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Date: 28.07.2025

CESTAT Kolkata Rejects Revenue's Misdeclaration Allegation

In a significant ruling, the Customs, Excise & Service Tax Appellate Tribunal (CESTAT), Kolkata, dismissed the appeal filed by the Revenue against M/s Maa Kali Traders concerning the classification and valuation of imported goods. The case revolved around whether the imported goods, declared as "Unwrought/Unrefined Zinc," were misclassified as "Zinc Dross," a restricted item under the Foreign Trade Policy (FTP). The Tribunal's decision highlights the importance of evidence-based adjudication and adherence to procedural norms in customs disputes.

Background of the Case

M/s Maa Kali Traders imported goods between January 2014 and December 2015, declaring them as "Unwrought/Unrefined Zinc" under CTH No. 79012090. The Revenue conducted chemical tests to ascertain the zinc content, which revealed a higher percentage of zinc than declared. Based on these findings, the Assessing Officer issued an assessment order demanding differential duty of Rs. 5,05,494/- along with interest, citing a higher assessable value.

The importer challenged the valuation, arguing that the transaction value was arbitrarily enhanced without legal basis. Simultaneously, the Revenue contended that the goods were misdeclared and should be classified as "Zinc Dross," subject to import restrictions.

Key Findings by the Tribunal

- 1. Chemical Test Results and Classification** The Tribunal noted that the chemical tests conducted by CRCL, Kolkata, did not conclusively establish the goods as "Zinc Dross." The laboratory lacked specific tests to categorize the goods as dross, and the zinc content found in the samples was below

the threshold required for classification as "Zinc Dross." This undermined the Revenue's claim of misclassification.

2. **Procedural Lapses by the Revenue** The Tribunal observed that the Revenue failed to raise the classification issue during earlier proceedings before the Commissioner (Appeals). As a result, the Revenue was barred from introducing new grounds in subsequent appellate proceedings. The Tribunal emphasized that procedural consistency is crucial in legal disputes.
3. **Valuation Discrepancies** The lower authority's valuation methodology, based on NIDB data of zinc ingots, was deemed arbitrary and unsupported by evidence. The Tribunal upheld the Commissioner's finding that the goods were neither zinc ingots nor of comparable purity, making the reassessed value untenable.
4. **Legal Precedents** the Tribunal referred to settled case laws, including the Jhawar Trading (P) Ltd. case, which established that goods with high zinc content cannot be classified as "Zinc Dross." These precedents further bolstered the importer's position.

Tribunal's Decision

The Tribunal dismissed the Revenue's appeal, affirming the Commissioner's order and granting consequential relief to the importer. It concluded that the Revenue's claims lacked sustainable evidence and procedural validity.

Implications of the Ruling

This judgment underscores the importance of evidence-based adjudication in customs disputes. It highlights the need for authorities to follow established procedures and present concrete evidence when challenging import declarations. The ruling also reinforces the principle that transaction value should not be arbitrarily disregarded without legal justification.

Conclusion

The CESTAT's decision in favor of M/s Maa Kali Traders is a landmark ruling that upholds the principles of fairness and procedural integrity in customs assessments. Importers and customs authorities alike can draw valuable lessons from this case, emphasizing the need for transparency, adherence to legal norms, and reliance on credible evidence in resolving disputes.

This Article has been written by Shri Ravi Shekhar Jha, Advocate Delhi High Court based on his interpretation of the law. He can be reached at his email id intelconsul@gmail.com or on his Mobile +91-9999005379.

Source: CESTAT Kolkata

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Write to us at office@aadrikaalaw.com

Tel: +91-11-4999 2707 | +91-9999005379

www.aadrikaalaw.com

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
KOLKATA**

REGIONAL BENCH – COURT NO.2

Customs Appeal No. 79147 of 2018

(Arising out of Order-in-Appeal No. KOL/CUS(CCP)/AA/1696-1697/2018 dated 14.08.2018 passed by Commissioner of Customs (Appeals), Kolkata)

Commissioner of Customs (Prev.), Kolkata

(15/1, Strand Road, M. S. Building, West Bengal, Customs House
Kolkata)

Appellant

VERSUS

M/s. Maa Kali Traders

(3/1, Kartick Bose Lane, Ground Floor,
Kolkata-700006)

Respondent

APPEARANCE :

Mr. Ashwini Kumar Choudhary, Authorized Representative for the Appellant
None for the Respondent

CORAM:

HON'BLE MR. R. MURALIDHAR, MEMBER (JUDICIAL)

HON'BLE MR. RAJEEV TANDON, MEMBER (TECHNICAL)

FINAL ORDER NO. 75717/2024

Date of Hearing : 23 February 2024

Date of Decision: 23 February 2024

PER RAJEEV TANDON:

The Revenue has filed the present appeal assailing the Order of the Commissioner (Appeals) bearing No. KOL/CUS(CCP)/AA/1696-1697/2018 dated 14.08.2018, the grounds that as the chemical test describes the goods as Zinc Dross, the Assessing Officer would have been legally correct to determine the applicability of the import conditions imposed by the Foreign Trade Policy, for the said imports and should have taken the said fact into account while finalizing the assessment. Since this is an appeal filed by the Revenue, it has been taken up for consideration even in the absence of the Respondent.

2. The facts of the case are that the appellant importer M/s Maa Kali Traders, had imported the goods declared as "Unwrought/Unrefined Zinc" falling under CTH No. 79012090 from Bangladesh, vide nine Bills of Entry between January 2014 to December 2015. Samples were drawn at the time of import by the Revenue to ascertain the percentage of Zinc content vide Test Memo No. 346 dated 12/03/2015. The Bills of Entry were assessed provisionally based

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on LME price as applicable on the date of filing of the Bill of Entry. It is the contention of the Revenue that the CRCL Test Report indicated the actual percentage of Zinc content to be more than as declared by the importer. The assessment was thus finalized by the Department. Accordingly, an Assessment Order No. 27/2017-18 dated 16 July 2017 was issued. A perusal of the said Order-in-Original (supra), issued for finalization of the assessment, directed the importer for payment of differential duty of Rs. 5,05,494/- along with interest as "assessable value based on test reports becomes higher than provisionally assessed value".

3. It is submitted by the Revenue that they had filed the impugned appeal before the Commissioner (Appeals) being aggrieved with the Order of Assessment (Order-In-Original referred supra), passed by the Assistant Commissioner of Customs, Petropole LCS as the goods were declared as unwrought/unrefined zinc (79012090) whereas CRCL test report shows the goods to be of higher purity zinc and is nothing but Zinc Dross (79020090). It may be of interest to mention that the importer had also filed an appeal against the said re-assessment order pointing out that the valuation adopted by the Department was arbitrarily enhanced by the Assessing Officer, disregarding the transaction value without a legal basis, and that the demand of differential duty on the basis of theoretical transaction value, based on NIDB price of primary Zinc ingots was not supported by any contemporaneous import and therefore, the order of the lower authority was unacceptable in law.

4. We have heard the Learned AR for the Revenue and perused the records.

5. As far as the appellant's appeal before the lower authorities was concerned, it was held by the Commissioner of Customs (Appeals) that the rejection of transaction value by the Assessing Officer was without any sustainable basis, as there was nothing on record to suggest that the transaction value paid by the buyer was different and/or there were any other consideration like buyer and seller being related etc. He has recorded a categorical finding that there was nothing on record to state that the price paid by the importer was not the sole consideration for sale of imported goods. As for the Revenue's Appeal, the Learned Appellate Authority held

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that the lower authority had adjudicated the matter solely on the grounds of valuation and there was nothing in the appeal filed by the Revenue to point out that the impugned goods were other than as declared and were not unwrought/unrefined Zinc but were Zinc Dross and therefore merited a distinct classification and corresponding import regulations. He therefore, dismissed the appeal of the Revenue as beyond the scope of the Assessment Order and therefore not maintainable. On the said findings of the Appellate Authority, Review Order however records as under:-

"2. The Committee is of the view that since the chemical test report dated 17.3.16 of the CRCL, Kolkata had specified the impugned goods as being in the form of, "Zinc Dross", the assessing officer should have taken this fact into account while finalizing the assessment."

6. The Revenue contends before us that Zinc Dross being a restricted item for import, this was a case of disguised import thereof in the guise of unwrought/unrefined zinc and was a clear case of willful mis-declaration and suppression. They claim it was a ploy to overcome the imposed conditions in the FTP and the assessing authority had therefore erred in the adjudication by ignoring the said facts. It is therefore, relevant to look into this aspect if at all it was the stand of the Revenue before Commissioner (Appeals) and as to how the Appellate Authority had dealt with the said matter. It is noted that the department failed to raise the said point in the earlier Review Order filed before the Commissioner (Appeals). Therefore, the said ground could no longer be taken up by the Revenue in subsequent Appellate proceedings being a fresh ground. In so far as, the contention of the Revenue, with regard to the subject goods being categorically held to be Zinc Dross was concerned reference is invited to para 9 and para 10 of the Order of the Learned Appellate Authority and reiterated here under:

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9. The goods have been tested in CRCL, Kolkata Customs House and zinc content has been specified by the Laboratory. The lower authority mentioned the percentage of zinc content of the impugned goods in its order but did not specify the actual test report. However, I find that numerous appeals have been filed by the importers of 'Unwrought/Unrefined Zinc' as well as by the departments in the same period with a common prayer. I also find that in one such test report, the Chemical Examiner concerned has defined 'Zinc Dross' as follows:

Dross – The oxides and other insolubles separating from a molten metal are sometimes referred to as 'Dross'. (Ref. Text book of Metallurgy)

As per Indian Standard: 2066-1962, 'Zinc Dross': It shall consist of galvanisers unsweated Zinc dross in regular or mushroom shaped ingots containing a minimum of 92 per cent Zinc. Ingots shall not weight over 50 kg each. Small broken parts shall not exceed 10 per cent of the weight of the ingots and no fines shall be included.

In this case the material imported has been reported by the Chemical Examiner of CRCL, Kolkata as follows:

"the sample, in the form of dross is greyish metallic lump of irregular shape and size. It is mainly composed of Zinc together with Iron and small amount of other inorganic matter. Zinc content in the sample is 89.3% by weight."

Accordingly, the department requested the Chemical Examiner, CRCL vide office letter ref. no. C. No. -VIII (6)656/PTPL-RD/Provisional Assessment/Zinc/17/Pt-I/3344 dt. 24.10.17 to clarify as to whether the report of "Metal being in the form of dross", is on the basis of physical observation of the sample or any specific test has been carried out to ascertain the same. He also requested him to furnish as to whether the sample of Zinc falls under the category of

- i) Hot dip galvanizing slab zinc dross, or
- ii) Continuous line galvanizing slab zinc top dross, or
- iii) Continuous line galvanizing slab zinc bottom dross


The Chemical Examiner replied as follows:

"It is to mention that specific colour test to categorise as "Dross" is not available in this laboratory and has not been carried out in this regard. The letter of Chemical Examiner is reproduced at the next page:

Attested/
Nitya
19/11/18
Superintendent of Customs (T&R)
CC (P), W.B., Kolkata

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(R)


GOVT. OF INDIA
OFFICE OF THE JOINT DIRECTOR
CHEMICAL LABORATORY, CUSTOM HOUSE
15/1, STRAND ROAD, KOLKATA - 700001.

F.No-537-32/2013Lab Pt II-747 Date: 29.11.17

To,
 Sh H.L.Songate
 Asstt. Commissioner of Customs
 Petra pole Land Customs Station

Sir,

Sub: Test Report of representative sample of Unrefined Zinc- reg

Please refer to your letter C.No-VIII (6)556/PTPL-RD/Provisional Assessment/Zinc/17/Pt-I/3344 dated 24.10.2017 on the above subject.

Definition of "Dross" as given in the literature available here is reproduced below:-

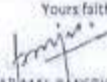
Dross-The oxides and other insolubles separating from a molten metal are sometimes referred to as Dross (Ref: Text Book of Metallurgy).

"Dross is the oxide deposit or the scum (often contaminated by other impurities on the surface of the molten metal)" -Oxford Dictionary


As per Indian Standard:2066-1962, "Zinc Dross-it shall consist of galvanisers unsweated Zinc dross in regular or mushroom shaped Ingots containing a minimum of 92 percent Zinc. Ingots shall not weight over 50 kg each. Small broken part shall not exceed 10 percent of the weight of the Ingots and no fines shall be included."

As regard the query, it is to mention that specific colour test to categorize as Dross is not available in this laboratory and has not been carried out in this regard.

This issues with the approval of C.E-I, In-charge, Chemical laboratory.

Yours faithfully,

 (PARIMAL BANERJEE)
 Chemical Examiner (Gr-II)

10. In view of the above, it is evident that CRCL, Kolkata could not establish the imported goods as Dross and hence the department in their grounds of appeal has just assumed but not established that the item imported is Zinc Dross. Accordingly, the department's claim for confiscation of the goods is not sustainable.



7. Thus, it is very clear that the CRCL, where the samples were sent for test, did not have the wherewithal in the first place to ascertain whether the imported goods were indeed "Zinc Dross". The test results as obtained, have been recorded in Table B of the order by Commr. (Appeals). The same is extracted below:-

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SI. No.	B/E No. & Date	Actual % of Zinc declared	Actual % of Zinc found in test report	Declared value per MT (in US\$)	Re-assessed value as per LME data (in US\$)
1.	4777595 dt. 1.3.14	80%	80.20%	800.00	1288.00
2.	2551305 dt. 10.9.15	85%	89.50%	800.00	1142.75
3.	3673158 dt. 22.12.15	85%	89.50%	800.00	877.98
4.	9430960 dt. 2.6.15	85%	89.70%	800.00	1417.73
5.	4587190 dt. 9.2.14	80%	85.50%	800.00	1228.80
6.	4461005 dt. 27.1.14	80%	86.00%	800.00	1215.20
7.	4477982 dt. 28.1.14	80%	89.90%	800.00	1206.40
8.	4562156 dt. 5.2.14	80%	91.00%	800.00	1172.00
9.	4663314 dt. 18.2.14	80%	93.10%	800.00	1250.40

8. We note that a similar question pertaining to whether the imported goods were classifiable as Zinc Dross had also cropped up before the Tribunal in the case of **Jhawar Trading (P) Ltd. Vs. Commr. of Customs, Calcutta-2002 (139) E.L.T. 695 (Tri.-Kolkata)**. Based on evidence, as placed before it, the Tribunal had allowed the appeal filed by the appellant. For sake of greater clarity, relevant portion of the said judgment is enumerated herein below:-

4. The test report dt. 19-7-99 of the chemical examiner of Customs House, Calcutta read as under :-

"The sample is in the form of grey coloured heavy, dense irregular lumps of different shapes and size with tarnished and oxidized surfaces. It is composed essentially of metallic zinc together with iron aluminium, metallic oxide and siliceous matter.

% of total zinc in the sample = 92.4 by weight

% of metallic zinc in the sample = 89.9 by weight

% of iron in the sample = 3.7 by weight

The sample under reference is other than zinc scrap/ash/residue. It appears to be a dross type of material. However, source/origin of the material under

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reference may also be verified”.

The report of M/s. Intalab Private Limited was as under :-

“RESULTS OF ANALYSIS - ON ORIGINAL SAMPLE

Total Zinc as Zn	...	92.01%
Lead as Pb	...	3.03%
Iron as Fe	...	3.92%
Aluminium as Al	...	TRACE

The sample is zinc dross/zinc spelter”

5. From the above Id. adv. concludes that the chemical examiner, Customs House has not given a categorical finding that the goods in question are dross. He has only given his opinion that the same appears to be a dross type of material. However, the goods being zinc ash/residue has been fully ousted by the chemical examiner. He submits that both the said results have shown that the goods consisted zinc more than 92% by weight and in spite of a specific query that whether the sample was zinc scrap (SAVES), no answer has been given by either of the two test houses. As such he submits that based upon the said test reports goods cannot be classified under Heading 26.20 which cover only ash and residue and nothing else. Further referring to various authoritative text books and dictionaries he submits that that dross is basically metal refuse and impurity in molten metal and where the zinc contents are more than 92%, the same cannot be held to be dross. He submits that the said issue came up before the Tribunal in the case of Premier Brass and Metal Works Pvt. Ltd. v. CC - [1990 \(48\) E.L.T. 98](#) wherein the Tribunal held that where the metal contents in the goods varied between 91.38% to 97.03% with very little presence of extraneous metals such as oxide, sulphide, lead, iron etc., the goods have to be assessed as waste and scrap and not as dross. The civil appeal filed by the Revenue against the above decision was dismissed by the Hon'ble Supreme Court as reported in 1995 (80) E.L.T. Page A-280. Similarly in the case of N.J. International v. CC - [1995 \(79\) E.L.T. 665](#), the goods found to be having metallic contents ranging between 93.8% and 96.4% were held to be waste and scrap and not dross. He also drew the attention of the Bench to the Tribunal decision in the case of Khalidas Sheet Metal Indus Pvt. Ltd. v. CC - [1997 \(94\) E.L.T. 165](#) and referred to Paragraph 4 of the said order. It is beneficial to reproduce Para 4, for better appreciation of the appellants' submission : -

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“We have considered the pleas made by both the sides. We observe that Chapter 26 carries the heading metal ores, slag and ash. Tariff 2602.04 carries the description slag, ash and residue containing metals or metallic contents. It is seen that this chapter covers the metallic ores or ores which have been processed into concentrates or which have been roasted. During this process certain slag, ash or residue may emerge which will have the concentration of the metal of much lower order than that may be present in the metallic ores. It is this slag, ash and residue which will be covered under this heading. The goods in question admittedly have not been obtained in the processing of metallic ores but were obtained in the electrolytic process where the zinc sheets after they had served out their purpose from electrocution were taken out as residue. We observe that the NARI circular NF-82 referred to by the appellants carries the heading standard classifications for non-ferrous scrap metals even though the items in this has been described by different code numbers. The classification given in that has to be taken to be that for scrap metals. The appellants on their own have relied upon a document which describes their goods as scrap. In view of the fact that we have ruled out the classification, under Chapter 26 we hold that in the light of our discussions the appellants’ goods have been rightly classified under Tariff Heading 79.01. The appeal is therefore dismissed”.

11. *After hearing both the sides I find that the questions to be decided in the present appeal is as to whether the goods described by the importer as zinc scrap ‘SAVES’ is in fact zinc dross and whether the same required a specific licence for importation. Admittedly the two test reports in question, as reproduced above have shown the zinc contents to be more than 92%. The chemical examiner of Customs House has not given a definite finding that the goods are zinc dross but has only observed that the same appears to be a dross type of material. Similarly there is no answer to the questions posed by the Revenue that whether the sample described as zinc scrap ‘SAVES’ is as per ISRI specification or not. The various decisions relied upon by the appellant lay down the ratio that where zinc contents are more than 92%, the goods cannot be classified as zinc dross. The documents relating to the import including the documents of the foreign supplier are also describing the goods as zinc waste and scrap. Nothing concrete has been produced on record by the Revenue to show that the descriptions in the documents is not correct. Accordingly by applying the ratio of the Tribunal decision relied upon by the appellant hold that the goods in question were freely importable.*

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9. It is therefore clear from the Table extracted in para 7 above, the chemical examination report reproduced in para 6 and the aforesaid proposition that the Revenue's contention that the imported goods were Zinc Dross is without a shred of sustainable evidence. The percentage of zinc found upon test may be higher than that declared but is certainly below the specified limit to merit classification as Zinc Dross, but for that of B/E No. 4663314 dated 18.2.14. In so far as the said question has been raised by the Revenue, it may be pointed out that they are precluded to raise such a question of classification in subsequent appellate proceedings. It may be suffice to quote the following paragraphs from the findings of the Appellate authority.

"13. The lower authority has re-determined the values of the imported goods on the basis of NIDB data of zinc ingots taking into consideration the zinc content on pro-rata basis. But the order is not reasoned order and is cryptic in as much as the lower authority has not disclosed the percentage of purity of the zinc ingots and the value thereof obtained from the NIDB data base, based on which he has resorted to such pro-rata calculation for re-determination of values of the impugned consignments. Besides, it is on record that the goods are neither zinc ingots nor the purity is anywhere near the 99 percentage mark which is standard for high grade zinc ingots."

10. We also note that the Learned Appellate Authority has relied on case law support that have since settled the Question involved in the present appeal. In fact The Learned Appellate Commissioner, discussed at significant length, the facts of the case and applied the legal position thereto as arises in view of settled case laws. However, in view of what has been stated above that the Revenue was barred from raising the impugned question of law having conceded the same in lower proceedings and therefore, could not open it afresh in subsequent proceedings, we refrain from dwelling on the matter any further, besides pointing out that the test results themselves do not support the case of the revenue.

11. We clearly find that the department had undertaken the re-assessment exercise, purely on the aspect of valuation of the said goods and therefore the question of determining the nature of this imported product was not taken up in the subsequent proceeding by the Revenue. The Appellate

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Authority had rightly held that the ground's raised by the Revenue supra were, in view of the lower authorities Order not maintainable.

12. In view of our findings above, we find no infirmity in the impugned order of the learned Commissioner (Appeals). The appeal filed by the Revenue is therefore dismissed, with consequential relief if any as per law and the order under challenge is upheld.

(Operative part of the Order was pronounced in the open court.)

Sd/-
(R. Muralidhar)
Member (Judicial)

Sd/-
(Rajeev Tandon)
Member (Technical)

Pooja