REGISTERED
SPEED POST

F.No.372/02/DBK/15-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING
6th FLOOR, BHIKAJI CAMA PLACE,
NEW DELHI-110 066

Date of Issue 5/2/18

Order No. 25/2018-Cus dated 5-2-18 of the Government of India passed by Shri R.P.Sharma, Principal Commissioner & Additional Secretary to the Government of India, under section 129DD of the Custom Act, 1962.

Subject	:	Revision Application filed under Section 129 DD of the Customs Act, 1962 against the Order-in-Appeal No. KOL/CUS(PORT) /AM/047/2015 Dated 23.07.2015, passed by the Commissioner of Customs (Appeals), Kolkata.
Applicant	:	M/s. Impex Metal & Ferro Alloys Ltd.
Respondent	:	Commissioner of Customs, Kolkata

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ORDER

A Revision Application No. F.No.372/02/DBK/15-RA dated 04.09.2015 has been filed by M/s. Impex Metal & Ferro Alloys Ltd. (hereinafter referred to as the applicant) against the order in Appeal No. KOL/CUS(PORT)/AM/047/2015 dated 23.07.2015, passed by the Commissioner of Customs (Appeals), Kolkata .

2. Brief fact of the case are that the applicant had imported High Carbon Ferro Manganese Fines on payment of customs duty from South Africa which was later claimed to have been exported to M/s Posco, South Korea, for which the applicant filed a drawback claim under Section 74 of the Customs Act, 1962. But it was rejected by the jurisdictional Assistant Commissioner on the ground that identity of the re-exported High Carbon Ferro Manganese Fines could not be established with the imported High Carbon Ferro Manganese Fines on the basis of documents submitted at the time of import and export. Being aggrieved, the applicant filed an appeal before the Commissioner (Appeals) who has also, vide his above mentioned order, rejected the appeal of the applicant. The applicant has filed the instant revision application challenging the order of Commissioner (Appeals) on the ground that they have fulfilled all the criteria of re export as per the provisions of Section 74 of the Customs Act, 1962 and the drawback of duty is admissible to them.

3. . Personal hearing in this case was held on 14.11.2017 which was attended by Sh. Bishwajit Mukherjee, advocate, for the applicant who reiterated the grounds of revision already pleaded in their revision application. However, Sh. S. Mukherjee, Assistant Commissioner (Drawback), appearing for the respondent, opposed the revision application for the reasons already elaborated in Order in original and Order in Appeal.

4. On examination of the revision application, the Commissioner (Appeals)'s Order and pertinent legal provisions, it is observed by the Government that for admissibility of drawback of customs duty under Section 74 of the Customs Act, 1962, the following conditions are to be satisfied :-

i) The imported goods should be capable of being easily identified,

ii) Duty of customs should be paid on the imported goods and the same should be exported within 2 years from the date of payment of duty on imported goods and

iii) The exported goods should be identified with the imported goods to the satisfaction of Assistant/Dy. Commissioner of Customs

5. While no doubt has been expressed either by the Dy. Commissioner or by the Commissioner (Appeals) in their orders regarding fulfilment of the above mentioned first two conditions in this case, the Assistant Commissioner (drawback) denied duty drawback to the applicant on the ground that the identity of the goods could not be established by the Dy. Commissioner of Customs (Docks) at the time of export on the basis of documents submitted by the applicant at the time of export and thereby the above cited third condition is not found satisfied. The examination report of the Dy. Commissioner of Customs (Docks) on 3.8.12, relied upon by the Assistant Commissioner of Customs (Drawback) in his Order, is produced below:

"Opened all the packages of 56 containers for appraisement in presence of AC (Haldia Dock). On examination, it was found that all the bags were stitched with label showing marks and numbers of the goods as "High Carbon Ferro Manganese Fines, Order No. 18942, Ship No. HCFM 20120105, sizd -6+Down", which were as per declaration wrt both import against B/E No. 7334571 dated 9.7.2012 and export documetns.

However, identity of the goods could not be established in authentic manner, as the imported goods were cleared under RMS B/E and it appears, physical identification of the goods in relation to import documetns, have not been verified/authenticated at the time of import clearance by physical examination of goods.

Moreover, at the time of importation the party has submitted an analysis cft of goods.....But now, at time of re-export the party has submitted an analysis cft of the export goods.... Which clearly differs wrt import test cft as referred above."

6. In addition to his observation that identity of the re-exported goods is not established as per the examination report of Dy. Commissioner of Customs, the Assistant Commissioner (Drawback) also noticed that the exported goods had been sold to the Korean company at a foreign exchange loss of US$ 56193.59, the content of exported goods varied from the imported one as per various test reports available and goods had not been directly exported or transhippied to the Korean

Company. The Commissioner (Appeals) has also agreed with the above reasons of the Assistant Commissioner in his order and has rejected the applicant's appeal.

7. The applicant has filed the above revision application against the order of Commissioner (Appeals) before the Government mainly on the grounds that the opinion of the adjudicating authority that the export goods can not be easily identified hinges on subjectivity, each item must be identified by methods appropriate to the nature of goods, physical examination of the goods is not only methods for establishing the identity of the goods, the first part of examination report has clearly established the identity of exported goods and there are several other co-lateral evidences like certificate of warehouse, Chartered Accountant, State bank of India which clearly support that they had imported High carbon ferro magenese fines and the same have been exported by them to the Korean company. While Government agrees with the applicant's above contentions that physical examination of the goods is not only the sole method for verification of identity of goods, each item must be identified by methods appropriate to the nature of goods and that the applicant has exported high carbon ferro magenese to the Korean company, no convincing evidence has been adduced by the applicant to establish that high carbon ferro magenese fines imported from South Africa only has been re-exported to the Korean company. The Government is convinced that identity of the exported goods with the imported goods cannot be established merely by one reason that the description of goods is common in both the imported as well as exported goods. Therefore, merely because high carbon ferro magense has been exported by the applicant does not automatically mean that the applicant has exported the same high carbon ferro magenese fines which they had imported earlier. As the imported high carbon ferro manganese had been cleared by Customs under RMS without physical examination thereof and high carbon ferro manganese is of various qualities in terms of content etc., it cannot be accepted on the basis of the applicant's claim only that high carbon ferro manganese exported to South Korea is the same as was imported earlier. Since high carbon ferro magenese has several different varities in terms of quality, composition and sizes etc., matching of overall quality and composition of imported and exported high carbon ferro manganese fines is the only available medhod to establish the identity of exported goods with

the imported ferro manganese. Thus apart from tallying of description and quantity of the exported goods with the imported goods, matching of contents of exported high carbon ferro manganese fines with the imported variety of high carbon manganese fines is of very crucial importance in this case to establish the identity of the exported goods with the imported goods.

8. It is not in dispute that as per declaration in the Bill of Entry the applicant had imported high carbon ferro manganese fines containing 72.09% manganese as main ingredient. Whereas in the Shipping bill magenese content in the exported high carbon ferro manganese is declared 68% only by the applicant himself. Thus manganese content in exported goods is almost 5% lower as comnpared to the imported high carbon ferro manganese fines which is quite significant. Other minor contents are also at variance in respect of imported and exported goods, but the difference is not of very significant magnitude. But from the major difference in the contents of manganese as declared by the applicant itself in the Bill of Entry and the Shipping Bill, which is major constituent of the imported as well as exported goods in this case, it is fairly evident that the exported high carbon ferro manganese fines containing only 68% manganese contents were of inferior quality and it could not be the same which they had imported earlier from South Africa having manganese purity of above 73%. This fact is even supported by the two main test reports issued by Assmang Manganese Division Cato Ridge Works and Custom House Lab test report. The first report of Assmang Manganese Division Cato Ridge Works was produced by the applicant before the customs officers at the time of import of the goods and Custom House Lab Report was given in respect of exported goods for which sample was drawn by the customs officers in the presence of applicant representative. As per test report of Assmang Manganese Division Cato Ridge Works manganese contents are reported as 72.09%. But in respect of exported goods the manganese contents are reported as 68.02% by Customs House Lab. Thus there is a major difference in manganese content in the imported and exported high carbon ferro manganese fines as per these two reports also. The applicant has relied upon the other two test reports recived from M/s Inspectorate Griffity India Pvt. Ltd. and M/s Posco center Korea to claim that difference in

maganese content is not very significant. But the Government does not consider these two reports relevant to the issue as these two test reports have not been given in respect of the samples drawn from exported goods in the presence of custom officers and, therefore, their authenticity is not free from doubt.

9. Coming to the argument of the applicant that in the first part of the examination report by the docks officers saying that identity of the exported goods with the imported goods is clearly established as it has been accepted that the bags containing high carbon ferro manganese fines for export were stitched with the label shoring the same marks & Numbers as were given in the Bill of Entry, the Government does not find it very impressive as stiching of lablel on the bags alone is not a very significant evidence to establish the fact that the exported goods were the same which were earlier imported. The identity of the exported goods is to be established on the basis of the main contents and quality of the imported mineral product and not on the basis of labels of imported goods only which can be used very easily on the bags of similar exported goods. But apart from label on the bags showing marks and numbers of the imported goods, there is no other evidence to corroborate that the high carbon ferro maganese fine containing 73% manganese were only exported. On the contrary from the above discussed declaration of the applicant in the Bill of entry, Shippng Bill, export invoice, test reports of Assmang Manganese Division Cato Ridge Works and test report of Custom House Lab, it is manifest that while the applicant had imported high quality of magnese, they have exported inferior quality of magenese to South Korea. This fact is also buttressed by another vital fact that the applicant has exported high carbon ferro maganese on lower value which is possible only for the low quality of goods. Had the exported material been of the same quality as they had imported from South America, they would not have exported on reduced value of the goods and by incurring extra heavy expenses by importing the goods first in India from South Africa and therafter exporting the same to South Korea. If they had intention to export the goods of high quality, they could easily export the goods directly from South America and avoid heavy expenses towards loading, unloading, warehousing, transporting the goods first at Haldia port and then repeating the same for export of the same goods to South Korea. It is really mysterious as to why they imported the ferro manganese in

India at all if they had already plan to export the same to Korea. It is also noted by the Government that after the High carbon ferro magenese fines was imported by the applicant, it remained in the custody of the applicant for long time and the departmental authority did not have any type of control over it and no evidence has been adduced to prove that the imported goods remained intact in the custody of the applicant for export purpose. Instead of providing direct evidence to support their claim, the applicant has placed reliance on several other materials such as the certificates of Warehouse and CA etc. to support their claim that the exported goods are the same as were imported earlier. However, no value can be attached to these documents in the face of above discussed direct evidences which are showing major difference in the quality of imported and exported high carbon ferro magenese fines. Moreover, the persons who have issued the above named certificate are not mineral experts and have not been associated with the physical or chemical examination of the imported and exported high carbon ferro magenese fines. They are otherwise also not independent persons in this matter and, therefore, their certificates cannot be given precedence over the original evidences as discussed above. The applicant has also claimed that in their own identical case the Commissioner (Appeals) has subsequently allowed drawback of duty vide OIA NO.Kol/Cus(Port)/AA/327/2015 dated 2.1.15. However, this claim is also found devoid of any truth as different set of facts were involved in the above OIA. In fact in the above case the imported goods had not been cleared for home consumption and had been bonded in Public Bonded warehouse operating under Custom's control and when these were cleared from Public Bonded warehouse by the applicant for export purpose the stuffing of export containers was carried out under the supervision of the Custom Officers only. Further, the test report of the imported and exported toods had also matched. Thus the facts of the above case are substantially different from the present case.

10. Considering all the above facts and evidences, it is evident that the applicant has not provided any convincing material on the basis of which it can be accepted at this juncture that the exported goods were the same which the applicant had imported earlier from South Africa. Hence, Government does not find any fault in the Order of Commissioner (Appeals).

11. Accordingly, the revision application filed by the applicant is rejected.

(R.P.Sharma) 5.2.18
Additional Secretary to the Government of India

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ATTESTED

5.2.2018

(Debjit Banerjee)
STO (REVISION APPLICATION)

Order No. 25/18-Cus dated 5-2-2018

Copy to:

1. The Commissioner of Customs, 15/1 Strand Road, Custom House, Kolkata, 700001.
2. Commissioner of Customs (Appeals), Kolkata, 15/1 Strand Road, Custom House, Kolkata, 700001.
3. Assistant Commissioner, (Drawback), 15/1 Strand Road, Custom House, Kolkata, 700001.
4. PA to AS(RA)
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