CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 2

Customs Appeal No. 20902 of 2014

(Arising out of Order-in-Appeal No. 242/2013 dated 17.12.2013 passed by Commissioner (Appeals), LTU, Bangalore.)

M/S. TE-Connectivity India Pvt. Ltd.
(formerly M/s TYCO Electronics Systems India (P) Ltd.)
TE Park, 22bb Doddenakundi, 2nd Phase,
Industrial Area, Whitefield Road,
Bangalore-560 048. **...Appellant(s)**

VERSUS

The Commissioner of
Central Excise & Service Tax,
Large Taxpayer Unit
JSS Towers, 100 FT Ring Road,
Banashankari III Stage,
Bangalore-560 085 **...Respondent**

WITH

(i) Customs Appeal No. 21870 of 2014
(M/S. TE-Connectivity India Pvt. Ltd.)

(Arising out of Order-in- Appeal No. 13/2014 dated 28.02.2014 passed by Commissioner (Appeals), LTU, Bangalore).

(ii) Customs Appeal No. 23229 of 2014
(M/S. TE -Connectivity India Pvt. Ltd.)

(Arising out of Order-in- Appeal No. 50/2014 dated 14.07.2014 passed by Commissioner (Appeals), LTU, Bangalore).

(iii) Customs Appeal No. 23788 of 2014
(M/S. TE-Connectivity India Pvt. Ltd.)

(Arising out of Order-in- Appeal No. 53/2014 dated 29.09.2014 passed by Commissioner (Appeals), LTU, Bangalore).

Appearance:
Shri N. Anand, Advocate for the Appellant
Shri Manish Akhoury, Authorised Representative for the Respondent

Coram:
Hon'ble P.A. Augustian, Member (Judicial)
Hon'ble Pullela Nageswara Rao, Member (Technical)

Final Order Nos. 20293-20296/2024

Date Of Hearing: 09.02.2024
Date Of Decision: 22.03.2024

Per : P.A. Augustian

M/s. TE-Connectivity India Pvt., Ltd., the appellant(s) is a 100% Export Oriented Unit (EOU) under EOU-EHTP scheme of the Government of India framed under Foreign Trade Policy (FTP) by the Ministry of Commerce under Foreign Trade Development and Regulation Act, 1992 (FTDRA) is engaged in business of manufacture and export of technology-oriented goods and are importing raw materials and components required for manufacture of such finished goods. The appellant is holding a private bonding warehouse license and are manufacturing finished goods in bond.

2. The brief facts of the case are the appellant imported goods duty free under Notification No. 52/2003-Cus dated 21.03.2003 read with para 6.15(b) of per Foreign Trade Policy (FTP) 2019-20. The appellant complied with the export obligation, however due to change of technology, some of the imported raw materials and components have become obsolete and unfit for manufacturing. Accordingly, appellant had requested for permission from the Jurisdictional Asst. Commissioner/ Deputy Commissioner to destroy the goods and clearance of the destroyed goods on payment of duty on the scrap value. However, the request was denied and duty payable at the time of import was demanded vide the impugned letters as tabulated below.

Appeal No.	TE's letter Annexure-D Date	ACIT/DCIT Reply Annexure-C Date	OIA Date
C/23229/2014	11.12.2013	27.01.2014	14.07.2014
C/21870/2014	16.09.2013	21.10.2013	28.02.2014
C/23788/2014	25.04.2014	15.05.2014	29.09.2014
C/20902/2014	18.07.2013	19.08.2013	17.12.2014

3. Aggrieved by the letters/ orders of denial of permission for destroying the imported goods by the Jurisdictional AC/DC the appellant filed appeals before Commissioner (Appeals). Commissioner (Appeals) confirmed the order of the Original Authority conveyed by the above letters. Aggrieved by the said orders, the present appeals are filed. Since the issue is common in all the above 4(four) appeals they are taken up for disposal by this order.

4. In the above appeal nos. C/23229/2014, C/21870/2014, C/20902/2014, C/23788/2014 the appellant has paid the duty payable at the time of import of goods under protest and destroyed the goods and cleared the scrap on payment of duty applicable to the destroyed goods.

5. The appellant in the appeal contended that; previously before opting to Large Taxpayer Unit jurisdiction (LTU) they were permitted vide Order-in-Original C.No.VIII/48/280/2002 EOU IV dated 28.02.2009 and C.No.VIII/48/73/2002 EOU IV dated 28.07.2009 to destroy imported goods with prior permission from customs authority; they sold the goods, so destroyed at their scrap value and paid duty on such scrap value on the clearance of scrap into the DTA; hence, they were of the bona fide belief that obsolete goods could be destroyed and cleared into the DTA on payment of applicable duty on the scrap value; subsequent to opting for LTU jurisdiction the appellant through various letters sought permission for destruction of goods and clearance of such goods from the factory on payment of applicable duty on the value of scrap generated as a consequence of destruction of obsolete goods. The LTU department passed orders denying permission for destruction of the goods and payment of duty on value of scrap and directed to appellant to pay the duty on the assessable value of the goods at the time of importation, despite acknowledging that the goods imported were obsolete; they have paid the duty on the imported goods under protest and destroyed the goods and

cleared the same as scrap. A copy of the TR-6 challans and the Mahazar drawn by the Department were enclosed with the appeals.

6. The learned counsel contended that both Notification No. 52/2003-CUS and Para 6.15(b) of the Foreign Trade Policy (FTP) specifically provides that no duty shall be leviable, when scrap is destroyed; Foreign Trade Policy, 2009-15 framed under Section 3 and 5 of the FTDRA, 1992 allows destruction of imported raw material without payment of duty with prior intimation to the department; The impugned order demanding duty with interest is contrary to Para 6.15(b) of FTP, hence contrary to the policy of Government of India; Para 6.15(b) of FTP deals with EoUs, EHTPs, STPs and BTPs and deals with unutilized imported goods and reads as under;

> *…………………………….*
>
> *……………………………….*
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> *……………………………..*
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> *"No duty shall be payable in case of capital goods, raw material, consumables, spares, goods manufactured, processed or packaged, and scrap/waste/remnants/rejects are destroyed within the unit after intimation to Customs authorities or destroyed outside the unit permission of the Custom Authorities."*.

7. The learned counsel further submits that the issue is no longer *res integra* and is well settled in favour of the appellant in the following judicial decisions.

a) In the appellant's own case, this Hon'ble Tribunal recently allowed the appeals in C/311,312,332 & 797/2012 vide Final Order No. 21269-212752/2023 dated 20.11.2023 and set aside the impugned decisions/orders.

b) Saint Gobain Crystals & Detectors (*I*) Ltd., Vs. CC Bangalore, 2018 (364) 1055 (Tri-Bang.).

c) India Actuators Private Limited Vs. CCE, 2009 (244) ELT 573 (T).

d) Macmillan India Ltd Vs. CC Bangalore

2008(223) E.L.T 449 (Tri-bang.).

e) CCE Vs. Pure Rice Ltd. 2007 (217) E.L.T. 173 (P&H) maintained by Honorable Supreme Court as reported in 2008 (222) ELT A79 (SC)

f) CCE Hyderabad Vs. Dr. Reddy Laboratories Ltd, FO No. 46/2010 dated 27.01.2010 upholding OIO No. 09/2005 dated 18.04.2005 passed by the Ld. Commissioner of Customs, Hyderabad.

8. The appellant further submits that condition (8) of notification No. 52/2003-Cus dated 31.03.2003 has been substituted by Notification No.32/2015-Cus dated 25.05.2015 which is *mutatis mutandis* as per para 6.15(b) FTP; the substitution is intended to make the condition in customs notification in consonance with para 6.15(b) of FTP, to avoid dichotomy between FTP and customs notification and to bring parity between the two provisions.
In this regard, they place reliance on the judgements in the cases of Govt. of India Vs. Indian Tobacco Association, 2005 (187) ELT 162 (SC): CCE Vs. Fosroc Chemicals (India) Pvt., Ltd., and Mehler Engineered Products (India) Pvt., Ltd., Vs. UOI, 2018 (364) ELT 27 (MAD).

9. The appellant further submits that CBEC's Customs Manual of Instructions vide para 25 of Chapter 25 extracted below reads as under:

"*25.3 Obsolete/surplus capital goods and spares can either be exported, transferred to another EOU/EHTP/STP/BTP/SEX/ unit or disposed of in the DTA on payment of applicable duties. The benefit of depreciation, as applicable will be available in case of disposal in DTA only when the unit has achieved positive NFE.* ***Duty is not charged in case of obsolete/surplus capital goods, consumables, spares, goods manufactured, processed or packaged and scrap, waste, remnants are***

> ***destroyed within the unit after intimation to Central Excise & Customs authorities or destroyed outside unit with the permission of Central Excise & customs authorities."***

10. Hence, the appellant contends that the CBEC's Customs Manual of Instruction provides on similar lines as that of para 6.15(b) of FTP and Board Vide Circular No. 18/1998- Cus dated 16.03.1998 clarified that duty free imported goods can be allowed to be destroyed without payment of duty foregone. Hence, the impugned orders are opposed to the above binding instruction issued by the CBEC. Further the learned counsel submits that the Department had earlier permitted destruction of obsolete goods and clearance on payment of duty on scrap value in their own case. Hence, the impugned orders are contrary to the previous orders/decision in their own case. Hence, they are opposed to the decisions in Jayaswals Neco Ltd Vs. CCE, 2006 (195) ELT 142 (SC) and Marsons Fan Industries Vs. CCE, 2008 (225) ELT 334 (SC).

11. Further the appellant contends that prior to substitution of condition (8) of the Notification it is provided that duty shall not be leviable in respect of scrap or waste material or remnants raising in the course of production, manufacture, processing and packaging, if such scrap or waste material or the remnants are destroyed within the unit and that their case is covered even prior to the substitution. Since, the phrase in the course of production has a wider connotation similar to the expression "in the manufacture" or in relation to manufacture.

12. During hearing of the appeals, Learned Counsel for the appellants submits that the issue is recurring in nature and against the past demands, appeals were filed before and this Tribunal vide Final Order No. 21269-21272 of 2023 dated 20.11.2023 allowed the appeals. Thereafter, the issue came up

for hearing again and this Tribunal allowed the appeals vide Final Order No. 20010-20012 of 2024 dated 04.01.2024.

13. Learned Authorized Representative (AR) for the Revenue submits that: as per Notification No.52/2003 dated 31.03.2003 clause 3(d) extracted below reads as;

> *"In the case of goods other than capital goods, such goods as are not proved to the satisfaction of the said officer to have been used in connection with the production or packaging of goods for export out of India or cleared for home consumption within a period of three years from the date of import or procurement thereof or within such extended period as the said officer may, on being satisfied that there is sufficient cause for not using them as above within the said period, allow; In the case of-*
>
> *a)………..*
>
> *b)………..″*

14. Hence, on a plain reading it is clear that in case of raw materials not put to use in manufacture within 3 years or such extended period the duty foregone at the time of import along with interest as to be paid. Hence, Department was correct in demanding and confirming the duty. Further the Customs Notification specifically speaks of disposal of Goods or Services in the manner provided in Export and Import Policy and **this notification**. Since the notification does not mention about the disposal of Raw materials the department was right in demanding the duty. In this regard the Learned AR has relied on the case law M/s. Pennar Industries Ltd., 2015(322) E.L.T. 402 (SC) Paras 16 & 17 are extracted below:

> "16. The aforesaid Order-in-Original of DGFT was under the provisions of EXIM Policy. It is held by this Court in Sheshank Sea Foods Pvt. Ltd. (Supra) that the same would not be binding on the customs authorities and as far as action taken under the Customs Act is concerned the same is to be covered by the provisions of the Customs Act.

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> ....
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> ....
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> 17. The decision in the aforesaid case, which is of the Coordinate Bench, binds us."

15. Further, the Learned AR for Revenue submits that as regards the substitution of condition No.8 of Notification No. 52/2003-Cus dated 31.03.2003, wherein the Learned counsel for the Appellant has cited the case laws and contended that the substitution would have retrospective effect, this contention was not raised by the Appellant before the Original Authority or the First Appellate Authority and there are plethora of judgements where in it is held that fresh grounds of appeal cannot be taken in the second round of appeal. He has relied on the following case laws.

i) Control Touch Electronics (Poona) Pvt., Ltd.,2016(355) E.L.T. 529 (Tri. - Mumbai)
ii) Allahabad High Court-Commissioner of Cus. & CCE, Goa Vs. Dempo Engineering Works Ltd., [2015 (319) E.L.T. 349 (SC)
iii) Hindustan Organic Chem. Ltd., Vs. CCE, Mumabi-VII [2010(251) E.L.T. 454(Tri. - Mumbai)-para3]
iv) Standard Pencils Pvt. Ltd., Vs. CCE, Chennai [2006 (197) E.L.T. 346 (Tri. - Del)]
v) Hon'ble Supreme Court in the case of CCE Vs. Dempo Engineering Works Ltd., reported in [2015 (319) E.L.T. 359 (SC)

16. Learned AR further submits that; in the appeal papers the permission submitted from Board of Approvals (BoA) of DGFT/JDFT does not pertain to the appellant; the appellant has not furnished any document such as Chartered Engineer's certificate evidencing the obsolesce of raw materials so destroyed; the order dated 04.01.2024 in Appeal Nos. C/28563/2013 & C/2708/2011, wherein it is held that the facts

of the case/issue involved in the case of Pennar Industries Ltd. 2015(322) E.L.T. 402 (SC) were different from the facts of the case at hand.

17. Heard both sides and perused the records.

18. We find that the appellants have imported goods and also procured goods from DTA in terms of exemption Notification No. 52/2003-Cus dated 21.03.2003 and Notification No.22/2003-CE dated 31.03.2003, respectively. It is their submission that due to rapid technological advancements few of the materials imported by them have become obsolete, remained unutilized and could not be used in the manufacture of the final product and hence necessarily have to be scraped being obsolete and unfit for manufacture of export goods.

19. We find that the relevant extract of the Notification No. 52/2003 dated 31.03.2003 reads as under:-

> *"(8) Subject to the satisfaction of the said officer, duty shall not be leviable in respect of–*
>
> *(i) the capital goods, if such capital goods are destroyed within the unit or outside the unit, when it is not possible or permissible to destroy the same within the unit, in the presence of Customs or Central Excise Officer;*
>
> *(ii) the scrap or waste material or remnants arising in the course of production, manufacture, processing or packaging, if such scrap or waste material or remnants are destroyed within the unit or destroyed outside the unit when it is not possible to destroy the same within the unit:"*

20. The notification was amended and raw materials were also allowed to be destroyed under intimation to customs. The relevant extract of the Notification No. 52/2003 after amendment by Notification 34/2015 dated 24.05.2015 reads as under;

> *"(8) Subject to the satisfaction of the said officer, duty shall not be leviable in respect of capital goods, **raw material**,*

consumables, spares, goods manufactured, processed or packaged, and scrap or waste or remnants or rejects are destroyed within the unit after intimation to Customs authorities or destroyed outside the unit with permission of Customs authorities:

Provided that this condition shall not apply in case of unit engaged in manufacture and export of gold, silver, platinum, diamond, precious and semi-precious stones."

21. The period of dispute in the present 4(four) appeals is prior to the substitution of condition (8) of Notification 52/2003 dated 31.03.2003. The appellant contends that the intent of the amendment was to address this particular situation, which was already provided in the Foreign Trade Policy (FTP) at Para 6.15(b) and was not provided in the Customs Notification No.52/2003 dated 31.03.2003. We find that on a harmonious reading of the provisions of Para 6.15(b) of FTP and the Customs Notification No. 52/2003 prior to the substitution of condition (8) of the notification, it would tacitly imply that destruction of the obsolete raw materials may be allowed after intimation to customs authority, if destroyed within the unit, and with permission of the customs authority for destruction outside the unit. We also find that such permission for destruction was given in the past by the Department.

22. Further, as regards the other submissions of the learned AR that; the appellant cannot raise the point of substitution of condition (8) in Notification No. 52/2003 as it was not raised before the original authority nor the first appellate authority, we find that the substitution was made in 2015, which is much after the passing of the orders by both the authorities; as regards the submission of approval from BOA (DGFT/JDGFT), we find that the learned AR has not adduced any such mandatory requirement; as regards the C.E. certificate certifying the obsolesce we find that their no such requirement, further there

was no charge/finding that the destroyed goods are not obsolete.

23. We also acknowledge that technological innovation and advancements would result in obsolesce of the earlier technology whereby the inputs, capital goods etc., used earlier for the production of final product would become obsolete and not fit for further use. Hence, the provision for destruction of the obsolete goods may have to be provided in the Policy/Notification. We find that the provision for destruction of capital goods, raw materials etc., was provided under the Foreign Trade Policy (FTP) in para 6.15(b), however, the provision for destroying the raw materials was not provided in the Notification No. 52/2003 dated 31.03.20003 and the provision has been bought in by the amending Notification No. 34/2015 dated 25.05.2015.

24. We also find that while considering the similar issue of the appellant, this Tribunal has allowed the appeals filed by the appellant.

25. In view of the above discussion and in the facts and circumstances, we find that there is no plausible reason to interfere with the ratio of precedent decisions of this Tribunal mentioned at Para 7 supra, hence the 4(four) appeals are allowed with consequential relief, if any, in accordance with the law.

(Order pronounced in open court on 22.03.2024)

(P.A. AUGUSTIAN)
MEMBER (JUDICIAL)

(PULLELA NAGESWARA RAO)
MEMBER (TECHNICAL)

sasidhar