

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, MUMBAI
REGIONAL BENCH**

**Customs Appeal No. 86836 of 2017
C/Cross/93096 of 2017**

(On behalf of Respondent)

(Arising out of Order-in-Original No. 198/2016-17/Commr/NS-V/JNCH dated 16.03.2017 passed by Commissioner of Customs, Nhava Sheva)

**Commissioner of Customs (Nhava Sheva-V) Appellant
Mumbai**

Jawaharlal Nehru Custom House,
Nhava Sheva, Navi Mumbai 400 707.

Vs.

M/s. Tirupati Microtech Pvt. Ltd. Respondent

201, Vinayak Business Centre,
Fetehpura-Pula Road,
Udaipur 313 001.

Appearance:

Shri Ashwini Kumar, Additional Commissioner, Authorised
Representative for the Appellant
Shri D.B. Shroff, Sr. Advocate, for the Respondent

CORAM:

**HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE MR. AJAY SHARMA, MEMBER (JUDICIAL)**

Date of Hearing: 20.07.2022
Date of Decision: 28.09.2022

FINAL ORDER NO. A/85904/2022

PER: SANJIV SRIVASTAVA

This appeal is directed against order in original No 198/2016-17/Commr/NS-V/JNCH dated 16.03.2017 of Commissioner Customs, Nhava Sheva. By the impugned order, Commissioner has dropped the proceedings initiated against the respondents vide show cause notice dated 21.03.2012.

1.2 Respondent has filed cross objections to the appeal.

2.1 Intelligence was gathered by DRI, Ahmedabad indicated that importers of Zirconium Ore Concentrates are importing the same by mis-declaring it as Zircon Sand/Zircon Ore and thereby wrongly claiming exemption from CVD under Sr.No.4 of Noti.No.4/2006-CE dated 1/3/2006. The intelligence further indicated that respondents holding IEC No.1397000902 are importing goods by declaring the same as Zircon Sand/Zircon

Ore, classifiable under CTH 26151000 and claiming exemption from payment of CVD under Sr.No.4 of Noti. No.4/2006-CE dated 1/3/2006.

2.2 Respondent had filed Bills of Entry Nos.4731107 dated 23.09.2011 and 4736471 dated 24.09.2011 for import of goods declared as Zircon sand/Zircon ore. The goods were imported at JNCH, Nhava Sheva.

2.3 Based on the above intelligence investigations were initiated against the said importer and the statement of Shri Pawan Kumar Kothari, Managing Director of the said firm was recorded under Section 108 of the Customs Act, 1962. In the course of his statement dated 15.11.2011 he was questioned as to how the goods imported by them are declared to be ores while the same are actually concentrates, to which he stated that they have vide their letter dated 15.11.2011 given a detailed submission, supported by documents, stating the reasons for the same. He also stated that the goods imported by them are ores and this is based on the decision of the Hon'ble CESTAT in the case of Indian Rare Earths Ltd [2002 (139) ELT 352 (Tri-Kolkata)]. This decision has also been upheld by the Hon'ble Supreme Court.

2.4 After completion of investigations revenue was of the view that importer has wrongly claimed the benefit of exemption from CVD in respect of the Zircon Concentrate imported by them by wrongly declaring the goods to be Zircon sand/Zircon Ore. The fact of the Zircon Concentrate is being deliberately wrongly described as Zircon sand/Zircon ore is evident from the fact that M/s.Iluka Resources Ltd, Australia, the supplier, have themselves, in their document titled 'Mineral Sands Technical Information' clearly stated that by the processes of Wet Concentration, Attritioning and Secondary Concentration and Dry Mill Processing they produce Zircon Concentrate. The importer has therefore, knowingly and deliberately indulged in mis-declaration of the goods imported by them with a view to wrongly avail of the benefit of exemption from payment of CVD under Noti.No.4/2006 CE dtd. 1/3/2006 (Sr.No.4). Hence, Section 28(4) of the Customs Act, 1962, for invoking the extended period for demand of duty is applicable. However, in the instant case the demand for differential duty of Customs -

CVD evaded by the importer pertains to the period from March, 2011 to November, 2011. i.e. within the period of one year. Therefore, the extended period of limitation under Section 28 (4) of the Customs Act, 1962 is not being invoked for recovery of the duty evaded. The differential Customs duty amounting to Rs.5,01,85,5671/- as indicated in Annexure- A &B to the SCN therefore, appears liable to be recovered from the importer along with applicable interest under Section 28 AA ibid.

2.5 Shri Pawan Kumar Kothari, Managing Director of M/s Tirupati Microtech Pvt. Ltd. has concerned himself in the import of Zircon Ore Concentrate by mis-declaring the same as Zircon Sand/Zirconium Ore with an intent to wrongly avail benefit of exemption from CVD under Notification No.4/2006-CE dtd.1/3/2006 (Sr.No.4), which renders the goods liable for confiscation under Section 111(d) & (m) of the Customs Act, 1962. For the above mentioned acts of omission and commission, Shri Pawan Kumar Kothari has rendered himself liable for penal action under the provisions of Section 112(a) of the Customs Act, 1962.

18. A show cause notice dated 23.01.2012 was issued to respondents asking them to show cause as to why:

- (i) the 3460.09 MTs goods i.e. Zircon Ore Concentrate, as detailed in Annexure 'A', totally valued at Rs.20,92,51,652/- should not be held liable for confiscation under Section 111 (d) & (m) of the Customs Act, 1962. However, as the goods are not available for confiscation, why redemption fine should not be imposed in lieu of confiscation.
- (ii) Differential Customs duty amounting to Rs.3,49,73,869/- (Rupees Three Crores Forty Nine Lakhs Seventy Three Thousand Eight Hundred Sixty Nine only), evaded by them on the said goods, should not be demanded and recovered from them under Section 28 (1) of the Customs Act, 1962;
- (iii) Interest should not be recovered from them on the said differential customs duty, as at (ii) above, under Section 28 AA of the Customs Act, 1962.

- (iv) (iv) Penalty should not be imposed on them under Section 114A of the Customs Act, 1962.
- (v) (v) Penalty should not be imposed on them under Section 112 (a) of the Customs Act, 1962.

2.5 A show cause notice dated 23.01.2012 was issued to respondent asking them to show cause to the Commissioner of Customs (Imports), Chennai, as to why:

- (i) The 1690000 Kg goods, i.e. Zicron Ore Concentrate, as detailed in Annexure 'B', totally valued at Rs.13.45,07,358/- should not be held liable for confiscation under Section 111 (d) & (m) of the Customs Act, 1962. However, as the goods are not available for confiscation, why redemption fine should not be imposed in lieu of confiscation.
- (ii) Differential Customs duty amounting to Rs.1,52,11,698/- (Rupees One Crore Fifty Two Lakhs Eleven Thousand Six Hundred Ninety Eight only), as detailed in the Annexure 'B' to the show cause notice, evaded by them on the said goods, should not be demanded and recovered from them under Section 28 (1) of the Customs Act, 1962;
- (iii) Interest should not be recovered from them on the said differential customs duty, as at (ii) above, under Section 28 AA of the Customs Act, 1962,
- (iv) Penalty should not be imposed on them under Section 114A of the Customs Act, 1969.

2.6 Show cause notice also asked Shri Pawan Kothari Managing Director of the appellant to show cause as to why penalty should not be imposed him under Section 112 (a) of the Customs Act, 1962.

2.7 CBEC vide its Order dated 01.08.2012 appointed the Commissioner of Customs (Imports), JNCH as the common adjudicating authority. Thereafter, CBEC vide notification No.82/2016 -Customs (NT) dated 07.06.2016 appointed Commissioner of Customs, Nhava Sheva -V as the common adjudicating authority in respect of the said SCN.

2.8 Commissioner has adjudicated the matter as per the impugned order dropping the proceedings initiated against the respondents.

2.9 Aggrieved by the impugned order revenue has filed this appeal on following grounds.

1) As per the HSN Explanatory Note, "Ores are seldom marketed before 'preparation for subsequent metallurgical operations. The most important preparatory processes are those aimed at concentrating the ores. For the purposes of heading 26.01 to 26.17, the term 'concentrates' applies to ores which have had part or all of the foreign matter removed by special treatments, either because such foreign matter might hamper subsequent metallurgical operations or with a view to economical transport."

2) M/s Tirupati Microtech Pvt Ltd are mainly importing their product from M/s Iluka Resources Ltd. Australia. M/s Iluka Resources Ltd have in their official website stated the manufacturing processes and flow charts. In the said manufacturing processes and flow chart documentation it is stated that the concentration of mineral sands from primary ore is carried out by wet concentration process and by dry concentration process. The Wet concentration process has been described as:

a. The Wet Concentration process:

- i. Wet concentration produces a high grade heavy mineral concentrate, maximising the content of valuable mineral sand whilst minimising the amount of non valuable mineral (gangue).
- ii. The slurry of mineral sands, silts and clays is further screened at a smaller aperture to remove such gangue material as fine rock, tree roots, other organic matter and fine clay balls. It is imperative that this material is removed before passing into the next stage of the concentrator as much of the equipment used has fine apertures, pipes and cutters which could become blocked.
- iii. The slurry is pumped to a bank (or banks) of hydro-cyclones, this removes very fine, predominantly clay and silt particles. The underflow from the hydro-

cyclones is fed to a constant density ("CD") tank. This is then pumped, at a constant density and feed rate (to optimise performance), to the distributors above the primary spirals in the wet concentrator.

- iv. iv. The slurry then passes to the spiral banks where separation of heavy mineral from the quartz sand occurs through gravity separation. The spiral troughs are angled and the heavy mineral sand moves to the inside and the lighter gangue minerals to the outside of the trough as the slurry travels down the spiral. Re-pulpers on the spirals aid in the recovery process.
- v. Heavy mineral concentrate from each stage passes on to the next upgrading stage to be further concentrated, middling's are usually recirculated, and tails scavenged to collect any left-over valuable heavy mineral.
- vi. Heavy mineral concentrate is stockpiled on site before being transported to the secondary concentrator or dry separation plant. It is stockpiled using dewatering cones or cyclone stackers. The concentrate is allowed to drain to minimize moisture before transportation.

b. Attrition and Secondary Concentration:

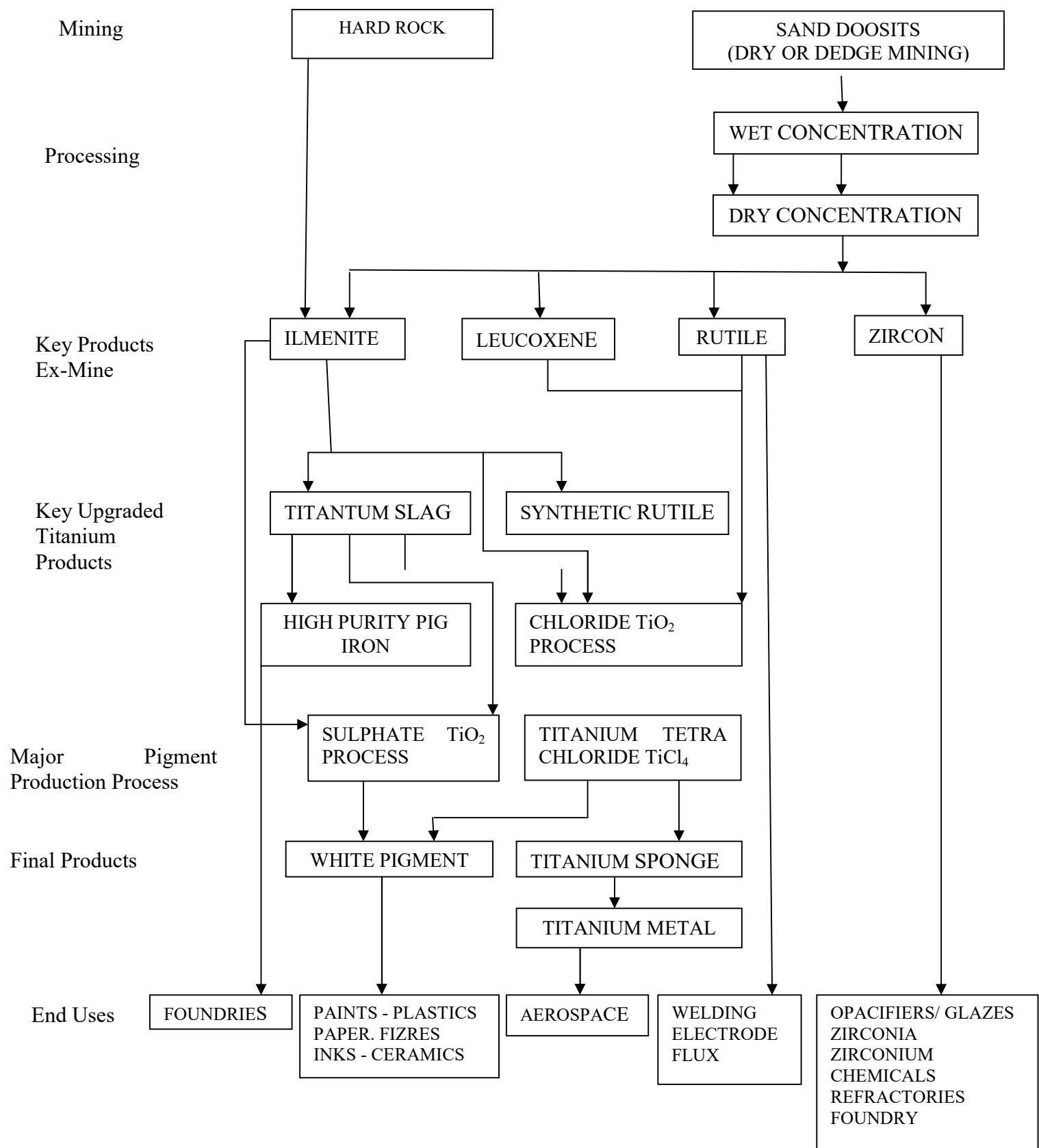
- i. Attritioning is carried out on heavy mineral concentrate to clean the mineral surface. It increases separation efficiencies in electrostatic separation performed during dry separation. This is done by agitating the mineral slurry vigorously causing the mineral particles to collide together and scrub the surfaces, Chemicals are occasionally added to aid this process..
- ii. Secondary concentration uses an up-current classifier to remove fine quartz and non valuable heavy minerals from the wet concentrator heavy mineral concentrate to achieve a heavy mineral content of approximately 98 percent.

c. Dry Mill Processing:

- i. Following wet processing the heavy mineral concentrate undergoes a number of dry processing stages to separate the valuable minerals. The design of each flow sheet will differ depending on the mineral assemblage.

- ii. Dry mill processing relies upon the unique physical properties of each mineral to separate the gangue minerals from the valuable heavy minerals.
 - iii. Rare earth drum and roll magnets remove most of the ilmenite as it is the most magnetic of the minerals in the dry mill feed. Electrostatic separation, using high tension roll and plate electrostatic machines, separate the non conductive minerals such as zircon, kyanite, staurolite, quartz and monazite from conductive minerals such as Rutile, leucoxene and residual ilmenite.
- 3 The conductive minerals are further cleaned by
- i. non electrostatic separation to remove residual conductive contaminants to marketable levels; and
 - ii. magnetic separation to separate rutile; leucoxene and residual ilmenite into rutile, Hyti and ilmenite products.
 - iii. The non-conductive minerals pass through a wet gravity circuit to separate the light quartz, kyanite and staurolite from the heavier zircon.
- 4 Zirconium concentrate is dried and cleaned by further
- Electrostatic separation to reduce the titanium dioxide content to below 0.15 percent; and
 - Magnetic separation to remove weakly magnetic monazite and residual staurolite.
5. The manufacturing process and flow charts is given below:

Titanium Feedstock Processing Routes



From the above process mentioned by the manufacturer supplier itself it is evident that the process of wet concentration/ Attritioning and Secondary concentration / Dry Mill Processing resulted into production of Zirconium ore Concentrate which have been imported in the subject case.

26. The importer has not submitted any evidence to prove that the goods imports were not subjected to above process. Under the circumstances, there was no need to carry independent test to verify as to whether the subject goods are Zircon ore/sand or Zirconium ore concentrate.

7. Accordingly, the observation of the Adjudicating Authority that the most direct evidence would be in the nature of chemical test that would indicate the concentration level of Zirconium in the imported product, is not correct.

8. The Adjudicating Authority has relied upon on the Tribunal Order in the case of M/s Classic Microtech Pvt. Ltd. V/s Commissioner of Customs, Ahmedabad reported at 2012 (285) E.L.T. 48 (Tri-Ahmedabad). In this regard it is seen that in the aforesaid case the goods were send to CRCL for test who gave their opinion based on test report of M/s Indian Rare of Earth Ltd. Research Centre, Kollam. In the aforesaid order the manufacturing process of M/s Iluka Resources Ltd. Australia as discussed above has not been considered. Considering the above mentioned manufacturing process, the subject goods cannot be considered to be Zircon Sand/ore. In view of the aforesaid facts, the relied upon CESTAT order is not squarely applicable in the present case.

9. In view of the above, it is evident that the imported goods are Zirconium ore Concentrate considering the manufacturing process of the supplier itself. Thus the imported goods i.e. Zircon ore Concentrate (5150.09 MTS) valued at Rs.44,37,59,010/- are liable for confiscation under Section 111(d) of the Customs Act, 1962; Differential Duty amounting to Ps. 5,01,85,567/- evaded by the importer on said goods, should be demanded and recovered from Importer under Section 28 (1) of the Customs Act, 1962; Interest should be recovered from importer on the said differential customs duty under Section 28AA of the Customs Act, 1962; Penalty should be imposed on the importer under Section 114A and 112 (a) of the Customs Act, 1962. and penalty should also be imposed on Shri Pawan Kumar Kothari, Managing Director of M/s Tirupati Microtech Pvt Ltd.

3.1 We have heard Shri Ashwini Kumar, Additional Commissioner, Authorized Representative for the Revenue and Shri D B Shroff, Sr. Advocate for the respondent.

3.2 Arguing for the Revenue learned authorized representative submits-

- Referring to available literature it can be concluded that the content of Zircon (ZrSiO_4) in imported Zircon Sand is

approx. 95% taking into consideration the IBM test report (93.05%) and Supplier’s chemical analysis report(98.5%). In instant case Supplier sales two grade of Zircon Concentrate namely

- Zircon In Concentrate-Zircon content 30-60%,
 - Mineral Sand Concentrate-Zircon content 20-25%,
- Thus, item in dispute is not even Zircon Concentrate due to high content of Zirconium Silicate (95%) but premium or standard grade of Zircon Sand as described in invoice attached to 2 (two) Bills of Entry

Bill of Entry No/ Date	B. E. Description	Invoice Description
4731107/23-09-2011	Zircon Sand Premium BIC MB (Zirconium Ore)	Zircon <u>Premium</u> BIC MB
4736471/24-09-2011	Zircon Sand (Standard Grade) (Zirconium Ore)	Zircon Sand (<u>Standard Grade</u>)

- The MSDS of Supplier for “Zircon Sand Products”, hereto attached as. As per said MSDS the “Zircon Sand Products” is known by various synonym namely (i) Premium (ii) Standard (iii) Ultra (iv) Universal (v) Zacura (vi) Zircon (vii) Zircon Sand (viii) Zirconium Silicate. The percentage of Zircon indicated is 95-99%. It is evident that supplier has described in the said MSDS as “Zircon Sand Products” and not “Zircon Sand Ore or Concentrate.”
- The addition of expression (Zirconium Ore) in description of items in Bills of Entry has been done with an intention to evade the duty by way of claiming exemption of notification 04/2006-C.E. dated 01-03-2006 as ore. By no way of stretch of imagination, it can be said that Zircon Sand having Zirconium Silicate (ZiSiO₄) to the extent of approx. 95% is Zirconium(ZiO₂) ore. Ex facie, this is patently malicious, where respondent is writing Zircon Sand having chemical formula as ZiSiO₄ as Zirconium Ore having chemical formula of Zirconium as (ZiO₂).

- In case of Star Industries Vs Commissioner of Customs Raigad (2015 (324) ELT 656 (SC)) – “EX-G”, following has been held:

"31. We, thus, are of the opinion that in the impugned judgment, the Tribunal has rightly arrived at the conclusion that by virtue of Note 4, concentrate has to be necessarily treated as different from ores which is deemed as manufactured product after Molybdenum Ores underwent the process of roasting. Once we keep in mind that conversion of ores into concentrate is considered as manufacture and, therefore, becomes liable for central excise levy, exemption Notification No. 4/2006-CE is to be interpreted in this light as the Legislature has intended to treat ores and concentrates as two distinct items and Notification No. 4/2006-CE exempts only 'ores', concentrates automatically falls outside the purview of said notification. It is rightly argued by the learned senior counsel for the Revenue that exemption notifications are to be construed strictly and even if there is some doubt, benefit thereof shall not enure to the assessee but would be given to the Revenue. This principle of strict construction of exemption notification is now deeply ingrained in various judgments of this Court taking this view consistently."

- In case of Malu Electrodes Pvt. Ltd. Vs Commissioner of Customs, (NS-I), Nhava Sheva (218(364)ELT 1023 (Tri-Mumbai)- “EX-H” following has been held:

*"From the above perusal of the **Explanatory Note to chapter 26** we find that not only minerals which exists in its natural form alongwith other substances, which is either extracted or mined, will qualify as ores, but also minerals in their 'ganuage' state will also be classifiable as Ores. It further transpires from the above Notes to the HSN that for **'Ores' to transform into 'concentrates', special chemical treatment/ processes have to be carried out which alters the basic chemical composition of the mineral itself, and mere physical or physio-chemical processes aimed at extracting or***

segregating the mineral from the natural substances would not tantamount to concentrating the 'ores'. Thus if the chemical composition of the mineral has not been altered while undertaking any physical processes as the facts of the present case shows the goods would not fall under the category of 'concentrate'. The revenue has relied upon the test report of IIT, Powai to hold that the goods in question are 'Concentrate' and not 'Ores'. On perusal of the test report of IIT, Powai we find that during investigation the following questions were asked to the said institute..:"(Emphasis added for reference)

This decision of CESTAT, Mumbai suffers from inherent defect as it has been held that to transform Ores into Concentrates, special chemical treatment is required, **which alters the basic chemical composition of Minerals itself.** Per contra, the explanatory notes to Chapter 26 bars the change in chemical composition during concentration process. The said Explanatory notes read as follows:

"The term "ores" applies to metalliferous minerals associated with the substances in which they occur and with which they are extracted from the mine; it also applies to native metals in their gangue (e.g. metalliferous sands).

Ores are seldom marketed before "preparation" for subsequent metallurgical operations. The most important preparatory processes are those aimed at concentrating the ores.

For the purposes of the present heading, the term "concentrates" applies to ores which have had part or all of the foreign matter removed by special treatments, either because such foreign matter might hamper subsequent metallurgical operations or with a view to economical transport.

*Processes to which products of this heading may have been submitted include **physical, physico-chemical or chemical operations**, provided that they are normal to the preparation of the ores for the extraction of metal. With the*

*exception of changes resulting from calcinations, roasting or firing (with or without agglomeration), **such operations must not alter the chemical composition of the basic compound which furnishes the desired metal.***

The physical or physico-chemical operations include crushing, grinding, magnetic separation, gravimetric separation, floatation, screening, grading, agglomeration of powders (e.g., by sintering or pelleting) into grains, balls or briquettes (whether or not with the addition of small quantities of binders), drying, calcinations roasting to oxidise or magnetise the ore, etc. (but not roasting for purposes of sulphating, chlorinating, etc.)"
(Emphasis added for reference)

Thus, explanatory notes specifically bar that concentration process must not alter the chemical composition of the basic compound.

- Order dated 16.03.2017 may be set aside.

3.3 Arguing for the respondent learned counsel submits

- At the outset it is submitted, that the Department's claim that the Appellants had imported Zirconium Ore Concentrate is not backed by any expert opinion or test report whereas experts in the field like IBM, Nagpur, IREL Research Centre etc. have all opined that the product imported is zircon sand/zirconium ore.
- Iluka Resources have by their email dated 20/09/2011 confirmed:
 - i. that they only supply zircon sand/ore to the Indian market from their mine in Australia;
 - ii. that the only zircon, Iluka supplies in the Indian market is a natural zircon ore;
 - iii. that the zircon ore is in the form of naturally occurring zircon sand (as the crystalline form Zirconium Silicate (ZrSiO₄);
 - iv. that as per the notes of the Customs Tariff, this material is not subject to any special "preparation" or treatment other than physical separation from other naturally occurring minerals (i.e., rutile and ilmenite) and host clay or sand;

- v. that for this material to be upgraded to a metal, the crystalline structure must be broken down by further processing at very high temperatures;
 - vi. that there was no change to the crystalline structure and the material is used without further chemical processing or chemical change in the said ZrSiO_4 structure;
 - vii. that they do not undertake grinding, floatation, sintering, calcination or roasting; and
 - viii. that they do not supply zircon concentrate to India and that all their material was to be considered as "zircon ore" consistent with the Australian Customs Harmonised Code for this material (see Ex B to the Cross-objections).
- Revenue for filing this appeal has totally misunderstood and misinterpreted the information set out in the Iluka website and have wrongly assumed that the 'Wet Concentration Process' and the 'Attrition and Secondary Concentration Process' results in a concentrate as the latter process states that "secondary concentration uses an up-current classifier to remove fine quartz and non-valuable heavy minerals from the wet concentrator heavy mineral concentrate to achieve a heavy mineral content of approximately 98%". Based on this statement it is alleged that the concentration is 98% and hence what was imported was a concentrate. This is totally misconceived, and a total misreading of the information set out in the website. The 98% concentration of heavy mineral content is not of anyone particular heavy mineral, like zirconium ore, but is a concentration of all the valuable heavy minerals contained in the beach sand, only one of which is zircon. This is because by the various physical processes carried out by Iluka the rock, clay, sand and other impurities has been substantially removed leaving only the heavy minerals naturally occurring in the sand. In fact, the website goes on to show, that the heavy mineral concentrate (HMC) thereafter undergoes several dry processing stages to separate the valuable minerals. The Dry Mill processing relies upon the unique physical

properties of each mineral to separate the gangue minerals from the valuable heavy minerals, and, that the dry mill processing relies upon the unique physical properties of each mineral to separate the gangue minerals from the valuable heavy minerals. Rare earth drum and roll magnets remove most of the ilmenite as it is the most magnetic of the minerals in the dry mill feed. Electrostatic separation, using high tension roll and plate electrostatic machines, separate the non-conductive minerals such as zircon, kyanite, staurolite, quartz and monazite from conductive minerals such as Rutile, Leucoxene and residual ilmenite. These conductive minerals are further cleaned to separate various heavy minerals. What Iluka exports is the ore of zirconium, i.e., zircon/zircon sand/zircon silicate, as explained here in below.

- The specifications of zircon sand covered by the Indian Standard (ISI: 9007-1978; Reaffirmed 2003). The Standard provides the chemical composition of zircon sand as under:

Constituent	Percent
ZrO ₂	65 Min
SiO ₂	35-35
TiO ₂	0.6 Max
Fe ₂ O ₂	0.15 Max

- The aforesaid process, which has been set out in the Department's appeal, does not result in the production of a concentrate leave alone 'Zirconium ore concentrate'. The process of separating zircon sand from the naturally occurring sand does not result in higher concentration of zirconium that that which occurs naturally in zircon crystals. The percentage of ZrO2 remains around 66% and is not increased.
- In fact, there is no such thing as zirconium ore concentrate. As explained by the CBEC in its Circular 9/2012 dated 23/3/2012 ores and concentrates are 2 different and distinct products. Further Chapter Note 4 of

Chapter 26 also provides that concentration of ores amounts to manufacture a new product. Thus, the entire basis of the show cause notice in the appeal is misconceived as there is no product such as 'zirconium ore concentrate'. There is a difference between ores and concentrates of ores. Also stated herein above applies to metallic ferrous minerals associated with the substances in which they occur. In case of an ore the chemical composition does not change. Concentrates of ores are obtained by specifically treating the ores by altering the chemical composition. In the present case, the Appellants import zircon sand which has not been subjected to any special treatment so as to change its chemical composition, in

- Zirconium (Zr) is a greyish-white metallic element with an atomic number of 40. It naturally combines with silicon and oxygen to form the mineral zircon (ZrSiO_4), the primary ore of this element. Zirconium was named after the silicate material in which it was first discovered, namely zircon. Zircon serves as the primary ore of zirconium metal. In other words, the ore of zirconium is Zircon, which is a mineral belonging to the group of nesosilicates. Zirconium is found in 2 minerals, zircon (zirconium silicate, ZrSiO_4) and baddeleyite (zirconium oxide, ZrO_2). The most important of these ores, zircon, occurs as Green concentrated in sand deposits in south-eastern United States Australia and Brazil. 14 million tonnes of the zirconium are in heavy mineral sands deposits in the United States. The sands are called zircon sands because they contain sand -sized mineral zircon grains (see Mineral Information Institute-Zirconium). Its chemical name is zirconium silicate, and its corresponding chemical formula is ZrSiO_4 . The crystal structure of zircon is tetragonal crystal system. Zircon is used as an opacifier, whitening agent, and pigment in glazes and stains used on ceramics and pottery. Heavy mineral sands are a class of ore deposit, which is an important source of zirconium, titanium, thorium, tungsten, rare-earth elements, industrial minerals diamonds, sapphires, garnets, and

occasionally precious metals or gemstones. Heavy mineral sands are placer deposits formed most usually in beach environments by concentration due to the specific gravity of the mineral grains.

- Thus, Zircon, Zirconium and zirconium concentrate are three different things:
 - Zircon is ZrSiO_4 (66% zirconium oxide- ZrO_2 and 32% SiO_2) or zircon sand or zircon silicate.
 - Zirconium is the metal itself, which is obtained from the ore - Zircon/zircon silicate/zircon sand. In other words, the entry covers the ore of zirconium, i.e., zircon/zircon silicate/zircon sand. The HSN for heading 26.15 makes this abundantly clear. It states that:
 "The principal zirconium ores generally classified in this heading are:
 (a)...
 (b) Zircon and zircon sands, zirconium silicates. (When in the form of a precious stone, zircon falls in heading 71.03)."
 - Zirconium concentrate is obtained when the ore is subjected to certain special treatments so as to change the crystalline structure of the ore.
- In the present case, no special treatment such as roasting or calcination or any other special treatment whatsoever has been carried out that would change the crystalline structure of the Zirconium ore naturally occurring in the sand.
- The purity of the ZrO_2 content i.e., zirconium oxide in the Zircon sand that has been imported is only 62% and not 98%. It is the naturally occurring crystal zirconium silicate (ZrSiO_4) that has a purity of 98-99%. The Department has deliberately not relied upon the test reports given in the Appellants' own case, which shows that the purity is 61-63% (see Ex A to the Cross Objections).
- In fact, the aforesaid test reports of the Appellants has been referred to by this Hon'ble Tribunal in the case of Classic Microtech Private Limited Versus Commissioner of Customs 2012 (285) ELT 418 (T) which dealt with the

identical product. This Hon'ble Tribunal concluded that the product imported is nothing but zircon sand/zircon ore and is entitled to the benefit of the notification. They relied on in its judgement in the case of Indian Rare Earths Ltd v CCE 2002 (139) ELT 352 (T) (hereinafter referred to IRE-1). This judgement has been followed by another bench of this Hon'ble Tribunal in the case of Astron International Ltd Versus Commissioner of Customs 2015 (321) ELT 517 (T).

- The Calcutta Bench of this Hon'ble Tribunal in the case of Indian Rare Earths Ltd Versus CCE 2016 (338) ELT 274 (T) (hereinafter referred to as IRE-2), took a contrary view to the aforesaid judgements of this Hon'ble Tribunal, holding that the process undertaken on sand ores like washing, magnetic separation, gravity separation to remove unwanted matter result into conversion of ores to concentrate and is an activity amounting to manufacture, in view of Chapter Note 4 to Chapter 26. The tribunal however allowed the alternative submission and remanded the matter back to the Commissioner for determining whether the assessee was entitled to the benefit of notification no. 63/95-CE dated 16/3/1995 which exempted all good other than those falling under heading 2701, 2702, 2703, 2704 and 2706 if manufactured in a mine.
- This issue now is no longer res. integra as the aforesaid judgement has been distinguished and explained by a recent judgement of the Mumbai Bench of the Tribunal in the case of Malu Electrodes Private Limited [2018 (364) ELT 1023 (T)]. The facts of the aforesaid case are similar if not identical.
- The zircon ore/zircon sand imported by the Appellants is nothing but sand which is in ore form having zircon which is separated from the sand by various physical means only. The Crystal ZrSiO_4 - zirconium silicate - containing 66% ZrO_2 occurs naturally in the beach sand. This is the same Crystal that has been removed from the sand and exported to the Appellants. There is no chemical change to this crystal. When Iluca uses the term "concentrate", what is meant is that aforementioned crystals have been

separated from the gangue and other heavy minerals and what is being exported is just the zirconium silicate crystal. To obtain the metal, i.e., zirconium, the manufacturer would have to remove the SiO_2 , i.e., silica content to be able to concentrate it. The zircon sand has a purity of only 62%. To become a concentrate, it must undergo chemical process and the ZrO_2 content must be increased to 95% by removal of the silica content. This is precisely what was held by this Hon'ble Tribunal in the case of IRE-1 (supra).

- As set out by the CBEC in Circular No. 332/2012 dated 17/2/2012 that it is go to home clear from the definition of concentrate in the HSN that removal of part or all foreign material is envisaged for conversion of ores into concentrates. The Ministry of Mines has clarified that no special treatment is involved in the crushing and screening of all and the end product can be termed as concentrate only when the grader wore a sufficiently improved through beneficiation. Federation of Indian Mineral Industries have also pointed out that several processes in addition to screening and crushing) such as milling, hydraulic separation, magnetic separation, flotation and concentrate thickening have to be undertaken for ores to be converted into concentrate. They therefore clarified that the levy of excise duty was attracted only in cases where the product meets the definition of concentrate as per the ages and notes, i.e., 'ores which have had part, or all the foreign matter removed by special treatments either because such foreign matter may hamper subsequent metallurgical operations or with a view to economic transportation'.
- Further, the Board's Circular 9/2012-CUS dated 23/3/2012 dealt with the doubts that were raised whether on imports of ore concentrate the benefit of the notification can be granted to "concentrate" of that ore. Note was made of the HS definitions of ore and concentrate. It was clarified that the recent changes in the Central Excise Act Tariff treating the concentration of ore as amounting to manufacture would not in any way change the definition of ore or concentrate for the purposes of classification and that these two items are two distinct products.

- There is a vast difference between a 'concentrate' and 'concentration'. The zircon crystal available in the sand can be seen with the high powered magnifying glass. After it is separated from the rest of the sand and the rest of the heavy minerals that crystal remains the same. There is no difference in the chemical purity or crystal structure of the zircon.
- As observed by this Hon'ble Tribunal in the case of Classic Microtech Private Limited (supra) has observed that the Indian Standard for Zircon Sand also clearly indicates the chemical composition in the IS 900/-1970 where the minimum percentage of ZrO₂ has been given a 65%. The is standard makes it clear that zircon sand is obtained by processing natural beach sand deposits rich in heavy minerals and that the clay content should be nil.
- As there is no merits in the appeal of revenue the same needs to be rejected.

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments:

4.2 For dropping the demand made in the Show Cause Notice Commissioner has observed as follows:

"29. The basic charge framed in the SCN against the noticees is that they have wrongly availed the benefit of exemption from payment of CVD under notification No.4/2006-CE dated 01.03.2006 (S. No. 4), which is available for zirconium ore, whereas the noticee has imported zirconium ore concentrate during the period from 01.03.2011 to 30.11.2011 through JNCH and Chennai port. Therefore, the basic question before me is to decide whether the goods imported by the noticee were zirconium ore or zirconium concentrate and whether zircon sand/zircon ore was being mis-declared as zirconium ore concentrate. I note that zirconium ore and concentrate are both classifiable under CTH 26151000. CBEC in Circular No. 08/2012-Customs dated 23.03.2012 refers to the following HS definitions of ore and concentrate: (i) The term ore applies to metalliferous minerals associated with the substances in which they occur and with which they are extracted from the mine; it also applies to

native metals in their gangue (e.g. inettalliferous sands) and (ii) The term concentrates applies to ores which have had part or all of the foreign matter removed by special treatments, either because such foreign matter might hamper subsequent metallurgical operations or v h a view to economical transport.

C. The Department has contended that the concentration processes undertaken by M/s Ilukas Resources Ltd., Australia, as per their website, that involves wet concentration process and dry concentration process, make it abundantly clear that they produce zircon concentrate and this is imported by the noticee. In this regard, the Department has argued that the decision of the CESTAT in the case of Indian Rare Earths, wherein the Tribunal has held that the processes of spiraling, gravity separation, electrostatic and magnetic separation carried out does not amount to manufacture, pre-dates the introduction of Note 4 to Chapter 26 vide Finance Act, 2011. In the said decision, the Tribunal had held that "From what has been stated above, it is clear that no manufacturing is involved in the present case justifying demand of excise duty". The Department has argued that consequent to the insertion of the said chapter note, a deeming legal fiction has been created. Therefore, even though the processes carried out on the goods may not change the essential characteristics of the goods or the chemical composition of the goods by as per the deeming legal fiction created by Note 4 of Chapter 26 of the Central Excise Tariff, the processes leading to concentration of the ores amounts to manufacture and hence, liable to payment of Central Excise duty.

31. I note that CBEC Circular No. 9/2012-Customs dated 23.03.2012, inter alia, clarified that the "recent changes in the Central Excise Tariff treating the concentration of ore as amounting to manufacture would not in any way change the definition of ore or concentrate for the purpose of classification." The Circular goes on to clarify that the implication for imported concentrate is that the benefit of exemption of additional duty of customs leviable under section 3 of Customs Tariff Act, 1975 in terms of a notification that applies to ores is no longer available to concentrates, even if concentrates and ores fall under the same tariff heading. In view of the aforesaid Circular, I am of the

view that it would be wrong to conclude that imported ores would per se be deemed to be concentrates, and therefore leviable to CVD.

32. The next issue that needs to be decided is whether the goods that were declared as zircon sand / zircon ore were other than that and actually "zircon ore concentrate". Further, if the imported goods were "zircon ore concentrate", are these goods to be treated as ore or concentrate for the purposes of levy of CVD. The Department has contended that the imported goods were zircon ore concentrate and mis-declared as zircon sand/ zircon ore. The importer has contended that there is no such product as "zircon ore concentrate". I find merit in the contention of the importer and relying on the opinion, inter alia. expressed by CBEC in the aforesaid Circular No. 09/2012-Customs, hold that ore and concentrate are two distinct products and there is no such intermediate product known as "zircon ore concentrate".

33. I now move to examine whether the goods imported by the noticee and declared as zircon sand/ zircon ore, which are supplied by M/s Iluka Resources Ltd., are to be treated as zircon ore or zircon concentrate. At the outset, it may be mentioned that the Department has not contended that there is any change in the nature of goods imported by the noticee subsequent to the insertion of the Note 4 to Chapter 26 of Central Excise Tariff vide Finance Act, 2011. Therefore, prima facie, if the goods imported prior to the aforesaid amendment were treated as ore they would continue to be treated as ore and not as concentrate after the amendment. There is nothing on the record to argue that importer was importing concentrate prior to the said amendment. In fact, as disclosed subsequently, there is substantial evidence confirm that the goods imported by the no and other similarly placed importers of zircon sand that these goods are indeed zircon ore

34. Be that as it may, it will be most appropriate and conclusive to examine whether the goods imported as zircon sand/zircon ore covered by the SCN, are actually ore or not. It is obvious that the most direct evidence would be in the nature of a chemical test that would indicate the concentration level of

zirconium in the imported product. Unfortunately, the Department has not adduced any such test report in the SCN. In fact, the SCN refers to test report dated 02.11.2011 of the Laboratory of Modern Mineral Processing of the Indian Bureau of Mines (IBM) which had concluded that zircon sand on chemical examination was found to be naturally occurring zircon ore, and argues that the said test report is liable to be discarded ab initio. I will revert to this test report later. For the present, on the issue of importance of test report in such cases, I refer to the CBEC letter F.No.387/W/04/2013-JC dated 04.03.2013 addressed to the Chief Commissioner of Customs, Ahmedabad, wherein it was decided that there weren't enough grounds to appeal against the CESTAT decision in the case of M/s Classic Microtech Pvt. Ltd. and others, in view, inter alia, that there was a need to provide conclusive and categorical test report stating that the imported consignment is zircon concentrate. The order of the CESTAT in Classic Microtech Pvt. Ltd. vs. Commissioner of Customs, Ahmedabad (2012(285) ELT 48 (Tri. Ahmedabad)], wherein it was held that imported goods, i.e. zircon sand is nothing but the zircon ore has, therefore, attained finality.

35. The noticee has contended that the product imported by them is obtained from seashore sand. The zircon sand or zirconium ore, so obtained from the seashore sand, contains about 67% Zirconium Oxide and about 33% silica. Since the goods imported by the noticee were not tested to suggest that they are zircon concentrate for inclusion in the SCN and the Department's basic contention is that the goods declared as zircon sand/zircon ore were concentrates; without any allegation that the goods imported by the noticee are different from other similarly placed importers, I proceed to examine the decisions cited by the noticee regarding the issue of classification of zircon sand/zircon ore. In particular, I refer to the aforesaid decision of CESTAT in the case of M/s Classic Microtech Pvt. Ltd., wherein a reference has been made to a letter dated 16.07.2011 of Indian Rare Earths Ltd. which has mentioned that for a concentrate, ore has to undergo the chemical process and ZrO₂ cont' it should be 95% or more. The decision cites chemical test report dated 27.08.2011 of Indian Rare Earths Ltd. Research Centre, Kollam that found the ZrO₂ content in the zircon sand sample to be

62.9%. It also mentions that similar test reports in respect of M/s Tirupati Microtech Pvt. Ltd. (the noticee in the instant case, with respect of samples drawn from goods covered by bill of entry No. 3215555 dated 15.04.2011 mentioned at S. No. 3 of Annexure-A of SCN) and M/s Ruby Ceramics Pvt. Ltd., Pune also confirm that ZrO_2 content in the samples is less than 62%. I note that in the test report pertaining to M/s Tirupati Microtech Pvt. Ltd., it has been "confirmed from the chemical analysis, XRD data and ZRF scan that the sample received by BE No. 3215555, dt. 15.4.2013 is naturally occurring zirconium ore." It is this IBM report that the Department has sought to ab initio discard as confirming that the imported goods are zircon ore. However, I note that in the said case of M/s Classic Microtech, CSETAT had this to say about the opinion of Research Centre of IREL and Indian Bureau of Mines: "We are of the considered view that since the experts in the field like Indian Rare Earths Ltd. Research Centre, Kollam and Indian Bureau of Mines has opined categorically. that the goods which were imported i.e. Zircon sand are nothing but the Zircon Ore, and the said expert opinion having not been rebutted by any other opinion from any other expert, and specifications of the imported goods seems to match with specification of ISI standard for Zirconium Ore, we have to hold that the goods imported by the appellant are eligible for the benefit of Notification No.4/2006-C.E, as the goods which are imported are nothing but Zirconium Ore." I agree that the expert opinion of IREL and IBM, which have not been challenged by any other expert opinion must be accorded highest reliance.

36. I would also like to rely on the findings of CESTAT in the M/s.Classic Microtech case on the subject of processes/treatments that have been carried out to obtain zircon sand. The order states "It is clear from the facts of the case that mineral sand freely occurred on sea beach along with ordinary sand. Most of the sand on the beach is ordinary sand only. Mineral sands constitute less than 10% of the total quantity of sand on the beach dredged out by the appellants. Sand as it occurs on the sea shore cannot be called mineral ores. Such sand is also not bought and sold as mineral ores. The processes carried out by the appellants lead to separation of valuable rare

mineral sands from the ordinary sand. To processes are physical and mechanical in nature. No special processes including roasting or chemical treatment is carried out. The processes do not bring about any upgradation or augmentation of purity in the mineral sands separated from ordinary sand. It is also on record that the resultant mineral sands are bought and sold as ores only and not as concentrates of ores. It is clear from note 2 to Chapter 26 of the Central Excise Tariff that only ores which have been submitted to processes, not normal of the metallurgical industries processes are physical and mechanical in nature. No special processes including roasting or chemical treatment is carried out. The processes do not bring about any upgradation or augmentation of purity in the mineral sands separated from ordinary sand. It is also on record that the resultant mineral sands are bought and sold as ores only and not as concentrates of ores. It is clear from note 2 to Chapter 26 of the Central Excise Tariff that only ores which have been submitted to processes, not normal of the metallurgical industries are excluded from ores. Thus, ores which have been subjected to special treatment go out of the scope of ores. No such special treatment is carried out in the present case."

37. I now move to the fate of SCN dated 23.03.2012 issued to M/s Ruby Ceramics Pvt. Ltd., Pune on the issue of treatment of zircon sand as zircon ore or concentrate for the purposes of levy of CVD thereon. I note that Commissioner of Customs, Pune vide his order dated. 19.05.2013 has judged for dropping the proceedings initiated against the noticee in obedience to the judicial discipline following the ratio of CESTAT judgement in the case of M/s Classic Microtech Pvt. Ltd. As mentioned above, the CESTAT judgement in the Classic Microtech case has attained finality, and the aforesaid O-I-O dated 19.03.2013 of Commissioner of Customs, Pune has been accepted by the Committee of Chief Commissioners, as communicated to this office vide letter F.No. VIII/CUS/ADJ/DRI/SCN /32/11-12/1093 dated 02.07.2013."

4.3 In the appeal filed revenue has the impugned order has been challenged only on the ground that the on the website of the M/s Iluka, manufacturing process has been shown. As result of the process undertaken as described the goods imported have

become the ore-concentrate and the benefit of exemption notification claimed in respect of the CVD shall not be admissible to them. On the other hand respondents have relied upon the e-mail dated 20.09.2011 of the Iluka wherein it has been specifically stated that they only supply zircon sand/ore to the Indian market from their mine in Australia. The mere fact that certain manufacturing processes have been described on the web site of the supplier would not mean that the goods supplied/imported were subjected to those process for alleging that the goods supplied were not ore but ore concentrate. Commissioner has in para 35 of the impugned order, considered this aspect and has stated that real test for determining the nature of imported goods would be the chemical examination report of the goods imported. He observes that show cause notice do not rely upon any test report to support the contention raised in the show cause notice, but negatives the chemical examination report dated 02.11.2011 of the Laboratory of Modern Mineral Processing of the Indian Bureau of Mines (IBM) which had concluded that zircon sand on chemical examination was found to be naturally occurring zircon ore. In our view the said test report which the show cause notice negatives could not be discarded in this manner, but revenue should have asked for re-test in case of doubt. The expert opinion available in the form of this test report cannot be discarded in this manner by relying on the manufacturing process mentioned on the web site of supplier.

4.4 Further revenue has in their appeal stated that the decision of tribunal in case of Classic Microtech relied upon by the Commissioner will not be applicable as that decision is based on the chemical examiner report which do not considers the manufacturing process as described on the website of Iluka. We do not find any merits in this submission of the revenue because as observed by us in previous para the goods are to be assessed to duty in the form in which they are imported and are presented for assessment and not on the basis of conjectures such as goods have been subjected to these processes described on the web site. Revenue has not produced any evidence to show that the goods imported were anything other than ore.

4.5 Further Commissioner has in the impugned order in para 37 referred to the similar proceedings initiated against M/s Ruby Ceramics by SCN dated 23.03.2012. These proceedings were also dropped by the Commissioner Customs Pune vide his order dated 19.05.2013. this order of Commissioner dropping these proceedings following the decision of tribunal in case of Classic Microtech has been accepted by the revenue as communicated to Commissioner vide letter dated 02.07.2013. Since in similar case revenue has accepted the order dropping the processes initiated against M/s Ruby Ceramics Pvt Limited, following the decision of the tribunal in the case of Classic Microtech, we do not find any merits in this submission of revenue.

4.5 Similar issue was considered by the tribunal in the case of Malu Electrodes Private Limited {2018 (364) ELT 1023 (T-Mum)] and following was observed: =

4. We have carefully considered the submissions made by both the sides. The issue involved is whether the imported goods are 'ore' or concentrate and whether eligible for availing exemption under Notification No. 4/2006-C.E., dated 1-3-2006 as superseded by Notification No. 12/2012-C.E., dated 17-3-2012. The revenue has alleged that the goods are concentrate and not ores as the process undertaken by the supplier amounts to manufacture of Concentrates. Allegation has been made against Appellant that the Wet Concentration process, Attrition and Secondary concentration and Dry Mill processing amounts to manufacture of concentrates. We find that the supplier M/s. Iluka Resources Ltd. Australia has described the goods as Rutile/HYTI91 Leucoxene Sand/Leucoxene Sand in import documents whereas in Bill of Entry filed by the Appellant the goods were described as Rutile Ore/Rutile Ore Leucoxene/Sand in Bill of Entry. On perusal of facts we find that the naturally Rutile/Leucoxene is an ore found in sea sand along with other raw material and out of the same after segregation of sand the imported goods were derived. The Chapter Note 2 to Chapter 26 of the Central Excise Tariff read as under :

"2. For the purposes of Headings 2601 to 2617, the term "ores" means minerals of mineralogical species actually used in the metallurgical industry for the extraction of mercury, of the

metals of heading 2844 or of the metals of Section XIV or XV, even if they are intended for non-metallurgical purposes. Headings 2601 to 2617 do not, however, include minerals which have been submitted to processes not normal to the metallurgical industry."

From the perusal of the above chapter note, it transpires that unless the minerals are subjected to the process not normal to metallurgical industry or which is of a special treatment category the goods would qualify classification as 'ores' only. The process undertaken by the suppliers i.e. Wet Concentration process, Attrition and Secondary concentration and Dry Mill processing are all normal process in mining industry and not any specialized process. It is a common process undertaken in any mining industry. The Explanatory Notes to Chapter 26 of the HSN in reference to 'Ores' and 'Concentrates' is as under :

"The term "ores" applies to metalliferous minerals associated with the substances in which they occur and with which they are extracted from the mine; it also applies to native metals in their gangue (e.g. metalliferous sands).

Ores are seldom marketed before "preparation" for subsequent metallurgical operations. The most important preparatory processes are those aimed at concentrating the ores.

For the purposes of the present heading, the term "concentrates" applies to ores which have had part or all of the foreign matter removed by special treatments, either because such foreign matter might hamper subsequent metallurgical operations or with a view to economical transport.

Processes to which products of this heading may have been submitted include physical, physico-chemical or chemical operations, provided that they are normal to the preparation of the ores for the extraction of metal. With the exception of changes resulting from calcinations, roasting or firing (with or without agglomeration), such

operations must not alter the chemical composition of the basic compound which furnishes the desired metal.

The physical or physico-chemical operations include crushing, grinding, magnetic separation, gravimetric separation, floatation, screening, grading, agglomeration of powders (e.g., by sintering or pelleting) into grains, balls or briquettes (whether or not with the addition of small quantities of binders), drying, calcinations, roasting to oxidise or magnetise the ore, etc. (but not roasting for purposes of sulphating, chloridating, etc.).

From the above perusal of the Explanatory Note to Chapter 26 we find that not only minerals which exists in its natural form along with other substances, which is either extracted or mined, will qualify as ores, but also minerals in their 'ganuage' state will also be classifiable as Ores. It further transpires from the above Notes to the HSN that for 'Ores' to transform into 'concentrates', special chemical treatment/processes have to be carried out which alters the basic chemical composition of the mineral itself, and mere physical or physio-chemical processes aimed at extracting or segregating the mineral from the natural substances would not tantamount to concentrating the 'ores'. Thus if the chemical composition of the mineral has not been altered while undertaking any physical processes as the facts of the present case shows the goods would not fall under the category of 'concentrate'. The revenue has relied upon the test report of IIT, Powai to hold that the goods in question are 'Concentrate' and not 'Ores'. On perusal of the test report of IIT, Powai we find that during investigation the following questions were asked to the said institute :

- (i) Whether the facts pointed out by the supplier pertaining to the processes to which the beach sand has been subjected to is correct?
- (ii) Whether the samples sent along with this letter is part of the beach sand which exists conjointly in nature along with other heavy minerals such as monazite, zircon, quartz, etc.

(iii) Whether after mining of beach sand, the percentage in the mined product of these heavy minerals like Rutile, leucoxene, monazite, zircon, etc, is increased by subjecting to different physical processes and segregating them on the basis of their physical property like specific gravity and magnetic property.

The Report given by the IIT, Powai was as under :

AA. In this connection, the Appellant further places reliance on the report submitted by IIT, Bombay issued vide its letter dated 3-5-2013, the relevant extract of which is reproduced hereinbelow :

"From the above studies it is clear that the Sample 1 and Sample 2 represent homogenous samples of rutile and anatase with a very narrow size distribution. The lack of any clay or quartz in the samples and their homogenous nature indicates that they have been subjected to concentration based on physical properties which may include specific gravity and magnetic or paramagnetic properties. The fine size and narrow range of size-4. distribution indicates that sizing may also have been carried out on these samples.

It is therefore concluded that the mined placer deposit has been subjected to beneficiation and concentration."

From the above report of IIT, Powai we find that no specific findings was given in the report in reference to questions posed by the revenue. It did not give nature of process undertaken by the supplier nor did it state as to whether the sample are part of beach sand along with other heavy minerals or whether it is ore or concentrate. Thus the report does not answer the questions put to it and cannot be made basis for deciding the question whether the imported goods are 'Ores' or 'Concentrates'. On the contrary it seems that the report favours the Appellant inasmuch as it states that the concentration if any done was based on physical properties and there has been no change or alteration in the chemical composition of the sample. This in turn when read with Explanatory note to the HSN substantiates the claim of the Appellant that in absence of any change in chemical composition the goods would fall into the category of 'Ores'. Thus we do not consider the report of IIT, Powai as supporting the claim of the revenue. The Ld. Counsel has also drawn our attention to the

report of Indian Bureau of Mining which is the apex body so far as standards in Mining Industry is considered. The Custom authorities at the time of importation of goods at three different times and different consignments has sent the samples for testing to Indian Bureau of Mining which has reported that the samples are "naturally occurring Rutile Ore/Leucoxene Sand". The report also contains the details of the metal content of the ore. The adjudicating authority has contended that the report does not support the case of Appellant as it treats Rutile and Leucoxene on same footings. We find that it has to be appreciated that both Rutile and Leucoxene are 'Ores' and hence their classification would be same. We find that in the test report of IBM the Titanium content is more than 90% which shows that it matches with the Indian Standard IS 4104-1967 of Rutile Ore to be containing the 90% of Titanium. Thus the IBM Report gets corroborated with the criteria of Indian Standards. In case of *Classic Microtech Pvt. Ltd. v. Commissioner of Cus., Ahmedabad - 2012 (285) E.L.T. 418 (Tri.-Ahmd.)* the Tribunal has held that "since the experts in the field like Indian Rare Earths Ltd. Research Centre, Kollam and Indian Bureau of Mines has opined categorically that the goods which were imported i.e. Zircon sand are nothing but the Zircon Ore, and the said expert opinion having been not rebutted by any other opinion from any other expert, and specifications of imported goods seems to match with specification of the ISI standard for Zirconium Ore, we have to hold that the goods imported by the appellant are eligible for the benefit of Notification No. 4/2006-C.E. as the goods which are imported are nothing but Zirconium Ore." We find that the ratio of the subject judgment equally applies in present case inasmuch as the report of Indian Bureau of Mining pertains to an expert report. Thus we do not find any reason to discard the report of the IBM.

5. The revenue has relied upon the judgment of *Indian Rare Earth Ltd. v. CCE & ST, BBSR-I - 2016 (338) E.L.T. 274 (Tri.-Kol.)* (hereinafter referred as IRE-2) and *Rungta Mines Ltd. v. CCE - 2016 (338) E.L.T. 454* that the process undertaken on sand ores like washing, magnetic separation, gravity separation to remove unwanted matters result into conversion of ores to concentrate and which activity is manufacture in view of Chapter

Note 4 to Chapter 26. Also reliance has been placed upon the judgments in case of Star industries v. CCU - 2015-TIOL-234-SC-CUS. In this context we are of the view that in the present case before blindly applying the Chapter Note 4 it is imperative to peruse the goods in the light of Chapter Note 2, HSN Explanatory Notes, the process undertaken by the supplier, the nature of the imported goods in question and the report of IBM. If the process to which the good are subjected to is not normal to metallurgical industry in that case it would not remain ores. As per the facts above show the process undertaken by the supplier of goods does not bring about any change in chemical composition nor any special treatment has been undertaken in respect of such goods. It is only a process to segregate the beach sand from the mineral sand by which the 'Ores' comes into existence. Thus in terms of Explanatory Notes the goods do not take the characteristics of 'Concentrate' and it cannot be said that there has been manufacture activity on such goods. We further find that the technical opinion would be the guiding factor in deciding the classification of goods as whether the goods are 'Ore' or Concentrate and the same can be decided only by the Experts. In case of Indian Rare Earth Ltd. find that more than eight institutes of National repute has reported that the goods are 'Ores' and such reports were not taken not consideration, hence we are not inclined to go into the ratio of said judgment as without ascertaining the characteristics of the goods in question they cannot be automatically termed as 'Concentrate' merely on the basis of Chapter Note 4 supra. In the present case, the process carried out by the supplier are not special treatments as it is normal to extraction of Ores. Also when read in context of Chapter Note 2, we find that in the present case the Ores were not put to any process not normal to the metallurgical industry and even the supplier has classified the goods in category of Sand only. It is coupled with the fact that on three consignments of imports at three different point of times the samples were sent to Indian Bureau of Mines (IBM) who has reported that the goods are 'Naturally occurring Rutile Ore/Leuxocence Sand. The report of IBM clearly shows that the imported goods even after undergoing the alleged processes has remained into stage of 'ore' or sand and does not qualify into the

category of 'concentrate'. We observe that the report of IIT, Powai does not adequately answer to the queries raised whereas the report of IBM clearly shows that the goods has remained into natural form of 'ores' or 'Sand'. Such report cannot be brushed aside as held by the Tribunal in case of *Classic Microtech Pvt. Ltd. v. Commissioner - 2012 (285) E.L.T. 418 (Tri.)*. The impugned order has not brought any fact as to why this report of IBM is not applicable in the present case. The adjudicating authority has merely proceeded to discard the report of IBM on the basis of description of goods as given in article in Wikipedia. Even the allegation of show cause notice regarding the process undertaken by the supplier is not based upon the enquiry made by the revenue but on the basis of information available on its website which is not correct. We therefore are of the view that the ratio of Tribunal orders in *IRE-2* and *Rungta Mines (supra)* are not applicable to the present case. It is to be observed that Chapter Note 2 to Chapter 26 which comes ahead of Chapter Note 4 is relevant criteria to determine the identity of goods. The revenue has not pointed out any instance that the imported goods were submitted to processes not normal to the metallurgical industry. Thus in absence of same it cannot be said that the goods are "concentrates". It has been alleged that in import documents the supplier has described the goods in all the documents as 'Rutile/HYTI 91 Leucoxene Sand/Lecoxene Sand' whereas in Bill of Entry the Appellant had prefixed the word 'Rutile Ore' with the intention to show the goods as 'Ore' and thereby claimed the exemption wrongly. We find that from the suppliers documents that the supplier has described the goods as 'Leucoxene Sand'. Nowhere the supplier has declared the goods to be 'Concentrates'. It is nowhere appearing on record that the supplier had consigned the goods as 'Concentrate' and the same has been shown as 'Ores' by the Appellant. In such case when at the supplier's end even after undertaking various processes as alleged by the revenue the goods has remained 'Sand', in that case the separation of mineral sands from Beach sand cannot be termed as process of 'Manufacture' of concentrates. The process carried out were only physical and mechanical separation process and after such process the separated mineral sand has the same form and properties which

it exist before undertaking such process. When the goods has been bought and sold as 'Sand' and even the same is known as 'sand' in the commercial parlance which has not been disputed by the revenue, the goods would stand covered by the term 'Ore'. From facts it is clear that Sand at Sea shore cannot be termed as 'Mineral ore'. The supplier undertook the process of separation of mineral sand from the ordinary sand by physical and mechanical processes and no chemical or roasting of sand took place. The process did not bring upgradation of purity in the segregated sands and as the import documents' show the goods in question has remained 'Sand' only. In terms of Chapter Note 2 (supra), the 'Ores' which have been submitted to the process not normal to metallurgical industry are excluded from category of 'Ores' whereas in the present case no such special treatment has been shown to have been carried out. In view of the fact that the process undertaken by the supplier of goods and in view of the report of the IBM that the goods has still remained in 'Ore' form we are of the view that as the process undertaken by the supplier is only segregation of ores from beach sand the process cannot be termed as manufacture of 'Concentrate'. It is also worth to reproduce the findings of the Tribunal in case of Indian Rare Earths Ltd. v. Commissioner of C. EX., BBSR-I - 2002 (139) E.L.T. 352 (Tri.-Kolkata).wherein the Tribunal on the basis of facts of the case i.e. the process of separation of mineral ores from beach sand held as under :

8. It from the facts of the case that mineral sands freely is clear occurred on sea beach along with ordinary sand. Most of the sand on the sea beach is ordinary sand only. Mineral sands constitute less than 10% of the total quantity of sand on the sea beach dredged out by the appellants. Sand as it occurs on the sea shore cannot be called mineral ores. Such sand is also not bought and sold as mineral ores. The processes carried out by the appellants lead to separation of valuable rare mineral sands from the ordinary sand. The processes are physical and mechanical in nature. No special processes including roosting or chemical treatment is carried out. The processes do not bring about any upgradation or augmentation of purity in the mineral sands separated from ordinary sand. It is also on record that the resultant mineral sands are bought and sold as ores only and not

as concentrates of ores. It is clear from Note 2 of Chapter 26 of the Central Excise Tariff that only ores which have been submitted to processes, not normal to the metallurgical industries are excluded from ores. Thus, ores which have been subjected to special treatment go out of the scope of ores. No such special treatment is carried out in the present case.

9. The Court has held in the case of Hyderabad Industries and Ors. v. Union of Apex India & Ors. that no manufacture of a new or distinct commodity takes place on account of the processes of separation of naturally occurring asbestos from asbestos rocks. In the earlier case of Minerals & Metals Trading Corporation of India Ltd., the Apex Court held that the separating of wolfram ore concentrate from the rock to make it usable ore is a process of selective mining. It is not a manufacturing process. The important test according to the Apex Court is that the chemical structure of the ore should remain the same. Thus, the principle of law is clear that .basic operations carried out to produce usable ore would not amount to manufacture of a new product. In the instant case, the appellants are carrying out certain physical and mechanical processes to separate mineral sands from ordinary sea shore sand. At the end of the processes, the mineral sands do not undergo any transformation. They remain in the same condition in which they remained along with ordinary sand on the sea beach. No upgradation or augmentation of their purity takes place. The chemical structure of the ore remained the same. The processes are not any special treatments which would take the ores out of the stage of plain and simple ores.

10. From what has been stated above, it is clear that no manufacturing is involved in the present case justifying demand of excise duty. The impugned order which has confirmed excise duty demand is set aside and the appeal filed by M/s. Indian Rare Earths Ltd. is allowed, with consequential relief, if any.

Applying the ratio of the above Tribunal's order which has been upheld by the Apex Court as affirmed in 2012 (283) E.L.T. A112 (S.C.). In our view the process involved in the present case is separate of minerals from beach sand i.e. through which ores comes into existence. It is not the special process of roasting or

change of chemical composition of goods which turns ores into 'concentrates'. Thus the goods in question does not merit classification as 'Concentrate' and hence Chapter Note 4 has no application in the present case. Our views are also based upon the Tribunal's order in case of Kerala Minerals & Metals Ltd. v. CCE, Kochi - 2007 (214) E.L.T. 556 (Tri.) wherein the Tribunal held as under :

5. We have carefully considered the submissions and have perused the ruling of Indian Rare Earths Ltd. cited by the counsel. The said ruling refers to 2 cases. Hyderabad Industries Ltd. v. U.O.I. - 1995 (78) E.L.T. 641 (S.C.); Mineral and Metals Trading Corporation of India Ltd. v. U.O.I. - 1983 (13) E.L.T. 1542 (S.C.). In the present case, the appellants are merely carrying on the activity of separating the minerals from the beach sand. The situation is similar to the one of the cited cases viz. Indian Rare Earths Ltd. wherein also the process of separation was from the beach sand to bring out rare mineral sands by physical process and mechanical process. In the present case also, the minerals which are present in the beach sand are separated by magnetic, electrostatic and gravity process. These minerals continue to remain as minerals in the same form. They had not changed their identity nor are they known by a different name in the market. There is no chemical or physical change in the mere characteristics. Therefore, the judgment of Indian Rare Earths Ltd. case, which is based on to 2 Supreme Court judgments, clearly applies to the facts of the case. Respectfully following the same, the impugned orders are set aside and appeals are allowed with consequential relief, if any.

6. We also find that the Tribunal in case of M/s. Jains Mines and Minerals India Ltd. v. CCE, Jabalpur - 2017-TIOL-3777-CESTAT-DEL, the Bench after appreciation of Chapter Notes 2 and 4 of Chapter 26 in reference to Iron Ore held that "improvement in content of "Fe" due to process undertaken by the Appellant by itself will not make the resultant product as iron ore concentrate". The Tribunal while passing the order relied upon the following judgments :

- (i) *Steel Authority of India Ltd. - 2012-TIOL-52-SC-CX = 2012 (283) E.L.T. A112 (S.C.),*
- (ii) *Bheraghat Minerals - 2000 (119) E.L.T. 271 (S.C.),*
- (iii) *Steel Authority of India - 2002-TIOL-499-CESTAT-KOL = 2003 (154) E.L.T. 65 (Tribunal) affirmed by Apex Court - 2012 (283) E.L.T. A112 (S.C.),*
- (iv) *Indian Rare Earth Ltd. - 2002-TIOL-485-CESTAT-KOL = 2002 (139) E.L.T. 352 (Tribunal), affirmed by Apex Court - 2009 (241) E.L.T. A70 (S.C.),*
- (v) *Super Engineering - 1996 (82) E.L.T. 539 (Tri.).*

7. We thus find that the ratio of the above Tribunal order is absolutely applicable to the ratio of present case. The Revenue has also relied upon the Tribunal's order in case of *V.V. Minerals v. Commissioner - 2016-TIOL-141-CESTAT-MAD* and *Trimax Sands Pvt. Ltd. v. Commissioner - 2018-TIOL-164-CESTAT-HYD* to contend that in line with IIT, Powai report the process undertaken by the supplier if of 'beneficiation' of the ore and thus the benefit of notification in question is not admissible to them. We find that in terms of Chapter Note 4, it the conversion of 'Ores' into 'concentrates' amounts to manufacture and it does not go into the process of beneficiation. Also the issue involved in both of those cases relates to classification of 'Illemnite beneficiated' based on specific wordings of the Tariff. Hence the ratio of the above both judgments is not applicable in present case. The revenue has also relied upon the judgment in case of *M/s. Star Industries - 2015-TIOL-234-SC* to support their claim. However on perusal of same it is found that the facts of the case are not applicable to the present case as in said case the goods itself were roasted ore and were defined as ore concentrate whereas in the present case the facts are entirely different and merit classification as 'Ores' only. In view of facts, we are of the view that the impugned goods being 'Ores' are eligible for the exemption from CVD in terms of Notification No. 4/2006-C.E., dated 1-3-2006 (Sr. No. 4) as superseded by Notification No. 12/2012-C.E., dated 17-3-2012 (serial No. 56). Accordingly we are of the view that the demand is not sustainable on merits. The Appellant has also challenged the demand on grounds of time bar. The demand has been raised against the Appellant by

invoking extended period for the imports made during the period March, 2011 to December, 2012. However we find that the issue was in the knowledge of the revenue as in August, 2011 itself the samples were sent for testing by the Customs. Further the issue involved itself has been of interpretation of activity undertaken in respect of impugned goods, HSN notes and chapter notes. In such case we are of the view that the non-payment of CVD cannot be attributed to any mala fide intention on part of Appellant. We thus also hold that the demand is barred by limitation of time and are not sustainable.”

4.6 In his submissions authorized representative submits that this decision suffers from inherent defect,- that being so the proper course for the revenue would be to get the decision set aside by way of appeal to appropriate forum. We find that this decision is on all four applicable to the facts of present case and we are inclined to follow it.

4.7 In view of the above discussions we do not find any merits in the appeal of the revenue.

5.1 Appeal filed by the revenue is dismissed

5.2 Cross objections filed by the respondent are accordingly disposed of.

(Order pronounced in the open court on 28.09.2022)

(Sanjiv Srivastava)
Member (Technical)

(Ajay Sharma)
Member (Judicial)