Commissioner of Central Excise Vs. Jayant Oil Mills

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Apr-07-1999

Reported in : (1999)LC985Tri(Mum.)bai

Appellant : Commissioner of Central Excise

Respondent : Jayant Oil Mills

Judgement :

1. This is an appeal filed by the Department against the decision of Collector of Customs, Mumbai whereby his order dated 29-9-1992 made in Order-in-Original No. Collrs./Adj/Order No. 3/92, he dropped the show cause notice dated 7-9-1988.

2. The facts of the case are that the respondents had obtained an advance licence No. 300444, dated 3rd November, 1983 under DEEC scheme, for import of 110.88 MTs of polyester staple fibre and 12.32 MTs of Viscous staple fibre at a total value of Rs. 16.4 lakhs. Against the same the respondents imported in four consignments containing 102.09 MTs of Polyester staple fibre at a CIF value of 16.03 lakhs during the period from March to August, 1984. The respondents were under an export obligation for the export of 112 MTs of spun yarn made out of man-made fibre for total FOB value of Rs. 22.04 lakhs to be completed within six months. The respondents exported 105.77 MTs of yarn valued at 24.78 lakhs under cover of 13 shipping bills during the period from March, 1984 to March, 1995. In all the cases shipments were allowed provisionally after trial of sample taken for test. Samples were decided by the Dy. Chief Chemist (Lab.) as well as SASMIRA, and test report showed that the goods exported were blended

polyester yarn with viscose spun yarn staple fibre. Out of 13 consignments, 5 consignments were exported from March to July, 1984. On the report of the Dy. Chief Chemist and SASMIRA test report DEEC book in respect of 8 consignments were also audited but the books were yet to be closed. The respondents had realised foreign exchange involved in these exports. The Department had information that certain exporters were using waste fibre used in place of prime virgin fibre and exporting of such yarn which was contrary to the stipulations under the DEEC Scheme. A search was conducted in the respondents premises. As nothing substantial was found from the documents seized to prove the divergent quality of polyester fiber and purchase of polyester waster for the manufacture of the goods exported the case was referred to the Export Department, with a request to get the additional samples lying in the Export Department of the assessee decided from Bombay Textiles Research Association (BTRA). Out of the 13 shipments made samples for 11 shipments were available and the same were sent to BTRA for test. After the test it was found that in 8 shipments the goods were found to contain less than 50% polyester waste fibre and in respect of 3 shipments polyester waste content exceeded 50%. On the basis of the total weight of polyester contained it came to 30942.43 kilograms. At that time of import 1% wastage was allowed. The raw material claimed to have been used i.e. 39,536 is valued at Rs. 54,22,876. Duty benefits sought by the customer was to the extent of Rs. 54,22,876. In a show cause notice dated 7-9-1987 issued to the Respondent it was alleged that shipments were allowed under DEEC Scheme provisionally subject to test reports referring composition and virgin of the fibre. The samples were retained from all the consignments tested at BTRA which revealed that yarn was made large proportions of polyester waste fibre. Therefore, it was charged under the show cause notice that there was a misdeclaration in respect of the raw material used for the manufacture of the final product. The purpose of the misdeclaration of the goods the shipping bill was apparently to derive undue advantage of off setting the import of first quality polyester fibre which had been imported duty free under the DEEC Scheme against these exports and thereby Government would have suffered loss of revenue to the extent of Rs. 54,22,876 approx. The respondents in their reply refuted the allegations stating that the notices were issued after three years of export. Collector in the impugned order had felt that the delay in three years had been held to affect the test which became erroneous. In the impugned order Collector referred to the proceedings initiated against the firm called M/s. Swadeshi Polytex as well as the report submitted by the Northern Indian Textile Research Association and SASMIRA on letter dated 6-2-1989. The same view had been repeated by VJTI in their opinion dated 13-2-1989. The Collector in the impugned order had found that the respondent had operated under a scheme for export promotion and the purpose had by and large been served. And the export obligation had been discharged and the foreign exchange remittance had been release by them. The Collector also found that at best one could have only a suspicion that the exporter may have used some waste fibre to the spinning yarn which was exported. But this could not find the basis of an order to penalise the respondent and imposed a major tax liability on the importer. He, therefore, dropped the show cause notice. Hence the present appeal.

3. It is contended by the Department in the appeal that on the basis of the test report from BTRA the polyester fibre contends in the goods covered under 3 consignments for which adjudications were initiated was 35947 kilograms. The total quantity of the polyester staple fibre imported against the advance licence was 10203 MTs. Such average wastage on the manufacture of polyester yarn from polyester fibre was about 5% the total waste thus could not have been more than 5.10 MTs.

Even if all the waste had been used in the 3 export consignments the question as claimed by the respondent the balance of 30.8 MTs of polyester fibre in these consignments should have been of virgin/prime quality. It was also argued that as per test report from BTRA the goods were found to be predominantly waste fibre which would mean that at least 19 MTs of waste fibres had been used in 3 consignments. Evidently this would mean that raw material meant for end product was waste product large in excess of generally generated in manufacture of polyester yarn from the polyester fibre. In view of the fact that party could not dispute the finding regarding the percentage of waste fibre the respondents' action of merely seeking to formulate/putforth possible explanation regarding fibre was found to be waste fibre is not fully convincing. It is, therefore, argued that

Collector's finding is wrong.

4. As against this ld. counsel for the respondent argued that the Collector's finding is absolutely correct and relies on the observations of the Collector's finding.

"On a very careful analysis of the various defence points advanced by the exporter, it has to be admitted that there is considerable force in their arguments. As already submitted by them, samples from 13 consignments were tested in Dy. C.C. Lab. as well as in the SASMIRA Lab. initially. But both these Labs have only certified the compositions of the end product was prime virgin fibre or synthetic waste. As against the above view, the BTRA has stuck to their opinion that even after a long period of storage it would be possible to find out whether the raw material used was synthetic waste or prime fibre and in respect of 11 samples tested, the report is positive in respect of 8 but it was otherwise in respect of 3 consignments. But one has to be careful and very circumspect in the given circumstances before a categorical view is taken on the basis of one test report, particularly when the other Labs have taken a different view. In an identical proceedings M/s. Swadeshi Polytex have stated that when yarn made from polyester blends are stored for more than three years, the test results may become erroneous. M/s.

Northern India Textiles Research Association also in the letter date 10-2-1989 has stated that when waste fibre is used in spinning of yarn it is very difficult to ascertain its exact content. Our Custom House Lab also could not give a definite opinion whether the raw material used were synthetic waste or virgin fibre. SASMIRA also in their letter dated 6-2-1989 have categorically stated that if yarn is stored for more than 3 years, that long storage affects the quality of the yarn generally the degradation takes place. The same view has been repeated by the VJTI in their opinion dated 13-2-1989.

According to them testing of yarn after three years may given erroneous results.

Coupled with the above views, the exporters also have given a very plausible explanation as to how the shipments made towards the end of the series of shipments showed different test results. According to them, some process waste of the yarn from the stage of carding and coming would have been pooled back into the system to spin the yarn towards the end. This would have caused a higher percentage of uneven fibres in the yarn. Considering the total quantity of prime fibre imported and the spun yarn exported by them and also taking into consideration the fact that in terms of the value the party has completely discharged the export obligation and also they realised the export remittances in full, in my view it is rather unfair to rake up the whole matter and clamp a demand on them exceeding Rs. 54 lakhs now. It has to be noted that they have operated under a scheme for export promotion and the purpose has by and large been served on the export obligation has been discharged and the foreign exchange remittance has been realised in full. At best one can only have a suspicion that the exporter may have used some waste fibre to spinning the yarn which was exported but this cannot form the basis for an order to penalise the party and impose a major tax liability on the exporter. I would, therefore, hold that this is a fit case for dismissal of the charges levelled against the party." 6. We feel that the Collector in passing the order had considered the arguments of the respondent and the test reports. There is a variation between the wordings of the analyst report and its conclusion. It is also contended before the Collector that the test reports could have been affected as a result of storage of samples for three years. It was also submitted rightly before the Collector that the goods under export was made of fibres and the relevant test report in respect of earlier consignments it confirmed that it contained entirely of prime fibre.

Therefore, the respondent could have used prime fibres which included spill over and processes waste from goods manufactured earlier. It was therefore, felt that while the test report indicated that fibres found in them were damaged to a certain extent. It has been rightly argued by respondent that the entire goods were made out of polyester waste fibre.

7. We have considered the view of the Collector extracted above. It indicates in identical case yarn made from polyester blends storing more than 3 years test results may become enormous. The Customs Laboratory as well as Sasmira did confirm the declarations filed in four cases relating DEEC book were also closed. Moreover, Collector had found that the export obligation has been discharged and

foreign exchange had been remitted to India therefore, this was a very peculiar case where on the basis of suspicion there could not be any levy of penalty. Hence we feel that in this case no interference is called for.

Appeal of the Department is dismissed.