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

Appeal(s) Involved:

C/20643/2019-SM

[Arising out of Order-in-Appeal No. 26/2019 dated 25/02/2019 passed by Commissioner of CUSTOMS, (Appeals) BANGALORE.]

M/s. Primacy Industries Ltd
(Earlier known as M/s. Primacy Industries Pvt. Ltd.)
Plot No.7A, Baikampady Industrial Area
MANGALORE – 575 011
KARNATAKA

Appellant(s)

Versus

The Commissioner of Customs
C.R. BUILDING, QUEENS ROAD,
P.B.NO. 5400,
BANGALORE – 560 001.
KARNATAKA

Respondent(s)

Appearance:

Ms. Neetu James, Advocate
LAKSHMI KUMARAN & SRIDHARAN
WORLD TRADE CENTRE NO.404-406,
4TH FLOOR, SOUTH WING BRIGADE
GATEWAY CAMPUS NO.26/1,
DR. RAJKUMAR ROAD,
BANGALORE - 560 055
KARNATAKA

For the Appellant

Mr. Gopa Kumar,
Joint Commissioner (AR)

For the Respondent

Date of Hearing: 08/08/2019
Date of Decision: 14/08/2019

CORAM:

HON'BLE SHRI S.S GARG, JUDICIAL MEMBER

Final Order No. 20632 /2019

Per : S.S GARG

The present appeal is directed against the impugned order dated 25.2.2019 passed by the Commissioner (A) whereby the Commissioner (A) has rejected the appeal of the appellant.

2. Briefly the facts of the present case are that the appellants are 100% EOU manufacturing and exporting wax candles. They have been procuring raw materials by way of import as well as from domestic units without payment of duty under the strength of Procurement Certificate (PC) and under CT-3 Certificates issued by the Jurisdictional Range Officer (JRO) as per the terms and conditions of B-17 Bond executed by them. The JRO had issued Procurement Certificate No.112/2013-14 dated 30.12.2013 for import clearance of 125 MT of 'Fully Refined Paraffin Wax' valued at USD 174375 without payment of Customs Duty to the importer's Bonded Warehouse cum manufacturing facility as per Notification No.52/2003-Cus. dated 31.3.2003 read with conditions stipulated in the B-17 Bond. The appellant filed warehouse Bill of Entry No.4262263 dated 4.1.2014 and the imported goods were cleared without payment of Customs duty. The assessable value of the goods so cleared was Rs.1,09,81,004/- and the duty foregone was Rs.34,27,004/-. As per the conditions of the Bond executed by the appellant, a re-warehousing certificate as proof of receipt of goods in the bonded premises is to be produced within three months from the date of clearance of goods from the port and necessary bond registers have to be maintained for each entry or removal of goods. As the importer failed to produce the same, the lower authority issued a show-cause notice to the appellant demanding customs duty foregone and interest thereon, treating the act of the importer as violation of provisions of Chapter IX of the Customs Act, 1962 read with the conditions of B-17 Bond. The importer in their reply to the show-cause notice submitted that they had been duped by their supplier from Dubai, who had supplied 'paraffin white powder' which turned out to be paraffin white powder instead of 'fully refined paraffin wax' as ordered by them. The supplier was also not ready to take back the goods and they lodged a police complaint regarding the fraud committed by their supplier. The police seized the containers and conducted the investigation and filed

the charge sheet in the JMFC Court at Mangalore. The Original Authority after following the due process passed the Order-in-Original confirming the demand of duty along with interest on the imported goods on the ground that the same were not warehoused. Aggrieved by the said order, appellant filed appeal and the Commissioner (A) rejected the same. Hence, the present appeal.

3. Heard both the parties and perused the records.

4. Learned counsel for the appellant submitted that the impugned order is not sustainable in law as the same has been passed without properly appreciating the facts and the law. She further submitted that the appellant placed order for "Fully Refined Paraffin Wax" but has been supplied "Magnesium Sulphate in powdered form (paraffin white powder), which are defective goods and is unfit for use by the appellants in the manufacture of wax candles. She further submitted that there cannot be any demand of duty on the paraffin white powder as the same has not even been imported in terms of the Procurement Certificate. She also submitted that the imported goods are unfit for use and therefore, the appellants have relinquished the title to the goods which is clearly evident from their letter dated 13.1.2014 and 17.1.2014 wherein the appellants have intimated the department that due to anomaly in the goods, they have discarded / disowned the imported goods. In reply to their letter, the Department has advised the appellant to follow the procedure in terms of Circular No.60/1999. She also submitted that the impugned goods have become unfit for use and the appellant has abandoned the said goods, therefore no duty liability arises in respect of the impugned goods in terms of proviso to Section 68 of the Customs Act, 1962 / Section 23(2) of the Customs Act. For this submission, she relied upon the following decisions:

- ***Indian Charge Chrome Ltd. vs. CCE & Cus. : 2001 (132) ELT 300 (Tri.-Kolkata)***
- ***Pure Rice Ltd. vs. CCE, Delhi: 2005 (181) ELT 265 (Tri.-Del.)*** affirmed by Hon'ble High Court of Punjab and Haryana as reported in ***2007 (217) ELT 173(P & H)*** and maintained by the Hon'ble Supreme Court as reported in ***2008 (222) ELT A79 (SC).***

- ***CC, Bangalore vs. Symphony Services Corporation India Pvt. Ltd.: 2012 (275) ELT 369 (Kar.)***

4.1 She also submitted that vide their letter dated 13.4.2014 and 20.1.2014, they have intimated the Department regarding the discrepancy in the imported goods and the Department vide their letter dated 21.1.2014 directed the appellant to follow the procedure in terms of Circular No.19/2007 and examine the cargo and intimate the discrepancy. Thereafter, the appellant intimated the discrepancy in terms of the letter dated 27.1.2014 which is at page 100 of the paper-book. Thereafter on intimation, the Department has not re-warehoused the goods but has directed the appellant vide their letter dated 30.1.2014 to follow the procedure in terms of Circular No.60/1999. Therefore, the appellant has followed the procedure prescribed in the Circular No.60/1999. Therefore, the appellant has followed the procedure prescribed in the Circular No.19/2007-Cus. and Circular No.7/2006. She also submitted that in any case re-warehousing of the goods is not permitted if any discrepancy is found at the time of examination of the imported goods. For this submission, she relied upon the CBEC Circular No.19/2007-Cus. dated 3.5.2007 wherein it was clarified that the self-warehousing /bonding procedure need not be followed if any discrepancy is found at the time of examination of the imported goods. Further, it is impossible for the appellant to submit a re-warehousing certificate as the goods imported was not fully refined paraffin wax and were not capable of being used in the manufacture of wax candles. As per the learned counsel, the Doctrine of Impossibility of Compliance, a condition which is imposed by the statute, the performance of which is impossible, then the performance of the same is understood to have been dispensed. For this submission, she relied upon the following decisions:

- ***Sundaram Fasteners Ltd. vs. CCE: 1987 (29) ELT 275 (T)***
- ***Kirloskar Ferrous Industries Ltd. vs. State of Karnataka: 2005 (59) Kar. L.J. 676 (HC)***

4.2 She also submitted that they have complied with the procedure under Circular No.60/1999 since they have discarded the goods and filed complaint before the local police station and the police seized the goods and in pursuance of the order dated 26.8.2017 passed by the Jurisdictional Magistrate First Class, the goods were disposed of by way of sale in public auction and the sale proceeds amounting to Rs.10,000/- were deposited in the Court and therefore, the disposal of the goods by way of action is to be considered as disposal of goods. She also questioned the demand of duty under Section 72(1)(d) of the Customs Act and in terms of the conditions of the bond on the ground that the goods were duly accounted for. For this submission, she relied upon the following decisions:

- ***Commissioner of Customs vs. Maini Granites Ltd.: 2005 (187) ELT 55 (Tri.-Bang.)***
- ***Flemingo Duty Free Shop Pvt. Ltd. vs. CCE: 2018 (361) ELT 742 (Tri.-Mum.)***

5. On the other hand, the learned AR defended the impugned order and submitted that the appellant have not complied with the various Circulars issued by the CBEC. He further submitted that the Circular No.19/2007-Cus. stipulates that in case of discrepancy in the goods the EOU is not allowed to self-warehouse the goods and has to follow the procedure prescribed under Circular No.7/2006-Cus. Further, the appellants have failed to furnish re-warehousing certificate and the goods have not been warehoused at all and therefore, it has to be treated as improper removal. The learned AR further submitted that the imported goods having been auctioned and the proceeds deposited in the Court, the goods should be considered to have been cleared into DTA and the Custom duty foregone at the time of import needs to be paid along with interest in terms of Circular No.60/1999.

6. After considering the submissions of both the parties and perusal of the material on record and the various decisions relied upon by both the parties, I find that the appellants have imported 'Fully Refined Paraffin Wax' but he supplier has not supplied the said goods and has supplied 'Paraffin White Powder' which is unfit for use by the appellant in the manufacture of wax candles. Immediately, on receipt of the goods and its examination, the

appellant informed the department and sought their guidance. The Department advised the appellant to follow the procedure in terms of Circular No.60/1999 and also to follow the procedure in terms of Circular No.19/2006-Cus. Further, I find that appellant vide their letter dated 13.1.2014 and 17.1.2014 have abandoned the imported goods. Further, I find that the appellant have followed the procedure prescribed in Circular No.19/2007 wherein it is clarified that the self-warehousing / bonding procedure need not be followed if any discrepancy is found at the time of examination of the imported goods. Further, I find that once the appellant lodged the complaint to the police and the impugned goods were seized and was auctioned by the order of the Jurisdictional Magistrate on 26.8.2017 and also the sale proceeds of Rs.10,000/- were deposited in the court. Since the goods have already been auctioned by the order of the Court, it was not possible for the appellant to comply the conditions of re-warehousing certificate and further, it was not possible for the appellant to submit re-warehousing certificate as the goods imported was not 'Fully Refined Paraffin Wax'. In fact, the appellant has been cheated / duped by the supplier and the appellant immediately inform the Department regarding the conditions of the impugned goods and followed the procedure as per the guidance given by the Department. Further, once the appellant has abandoned the goods, duty liability cannot be fastened on the appellant in view of the various decisions relied upon by the appellant cited supra. In view of my discussion above, I am of the considered view that the impugned order is not sustainable in law and therefore, I set aside the same by allowing the appeal of the appellant.

(Order was pronounced in Open Court on **14/08/2019.**)

S.S GARG
JUDICIAL MEMBER

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