

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
EASTERN ZONAL BENCH : KOLKATA**

REGIONAL BENCH – COURT NO. 1

Customs Appeal No. 79149 of 2018

(Arising out of Order-in-Appeal Nos. KOL/CUS(CCP)/AA/1540-1541/2018 dated 09.08.2018 passed by the Commissioner of Customs (Appeals), 3rd Floor, Custom House, 15/1, Strand Road, Kolkata – 700 001)

Commissioner of Customs (Preventive)

15/1, Strand Road, Custom House, M.S. Building,
Kolkata – 700 001

: Appellant

VERSUS

M/s. Sakti Enterprises

137, N.S. Road, 4th Floor, Suite-31,
Kolkata – 700 001

: Respondent

APPEARANCE:

Shri Tariq Sulaiman and Shri Ashwini Kr. Choudhury, Authorized Representatives
for the Appellant/Revenue

Shri R.N. Bandyopadhyay, Advocate
For the Respondent

CORAM:

HON'BLE SHRI ASHOK JINDAL, MEMBER (JUDICIAL)

HON'BLE SHRI K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO. 75441 / 2024

DATE OF HEARING / DECISION: 05.03.2024

Order : [Per Shri K. Anpazhakan]

The respondent, M/s. Sakti Enterprises, 137, Netaji Subhas Road, 4th Floor, Suite No.31, Kolkata-700 001 had imported consignments declaring the goods Unwrought / Unrefined Zinc falling under ITC No. 7912090 from Bangladesh through Petrapole Land Customs Station under two (2) Bills-of-Entry during the period from 19.03.2015 to 10.03.2016.

1.2 Representative samples were drawn and sent to CRCL, Custom House, Kolkata to ascertain the percentage of Zinc content. In the meantime, the Bills-of-Entry were assessed provisionally on the basis of LME price available on the date of filing of the Bills-of-Entry. Upon receipt of the Test Report from CRCL, Kolkata, it was found that the actual percentage of Zinc content in the Test Report was more than the percentage of Zinc content declared by the importer. Accordingly, the assessment was finalized by issuing Final Assessment Order No. 32/2017-18 dated 16.07.2017 by the Assistant Commissioner of Customs (Import), North 24 Parganas, Bongaon. The assessable value was enhanced on the basis of LME price and differential duty amounting to Rs.90,623/- was confirmed.

2. The Commissioner of Customs (Preventive), Kolkata reviewed the adjudication order passed by the Assistant Commissioner *inter alia* on the following grounds: -

"(i) The importer had declared the goods as "Unwrought/Unrefined Zinc falling under Tariff item 79012090, whereas the test report of CRCL shows that the imported goods having higher purity of zinc was Zinc Dross and classifiable under Tariff item 7902 00 90. Therefore Section 111 (m) of the Customs Act, 1962 should have been invoked for confiscation of the goods in view of mis- declaration of imported goods.

(ii) Further, the impugned goods being Zinc Dross meriting classification under Tariff item 7902 00 90 being other than ISRI specified Zinc Dross which is classified under Tariff item 7902 00 10, Section 111(d) of the Customs Act, 1962 should have been invoked for confiscation of goods in view of the restrictive nature of the goods and corresponding Import Trade Control and Foreign Trade Policy violations.

..."

3. The importer filed an appeal before the Ld. Commissioner (Appeals) on the ground that the value of the impugned goods had been arbitrarily enhanced by the assessing officer and contended that the transaction value should have prevailed; the demand of additional duty on the basis of NIDB data for primary Zinc ingots is not supported by any contemporaneous imports and therefore, they argued that the enhancement of value is not sustainable. Aggrieved by the above order, the Department had also preferred appeal on the ground that the chemical test report dated 17.03.2016 of CRCL, Kolkata has specified the imported goods as "Zinc Dross"; the assessing officer should have taken this fact into account while finalizing the assessment; when the chemical test report identified the goods as "Zinc Dross" which is a restricted item for import under the Foreign Trade Policy, its import in the guise of unwrought Zinc is a clear wilful mis-declaration and suppression of fact and the adjudicating authority has ignored this fact.

3.1 The Ld. Commissioner (Appeals) in his Order, inasmuch as it related to the importer's appeal, held that the assessing officer has rejected transaction values without any valid reasons and without following the due procedure as per Section 14 and Valuation Rules, especially when there is nothing on record to suggest that the transaction value declared by the respondent were not the price actually paid and the buyer and seller were related or price was not the sole consideration for sale. Therefore, the enhanced value was liable to be struck down and set aside. On the appeal filed by Revenue, the Ld. Commissioner (Appeals) observed that the lower adjudicating

authority had decided the case on the grounds of valuation only. However, in the appeal, the ground was that the impugned goods were not "unwrought/unrefined zinc" as declared by the importer but "Zinc Dross" which should have been classified under a different CTH. Therefore, the grounds of appeal of Revenue were beyond the scope of the Assessment Order and hence not maintainable. The Ld. Commissioner (Appeals) set aside the enhanced value and ordered assessment of the Bill of Entry at the declared price. The Importer's appeal was allowed and the appeal filed by Revenue was rejected. Aggrieved by the above order, the Revenue is before us.

4. In its grounds-of-appeal, the Department has contended that the assessing officer has only dealt with the valuation aspect of the impugned goods; the Ld. Commissioner (Appeals) has overlooked the fact that provisional assessment was not limited to valuation alone and the assessing officer was required to consider the full text of the chemical analysis report, which he has not done. Hence, the Revenue contends that the impugned order is not maintainable.

5. The respondent submits that the percentage of Zinc content in both the Bills-of-Entry filed by them was 85.05% only; the Test Report conducted by the Department through CRCL, Kolkata indicated a higher percentage of Zinc, the details of which are as under:-

Sl. No.	B/E No. & Date	Actual % of Zinc declared	Actual % of Zinc in test report	Declared value per M.T. (in US\$)	Re-assessed value as per LME data (in US\$)
1.	4533688 dated 10.03.2016	85.05%	87.80%	800.00	1129.20
2.	8650713 dated 19.03.2015	85.05%	92.50%	800.00	1299.30

6. Heard both sides and perused the appeal documents.

7. We observe that the Department has rejected the transaction value and redetermined the same on the basis of LME price considering the percentage of Zinc content in the consignments in terms of the Test Report of CRCL, Kolkata. As per the Test Report, the Zinc content in Bill-of-Entry No. 4533688 dated 10.03.2016 was 87.80% and the Zinc content in Bill-of-Entry No. 8650713 dated 19.03.2015 was 92.50%. We had asked the Ld. Authorized Representative appearing for the Revenue to furnish a copy of both the Test Reports. However, the Ld. Authorized Representative could not submit a copy of the Test Report for the Bill-of-Entry No. 8650713 dated 19.03.2015. It is observed that the percentage of Zinc should be above 92% in "Zinc dross". Only in the Bill-of-Entry No. 8650713 dated 19.03.2015, the Zinc percentage was found to be more than 92%. However, no such report has been produced before us by the Department to substantiate this claim. In the absence of a Test Report, it cannot be considered that the percentage of Zinc content in the goods imported by the respondent was above 92%.

7.1 In respect of the other Bill-of-Entry No. 4533688 dated 10.03.2016, the percentage of Zinc content was found to be only 87.80%, which is less than 92%. Accordingly, these goods cannot be considered as "Zinc dross" which are restricted as per the Foreign Trade Policy.

8. Thus, we observe that the Department has not brought any evidence on record to substantiate their claim that the percentage of Zinc content in both the

Bills-of-Entry was more than 92% so as to classify the same as "Zinc dross". Accordingly, we find that there is no infirmity in the impugned order passed by the Ld. Commissioner (Appeals) and therefore, we uphold the impugned order passed by the Ld. Commissioner (Appeals).

9. The appeal filed by the Department is rejected.

(Operative part of the order was pronounced in open court)

Sd/-
(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

Sd/-
(ASHOK JINDAL)
MEMBER (JUDICIAL)

Sdd