 10 containers were placed under seizure on 26/3/99. The case against M/s Hindustan Overseas ~~reference to the case~~ No. VIII (ICD) 6/Adj./Commr./26/99 dated 23/12/99. Subsequent enquiry revealed that from the same supplier, there were other imports in past at ICD, Ballabgarh wherein the goods had been declared as secondary zinc ingots or zinc slabs "scull" and one such import was by M/s Chirag Enterprises, D-15/108, Sector-3, Rohini, Delhi [hereinafter referred to as M/s Chirag] with Shri Sudhanshu Mittal as proprietor. M/s Chirag had imported consignments in six containers declared to contain "108.047 MTs of secondary zinc ingots in 157 bundles, totally valued at Rs. 31,58,641/- (Rupees Thirty One Lakh Fifty Eight Thousand Six Hundred Forty One)" at ICD, Ballabgarh vide bills of entry No. 167 dated 22/9/98, 248 dated 22/10/98 and 269 dated 30/10/98. Some of the other importers were M/s Veer Enterprises, M/s Rajiv Enterprises, M/s Alok Overseas and M/s Ashish International (P) Ltd.

1.2 Enquiry was made with Shri Sudhanshu Mittal and his statement was recorded on 24/5/99 under Section 108 of Customs Act, 1962, wherein he admitted that he is the sole proprietor of

M/s Chirag and he was in the business of hiring of bulldozers, that since he was not having good business, he started the import of zinc ingots, that the import has been made from M/s ATL, USA, that Shri Naresh Mittal, Proprietor of M/s American Trade Link, is his first cousin, that he had imported 6 (six) containers at ICD, Ballabgarh under 3 (three) bills of entries, that his cousin Shri Naresh Mittal had offered to supply the zinc on credit, that since on arrival of the goods, he did not have the enough money to pay to the bank for retiring the documents and paying the duty, and only an amount of Rs. 10,00,000/- (Rupees Ten Lakhs) could be arranged by him, the rest of the money for retiring the documents and payment of duty was arranged by his cousin Shri Naresh Mittal, that the clearing agent was also arranged by Shri Naresh Mittal, that he did not have sales tax registration, that he had no knowledge about the quality of the zinc ingots, that Shri Naresh Mittal has told him that the zinc was secondary zinc ingots but no test report in this regard were given, that he is not aware as to how the custom declaration forms attached with the bills of entry were ~~signed~~ ^{signed} by Shri Ambika Saroj, Proprietor of M/s Chamunda Metal Co., that he had no knowledge of the weight of the bundle of zinc ingots, that the entire consignments of zinc imported by him had been sold to one Shri Jagdish of Moradabad in cash whose

address is not known to him, that the goods were sold @ Rs. 39/- or Rs. 40/- per kg. and that with regard to Special Additional Customs Duty (SAD) for which exemption under Notification No. 56/98-CUS dated 1/8/98 had been availed, he is prepared to pay this duty if according to the Department, he is not eligible for the exemption.

1.3 Since in the case of consignments imported by M/s Hindustan Overseas from M/s ATL, declared to contain "zinc ingots - scull" - and also in respect of consignments imported from the same supplier by M/s Ashish International and M/s Alok Overseas, declared to contain "Secondary zinc ingots", the goods were found to be prime quality zinc ingots with average weight of each bundle being one MT, and since in respect of similar import from the same supplier by M/s Veer Enterprises and M/s Rajiv Enterprises, the importers, as against the declared description of - "Secondary zinc ingots", accepted the goods to be prime quality zinc ingots, the Department was of the view that in case of the consignment imported by M/s Chirag also, the goods were actually prime quality zinc ingots and the weight of each bundle of the zinc ingots was one MT and according to the Department, therefore, on the basis of the actual quality and quantity of the

goods, their value should be – Rs. 70,34,034/- (Rupees Seventy Lakh Thirty Four Thousand and Thirty Four) as against the declared value of Rs. 31,58,641/- (Rupees Thirty One Lakh Fifty Eight Thousand Six Hundred Forty One) and accordingly duty amounting to Rs. 25,77,967/- (Rupees Twenty Five Lakh Seventy Seven Thousand Nine Hundred Sixty Seven) including Special Additional Customs Duty has been short paid by the appellant. Accordingly, a show cause notice dated 8/6/99 was issued to M/s Chirag and Shri Sudhanshu Mittal for –

(a) enhancement of the assessable value of the goods to Rs. 70,34,034/- (Rupees Seventy Lakh Thirty Four Thousand and Thirty Four) CIF as against the declared of Rs. 31,58,641/- (Rupees Thirty One Lakh Fifty Eight Thousand Six Hundred Forty One),'

(b) recovery of differential duty of Rs. 25,77,967/- (Rupees Twenty Five Lakh Seventy Seven Thousand Nine Hundred Sixty Seven) from M/s Chirag under proviso to Section 28 (1) of Customs Act, 1962 alongwith interest on this duty under Section 28AB; and

(c) imposition of penalty on Shri Sudhanshu Mittal under Section 112(a) of Customs Act.

1.4 Subsequently in course of further investigation, the Department was of the view that certain officers namely Shri Irfan Ahmed, Assistant Commissioner; Shri B.S. Suhag, Appraiser; Shri Pradeep Sharma, Appraiser; Shri Vinod Parkash, Superintendent; Shri Y.P. Gupta, Inspector; and Shri S.K. Chauhan, Inspector; who were associated in clearances of these consignments, had also abetted this illicit import and accordingly an Addendum dated 6/6/2000 to the earlier show cause notice dated 8/6/99 was issued for imposition of penalty on these officers also under Section 112 (a) of Customs Act, 1962 for abetment.

1.5 The show cause notice dated 8/6/99 alongwith its Addendum dated 6/6/2000 was adjudicated by the CCE, Delhi – IV vide order-in-original No. 03/RH/Adj./2005-06 dated 29/4/05 by which –

- (a) The Commissioner upheld the allegation against the appellant; that the quality and quantity of the goods has been misdeclared with intention to evade the payment of duty ;
- (b) held that the goods imported under B/E No. 167 dated 22/9/98, 248 dated 22/10/98 and 269 dated 30/10/98 were prime quality zinc ingots with 99.995% purity with actual weight 170 M.T. as against declared weight of 108.047

M.T.; and accordingly held that, the value of the goods should be Rs. 70,34,034/- (Rupees Seventy Lakh Thirty Four Thousand and Thirty Four) – as against the declared value of Rs. 31,58,641/- (Thirty One Lakh Fifty Eight Thousand Six Hundred Forty One);

(c) held that the appellant are not eligible for SAD exemption under Notification No. 56/98-CUS dated 1/8/98 ;

(d) confirmed total duty demand of Rs. 25,77,967/- (Rupees Twenty Five Lakh Seventy Seven Thousand Nine Hundred Sixty Seven) against the appellant under proviso to Section 28 (1) of Customs Act, 1962 alongwith interest on this duty under Section 28 AB and an amount of Rs. 1,96,151/- (Rupees One Lakh Ninety Six Thousand One Hundred Fifty One) already paid against this demand was ordered to be appropriated ; and

(e) imposed penalty of Rs. 25,77,967/- (Rupees Twenty Five Lakh Seventy Seven Thousand Nine Hundred Sixty Seven) on Shri Sudhanshu Mittal proprietor of M/s Chirag under Section 112 (a) of the Customs Act, 1962.

1.5.1 The penal proceedings against Shri Irfan Ahmed, Assistant Commissioner; Shri B.S. Suhag, Appraiser; Shri Pradeep Sharma, Appraiser; Shri Vinod Parkash, Superintendent; Shri Y.P. Gupta, Inspector; and Shri S.K. Chauhan, Inspector; were dropped.

1.6 It is against this order that M/s Chirag and proprietor Shri Sudhanshu Mittal have filed these two appeals.

2. Heard both the sides, and also perused the written submissions submitted by the Appellants on 29/5/09 and by the Respondent also on 29/5/09.

2.1 Shri Piyush Kumar, Advocate, the learned Counsel representing the appellants made the following submissions in course of hearing as well as in the written submissions filed by him :-

(1) The issues involved in these appeals are – (a) whether the Commissioner is legally correct in holding that the appellant wilfully misdeclared the goods imported under bills of entry No. 167 dated 22/9/98, 248 dated 22/10/98 and 269 dated 30/10/98 as “secondary zinc ingots” and have

under valued the same and also whether the weight of the consignment has been misdeclared as 108.047 MTs as against the actual weight of 157 MT determined by the Commissioner in the impugned order ;

(b) whether the Commissioner is legally correct in determining the value of the three consignments at Rs. 70,34,034/- (Rupees Seventy Lakh Thirty Four Thousand and Thirty Four) and on this basis confirming the differential duty demand amounting to Rs. 25,77,967/- (Rupees Twenty Five Lakh Seventy Seven Thousand Nine Hundred Sixty Seven) which includes the Additional Customs Duty demand amounting to Rs. 1,96,151/- (Rupees One Lakh Ninety Six Thousand One Hundred Fifty One) ; and

(c) Whether the Commissioner is correct ⁱⁿ ~~in~~ imposing penalty of Rs. 25,77,967/- (Rupees Twenty Five Lakh Seventy Seven Thousand Nine Hundred Sixty Seven) on Shri Sudhanshu Mittal under Section 112A of Customs Act;

The duty demand of Rs. 25,77,967/- (Rupees Twenty Five Lakh Seventy Seven Thousand Nine Hundred Sixty Seven) comprises of two parts – Rs. 23,81,816/- (Rupees Twenty Three Lakh Eight One Thousand Eight Hundred Sixteen) is the demand of Customs Duty on account of misdeclaration of quality, quantity and value and the duty demand of Rs. 1,91,151/- (Rupees One Lakh Ninety One Thousand One Hundred Fifty One) is towards Special Additional Duty (SAD) under Section 3A of Customs Tariff

Act, which according to the Department was payable as the appellants were not eligible for SAD exemption under Notification No. 58/98-CUS dated 1/8/98.

The Commissioner's decisions on the above issues are without any basis.

(2) With regard to allegation of misdeclaration of quality and value, the Commissioner's finding against the appellant are on the ground that the appellant had imported the consignment from M/s ATL, USA who had supplied similar goods to M/s Veer Enterprises, M/s Alok Overseas, M/s Ashish International and M/s Rajiv Enterprises, wherein the goods were found misdeclared and the respective importers had paid the duty, and that the appellant Shri Sudhanshu Mittal is the cousin of Shri Naresh Mittal who is the owner of supplier's company M/s ATL, USA. As regards the allegation of misdeclaration of the weight, the same has been upheld by the Commissioner relying upon a number of bill of lading with regard to supply of zinc ingots, wherein the weight of one bundle was one MT and on this basis the Commissioner has concluded that it is an international norm to make one bundle of one MT each of zinc metal and it is on this basis that the Commissioner has concluded that the actual weight of the zinc ingots imported by the importer under the three bills of entry should be 157 MT as declared value of 118 MT. The aforesaid findings of the Commissioner are patently misconceived and without any basis.

(3) The goods covered under the impugned three bills of entry had been cleared by the customs officers after due examination. The examination reports which are available on the reverse of the bill of entry clearly reveal that the goods were duly examined by the officers and were found to be as per the declaration.

(4) In this case the consignments were examined by the proper officers in accordance with the prevailing practice. Shri Pradeep Sharma, Appraiser, in his reply dated 20/11/2000 to the show cause notice has stated that the nature and quality of the consignments, in question, were ascertained by the way of visual examination, as by virtue of long experience in examination of the imported goods, he had occasion to compare secondary metal with prime quality metal and it was possible for him to distinguish between the two. He has also stated that it is possible to distinguish between the prime quality zinc and secondary zinc by visual examination without any laboratory tests.

(5) During course of investigation, the Investigating Officer had raided the appellant's premises and wherein no incriminating documents or material or any offending goods had been recovered. Had there been any fraud or any murky deal, the Department would have definitely found some incriminating material.

(6) The finding of the learned Commissioner qua the misdeclaration of quality on the basis of test report pertaining to the consignment of other importer purportedly supplied by the same overseas supplier, is contrary to the

common prudence and settled law. The test reports in respect of the zinc ingots imported by M/s Alok Overseas and M/s Ashish International from the same supplier cannot be applied to the consignments imported by the appellant.

(7) Just because the importer and the proprietor of the supplier's company Shri Naresh Mittal are related, being first cousins, it cannot be concluded that the consignments supplied by the supplier has been misdeclared.

(8) Though the Commissioner has given the finding that it is the international norm to make one bundle of zinc ingots of one MT, no concrete evidence in this regard has been adduced.

(9) As regards the eligibility of the goods imported by the appellant for exemption from SAD under Notification No. 56/98-CUS dated 1/8/98; it is submitted that since the appellant had declared that they are traders and obviously the goods were meant for sale as such, they were eligible for this exemption and hence this exemption has been wrongly denied.

(10) The findings of the Commissioner in respect of the allegations against the appellants fail on the touch-stone of the trite-dictum that suspicion, howsoever grave, cannot take the place of proof. The Commissioner's finding on all the issues involved are based on presumption and suspicion.

2.2 Shri A.K. Madan, the learned Senior Departmental Representative, made the following submissions at the time of personal hearing as well as in the written submissions submitted on 29/5/09 :-

(1) Though in this case no direct evidence of misdeclaration of weight or misdeclaration of quality of the goods is available, the following circumstances clearly show that the goods had been misdeclared –

(a) Facts of the case as discussed at page 1 and 2 of the impugned order-in-original show that the supplier of the goods in the present case was M/s ATL, USA with Shri Naresh Mittal as its Proprietor and the same supplier had supplied the goods declared as “zinc ingots scull” to M/s Hindustan Overseas and those goods on examination by the DRI were found to be prime quality zinc ingots with 99.995% purity and the actual quantity was found to be 269.79 MT as against the declared quantity of 201.866 MT. Similar goods supplied by the same supplier to M/s Alok Overseas and M/s Ashish International were seized at N-54, Sainik Farms, New Delhi and on test were found to be prime quality zinc ingots of 99.995% quality and not

secondary zinc as declared. In case of similar imports from the same supplier by M/s Veer Enterprises and M/s Rajiv Enterprises, the importers accepted the misdeclaration and deposited the differential duty. Therefore in the present case when the supplier is the same and the goods were declared as secondary zinc ingots, the preponderance of probability would be in favour of the goods being prime quality zinc ingots.

(b) The importer's firm is owned by Shri Sudhanshu Mittal who is first cousin of Shri Naresh Mittal. For this import, Shri Naresh Mittal, as admitted by him in his statement, could arrange only Rs. 10 lakhs (Rupees Ten Lakhs) for making payment to the supplier through the Bank and payment of duty and the remaining amount for making payment to the bank for retiring documents and for payment of duty was arranged by Shri Naresh Mittal. Even the CHA was not engaged by him.

(c) Shri Sudhanshu Mittal, could not even tell the full name and address of one Shri Jagdish to whom the imported consignments are claimed to have been sold.

(d) The customs declaration forms attached with the bills of entry have been signed by one Shri Ambika Saroj, Proprietor of M/s Chamunda Metal Co. No explanation has been given by Shri Sudhanshu Mittal as to how Shri Ambika Saroj of M/s Chamunda Metal Co. has signed the declaration in the bills of entry. Shri Ambika Saroj, Proprietor of M/s Chamunda Metal Co. had also imported the zinc ingots from the same supplier and the same had been seized from the godown of M/s Alok Overseas and M/s Ashish International and had been found to be prime quality zinc ingots as against in the declared description of secondary zinc ingots.

(2) Shri Sudhanshu Mittal has not retracted his statement dated 24/9/99 which is corroborated by the aforesaid evidence and which clearly shows that Shri Sudhanshu Mittal was made the proprietor of M/s Chirag only to import the misdeclared goods into the country and Shri Sudhanshu Mittal actively connived in this and actual importer is somebody else.

(3) It is established that Shri Naresh Mittal as Proprietor of M/s ATL, USA had supplied such misdeclared goods to

other importers and importers in some of those cases have admitted misdeclaration and paid duty. It can, therefore, be deemed to be established that the goods supplied by Shri Naresh Mittal to M/s Chirag are also misdeclared. In this regard reliance is placed on Hon'ble Supreme Court's judgment in the case of **Collector of Customs, Madras and others vs. D. Bhoormull** reported in **1983 (13) E.L.T. 1546 (S.C.)** [para 30 and 31 of the judgment]. Beside this, reliance is also placed on the judgment of Tribunal in the case of **Annapurna Yarn Fabrics vs. Commissioner of Cus. (Port), Kolkata** reported in **2002 (150) E.L.T. 590 (Tri. – Kolkata)** and also the judgment of the Tribunal in the case of **Mettaco Engg. Pvt. Ltd. vs. CC, Ahmedabad** reported in **2005 (182) E.L.T. 210 (Tri. – Del.)**. In para '9' of the judgment, case of M/s Mettaco Engg. Pvt. Ltd., the Tribunal has held as under :-

“As already noted in para 6, the short shipment indicated in private records remains fully established in regard to consignment under Shipping Bill No. 241 dated 11/10/95 by the difference noticed on examination of the goods. In such a case, the authorities cannot be faulted for confirming short exports in regard to the previous consignments also based on the position

revealed by private internal documents. The appellants would appear to have been adopting the same *modus operandi* in the case of all these export consignments. The charge in respect of other consignments also has to be accepted as established. Therefore, proceedings are well founded in respect of previous exports also."

(4) All the aforesaid judgments clearly indicate that evidence required to be produced by the Department is not restrict evidence and the Department has to prove its case only by preponderance of probability, which has been established by the Department in this case.

(5) The Commissioner has correctly determined the value on the basis of the LME price of the prime quality zinc ingots.

(6) As regards misdeclaration of weight, as has been held by the Commissioner relying upon a number of bills of lading, the international norm is to make bundle of one MT each of the zinc metal. This fact has not been disputed by the appellant by producing even a single bill of lading of zinc ingots showing different weight per bundle. Therefore, the Commissioner's finding that total weight of the three

consignments consisting of 157 bundles was 157 MTs as against the declared weight of 108 MT, is correct.

(7) Since the appellant did not have the sales tax registration number and no evidence has been produced to show as to whether the place where the goods were sold, the sales tax was payable, the SAD exemption under Notification No. 56/98-CUS would not be available and its demand has been rightly confirmed.

(8) The appellant's stand that the goods were cleared after visual examination by the officers who are co-noticee in the show cause notice for imposition of penalty and since proceedings against the officers have been dropped, there was no misdeclaration, is not at all sustainable. What the Commissioner has held is that the officers were negligent and inefficient, but he dropped the penal proceedings on the ground that there is no concrete evidence of their abetment or connivance. Dropping of proceedings against the officers is of no consequence to the case against the appellant.

(9) Since the goods have been misdeclared with regard to weight, purity and value, the same have been correctly held to be liable for confiscation under Section 111 (l) & (m) of

Customs Act 1962 and penalty has been correctly imposed under Section 112 (a) on the Appellants.

3. We have carefully considered the submissions from both the sides and perused the records.

3.1 On going through the case records, we find that earlier when these appeals had come up for hearing on 1/7/08, on being informed that this case against M/s Chirag and Shri Sudhanshu Mittal was an offshoot of the investigation against M/s Hindustan Overseas, Delhi; M/s Ashish International Pvt. Ltd., M/s Alok Overseas, M/s Veer Enterprises, M/s Chamunda Metal etc. and since against the Commissioner's order in that group of cases appeal No. C/665/2005, C/464-470/2005 and C/471/2005 have been filed, the Bench directed for linking of these appeals alongwith the appeal No. C/665/ 2005, C/464-70/ 2005 and C/471/2005 which were against the Commissioner's order in original No. 44/RH/Adj./04 dated 28/1/05. However, since the linked appeals had already been dismissed vide Tribunal's final order No. 921-28 of 2005-CUS dated 31/10/05 for non-compliance to the provisions of Section 129E of the Customs Act, the present appeals No. C/737-738/05, when listed for hearing on 18/5/09 were listed as such without being linked up with the

appeals ~~...~~ No. C/665/05, C/464-470/05 & C/471/05. Since the case against the present appellants and the case against M/s Alok Overseas, M/s Ashish International, M/s Veer Enterprises and others are the outcome of the same investigation, and a lot of evidence is common, we have considered it necessary to take judicial notice of the order-in-original No. 44/RH/Adj./04 dated 28/1/05 passed by the Commissioner in the cases ⁴ M/s Alok Overseas, M/s Ashish International, M/s Veer Enterprises and others, which stands upheld by the Tribunal vide order-in-appeal No. 921-28/05-CUS dated 31/10/05 and use the evidence against the Appellants in that case, in this case also.

4. Investigation into this group of cases were started when on 26/3/99, the DRI officers in pursuance of specific information examined 10 containers declared to contain "zinc slabs scull" with declared value of U.S. \$ 575 per MT and on examination, found the goods to be prime quality zinc ingots wrapped in pallets with iron strips with manufacturer's certificate certifying the purity as 99.995%. While the declared weight of the consignment was 201.866 MT, each pallet was found to be containing about one MT of the zinc ingots and the total quantity in the 10 containers was found to be 259.79 MT. While the declared country of origin

was Netherlands, on examination the black cards found affixed on the pallets were mentioning country of origin as Russia. The supplier of this consignment was M/s ATL, USA whose Proprietor was Shri Naresh Mittal. Since, it was found that in past, a number of consignments declared to be containing "secondary zinc ingots" had been imported from the same supplier, details of all these imports were obtained and M/s Chirag is one of such importer. The other imports were in the name of – (1) M/s Alok Overseas, A-313, Chandgi Ram Block, Khel Gaon, New Delhi, (with Shri P.K. Jain, brother of one Shri R.K. Jain and Arvind Kumar Jain, S/o R.K. Jain, as partners); (2) M/s Ashish International Pvt. Ltd., A-313, Chandgi Ram Block, Khel Gaon, New Delhi (with Shri R.K. Jain as M.D. and his brother Shri P.K. Jain and his wife Mrs. Urmil Jain as Directors); (3) M/s Veer Enterprises, Maujpur, Delhi (with Shri Rajender Jain, a tyre dealer and a relation of Shri R.K. Jain, as Proprietor); (4) M/s S.R. Overseas, East Krishna Nagar, New Delhi (with Shri Sukhmal Jain a relation of Shri R.K. Jain as Proprietor); (5) M/s Shyam International, Wazir Nagar, New Delhi (with Shri Laxmi Narayan Agarwal, an employee of Shri R.K. Jain as Proprietor); (6) M/s Chamunda Metal Co., Delhi (with Shri Ambika Saroj, a driver of Shri R.K. Jain as Proprietor). Proprietor of M/s Hindustan

Overseas, whose consignments had been intercepted by the DRI officers on 26/3/99, is one Shri Banwari Lal, as employee of Shri R.K. Jain. On investigation into the imports made by M/s Hindustan Overseas, M/s Alok Overseas, M/s S.R. Overseas, M/s Veer Enterprises, M/s Ashish International, M/s Shyam International and M/s Chamunda Metal Co., it was found that all these companies are the front companies of one Shri R.K. Jain, a dealer in non-ferrous metals and while he is the Managing Director of M/s Ashish International, other companies are in the name of his relatives and employees and it is Shri R.K. Jain who is the person behind these companies and making imports in the name of these companies. Some of the goods zinc ingots imported in the name of M/s Alok Overseas and M/s Ashish International, which had been declared in the Bills of entry as "Secondary zinc ingots", were seized from a godown of M/s Ashish International at N-54, Sainik Farm, Delhi and on being tested by CRCL and Spectro Analytical Labs (P) Ltd., Delhi the goods were found to be prime quality zinc ingots of the purity 99.995%. The ten containers imported by M/s Hindustan Overseas, New Delhi, a front company of Shri R.K. Jain, which were declared to be containing "201.866 MTs of Zinc Slab Scull", on examination by the DRI officers on 26/3/99 were found to be 269.79 MTs of

prime quality zinc ingots of 99.995% purity. On considering the evidence on record, the Commissioner vide order-in-original No. 44/RH/Adj./04 dated 28/1/05 has held that the zinc ingots imported in the name of M/s Alok Overseas, M/s SR Overseas, M/s Veer Enterprises, M/s Ashish International, M/s Shyam International and M/s Chamunda Metal Co. were prime quality zinc ingots packed in bundles of one MT each and on this basis confirmed the duty demand of Rs. 4,05,73,710/- (Rupees Four Crore Five Lakh Seventy Three Thousand Seven Hundred and Ten) against these companies and imposed penalties on them besides penalty of Rs. 4,05,73,710/- (Rupees Four Crore Five Lakh Seventy Three Thousand Seven Hundred and Ten) on Shri R.K. Jain and penalty of equal amount on his brother Shri Pradeep Kumar Jain. One significant fact in the case adjudicated by Commissioner vide order dated 28/1/05 is that M/s Chamunda Metal Co. is also held to be a front company put up by Shri R.K. Jain, whose Proprietor Shri Ambika Saroj, is a driver of Shri R.K. Jain.

5. In the present case, the fact that declaration on the bills of entry have been signed by Shri Ambika Saroj, Proprietor of M/s Chamunda Metal Co., a front company of Shri R.K. Jain, coupled with the facts that –

- (a) Shri Sudhanshu Mittal, has not been able to give any explanation as to how the declaration on the Bills of entry are signed by Shri Ambika Saroj ;
- (b) money for payment to the bank for retiring the documents and payment of duty has been provided by somebody other than Shri Sudhanshu Mittal ;
- (c) Shri Sudhanshu Mittal is not able to give full name and address of the person, to whom the imported zinc ingots are claimed to have been sold, and
- (d) in this case also while the bills of entry, had been filed under 'self' i.e. not through any CHA or intermediary, the same had been prepared and the customs clearance work had been handled in unofficial capacity by one Shri Sanjay Sharma, a CHA, the same person who had prepared the bills of entry and handled the consignments of zinc ingots imported in the name of M/s Alok Overseas, M/s S.R. Overseas, M/s Ashish International, M/s Veer Enterprises, M/s Shyam International, M/s Chamunda Metals etc. the front companies of Shri R.K. Jain; clearly indicate that the

real person behind these imports in the name of M/s Chirag is also Shri R.K. Jain and since –

- (a) in case of imports in the name of M/s Hindustan Overseas, a front company of Shri R.K. Jain owned by one Shri Banwari Lal, an employee of Shri R.K. Jain, as against the declared description of – ‘201.866 MTs of zinc slab scull’ the goods were found to be prime quality zinc ingots with 99.995% purity and 269.79 MT in weight – each pallet/bundle of ingots being one MT in weight ;
- (b) in case of the imports declared to contain – “Secondary zinc ingots”, in the name of M/s Alok Overseas and M/s Ashish Enterprises the goods, which after clearance had been stored in their godown at Sainik Farm, Delhi from where the same was seized, were on chemical test and spectroscopic examination found to be prime quality zinc ingots of 99.995% purity; and
- (c) M/s Veer Enterprises, have accepted the misdeclaration in description of the goods and deposited the differential duty;
- (d) The preponderance of probability would be in favour of the goods being prime quality zinc ingots instead of “secondary zinc ingots” as declared in the bills of entry.

6. As regards the misdeclaration of quantity, we find that in this group of imports in whichever case the goods were physically available, and examined the average weight of each bundle/pallets was one MT. A number of other bill of lading mentioned in the Commissioner's order show that the zinc ingots are normally packed in the bundle of one MT. The appellants have not produced any bill of lading showing the packing of zinc ingots bundle/pallets less than one MT. In view of these circumstances, we concur with the Commissioner's finding regarding misdeclaration of quantity.

7. In this case, it is true that the goods had been examined by the Customs officers but examination had been done visually and from visual examination it is not possible to distinguish between prime quality zinc ingots and secondary zinc ingots. Though the officers have been exonerated by the Commissioner, we find it strange as to how these officers without taking any sample and getting the same tested, have concluded that the consignments were of secondary zinc ingots while in whichever cases the goods were physically available and were tested, the same were found to be prime quality zinc ingots with purity of 99.995%. At page 91 to 95 of the order-in-original No. 44/RH/Adj./04 dated 28/1/05 (subject matter of the linked appeals No. C/665 & 464-470/05 and

C/471/05) we find that in case of import of zinc ingots by M/s S.R. Overseas, while in the invoices and the bills of entry, filed for clearance of the goods, the same were declared as "Secondary Zinc ingots", the IGM No. 508 dated 26/10/88 against which these bills of entry had been filed, mentioned the goods as - "High grade zinc ingots", but Shri Irfan Ahmed, the Assistant Commissioner, first allowed the amendment of IGM so as to bring the description of the goods, as mentioned in the IGM ^{as per} _{the} the description, as mentioned in the invoices and the Bills of entry, subject to verification of the goods in first check (which in appraising terminology means first examination to ascertain the description and then assessment of duty), and thereafter he himself examined the goods (due to strike of the executive officers), without drawing any samples and getting the same tested, and gave report that the goods are secondary zinc ingots and ordered clearance of the goods out of customs charge. The Commissioner, has observed that the decision of Shri Irfan Ahmed to confirm the description of the goods as "Secondary zinc ingots" without any chemical test is in quite contrast to his order for drawing sample and testing in respect of Bill of entry No. 24 dated 29/5/05 by M/s Ankur Metal Bhandar for clearance of a consignment declared to contain 'Secondary zinc ingots'. The

Commissioner has also observed that it is not possible to distinguish between prime quality and secondary zinc ingots by visual examination.

7.1 The Commissioner in the order-in-original No. 44/RH/Adj./04 dated 28/1/05 as well as in the impugned order on these appeals has observed in a number of cases when the goods were examined by the Inspectors, instead of a categorical report as to whether the goods are as per the declared description, non committal reports like – “the goods are said to be secondary zinc ingots” or “the goods appear to be secondary zinc ingots” have been given which shows that even the examining officers were not sure as to whether the goods are as per the declared description. In the present case also neither the Appraising Officers gave order for examination by drawing and testing the samples nor the samples were drawn and the shed Inspectors, who admittedly are not expert in metals, merely on visual examination, in one case gave the report that the goods are as per declaration, in other two cases gave ambiguous reports that – “the goods are said to be secondary zinc ingots”. It is on the basis of such report, that Shri Irfan Ahmed as Assistant Commissioner, finalized the assessment and the goods were cleared out of Customs charge.

7.2 In the present case, as well as in case of importers in the name of M/s Ashish International, M/s Alok Overseas, M/s S.R. Overseas, M/s Veer Enterprises, M/s Shyam International and M/s Chamunda Metal Co., even though the bills of entry had been prepared by Shri Sanjay Sharma, a CHA and it is he who had handled the customs clearance work, the bills of entry had been filed under 'self' for which permission had been granted by Shri Irfan Ahmed. This had obviously been done to conceal the identity of the importer firms. In case of "self" bills of entry i.e. bills of entry not filed through a CHA, the officers have to be extra cautious, as in case of any serious irregularity, if the importer is found to be fictitious or vanishes, there is nobody from whom the custom officers can make any inquiry. But in this case the conduct of the officer has been the opposite.

7.3 In view of the above facts and circumstances, we are of the view that notwithstanding exoneration of the officers by the Commissioner, a series of serious irregularities as mentioned above, point towards inevitable conclusion that the officer's conduct is not bonafide and therefore no credence can be given to the so called examination of the goods by the officers. In fact, the conduct of the officers points towards the guilt of the Appellants.

8. As regards the eligibility for exemption from SAD, under Notification No. 56/98-CUS, we find that the importer did not have any sales tax registration and he did not give any evidence, whatsoever, that the goods have been sold from a place where sales tax was chargeable. Shri Sudhanshu Mittal was not even able to tell the full name and address of the person to whom the goods had been sold. In view of these circumstances, the benefit of exemption under Notification No. 56/98-CUS dated 11/8/98 which is available only when the goods imported are sold as such from a place where sales tax is chargeable, would not be available and the same was rightly denied to the importers.

9. In view of the above discussion, we do not find any infirmity in the impugned order. The appeals are dismissed.

(Pronounced in open court on 31/7/59)

(Rakesh Kumar)
Technical Member

(D.N. Panda,
Judicial Member

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