

Kapadia Enterprises Vs. Collector of C. Ex. and Cus.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Sep-20-2000

Reported in : (2001)(131)ELT494TriDel

Appellant : Kapadia Enterprises

Respondent : Collector of C. Ex. and Cus.

Advocate for Pet/Ap. : Shri. Mayur Shroff

Judgement :

1. The appellants were engaged in the manufacture of what was commercially called 'Taspa Yarn'. The visit by Central Excise (Preventive) officers to the appellants' factory premises on 22-7-1987, followed by further investigations, revealed to the Department that the appellants had manufactured and cleared a quantity of over 11,000 Kgs of Taspa Yarn without payment of Central Excise duty during the period 26-11-1986 to 15-5-1987. Department took the view that the product was special yarn classifiable and chargeable to duty under Chapter Heading 56.06 of the Central Excise Tariff and, therefore, by show-cause notice dated 12-1-1990, directed the appellants to show cause why an amount of Rs. 3,45,368.88 should not be recovered from by them towards Central Excise duty on the aforesaid quantity of Taspa Yarn under Rule 9(2) of the Central Excise Rules read with Section 11A(1) of the Central Excises & Salt Act (CESA) and also why penalty should not be imposed on them under Rule 173Q(1) of the said Rules. The show-cause notice was issued by invoking the extended period of limitation under the proviso to Section 11A(1) of CESA. The appellants contested the show-cause

notice by submitting, inter alia, that the Additional Collector of Central Excise, who had issued the show-cause notice, had no jurisdiction to do so or to adjudicate any dispute arising from such notice under Section 11A of the CESA, that the Department had not discharged the burden of classifying their product as special yarn under Chapter Heading 56.06 of the Central Excise Tariff, that their product did not contain any core yarn and therefore could not be classified as special yarn under Chapter Heading 56.06 having regard to the H.S.N. Notes under Heading No. 56.06, that the Chemical Examiner's report (relied on in the SCN) of test conducted on samples drawn from other manufacturers was not valid and reliable evidence against them and that the show-cause notice was timebarred. The Additional Collector, who adjudicated the dispute, confirmed the demand of duty and imposed a penalty of Rs. 35,000.00. The present appeal is against the order of the Additional Collector.

2. We have carefully examined the impugned order and connected records.

We have also heard Shri Mayur Shroff, Counsel for the appellants and Shri M.P. Singh, JDR for the respondents.

3. Ld. Advocate reiterated the grounds of the appeal and, after giving a brief account of the process of manufacture of the product in question, submitted that Taspa Yarn did not contain any core yarn and, therefore, would not be classifiable under Tariff Heading No. 56.06 as claimed by the Department. He relied on CBEC Circular No. 26/88-CX. 1, dated 10-10-1988, whereby the Board clarified its earlier Circular dated 26-4-1988 and laid down that if there was no core yarn in a fancy yarn, such fancy yarn would not be classifiable as special yarn under Tariff Heading 56.06. Ld. Counsel also relied on the decision of the Tribunal in the case of Pratik Crimpers v. Collector of Central Excise, Mumbai [1998 (25) R.L.T. 24] and further on the decision of the Tribunal (Larger Bench) in the case of S.J. Vasania Silk Mills and Ors.

v. CCE, Surat - 2000 (38) RLT 964 in support of the appellants' case that since there was no core yarn in the product in question, the product would not be classifiable as special yarn under Tariff Heading 56.06. While referring to the case of Pratik Crimpers, Ld. Counsel submitted that the process of manufacture of

Taspa Yarn in that case was identical with the process in the instant case and, therefore, the ratio of the decision in that case should be squarely applied to the instant case. Counsel, therefore, prayed for setting aside the impugned order and allowing the appeal.

4. Ld. DR, opposing the above submissions, submitted that the decision in Pratik Crimpers (supra) was based on the evidence of Chemical Examiner's report and that the said report could not be relied on for a decision in the instant case. He also said that the appellants themselves virtually accepted the presence of core yarn in the product in the context of explaining the process of manufacture and, therefore, it could not be gainsaid that the Taspa Yarn was to be classified under Tariff Heading 56.06. Ld. DR also relied on the decision of the Tribunal in the cases of Garden Silk Mills Ltd. v. CCE, Baroda [1995 (7) R.L.T. 298] and Damanwala Silk Mills Ltd., Surat v. CCE, Surat [1997 (96) E.L.T. 46]. In both those cases, the Tribunal had held that Taspa Yarn was to be classified under Tariff Heading 56.06. Recalling the process of manufacture of the product in question, Ld. DR submitted that two different yarns - Polyester filament yarn and Nylon filament yarn were fed together into the machine and were made to run at different speeds. The polyester yarn running at lower speed was the base yarn and the nylon yarn ran at higher speed over the base yarn, producing a slub effect on the product. According to Ld. DR, the slow moving base yarn of polyester filament could be termed as core yarn.

Ld. DR described the process as a special process, which gave a special design and shape to the final yarn, which emerged as a fancy yarn by virtue of its slub effect and differed from the normal construction of single and folded yarns. He, therefore, argued that the product should be classified as special yarn under Tariff Heading 56.06, especially since it contained a core yarn. He prayed for upholding the impugned order and rejecting the appeal.

5. We have carefully examined the rival submissions. Having perused the facts of the case of Pratik Crimpers as disclosed by the Department's Appeal dismissed show cause-notice and the Tribunal's order in that case, we note that the process of manufacture of Taspa Yarn of the present appellants is identical with that of

Pratik Crimpers. The appellants had used two types of yarns viz. nylon yarns of 20 denier and polyester yarns of 30 denier. The polyester yarn was used as base yarn and the nylon yarn was used to cover the base yarn. In their "Lohia" Crimping machine model No. 440, into which the two yarns were fed together in single spindle, the polyester yarn was made to run at a lower speed while the other yarn was made to run over it at a higher speed; as a result of which a slub effect was produced on the processed yarn. Quantities of polyester and nylon yarns used for the manufacture were in the ratio of 1:1.5 by weight. The appellants used special attachments [namely, Tensor/Ceramic guide] to the crimping machine for the manufacture of Taspa Yarn. We note that, in the above process of manufacture as explained by Shri M.K. Kapadia, one of the partners of the appellant-firm, in his statement under Section 14 of the CESA, there is no reference to any core yarn. We, further, note that no sample of the product in question was drawn by the Departmental officers for any chemical test. The results of the chemical test conducted on samples of product drawn from other manufacturers can be no evidence against the present appellants. The view taken by the adjudicating authority in this behalf is correct. The Additional Collector has rightly sustained the preliminary objection raised by the assesseees against placing reliance on the test report relating to sample drawn from another manufacturer viz. M/s. Beekaylon Synthetics Pvt. Ltd. In this context, we must also observe that the appellants are also estopped from relying on such test report in the present appeal.

On a perusal of the statement recorded by the Departmental officers from Shri M.K. Kapadia under Section 14 of the Act, we find that, nowhere in the statement, he admitted the presence of core yarn in the product, though he referred to base yarn. No evidence appears to have been adduced by the Department to prove that the 'base yarn' referred to by the appellants was 'core yarn' in terms of H.S.N. Notes or otherwise. It is, further, found that the appellants did not admit the presence of core yarn in their product in their reply to the show-cause notice. Since the burden of classification of the product was on the Department, the burden of proving existence of core yarn in the appellants' Taspa Yarn was very much on the Department. Department utterly failed to discharge this burden. Therefore, we are not in a position to accept the contention of Id. DR that the product contained core yarn.

6. In the case of Pratik Crimpers (supra) whose product and process of manufacture were identical, respectively, with those of the present appellants, there was a chemical test of sample drawn from the product and the report of the Chemical Examiner and his oral evidence (given in cross-examination) were clearly to the effect that the product did not contain core yarn. It was on the basis of such evidence coupled with the process of manufacture that the Tribunal ruled out classification of the product under Tariff Heading 56.06. In the instant case, there was no drawal of sample for chemical test from the appellants' factory, which only marked the failure of the Department in proving presence of core yarn in the Taspa Yarn of the appellants. No technical literature or expert's opinion appears to have been consulted for proving so. In the absence of such proof as well as of any admission (by the assessee) of presence of core yarn in the product and in view of the fact that the process of manufacture in the instant case was identical with that in the case of Pratik Crimpers (supra), we are inclined to apply the ratio of the Tribunal's decision in Pratik Crimpers (supra) squarely to the present appellants' case and to hold that, in the absence of core yarn in their product, the Taspa Yarn is not classifiable under Tariff Heading 56.06 for the period of dispute. We have also noted that the adjudicating authority has not recorded any specific finding that the product in question contained a core yarn. To classify the product under Heading 56.06 without such finding is unsustainable.

7. We have examined the Board's circular dated 10-10-1988 also and have noted that this circular was also considered by the Tribunal in Pratik Crimper's case. We, further, note that the decision of the Tribunal in Pratik Crimper's case stands affirmed by the Larger Bench in the case of S.J. Vasania Silk Mills and Ors. (supra). The case law relied on by Id. DR is found to have been disapproved by the Larger Bench.

8. In view of our findings recorded above, the issue whether the Taspa Yarn manufactured by the appellants from duty-paid polyester/nylon filament yarns and cleared from their factory without payment of duty during the period of dispute is classifiable and chargeable to duty under Tariff Heading 56.06 as claimed by the Department, will stand decided against the Revenue. The demand of duty on such clearances and imposition of penalty on the appellants are set aside. We need not

address the question of limitation. The appeal is allowed.

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