CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 717 of 2012

[Arising out of Order-in-Appeal No: 259/MCH/AC/CFS(M)(I)/2012 dated 4th May 2012 passed by the Commissioner of Customs (Appeals), Mumbai Customs Zone –I.]

Birla NGK Insulators Pvt Ltd
Opp Laxmi Studio, PO Meghasar, Tal: Halol
Dist: Panchmahal7 – 389 350 … ***Appellant***

versus

Commissioner of Customs (CFS) (Import)
CFS Mulund, Mumbai – 400 081 ***…Respondent***

APPEARANCE:

Ms Lakshmi Menon, Advocate for the appellant

Shri Manoj Kumar, Assistant Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE DR SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO: A/87561 / 2019

DATE OF HEARING:	18/04/2019
DATE OF DECISION:	18/04/2019

PER: C J MATHEW

Appellant, M/s Birla NGK Insulators Pvt Ltd, challenges order-in-appeal no. 259/MCH/AC/CFS(M)(I)/2012 dated 4th May 2012 of

Commissioner of Customs (Appeals), Mumbai Customs Zone –I which upheld the order of the original authority classifying ‘ball clay’, imported *vide* bill of entry no. 435/17.04.2003, under sub-heading no. 380290 of First Schedule to Customs Tariff Act, 1975, applicable to ‘activated clay’, instead of the claimed classification in tariff item no. 25084010 of First Schedule to Customs Tariff Act, 1975. The consequent under-recovery, ascertained to be ₹ 4,51,749, was ordered to be deposited along with interest.

2. Learned Counsel for appellant pointed out that the bill of entry for import by debit of scrip under ‘duty entitlement pass book (DEPB)’ scheme had been provisionally assessed as test results of samples were awaited. It was informed that notice had been issued for recovery of duty of ₹ 4,51,479, along with interest of ₹ 340719, under section 78 of Customs Act, 1962 on 1st September 2005 and consequent confirmation, challenged before the first appellate authority, was set aside and remanded for fresh decision. Submitting that the demand was confirmed again by the original authority which was upheld in the impugned order, Learned Counsel seeks setting aside of the same.

3. We have heard Learned Authorized Representative who submits that the test report indicated that the goods were ‘activated clay’ and that reclassification under the appropriate heading was correct.

4. We find that original authority and first appellate authority have

taken note that the bill of entry had been provisionally assessed. However, the proceedings before them were concluded on the basis of notice issued under section 28 of Customs Act, 1962 referred to *supra*, leading to confirmation of demand upon reclassification.

5. The proceedings initiated under section 18 of Customs Act, 1962 are yet pending and classification, based on test results, require finalization under section 18(2) of Customs Act, 1962 as it stood then. There is no cause for initiation of action under section 28 of Customs Act, 1962 while the goods were yet provisionally assessed as the allegation of short-levy, implicit therein as cause of action, cannot be applied to orders under section 18(1) of Customs Act, 1962.

6. Accordingly, we set aside the impugned order and direct that the original authority issues a fresh order in accordance with section 18(2) of Customs Act, 1962.

(Pronounced in open court)

(Dr. Suvendu Kumar Pati)	**(C J Mathew)**
Member (Judicial)	***Member (Technical)***

**/as*