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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/384 /2010-386 /2010 - CU[DB], C/S/2099-2100/2010 Date **25/03/2011**

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

To :
1. SH. DEEPAK PRASHAR, DIRECTOR
2. SH. N.D.PRASHAR, DIRECTOR
3. M/S SONIA OVERSEAS PVT. LTD.
34, INDUSTRIAL AREA, PHASE-I,
PANCHKULA (HARYANA)

M/S SONIA OVERSEAS PVT. LTD. Appellant

Vs

C.C. (PREVENTIVE) AMRITSAR **STAY ORDER NO.C/126-128/2011** Respondent

I am directed to transmit herewith a certified copy of **Final order No. C/134-136/ 2011 CU[DB]** dated

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
C.C. (PREVENTIVE) AMRITSAR
CUSTOM HOUSE, CENTRAL
REVENUE BUILDING, THE MALL,
AMRITSAR 143001.

2. Adv. / Consult
MR.JAGMOHAN BANSAL
1640/1,SECTOR-40B,
CHANDIGARH

3. C.D.R
4. Bar association, CESTAT, New Delhi
5. Director Publications, Customs, Excise. I.P. Estate, New
6. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017
9. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi -
10. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
11. LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
12. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
13. Office Copy
14. Guard file

Assistant Registrar
(Customs Appeal Branch)

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

COURT NO. IV

Date of Hearing : 1.3.2011

Custom Stay No. 2099-2101 of 2010 and Custom Appeal No. 384-386 of 2010

[Arising out of the Order-in-Original No. 03/Cus/10 dated 30.4.2010 passed by the Commissioner of Customs, Amritsar]

For Approval and signature :

Hon'ble Mr. Ashok Jindal, Member (Judicial)
Hon'ble Mr. Mathew John, Member (Technical)

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

M/s Sonia Overseas Pvt. Ltd. — Appellant
Shri N.D. Prashar, Director
Shri Deepak Prashar, Director

Vs.

CC, Amritsar — Respondent

Appearance :

Appeared for Appellant : Shri G.L. Rawal, Sr. Advocate, Sh. P.K. Mittal & Sh. Jagmohan Bansal, Advocates

Appeared for Respondent : Shri B.L. Soni, SDR

Coram:
Hon'ble Mr. Ashok Jindal, Member (Judicial)
Hon'ble Mr. Mathew John, Member (Technical)

Stay order No. C/126-128/11
Final Order No. C/134-136/11 dated 24.3.11

Per Mathew John :

These Appeals and Stay Applications are against O-in-O No. 03/Cus/10 dated 30-04-2010 issued by Commissioner of Customs

(Import), Amritsar which involved adverse consequences to the various Appellants. The main finding in the order is about under-valuation of imported goods. There is another issue of difference in quantity noticed in one import consignment.

2. The main Appellant, M/s Sonia Overseas Pvt Ltd imported 99 consignments of zinc ash/skimmings and 14 consignments of zinc dross during the period Feb 2006 to Feb 2009 and paid customs duty on the basis of values declared by them. The words "the impugned goods" are used hereinafter to refer to zinc ash, zinc skimming or zinc dross. They manufacture zinc ingots and zinc sulphate from the impugned goods. The zinc ingot manufactured is not of the same as prime quality metal for which prices are quoted on London Metal Exchange (LME).

3. VARIOUS TERMS RELATING TO THE TRADE OF ZINC ASH/SKIMMING AND ZINC DROSS

Zinc Ash/Dust/Dross/Skimming are the species of raw material (recyclable waste) for extraction of zinc and also for manufacture of salts of zinc like zinc sulphate.

3.1 ZINC DROSS contains the maximum zinc Contents, i.e. more than 90% by weight. Zinc dross is produced during the process of galvanization, infact this is, accumulated drops of zinc metal with other impurities which falls down, when articles dipped into molten zinc are taken out. Some of the molten zinc clinging to the galvanized item fall down and these dropping accumulate to from Zinc Dross.

3.2 ZINC DUST – In some cases, inner lining (lumen) of an item is also to be galvanized e.g. the inner side of the pipe. For this purpose zinc particles are blown inside the pipe and these particles stick to the inner side of the pipe and pipe is galvanized. However, some of these blown zinc particles do not stick to the inner side of the pipe and come out from the other side of the pipe. These particles are collected outside and this is zinc dust. It contains high contents of the metal.

3.3 ZINC ASH AND ZINC SKIMMING – In the process of galvanization, the zinc metal is melt and the article to be galvanized is passed through the molten zinc metal. When article is dipped in the molten zinc some oxidation of metal zinc takes place, which comes at the top of molten zinc metal. This is called Zinc Ash and is collected from the top. While collecting Zinc Ash from the top of the zinc metal, some of molten zinc metal also comes along. This mixture of zinc ash and molten metal is zinc skimming. The item mostly imported are zinc Ash and Zinc Skimming. The normal use of Zinc Skimming and Zinc Ash is to extract the zinc metal and manufacture of other by products such as Zinc Sulphate or Zinc Oride.

3.4 METALLIC CONTENTS - This expression refers to the quantity of metal zinc that can be extracted from the Zinc Skimming/Ash. For example, if the metallic content of particular consignment is declared as 45% then one ton of said raw material (Zinc Skimming or Ash) can produce 450 kgs. of Zinc Metal.

3.5 TOTAL ZINC CONTENTS – This expression signify the total zinc contents in consignment. For example ; if the total zinc contents in the consignment are 70%, it means that 70% Zinc Contents are present in the consignment but, it does not mean that out of one ton said material 700 Kgs. of Zinc can be extracted. It actually means that so much amount of Zinc is present is some form in the consignment, may be in free form (recoverable as zinc metal) or may be in some compound form. The consignment having zinc contents 70% and metallic contents 45% signifies that 45% metal zinc is extractable as zinc metal and remaining 25% cannot be extracted as metal.

4. As per the chemical reaction, if 100 gm. of zinc skimming/ash having 65% to 70% zinc (Zn) contents is chemically reacted with sulphuric acid (H_2SO_4) and water (H_2O) [i.e., dilute sulphuric acid], approximately 285.9 to 307.9 gm of zinc sulphate/sulfate ($ZnSO_4\,7H_2O$) is produced.

5. The impugned goods are items generally prone to undervaluation for import. So Customs Houses were adopting a

practice of assessing the impugned goods at a predetermined standard value based on some studies. Importers found it quite convenient to suppress the transaction value of the impugned goods and continued to produce invoices showing values near such standard value in spite of the fact that international prices for the impugned goods had increased considerably. Sometime in Feb 2006 the Directorate of Revenue Intelligence noticed this suppression of value and initiated investigation against some importers. The imports made by the Appellant also were investigated. DRI made enquiries with Belgium Customs, Consulate General of India in New York, High Commission of India in Singapore and Embassy of India in Brussels which sources gave some evidence suggesting undervaluation of the goods. Investigations conducted locally also unearthed some evidence indicating undervaluation. However the evidences were not sufficiently co-relating with the consignments imported by the Appellants except in 3 Bills of Entries viz. 103021 dated 15.5.04, 105112 dated 28.11.05 and 105111 dated 28.11.05.

6. It is common knowledge that international prices of the impugned goods have a co-relation with the price for zinc metal quoted on LME. But the prices of the goods are also dependent on the content of metallic zinc in the impugned goods and content of zinc in any other form (like zinc oxide) in the impugned goods.

7. During the relevant time there was Import Control Order in force to the effect that the impugned goods can be imported into India only if the imported goods had at least 65% by weight of zinc content in it.

8. The impugned SCN is issued on the basis that since zinc Ash/skimming contained 65% of zinc content, the value should be equal to 65% of the price of zinc quoted on LME. In the case zinc dross this price is seen fixed corresponding to 90.18% to LME prices. No allowance is made for taking into account zinc content in metal form or in any other form in the impugned goods imported. No allowance is made for processing cost for extracting

prime zinc from the impugned goods. The Adjudicating authority has confirmed a duty demand of about Rs. 1.63 crores. Penalties amounting to about 3.90 crores are imposed. Interest under section 28AB is demanded on differential duty. There are also fine imposed in lieu of confiscation.

9.1 The main submissions of the Appellant is that the department at different stages suggested valuation of the impugned goods at 25% of the value of LME prices for zinc , 40% of such price and finally at 65% such price. No acceptable reasons are given for changing from one basis to another. The calculation of the department does not take into account the actual content of metallic zinc in the goods and content of zinc in other forms. The Appellants argue that they never manufactured prime zinc metal for which value is quoted on LME. Their main product is zinc sulphate which is produced by simply adding sulphuric acid to the material and does not involve costly processes for extracting prime metal zinc. They contend that the valuation method followed has no legal basis and hence the demands and penalties and fines are not sustainable.

9.2 However, they are not contesting allegation of undervaluation in the case 3 Bills of Entries listed in para-5 above. They have expressed their willingness to pay the differential duty on these consignments.

10. The Ld. D.R. on the other had submits that this is case where evidences for undervaluation have been unearthed by Customs department after conducting overseas enquiries and this is a case where the parties concerned have accepted undervaluation in statements recorded under Section 108 of the Customs Act. So he argues that the Appellants should not be allowed to contest the issue of undervaluation, in Appeal proceedings.

11. After considering arguments on both sides we find that a demand based on the argument that the price of these goods

should be fixed at 65% of LME price for zinc is not consistent with laws and common sense. This formula does not take into account the fact that the Appellants were not manufacturing prime metal zinc for which price is quoted on LME. It does not taking into account any processing cost or profit margin. It does not take into account the actual contents of zinc in the impugned goods and the form in which such zinc is present. It is also seen that the statement recorded under Section 108 accepts undervaluation of a few consignments only and not all consignments.

12. The formula adopted for confirming the demand is as if 100 tons of zinc skimming is equal to 65 tons of prime metal of zinc, implying that anyone who wants to use 65 tons of prime metal zinc can just buy 100 tons of zinc skimming and use it in substitution. This argument is prima facie absurd.

13. Letter F. No. S/26/Misc-79/2008 Gr-I dated 12-12-2008 addressed to Commissioner of Customs Amritsar, issued by Commissioner of Customs (Import), JNCH Mumbai, is produced before us. This letter indicates that in JNCH, Mumbai value for the impugned goods are taken on the basis that if the impugned goods have no content of metallic zinc its value should be calculated at 40% of LME price and if it has metallic content the percentage point of 40% should be increased by 2.5% for every slab of 5% of metallic content in the impugned goods. Thus if the impugned goods has 100% Metallic content the price should be taken as 85% of LME. This letter does not explain the basis of the formula. It appears to be an empirical formula.

14. A report dated 10-12-08, on "Valuation Aspects of Zinc Skimming/Ash" prepared by a committee of five officers of Amritsar Customs is also produced. This report shows some empirical calculations to conclude that the suggestion to adopt 40% of LME price of zinc for the impugned goods containing no metallic zinc is unreasonable. They relied on local market price of zinc ash/skimming or the goods like zinc sulphate manufactured by the Appellants from the impugned goods to come to this

conclusion. The report suggests a basis of 25% of LME prices for ash/skimming containing no metallic content and incrementing the percentage of 25% by 4.5% for every slab of 10% of metallic zinc in the impugned goods. This implies that if dross containing 100% metallic content is imported its price should be taken as 70% LME price of zinc. This report reveals some understanding of the issues but still has some deficiencies like,-

(a) The report does not consider the Customs Valuation Rules and does not indicate which rule forms the basis for the value suggested;

(b) There is no data available about metallic content or zinc content in other form, in any of the import consignments for applying the formula. The only information available is that the impugned goods should have contained at least 65% zinc content in any form;

(c) Though the Committee which prepared the report, had five members, the expertise of each of the members is not made clear. The report could have been taken more seriously if the Committee had an expert on metallurgical processes and its costs, another expert on costing and another expert on Customs Valuation Rules. If there was none available in the department, outside experts should have been consulted. By simply increasing the number of members of a committee, the reliability of its report cannot increase.

Thus the facts that this Tribunal has noticed can briefly be stated as under:

(a) There are evidences to show undervaluation of the impugned goods as seen from the fact that the prices declared remained more or less static, irrespective of increase in value of zinc in international market and the fact that in the case of few Bills of Entries undervaluation is proved by acceptable collateral evidence and is accepted by the Appellant.

(b) Waste materials by its very nature cannot be of uniform standard and it is difficult to assess its value unless more information about the usable material and the form in which such usable material is present, in the waste are available,

(c) While LME prices can be good indicator to detect undervaluation it cannot be a measure for undervaluation of commodities like zinc ash/skimming and zinc dross without taking into account other relevant factors.

(d) The department is not having test reports to show the zinc contents in each of the consignments and the content of metallic zinc in each of the consignment which are crucially required for assessing the value of the goods.

(e) The suggestion to fix the value of zinc skimming equal to 65% of the value of zinc of prime quality quoted on LME is nearly absurd.

15. Having noticed the above factors we have come to the conclusion that there is a case for giving stay on all the demands made by the impugned order. There is also a need to remit this matter to the original authority for reconsideration of the matter on more acceptable principles.

16. After granting waiver for any deposit for hearing the Appeal we have heard the Appeal itself with the consent of both the parties.

17. Suggestions were called for from the Appellants for a workable method using which the extent of undervaluation can be determined. A few basic principles were agreed in the discussion in the bar. These are,-

(a) The value of metallic zinc in these raw materials should be based on the price at which zinc ingots manufactured by the Appellants are sold after making adjustments as provided in Rule 7(3)(b) of Customs Valuation Rules;

(b) The value of other forms of zinc in these raw materials should be based on the value of zinc sulphate sold by the Appellants after making adjustments as provided in Rule 7(3)(b) of Customs Valuation Rules;

(c) The percentage of metallic zinc and zinc in other forms in the two types of the goods namely, (i) zinc ash/ zinc skimming (ii) zinc dross may be found out from the manufacturing records and account books maintained by the assesse for the relevant period and these percentages may be applied uniformly for all consignments for a period, say an year.

(d) Any calculations made using the above principles cannot be used to claim any value less than the value declared at the time of import.

18. The Appellants undertake to furnish this data for the relevant period based on their records for verification by the department. They also undertake to pay differential duty based on such calculations. Interest and penalty which are legal consequence will follow.

19. The Adjudicating Authority should constitute a Committee of persons having expertise in chemical processes, costing and Customs Valuation Rules. If any of such expertise is not available within the department persons outside the department with good standing in the concerned field may be consulted or co-opted in the Committee for checking the data to be submitted by the Appellant.

20. We wish to state that we are making this order following the principle laid down in Rule 9 of the Customs Valuations (Determination Value of Imported Goods) Rules, 2007 and covers pending provisions in the previous rules read with rule 7(3) of the Valuation Rules, 2007 (and corresponding provision in previous rules). Rule 7 reads as under:

> **"7.Deductive value.** — (1)Subject to the provisions of rule 3, if the goods being valued or identical or similar imported goods are sold in India, in the condition as imported at or about the time at which the declaration for determination of value is presented, the value of imported goods shall be based on the unit price at which the imported goods or identical or similar imported goods are sold in the greatest aggregate quantity to persons who are not related to the sellers in India, subject to the following deductions : —

(i) either the commission usually paid or agreed to be paid or the additions usually made for profits and general expenses in connection with sales in India of imported goods of the same class or kind;
(ii) the usual costs of transport and insurance and associated cost incurred within India;
(iii) the customs duties and other taxes payable in India by reason of importation or sale of the goods.

(2) If neither the imported goods nor identical nor similar imported goods are sold at or about the same time of importation of the goods being valued, the value of imported goods shall, subject otherwise to the provisions of sub-rule (1), be based on the unit price at which the imported goods or identical or similar imported goods are sold in India, at the earliest date after importation but before the expiry of ninety days after such importation.

(3) (a) If neither the imported goods nor identical nor similar imported goods are sold in India in the condition as imported, then, the value shall be based on the unit price at which the imported goods, **after further processing**, are sold in the greatest aggregate quantity to persons who are not related to the seller in India.

(b) In such determination, due allowance shall be made for the value added by processing and the deductions provided for in items (i) to (iii) of sub-rule (1)."

21.1 We are conscious of the fact it can be argued that the conversion of zinc oxide to zinc sulphate is more than the processing envisaged in Rule 7(3). This argument may apply to lesser degree in the case of metallic zinc in the goods to zinc ingots. But the provisions of Rule 9 and Rule 7(2) provides for a method as near to the methods prescribed, as possible can be used.

21.2 We have also noted the provisions in Rule 9(2) of the said rule which reads as under :-

"No value shall be determined under the provisions of these rules on the basis of the selling price in India of the goods produced in India".

This provision would generally apply for goods produced in India or manufactured in India from indigenous raw material. This provision cannot be considered as bar to arrive at the cost of the imported raw material from the indigenous price at which the processed goods are sold, especially when no other reference is available and when the importer has no objection to adopt the method. Further Rule 7(3)(a) specifically authorizes such approach.

22. We also want to make it clear that the above directions are broad guidelines. If the experts wants to refine the suggested method based on availability or non-availability of reliable data such deviation can be made subject to the condition that it should make sense to any person with a broad understanding of the principles.

23. It is also being made clear that the Appellant shall not seek any refund of any monies so far collected against the demands till a fresh order is passed. He shall also deposit the differential duty in the case of Bills of Entries for which undervaluation is accepted by him.

24. The impugned order is set aside and the matter is remitted to the original authority for fresh consideration as per guidelines given herein above. The Appeals and Stay Applications are disposed of accordingly.

(Pronounced in Court)

(Ashok Jindal)
Member (Judicial)

(Mathew John)
Member (Technical)