

Commr. of Cus. and C. Ex. Vs. Ashima Fabrics

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Jun-12-2002

Reported in : (2003)(154)ELT530Tri(Mum.)bai

Judge : S T Gowri, G Srinivasan

Appellant : Commr. of Cus. and C. Ex.

Respondent : Ashima Fabrics

Judgement :

1. The application under Section 35E of the Act and the two appeals by Ashima Fabrics are against the order of the Commissioner of Central Excise, Ahmedabad. The appeal C/735/1999 is filed under the Customs Act, 1962 and appeal E/2569/1999 is filed under the Central Excise Act, 1944 by Ashima Fabrics.
2. The notice issued to Ashima Fabrics a 100% export-oriented unit, proposed to demand duty on a number of counts. In the order impugned in these appeals the Commissioner has dropped the demands on some account and confirmed them on others. The application by the Commissioner is against that portion of the order dropping the demand and the appeals by the firm are against that portion of confirming the demands and imposing penalty.
3. Having heard the departmental representative and the Counsel for the firm we proceed to give a finding on each of these issues.

4. A sum of Rs. 1,82,89,599/- was demanded on the ground that the unit could avail the benefit of exemption contained Notification 8/97 with regard to the gray fabrics cleared by it to the domestic tariff area.

The Commissioner has concluded that this demand is not sustainable and dropped it and this is challenged in the department's appeal.

Notification 8/97 exempts 'finished products, rejects or waste or scrap specified in the Schedule to the Central Excise Tariff Act, 1985 (5/1986) and produced or manufactured in a 100% export-oriented undertaking (EOU) or a free trade zone only from the raw material produced or manufactured in India and allowed to be sold in India in accordance with the provisions of sub-paragraphs (a), (b), (c), (d) and (f) of paragraph 9.9 or of paragraph 9.20 of the Export-Import Policy April 1997 - 31-3-2002' from so much of the duty as in excess of the amount equal to the duty leviable under Section 3 of the Act on like goods produced or manufactured and cleared by other than 100% export-oriented unit or free trade zone and cleared in India. In the course of manufacture of grey fabrics that it sold in the domestic tariff area the assessee made sizing mixture which was used to size the yarn that was taken for weaving the fabric that it cleared. One of the ingredients of the sizing mixture was polyvinyl alcohol (PVA) which was imported. The notice alleged that the use of polyvinyl alcohol contravened the condition subject to which the benefit of the exemption notification is available, that the finished goods should be made only from the raw material produced or manufactured in India.

5. It was the contention of the assessee that what was used to make the sizing mixture and therefore the PVA is not raw materials for the fabrics, but is only a 'consumables'. It is contended that the sizing mixture was washed off the fabrics after it was woven and therefore it would not constitute part of the final product. Evidence in the form of certificate from the Ahmedabad Textile Industries Research Association, the Bombay Textile Research Association and of one Mahesh R. Patel, stated to be a Professor in L.D. College of Engineering, Ahmedabad were produced to the effect that the sizing material was a consumable and not raw material. It was also contended that the use of PVA was

not essential for making sizing mixture which can be made without using this product. PVA thus being an optional product could not be considered to be a raw material.

6. The Commissioner has in his order found that the judgment of the Supreme Court in CCE v. Ballarpur Industries Ltd. - 1989 (43) E.L.T.804 and Collector v. Eastern Paper Industries Ltd. - 1989 (43) E.L.T.201 took the view that consumables also are to be considered as raw materials and has held that therefore the PVA was a raw material, and therefore the benefit of the exemption could be denied. He, however, found that the Board has in its Circular No. 389/22/98, dated 5-5-1998 has held that the exemption contained in Notification 8/97 cannot be denied to a 100% EOU or a export promotion zone by the fact that it is using imported consumables. It has ordered that all the pending cases may be decided accordingly. He has found this to constitute promissory estoppel and binding upon him. In the light of the evidence that was produced by the assessee to show that the PVA was a consumable goods he has applied the Board's clarification and dropped the demand for duty.

7. The department's appeal contends that the judgments of the Supreme Court that the Commissioner has cited themselves held that even consumable goods would be rightly classified as raw material and therefore the benefit of the exemption contained in the notification would not be available. It is further contended that 'as per Board's circular No. 389/22/98, dated 5-5-1998 benefit of Notification No.8/97, dated 1-3-1997 cannot be extended to those units which manufacture goods out of both imported and indigenous raw materials. In the instant case imported raw material PVA is used in the manufacture of the unbleached cotton grey fabrics'. It is further contended that the doctrine of promissory estoppel would not apply because the demand for duty was for a period (22-4-1997 to 27-5-1997) prior to issue of the circular in question.

8. These arguments were repeated by the departmental representative.

The Counsel for the assessee relies upon the Commissioner's reasoning and the evidence that he has considered and further contends that the Commissioner's finding that the PVA is in the nature of consumable goods is not

questioned. Ballarpur Industries Ltd. v. CCE, in our view, has rightly been relied upon by the Commissioner for his conclusion that the PVA is raw material. The Court was construing the words in Notification 105/82 which granted concession from excise duty to goods, in the manufacture of which any goods falling under Item 68 of the tariff have been used as raw material or component parts. The Court declined to accept the contention on behalf of the Collector that to become raw material, the goods must 'either in their original or altered form endure as a composite element of the end-product'. It concluded as follows : "One of the valid tests, in our opinion, could be that the ingredient should be so essential for the chemical processes culminating in the emergence of the desired end-product, that having regard to its importance in and indispensability for the process, it could be said that its very consumption on burning-up is its quality and value as raw-material. In such a case, the relevant test is not its presence in the end-product, but the dependence of the end-product for its essential presence at the delivery end of the process." By applying this test, we are of the view, that the PVA is a raw material. The contention that its use was optional in that the assessee might have manufactured the fabric without using it, again is irrelevant. In considering whether a product is a raw material, one should be concerned with the process that is actually undertaken and not a hypothetical process which was not actually employed. If a person manufactures yarn coated with sizing mixture in the making of which he did not employ PVA that chemical would not be a raw material for him.

When in the manufacture (as in the present case) PVA has been used, the possibility that it need not have been used but some other substance in its place could have been used does not require to" be addressed. We are required to be concerned with the actual process of manufacture and not a possible theoretical alternative.

10. The contention in the appeal that the circular of the Board will not apply, is difficult to comprehend. The circular which the Commissioner has reproduced in his order, was concerned with two situations one whether the unit produces goods from both the indigenous and imported raw material and secondly, whether the term raw material would cover consumable goods. The circular clarified that the benefit of the notification would not be available to those units which 'manufacture

out of both imported and indigenous raw material, the benefit is available to those units, which manufacture goods only from indigenous raw material/ With regard to the second situation, it said that the unit was eligible for the benefit of the notification 'even if imported consumables are used since the notification does not debar the use of the imported consumables'. From a reading of these clarifications together it would follow that the benefit of the notification would not apply to a unit making goods from indigenous and imported raw materials so long as the imported raw material was not a consumable. If it is a consumable since the notification does not debar the use of such consumable goods the benefit of the notification would be available. The contention in the appeal therefore ignores the part of the clarification which the Commissioner has relied upon.

11. The contention that the notification will not apply to earlier clearances again is unacceptable. Paragraph 3 of the notification requires the Commissioners to settle all pending disputes in the light of the clarification that prevails. This was pending before the Commissioner when the clarification was issued and he has rightly applied.

12. We have our reservations as to whether PVA is in fact a consumable.

The scope of the term 'consumable' has not been defined anywhere. The word appears to have been used in the Board's circular to denote material which, while it is necessary for the manufacture of the finished goods, does not remain with it or form part of it when it finally emerges. It is clear that the PVA in the case before us is clearly present, in the grey fabrics after it comes out of the loom and in the process employed by the appellant the fabrics would not have been manufactured without using it. It is therefore difficult to conceive of it as a consumable.

13. The technical material cited by the assessee that the Commissioner has relied upon, the certificate of the Ahmedabad Textile Research Association, does not furnish any material in support of its view that the PVA is a consumable. The affidavit of Mahesh R. Patel, Professor of L.D. College of Engineering can be dismissed simply on the ground that he has not been shown to have been any particular qualification that justifies accepting his opinion whether sizing material is consumable or not. His opinion that since the sizing mixture is not a raw material

for the manufacture of the fabrics because "the said mixture does not get transformed into the end-product" is directly contrary to the Supreme Court's judgments. We are also unable to find any basis for the view expressed in the Board's circular that the Notification 8/97 does not debar the use of consumable goods. The notification refers to raw materials, and consumables are invariably raw materials. However, it is now settled law that the circulars of the Board in this regard would be binding upon the Commissioner, whether they are right or wrong. The circular therefore would bind the Commissioner.

14. The department's appeal does not even attempt to question the finding of the Commissioner that the PVA is a consumable and therefore covered by the Board's circular. The third ground cited in the appeal that since even consumables are raw materials, Board's circular cannot be extended to units which manufacture goods out of both imported and indigenous raw material and the benefit of the circular will not apply to prior clearances has already been dealt with us. It has therefore to be concluded that the department's appeal accepts as correct the finding of the Commissioner that the PVA is a consumable goods. These proceedings arise out of an order passed by the Board under Section 35E of the Act. It is therefore not permissible to go beyond the points raised in that order. The Board's order does not question the finding of the Commissioner that PVA is a consumable. That being so the application by the Commissioner of the contents of the Board's circular is proper and cannot be found fault with.

15. Appeals C/735 and E/2569 are by Ashima Fabrics against the portion of the order of the Commissioner in which he has confirmed part of the notice and demanded certain amounts. It is not clear why two appeals have been filed because the wordings of the appeal are identical in each case. Each of them is stated to be against the order contained in paragraph 53(iii), (v), (vi), (ix), (x), (xii) and (xiv). Counsel for the company explains that both the appeals were filed because part of the amounts have been confirmed under the excise and part under the Customs Act. We will take up each of these issues.

16. The Commissioner has demanded amounts which he finds payable as cess in terms of Textiles Committee Act, 1963. The contention of the appellant is that the

cess under the Act is payable on textile machinery manufactured in India and is not payable on such imported machinery. He points to the show cause notice which itself shows that the machinery in question was imported. The Commissioner's view that evidence had not been produced to establish that the textile machinery was imported or not therefore cannot be sustained.

17. Special additional customs duty has been demanded on imported capital goods. The contention of the assessee is that when the goods were imported in 1993, special additional duties of customs was not in existence. That duty came into existence in terms of Finance Act, 1996.

The Commissioner, before whom this argument was raised, has answered it by saying that it is the duty payable on the date on which the goods are removed from bonded warehouse that will apply, and on that date special duty of customs was payable. The appellant has relied upon the decision of the Tribunal in NGEF v. CCE - 1998 (27) RLT 700. The Tribunal in that decision held, following the decision of the Supreme Court in CCE v. Vazir Sultan Tobacco Co. Ltd. - 1996 (83) E.L.T. 3 that the goods which were imported when the special additional duty of customs was not on the statute book and cleared from a warehouse subsequent to the introduction of the levy would not be liable to pay that duty. The ratio of that decision will apply to the facts before us. The same view in fact has been communicated in the trade notice dated 5-1-99 issued by the Commissioner of Central Excise reproduced in 1999 (106) E.L.T. T28. There is therefore no legal authority for this demand.

18. Duty of Rs. 75,652/- has been demanded on cotton yarn on the ground that it was received without payment of duty for being used in the manufacture of exported product and has not been so used. The contention of the appellant is that the yarn which was received was duty paid. Reliance is placed on a letter dated 8-9-98 of the jurisdictional Superintendent which confirms this view. The Commissioner has not referred to this letter and holds that there is no evidence to show payment of duty on these goods. It is not possible for us to accept the Superintendent's letter as evidence of payment of duty on these goods. The letter is issued on 8-9-98, quite sometime after manufacture and export took place and it

appears after the unit itself was closed. It does not indicate the basis for its conclusion. We are therefore of the view that the Commissioner was right in disregarding this letter. We would however like to give the assessee an opportunity to establish that the yarn was duty paid and remand the matter to the Commissioner for this purpose.

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