IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI

APPEAL NO: C/88082/2017

[Arising out of Order-in- Appeal No: PUN-CT-APII-000-256-17-18 dated 2nd November, 2017 of Commissioner of Central Tax (Appeals), Pune.]

Olive Tree Trading Pvt Ltd …***Appellant***

versus

Commissioner of Customs
Pune – II …***Respondent***

<u>*Appearance:*</u>

Shri Rohan Balani with Shri Anil Balani, Advocates for appellant

Shri Manoj Kumar, Assistant Commissioner (AR) for respondent

CORAM:

Hon'ble Shri C J Mathew, Member (Technical)

Date of hearing: 12/04/2018
Date of decision: 12/04/2018

<u>ORDER NO: A/86177 / 2018</u>

M/s Olive Tree Trading Pvt Ltd, who had imported consignments of 'coconut milk' and almond milk *vide* bill of entry no. 4360865 dated 24th February 2016, requested their supplier to take back the goods for being not compliance with the shelf life prescription in notification no. RE-20001/1997-2002 dated 30th July 2001. While the goods were yet with the custodian, they were subject to destruction *vide* panchanama dated 28th April 2017 on order of Assistant Commissioner of Customs, ICD, Pune dated 24th April 20017. The show cause notice issued to appellant on 13th May, 2016 proposing revocation of Customs bonded warehousing licence, recovery of duty along with interest thereon, confiscation of goods under section 111 of Customs Act, 1962 and imposition of penalty under section 112 of Customs Act, 1962 was adjudicated by the original authority confirming demand of ₹ 3,22,806/-, along with interest thereon, and, having confiscated goods, imposing penalty of like amount under section 112 of Customs Act, 1962. In appeal of Revenue against that order, against which cross-objections were filed by the appellant, Commissioner of Central Tax (Appeals), Pune *vide* order-in-appeal no. PUN-CT-APII-000-256-17-18 dated 2nd November, 2017 enhanced the duty to ₹ 3,84,023/- as proposed in the show cause notice and imposed equivalent penalty. The first appellate authority held that it was beyond the power of adjudicating authority to revoke/cancel warehousing licence which is vested only with the Commissioner of Customs. Aggrieved by the order, the appellant seeks setting aside the demand of duty, the interest thereon and the penalty.

2. According to Learned Counsel for appellant they had on their

own communicated the probable non-compliance with the FSSAI norms and that the exporter was not willing to take back the goods which remained under the control of customs authorities. The goods were destroyed as ordered by the Assistant Commissioner of Customs. It is also contended that the goods having been destroyed while in custody of the custodian, the duty should have been remitted under section 23 of Customs Act, 1962. It is further contended the goods were not cleared for home consumption on which alone the discharge of duty liability is predicated. Reliance was placed on the decision of Tribunal in *Commissioner of Customs, Ahmedabad v. ACX International [2012 (286) ELT 602 (Tri.Ahmd)]*

> *'7. The Revenue is aggrieved by setting aside the penalty and also setting aside of the confirmation of demand of the Customs duty on the Courier company. As is already reproduced by me, I find that the first appellate authority has modified the order of the adjudicating authority and has ordered for absolute confiscation of the goods. On such absolute confiscation of the goods, the Revenue has not preferred the appeal in their grounds of appeal. If that be so, in my considered view, no demand of duty arise as once there is absolute confiscation, the clearances of the goods do not take place from the Customs area.'*

and of the decision of the Tribunal in *CCL Products (India) Ltd v. Commissioner of Customs & Central Excise, Guntur [2009 (247) ELT 248 (Tri.-Bang.)]* which held that

'5. We have considered the submissions made at length by both sides and perused the records. On perusal of the records, we find that the undisputed facts are the appellant is a 100% EOU and has imported the "PLT-Tin Plates" falling under Chapter Heading No. 8309.90 without payment of duty in terms of Notification No. 53/97-Cus. dt. 3-6-1997. It is also undisputed that the appellants have been keeping the department informed about the damaged condition of the imported goods. It is also undisputed that the said damage was certified by the Insurance Company and the appellants had sought the permission to destroy the goods under Central Excise provisions. The list of sequence of events as submitted by the learned counsel clearly indicates that the appellant was consistently following-up with the revenue authorities for destruction of said goods. Despite of such efforts, there was no answer or any communication from the revenue and the appellants were slapped with the show cause notice on 17-3-2005 for destruction of such goods. We are of the considered opinion, that in this case, there is no error or fault of the appellant in destroying the goods even before the jurisdictional authorities came and verified the extent of damage of the said goods, as the fungus which had developed on the imported goods could have spread in their factory, which is manufacturing instant coffee. Another way of approaching this issue is, that, the imported goods were lying in the customs bonded warehouse i.e. EOU. We find that the destruction of goods within the customs bonded warehouse or outside the unit by just informing the customs authorities has been upheld by this Tribunal in the decision of M/s. Mac Milan India Ltd. (supra). .....'

3. On the issue of penalty, it is the contention of the Learned Counsel that there was no intent on their part to import any goods in

violation of any laws of the country and, therefore, issue of show cause notice for recovery of duty or for imposition of penalty was not warranted.

4. Learned Authorised Representative contends that the goods had been imported in violation of restrictions in the Foreign Trade Policy and that the original authority had rendered clear finding of the appellant being well aware of the arrival of consignment coming in the country which justified the detriments.

5. It would appear from the records, and from the rival submissions, that the goods had been destroyed in April 2017. It was incumbent upon the original authority to have ordered remission of duty along with the order of destruction. Recovery of duty, along with interest thereon, ordered by the original authority is, therefore, not proper. It is indeed strange that Revenue considered it necessary to file an appeal against the order of the adjudicating authority before the first appellate authority; with the destruction of the goods, to which the importer acquiesced the liability to duty ceases and, the goods not having been cleared for home consumption, re-determination of the value is superfluous. The appellant had, of their own accord, reported the non-conformity with the prescribed shelf-life at the time of import. There is no evidence on record to sustain the contention that the appellant had imported the goods even though

aware that it was contrary to Foreign Trade Policy.

6. For the above reason, the impugned order is set aside; the duty liability and imposition of penalty are set aside with consequential relief.

(Dictated in Court)

(C J Mathew)
Member (Technical)

**/as25041308*