CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE

Appeal(s) Involved: **C/1855/2011-SM**

(Arising out of Order-in-Appeal No.27/2011/CUS(B) dt. 31/03/2011 passed by CC(Appeals), Bangalore)

SAINT GOBIN CRYSTALS & DETECTORS (I) LTD
UNIT-1 SY.NO.171/1, MARUTHI INDUSTRIAL ESTATE, HOODI RAJAPALYA, WHITEFIELD ROAD, BANGALORE 560 048 — Appellant(s)

Versus

BANGALORE-CUS — Respondent(s)

Appearance:

Shri Raghavendra, Advocate
G.SAMPATH & S. RAGHU
543,12TH CROSS,8TH MAIN J.P NAGARA 2ND PAHASE,
BANGALORE
KARNATAKA
560078 — For the Appellant

Shri Parashivamurthy, Dy. Commissioner(AR) — For the Respondent

Date of Hearing: 02/11/2017
Date of Decision:…………………

CORAM:
HON'BLE SHRI S.S GARG, JUDICIAL MEMBER

Final Order No. ______________________

Per : S.S GARG

The present appeal is directed against the impugned order dt. 31/03/2011 passed by the Commissioner(Appeals) whereby the Commissioner(Appeals) has rejected the appeal of the appellant and upheld the Order-in-Original.

2. Briefly the facts of the present case are that the appellants are registered as 100% EOU engaged in the manufacturing of instrument and apparatus for measuring or detecting ionizing radiations. They were not able to use some of the raw materials and components procured duty free and which became obsolete / redundant and wanted to destroy the said items in terms of provisions of para 6.15(b) of the Foreign Trade Policy 2004-09. The appellants approached the jurisdictional officer on 18/11/2008 after expiry of initial warehousing period as the said raw materials were imported during the period 2004-05. The jurisdictional Range Officer vide letter dt. 09/04/2009 informed that the Assistant Commissioner has denied permission for destroying the unutilized raw material and thereby directed the appellant to pay the duty foregone on the imported goods along with interest on the goods that have remained unutilized during the initial warehousing period. Thereafter the appellant made the payment of duty of an amount of Rs.2,05,565/- vide TR6 challan dt. 28/04/2009. Thereafter appellant vide their letter dt. 13/08/2009 filed a refund claim claiming refund of customs duty paid on the ground that there was no requirement under law to pay duty as the goods would have been destroyed as per para 6.15(b) of the Foreign Trade Policy 2004-09. The original authority vide order dt. 10/02/2009 rejected the refund claim on the ground that warehousing period has expired for the said goods between March 2007 and Februry 2008 and the appellant had never applied for extension of the warehousing period. Aggrieved by the said order, appellant filed appeal before the Commissioner(Appeals) who rejected the appeal. Hence the present appeal.

3. Heard both sides and perused records.

4.1. The learned counsel for the appellant submitted that the impugned order is not sustainable in law as the same has been passed without considering the provisions of law in right perspective. He further submitted that the impugned order is contrary to the issue involved in the present case. He also submitted that in the impugned order, there is no discussion at all as to how the appellants are not eligible for the refund. He also submitted that the adjudication order has been passed without issuance of show-cause notice to the appellant and hence suffers from violation of principles of natural justice. In support of this submission, he relied upon the following decisions:-

i. Dharampal Satyapal Ltd. Dy. CCE, Gauhati [2015(320) ELT 3(SC)]
ii. CC(Import), Mumbai Vs. Goodwill Sales Pvt. Ltd. [2016(343) ELT 1193 (Tri. Mum.)]
iii. CCE, Indore Vs. GRD Profile Steels (P) Ltd. [2009(247) ELT 821 (Tri. Del.)]

4.2. He further submitted that the lower authorities have totally ignored the fact that on the date of application for destruction of the goods, the Customs licence granted to the appellant had been renewed and that the goods are still in the bonded warehouse. It is his further submission that the payment of duty will arise only on de-bonding. He further submitted that the communication letter issued by the jurisdictional Range Officer informing about the denial of permission for destruction of obsolete items by the Asst. Commissioner cannot be treated as a valid mode of communication and the question of challenging the same does not arise. The communication letter issued by the jurisdictional Range Officer informing about the denial of permission for destruction of goods is in the nature of a letter and the same is not an appealable order. In support of this submission, he relied upon the decision in the case of BPCL Vs. CCE, Delhi [2014(312) ELT 255 (Tri. Del.)].

4.3. He also submitted that the order rejecting the request for destruction of the obsolete items by the Assistant Commissioner was never communicated to the appellant and the claim for refund of duty paid on the obsolete item was merely rejected on the ground that the permission for destruction was rejected. He also submitted that the appellant has fulfilled the export obligation during the relevant period and having achieved the positive Net Foreign Exchange are entitled for destruction of obsolete items without payment of duty in terms of para 6.15(b) of the FTP 2004-09 and therefore the question of demand of duty does not arise. For this submission, he relied upon the decision in the case of Macmillan India Ltd. Vs. CC, Bangalore [2008(223) ELT 449 (Tri. Bang.)]

5. On the other hand, the learned AR reiterated the findings of the impugned order.

6. After considering the submissions of both the parties and perusal of material on record, I find that it is not in dispute that the appellant has fulfilled the export obligation during the relevant period and have

achieved the positive Net Foreign Exchange. Further I find that as per para 6.15(b) of the Foreign Trade Policy 2004-2009, the appellants are entitled to destroy the raw material, spares, waste and scrap within unit after intimation to the Customs authorities or destroy outside unit with permission of Customs authorities. In the present case, the permission to destroy the obsolete material and components was sought from the jurisdictional Range Officer and vide letter dt. 09/04/2009, the jurisdictional Range officer has informed the appellant that the Assistant Commissioner has denied the permission for destroying the unutilized raw material and thereby directed the appellant to make the payment of duty foregone. It is also a fact that the order of the Assistant Registrar has not been given to the appellant and the observation of the Commissioner(Appeals) tha the appellant has not challenged the order dt. 09/04/2009 is not sustainable because the order is not of 09/04/2009 it is only a letter written by the Range officer to the appellant. Further I find that the refund claim has only been rejected on the ground that warehousing period has been expired whereas the fact of the matter is the Customs licence granted to the appellant had been renewed and the goods were still in the bonded warehouse. Further I find that the claim for refund under Section 27 of the Customs Act, 1962 has not been considered at all since the impugned order gives finding beyond the scope of the proceedings. It is also a fact that the goods are still in the bonded warehouse only and the appellant’s unit will continue to be an EOU. It is well settled law that no duty is payable when the goods are in the bonded warehouse. Further I find that both the authorities have not considered the provisions of Foreign Trade Policy

2004-2009 which by para 6.15(b) allows the appellant for destruction of the goods under intimation to the Department. In view of these infirmities, I am of the view that the impugned order is not sustainable in law and the matter needs to be remanded to the original authority to consider the claim of refund in the light of the fact that the appellant has achieved positive NFE during the period and the Customs licence of the appellant has been renewed on the date of application for destruction of the goods and further that no order of Asst. Commissioner was communicated to the appellant denying the permission for destruction of the goods and further the original authority will also consider the FTP 2004-2009 which provides in para 6.15(b) that the appellant can destroy the obsolete mater under intimation to the Department. In view of this discussion, the impugned order is set aside and the appeal is remanded to the original authority to decide the claim of the appellant afresh after complying with the principle of natural justice.

(Pronounced on ……………………………..)

S.S GARG
JUDICLAL MEMBER

Raja...