**Collector of Central Excise Vs. Orkay Polyester**

**Collector of Central Excise Vs. Orkay Polyester**

**SooperKanoon Citation** : sooperkanoon.com/2911

**Court** : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

**Decided On :** Oct-17-1986

**Reported in** : (1988)(15)LC162Tri(Mum.)bai

**Appellant** : Collector of Central Excise

**Respondent** : Orkay Polyester

**Judgement** :

1. This appeal arises out of and is directed against the order No.V-56B(30)l13/TC/83 dated 24-3-1986 passed by Collector of Central Excise (Appeals), Bombay. The brief facts necessary for the disposal of this appeal are:-

2. M/s Orkay Polyester, proprietors, Orkay Silk Mills, MIDC, Raigad (for short M/s Orkay) are the manufacturers of polyester filament yarn falling under Tariff item No. 1811(i)(a). By their application dated 22-3-1982 they sought permission to work under Rule 56B of the Central Excise Rules, 1944 (for short 'The Rules'). The Assistant Collector of Central Excise Division XIII, Kalyan by his letter dated 17-5-1982 permitted M/s Orkay to send the polyester filament yarn (POY) for draw texturisation to the following parties:- (5) M/s Bombay Dyeing and Mfg. Co. Ltd., Bombay, subject to the following conditions: (1) should maintain detailed accounts of goods sent for draw textur-ising and for such goods received back to the factory of origin; (2) duty on such goods shall be paid at the appropriate rate at the time of final clearance of the goods; and (3) to execute necessary general bond of an appropriate amount for removal of semi-finished goods sent for draw texturising.

3. The Assistant Collector of Central Excise, Kalyan by his letter dated 11-3-1983 withdrew the permission granted to M/s Orkay by his letter dated 17-5-1982. After a lapse of nearly ten months, M/s Orkay represented to the Assistant Collector that the reasons assigned for withdrawal of the permission are no reasons at all and requested the Assistant Collector to restore the Rule 56B facility. In this representation M/s Orkay stated, among other things, that the shelf life of POY is limited and by its very nature it cannot be preserved for long period whereas texturised yarn can be preserved for much longer period. The Assistant Collector, by his order dated 17-2-1984, rejected the request holding that the partially oriented yarn are classifiable under tariff item 18-II (i)(a) of CET and after texturisation the tariff of POY is changed from 18-II(i)(a) to 18 II(i)(b). Thus the tariff item of POY and texturised yarn are different. Further, with effect from 1-7-1983, the duty liability of textured yarn has been transferred to Base Yarn and total duty liability is to be recovered at POY stage and cannot be postponed till the POY is subjected to the process of texturisation. It was also stated in the order that POY is in the nature of finished goods.

Therefore, the permission sought on the ground that shelf life of POY is short and by paying duty at POY stage huge funds are blocked would not justify granting of permission under Rule 56B.4. Being aggrieved by this order, M/s Orkay filed an appeal before the Collector of Central Excise (Appeals), Bombay. The Collector (Appeals), Bombay by his order dated 24-3-1986 allowed the appeal. Being aggrieved by the order of the Collector (Appeals), the Collector of Central Excise, Bombay-Ill had preferred this appeal.

5. During the hearing of this appeal, Shri Senthivel, the learned SDR, who appeared for the Collector, at the outset submitted that the issue involved in the appeal namely whether POY is a semi-finished goods had been considered and decided by this Regional Bench in its Order No.975/86-WRB, dated 21-8-1986 in ED(BOM)A No. 155/85 & ED(BOM) 15/85 - Collector of Central Excise, Bombay-III v. Reliance Textiles Industries Pvt. Ltd.-1986 (26) ELT 227 (Trib.). Having regard to the said decision, Shri Senthivel contended that the present appeal may be allowed.

6. Shri Senthivel further submitted that the Collector (Appeals) had also held that POY is both finished and semi-finished product depending upon its further use. In this connection, Shri Senthivel drew our attention, to the following observations contained in the order of the Collector (Appeals): "The question whether a product is a finished product or semifinished would vary from manufacturer to manufacturer. It may be finished for one and semi-finished for another. This was the view of the Tribunal in Amber Bearing Manufacturing Co. v. Collector of Central Excise, Nagpur, 1984 ELT (16) 278 May '84. In the case under consideration, it is seen that POY is used not only for the appellants' use but also sold outside to various customers. This being the case, POY can be regarded as both semi-finished and finished. Where it is required for the appellants' use after texturisation for purposes of weaving, then POY can be treated as semi-finished goods.... In so far as sale of POY directly is concerned, the question of Rule 56B does not arise since they can be considered as finished excisable goods".

Shri Senthivel submited that the goods cannot be both finished and semifinished for the purpose of Central Excise Law. It could either be finished or semi-finished and it can never be finished and semi-finished simultaneously. Shri Senthivel urged whether the given goods is finished or semi-finished goods does not depend on its future use. In short, Shri Senthivel contended Sat end use of the goods is not a determinative factor in considering the question as to whether the goods are semi-finished or finished. He further urged that POY is a finished product; it is marketed as a finished product. The Central Excise Law classified the yarn into two categories, namely, textured and other than textured. These two categories of yarn are treated as different excisable commodities not only under the Central Excise Act, the Central Excise Tariff Act but also by the commercial world as well as in trade parlance.

7. Shri Senthivel further submitted that he would adopt the grounds urged by him in Appeal No. ED(BOM) 155/85 decided by this Bench on 25th August, 1986.

8. Shri H.M. Jagtiani, learned Advocate of the Respondent raised several contentions and the contentions so raised by Shri Jagtiani are formulated below: (1) The Assistant Collector by his order dated 17-5-1982 had permitted M/s Orkay

to send POY for draw texturisation subject to certain conditions set out in the order. This order was made after considering the application of M/s Orkay dated 23-3-1982. Having once granted permission to work under Rule 56B of the Rules the Assistant Collector has no jurisdiction to withdraw the permission.

Therefore, the Assistant Collector's order oif withdrawal of the permission dated 11-3-1983 is not valid in law. Further, the said withdrawal was made without hearing M/s Orkay and without giving any opportunity to them. And, therefore, there had been violation of the principles of natural justice. On that ground also the order of withdrawal is liable to be set aside. Shri Jagtiani submitted that if the Department was aggrieved by the order dated 17-5-1982 passed by the Assistant Collector the only remedy opened was to have resort to the provisions of Section 35E(2) of the Central Excise Act and since the Collector of Central Excise had not authorised filing of an appeal against the order dated 17-5-1982, the order of the Assistant Collector has become final. And on this ground alone the present appeal of the Collector should be rejected, (2) The appeal filed by the Collector of Central Excise in M/s Reliance Textile Industries' case was allowed by this Bench on the following three main grounds: (i) Excise duty is leviable only on finished goods. Since POY appears in the Central Excise Tariff, it should be considered as finished goods, (iii) Granting of permission to remove excisable goods under Rule 56B would offend the provisions of Rules 9 & 49 of the Rules.

9. Shri Jagtiani. submitted that none of the above grounds is a valid ground and therefore the order in The Reliance case needs to be reviewed and as such the present appeal may be referred to a larger Bench.

10. Elaborating his contention, Shri Jagtiani submitted that the view taken by the Bench in The Reliance case that excise duty is leviable only on finished goodsd and that no excise duty is leviable on the semifinished goods is incorrect. Such a view overlooks the clear provisions of Rule 56B. Rule 56B is applicable to excisable goods which are semi finished. If the goods are not excisable, the question of applicability of Rule 56B would not arise at all. It is only when goods has attained excis-ability stage then only the question as to whether the goods are semifinished has to be considered. Shri Jagtiani gave an illustration of a steel chair

which required painting. He submitted that the chair might have attained excisability stage before painting or polishing and therefore Rule 56B would be applicable for removing the chairs for the purpose of painting and polishing. Shri Jagtiani contended textured yarn and non-textured yarn are yarns. The non-textured yarn, which is a semi-finished yarn, is removed for further processing to make it a textured yarn which again is a yarn and therefore Rule 56B would apply to carry out those processes.

11. Shri Jagtiani submitted that in order to avail the facility of Rule 56A prior to its amendment the material or component part in respect of which credit is sought should fall under the same tariff item or sub-item as the finished excisable goods but such restriction is not found in Rule 56B. Rule 56B does not disqualify a manufacturer from removing the goods falling under one sub-item for manufacture of the goods falling under another sub-item.

12. Shri Jagtiani further contended that Rule 56B is not an exception either to Rule 9 or to Rule 49. The scope of Rules 9 and 49 are altogether different from the scope and ambit of Rule 56B. Rule 56B, Shri Jagtiani urged, contemplates deferment of payment of duty.

13. Shri Jagtiani submitted that shelf life of POY is limited and by its very nature it cannot be preserved for long period. On the other hand, textured yarn can be preserved for much longer period and there is no adequate demand for POY. The appellant has necessarily subject it to further processing for texturisation or else POY would deteriorate and there would be huge loss to the manufacturer. To avoid this contingency Rule 56B was intended.

14. Shri Jagtiani then referred to certain Notifications issued under Rule 8 of the Rules. He particularly referred to Notification No. 55 of 78, dated 1-3-1978; Notification No. 162 of 83. dated 25-5-1983 and the Notification No. 178 of 83, dated 1-3-1983. Shri Jagtiani submitted in the Notification No. 55 of 78 the rate of duty prescribed for textured yarn produced out of base yarn was the duty for the time being leviable on the base yarn if not already paid plus Rs. 5/- per kilo. He submitted that non-payment of duty on base yarn would be possible only when it is permitted to be removed under Rule 56B for the purpose of texturisation. Shri

Jagtiani submitted that even the Government of India which had the power to issue Notification did contemplate removal of POY without payment of duty under Rule 56B. Shri Jagtiani finally submitted that the view taken by this Bench in The Reliance case is considered as correct then Rule 56B becomes redundant as it cannot be applied to any situation.

15. In reply, Shri Senthivel urged that M/s Orkay had obtained L-4 licence for the manufacture of POY. If POY is to be considered as semifinished, there was no need to obtain any licence. Further, admittedly M/s Orkay had sold POY and in the invoices they had described POY as filament yarn thus the appellants themselves understood POY as finished goods. The Collector (Appeals) also held that POY which is removed for the purpose of sale is finished goods. If the POY is finished goods under Rule 56B the Collector cannot permit for its removal for the manufacture of textured yarn. The textured yarn and non-textured yarn are two different commodities and they fall under two different sub-items, of a tariff item. Shelf life of POY cannot be a ground to hold that it is a semifinished goods. Shri Senthivel submitted that this contention, which was urged before the Collector (Appeals) has been rejected by the Collector (Appeals).

16. Shri Senthivei also submitted that the expression 'excisable goods' was employed in Rule 56B to distinguish the goods from non-excisable goods. He urged that prior to the introduction of tariff item No. 68 in the year 1975 several goods were non-excisable goods. The Rules including Rule 56B were framed in the year 1944 and necessarily the Rule making authority had to employ the word 'excisable goods' in contra definition to non-excisable goods.

17. Shri Senthivel further submitted that unless the payment of duty is specifically exempted it can neither be deferred nor not demanded. The non-demand of duty or deferment of duty would be counter to and violate the provisions of second proviso to Rule 9.

18. It was further submitted by Shri Senthivel that there is difference between Rule 56B and Rule 56C. Rule 56C excluded the applicability of Rules 9 and 9A. But then Rule 56B did not provide for exclusion of Rules 9 and 9A.19. As regards the Notifications relied on by Shri Jagtiani, Shri Senthivel submitted that the

Notifications only prescribed rate of duty and they cannot be pressed into service to determine the question as to whether POY is semi-finished or finished goods. Further, most of the Notifications relied on were either rescinded or amended.

20. Shri Senthivel further urged that the power conferred on the Collector under Rule 56B is a discretionary power. The Assistant Collector, to whom this power is delegated, is entitled to withdraw the permission earlier granted. The power conferred on the Assistant Collector under Rule 56B should be treated differently from assessment proceedings and adjudications. The issue of show cause notice is not required to refuse permission under Rule 56B. But then issue of show cause notice would be necessary to demand duty or to impose penalty or levy fine. The Central Excise Law, according to Shri Senthivel, envisages review of orders by the same authority. In that connection, Shri Senthivel relied on Rule 173-B. It was also urged By Shri Senthivel that it is by administrative or executive order the Assistant Collector granted permission. The order of the Assistant Collector cannot be equated to adjudication and therefore the contention of the learned advocate that the only method by which the said order could be revised is by resorting to Section 35E of the Central Excise Act, is not correct. If the change of circumstances warranted modification or cancellation of the permission granted, the Assistant Collector has jurisdiction and competence to withdraw the permission. The Assistant Collector did give reasons for withdrawing the permission earlier granted and the reasons are valid.

21. It was also contended by Shri Senthivel that the order of the Assistant Collector challenged by the Respondent before the Collector (Appeals) was not the order dated 11-3-1983 by which he withdrew the permission granted under Rule 56B but the order dated 2-2-1984 which order was made after considering the representation made by the appellant on 18-1-1984. And that order does not suffer from any infirmity. In the said circumstances, the contentions urged by the learned Advocate that the order of the Assistant Collector granting permission remained intact cannot be accepted.

22. Finally, Shri Senthivel submitted that the decision taken by this Bench in M/s Reliance Textiles is correct and legal and there is no need to refer the matter to

the larger Bench.

23. In reply, Shri Jagtiani submitted that no power of review is conferred on the Assistant Collector and the order dated 17-2-1984 should be treated as an extension of the order dated 11-3-1983. The analogy of Section 11A and Rule 173B, according to Shri Jagtiani, are not relevant since they incorporate built-in machinery. Shri Jagtiani submitted that the Respondent is not required to file an appeal against the observations when the Collector (Appeals) had allowed their appeal and granted the relief sought by them. Finally, Shri Jagtiani submitted that Notification No. 178 of 83, dated 1-7-1983 and the Notification No. 162 of 83, dated 22-5-1983 have not been rescinded. He refuted the contention of Shri Senthivel that the said notifications are applicable to captive consumptions.

24. We have carefully considered the submissions made on both the sides.

25. Having regard to the rival contentions, the points that fell for determination are: (1) Whether the Assistant Collector's order dated 11-3-1983 withdrawing the permission granting Rule 56B, is without jurisdiction and invalid in law, (3) Whether it is open to M/s Orkay to contend that the order dated 17-5-1982 has become final without challenging the order dated 11-3-1983, and (4) Whether the decision of this Bench, in EB (BOM) 155/85 - Collector of Central Excise, Bombay-III v. Reliance Textiles Industries Pvt. Ltd., As these points are inter-related hence they are taken up together for consideration. Factual positions are not disputed. M/s Orkay sought permission under Rule 56B to remove the polyester filament yarn for draw texturisation. The Assistant Collector by his order dated 17-5-1982 granted permission subject to certain conditions. The Assistant Collector, however, by his order dated 11-3-1983, had withdrawn the permission granted on 17-5-1982. He assigned certain reasons for the withdrawal. Shri 'Jagtiani had contended that the reasons assigned are not reasons at all whereas Shri Senthivel had urged that they are valid reasons. We need not go into that controversy at this stage. M/s Orkay did not challenge the order of the Assistant Collector dated 11-3-1983. They however, addressed a letter dated 18-1-1984 requesting the Assistant Collector to restore the Rule 56B facility. The Assistant Collector by his order dated 2-2-1984 rejected the request assigning reasons. M/s Orkay challenged this order dated 2-

2-1984 by filing an appeal before the Collector (Appeals). It is thus seen that the order challenged was not the order dated 11-3-1983 by which the Assistant Collector had withdrawn the permission granted by his order dated 17-5-1982 but the order dated 2-2-1984. Neither party rightly considered the orders dated 17-5-1982 and 11-3-1983 as decision or adjudication order requiring to be challenged before a higher authority. Even under law, the orders dated 17-5-1982 and 11-3-1983 cannot be treated as decision or adjudication order. The statute, namely, Rule 56B conferred on the Collector a power to permit a manufacturer to remove excisable goods which are in the nature of 'semi-finished goods', for carrying out certain manufacturing processes by special order and subject to the execution of a Bond by the manufacturer and subject to such conditions as the Collector may specify. It appears this power was delegated to the Assistant Collector. M/s Orkay made an application dated 22-2-1982 under Rule 56B seeking permission to send the Polyester Filament Yarn to five parties for draw texturisation. The Assistant Collector did grant the permission sought. The order granting permission, though statutory was a purely discretionary and the same cannot be treated as a decision or adjudication order as is understood by law. At that stage, there was no lis, no dispute. There were no two parties also. The Assistant Collector could have refused permission. He was not required to issue show cause notice or hear the applicant. In the circumstances, the said order does not partake the character of an 'adjudication order' or 'a decision' as they are understood by law. But then the position was different when the Assistant Collector withdrew the permission by his order dated 11-3-83. The difference between the two orders is that the order dated 11-3-1983 did affect the civil right of M/s Orkay. They are deprived of the right earlier conferred on them. Strictly such an order could not have been passed without issuing a show cause notice or giving an opportunity of being heard to M/s Orkay. M/s Orkay could have challenged that Order dated 11-3-1983 on the ground of gross violation of the principles of natural justice. We do not mean to say that the order was an appealable order because as in the case of order dated 17-5-1982 there was no lis, there were no two parties, there was no dispute requiring the Assistant Collector to decide the disputes.

Knowing that it was not an appealable order, M/s Orkay rightly made a representation to the Assistant Collector by their letter dated 18-1-1984. In this

letter, they pointed out that the reasons assigned in the order dated 11-3-1983 are not reasons and therefore requested the Assistant Collector to restore the earlier order. Thus lis or dispute between the parties arose for the first time by reason of a representation made by M/s Orkay. The Assistant Collector treated this representation as an application for permission under Rule 56B. He rejected the request giving reasons and one of the reasons given was that POY is in the nature of finished goods and therefore permission under Rule 56B was not justified. This order has been rightly challenged by M/s Orkay because they considered that order as an appealable order. .

26. Shri Jagtiani had contended that the order dated 17-5-1982 has become final because the Collector, who had the power to review or revise the Assistant Collector's order under Section 35-E(2), had not chosen to do so. This contention has no force. The power conferred on the Collector under Sub-section (2) of Section 35-E, is a suo motu power of examination of the record of any proceeding in which the adjudicating authority subordinate to him has passed any decision or order under the Act for the purpose of satisfying himself vas to the legality or propriety of such decision or order. This sub-section cannot have any application firstly, when the Assistant Collector granted permission by his order dated 17-5-82 he did not pass that order as an adjudicating authority. As stated earlier, that order of the Assistant Collector was neither a 'decision' nor an 'adjudication order' as legally understood. In the case of Province of Bombay v.Khusaldas S. Advani, AIR "The word 'decision' in common parlance is more or less a neutral expression and it can be used with reference to purely executive acts as well as judicial orders. The mere fact that an executive authority has to decide something, does not make the decision judicial. It is the manner in which the decision has to be arrived at which makes the difference and the real test is. Is there any duty to decide judicially?" 27. According to Concise Oxford Dictionary 'to decide' means: "Settle (question, issue, disputes), by giving victory to one side; giving judgment (between, for, in favour of, against), bring, come, to a resolution, and 'decision' means settlement (of question, etc.), conclusion, formal judgment, making up one's mind, resolve, resoluteness, decide character." 28. When the Assistant Collector granted permission he did not act as an adjudicating authority. He was not required to decide any issue or dispute. There was no duty to act judicially. In

the said circumstances, the contention of Shri Jagtiani that the Collector of Central Excise ought to have exercised his power under Section 35-E(2) and since the Collector of Central Excise had not exercised that power the order dated 17-5-1982 has become final deserves to be rejected.

29. The Assistant Collector did not specify any period when he granted the permission dated 17-5-1982. Since no period was specified Shri Jagtiani contended that it would be operation for all time to come. We are unable to accept this contention. Rightly or wrongly, the very .Assistant Collector withdrew the permission granted earlier by his order dated 11-3-1983. It would have been open to M/s Orkay to challenge this order in an appropriate forum as the same was made without complying with the principles of natural justice. But then for reasons best known to M/s Orkay they did not choose to challenge.

Therefore, the earlier order, namely 17-5-1982 no more existed after the Assistant Collector passed the order dated 11-3-1983. Even the order dated 11-3-1983 also does not exist because the Assistant Collector, after considering the representation made by M/s Orkay in their letter dated 18-1-1984, passed a fresh order dated 2-2-1984. M/s Orkay had challenged this order and have also succeeded before the Collector (Appeals) and the order of the Collector of Excise (Appeals) is under consideration by reason of the appeal filed by the Collector of Central Excise, Bombay-Ill.

30. Strictly speaking, it would not be necessary to record any findings on any of these three points. However, for the reasons stated in the preceding paragraphs we hold that since the order dated 17-5-1982 passed by the Assistant Collector cannot be considered as a "decision" or "adjudication order" and since the Assistant Collector did not act as an adjudicating authority, the question of Collector, exercising his power under sub-section(2) of Section 35-E, did not arise and since the Assistant Collector had withdrawn the order dated 17-5-1982, by his order dated 11-3-1983 and since the order dated 11-3-1983 had not been challenged by M/s Orkay, the order dated 17-5-1982 no more exists. The other question, namely, whether order dated 11-3-1983 passed by the Assistant Collector was without jurisidction and invalid in law has become academic and

therefore there is no need to record any finding.

The premises of Shri Jagtiani that the decision of this Bench in M/s Reliance Textile Industries' case was based mainly on the three grounds referred to in his argument, is not correct. One of the questions that arose for consideration in M/s Reliance Textile Industries' case was whether POY is a semi-finished or in the nature of semi-finished goods and the other question that arose for consideration was what is the true scope and ambit of Rule 56B. The Bench in the first instance referred to Rule 56B itself. The Bench observed: "The Collector can authorise removal of excisable goods (finished goods) in Bond for the purposes of carrying out tests only and not for any other purpose. In respect of excisable goods which are in the nature of semi-finished goods, the Collector may permit a manufacturer t9 remove such goods for carrying out certain manufacturing processes. The Rule makes it clear that the goods which are permitted to be removed by a manufacturer from a premises of his to another premises of his, is required to be brought back to his factory unless he is allowed to remove the said goods on payment of duty or without payment of duty for export, from his other premises". Thus bringing back of the same goods is the essential requirement of Rule 56B.' "The manufacturing process contemplated in Rule 56B are only those processes required for the completion of the product. Excisable goods may be produced or manufactured by a single manufacturing processes or by multiple processes. Until all the manufacturing processes are carried out goods will be considered either unfinished or semi-finished or in the nature of semi-finished goods." "Since the Collector cannot permit removal of finished product for purposes other than carrying out tests, he cannot permit removal of excisable goods which are in the nature of semi-finished goods to convert it into a new excisable product. If the manufacturer applies for permission to convert the semi-finished goods or the goods in the nature of semi-finished goods into another excisable commodity, the Collector has not been authorised under this Rule to permit removal".

31. After referring to the manufacturing process of POY, the Bench observed: "From the process description given above, it would be clear that POY is a finished product and it is not either semi-finished or in the nature of semi-finished goods. Admittedly it falls under tariff item 18-II(i)(a). As a matter of fact, The Reliance had

cleared 52% of the POY manufactured by them after paying excise duty for selling. As has been observed earlier, the goods will not be exigible for excise duty unless it is a finished product falling under one or other tariff items. If really POY is a 'semi-finished' or 'in the nature of semi-finished goods' one cannot expect The Reliance to pay excise duty for the quantity removed for sale." 32. After referring to the judgment of His Lordship Justice Pendse in the case of Vegetable Oil Products Ltd. v. Union of India and Ors., 1980 ELT page 704 (BOM), the Bench observed: "This judgment is a complete answer to the reasons assigned by the Collector of Customs (Appeals) for coming to the conclusion that POY is a 'semi-finished' goods." 33. After referring to the judgment in Arvind Mills Ltd. Ahmedabad v.Union of India and Ors., 1983 ELT 326 (Gujarat), the Bench observed: "POY is an identifiable item and marketed as such and known as such in the market. Drawing and texturising of POY is for manufacture of fabrics and not for the processes of manufacture of POY itself. The use of POY at any subsequent stage would not make it a semifinished goods. The contention of Shri Nariman that whether a product is 'finished' or 'semi-finished' should be judged from the point of view of the manufacturer appears to us is not a sound contention.

The contention of Shri Nariman, if pushed to its logical conclusion would imply that the texturised filament yarn produced by The Reliance, though a finished product, would be a semi-finished product for a manufacturer of fabric. But then under Rule 56B a finished product can be allowed to be removed only for the purpose of carrying out tests and to no other purpose. Therefore the Collector cannot authorise removal of texturised yarn on an application of a manufacturer of a fabric because for the purpose of Central Excise Law, texturised yarn is a finished product and the permission that could be granted by the Collector would be for its removal for the purpose of carrying out tests and not for its use in the manufacture of a fabric".

After referring to the decision in Union Carbide (India) Ltd. v.Assistant Collector of Central Excise and Ors., 1978 ELT (J 180), the Bench observed: "The ratio of this decision also applies to the facts of the present case. Just because the POY cannot be woven or knitted into fabric without texturisation, the POY does not cease to be a finished excisable product. Its use in the end-product does not

determine its character or convert it into a semi-finished product".

34. After referring to the decision of the South Regional Bench in Pondy Wire Fabricators v. Collector of Customs and Central Excise, Tiruchirapally, 1985 (22) ELT 809 (Tribunal), the Bench observed: "This decision is equally applicable to the facts of the present case. POY is a marketable product in its own right. It may be raw material for texturisation but being a finished product by itself the Collector cannot grant permission for its removal for the purpose of texturisation".

35. The Bench then referred to the permission sought by The Reliance.

The permission sought was for drawing and texturising the POY. The Bench observed: "By drawing and texturising, the POY gets converted into a new excisable goods. Under Rube 56B a semi-finished goods, which is permitted to be removed for further manufacturing processes shall have to be brought back after the completion of the manufacturing processes. If by the application of the manufacturing processes, the POY gets converted into a new excisable goods, then that part of the rule cannot be complied with because on drawing and texturising, POY, as an excisable commodoty, ceases to exist and a new and different excisable commodity, viz., texturised filament yarn emerges".

As stated earlier, Rule 56B does not empower the Collector to grant permission to convert a semi-finished excisable goods into a different excisable goods. He can only permit removal of a semi-finished excisable goods for carrying out further manufacturing processes so as to make it a finished or a completed product. It was not contended that the finished form of POY is texturised filament yarn. As stated earlier, the contention was that unless the POY is texturised, it cannot be knitted or woven into a fabric.

36. The Bench, thereafter, referred to Rule 49A, Rule 56C, Rules 96E and 96EE for the purpose of pointing out the Central Excise Law. It makes provision for removal of finished goods without payment of duty for manufacture of a different excisable goods.

37. The violation of Rule 9 of the Rules was on the ground that the application of The Reliance was for removal of POY for the manufacture of texturised filament yarn. Since POY and textured yarn are two different excisable articles, removal of one excisable article for manufacture of another excisable article, without payment of duty, would violate Rule 9 of the Rules.

38. The Bench considered the contention of Shri Nariman that the removal of POY will only result in postponement of duty. The Bench observed: "Even assuming that it results in postponement of duty even then the Collector has not been authorised under Rule 56B to permit removal of a finished product for the manufacture of another finished product even if the manufacturer of both the products is one and the same person".

39. The Bench also considered the contention of Shri Nariman based on the definition of POY. POY is defined as a filament yarn which is incompletely drawn. While considering this contention, the Bench observed: "The request of The Reliance is not for further drawing to make POY a completed yarn but to convert it into a texturised yarn and for that purpose POY cannot be allowed to be removed under Rule 56B".

40. The Bench further considered the contention that partially oriented yarn is semi-finished because it cannot be directly used in the manufacture of woven or knitted fabric. The Bench observed: "The end use is not a criterion to determine whether POY is a finished or semi-finished goods. The texturisation is intended to make POY as a stable raw material. So that it can be used for the manufacture of woven or knitted fabric".

The Bench then referred to the observation of Gujarat High Court in M/s Arvind Mills Ltd. The Gujarat High Court held that the manufacture of fabrics are not liable to pay duty on the weight of the sized yarn because the sizing apply to yarn in order to strengthen the yarn so as to have proper strength at the time of weaving and that process is for manufacturing fabrics and not for the purposes of manufacturing yarn itself. Similarly, the process to be applied to POY is to make it stable for the manufacture of fabric and not for the process of manufacturing POY itself. Such manufacturing processes are not the processes contemplated by Rule

56B. The Bench also emphasised that the nature and character of POY cannot be judged with reference to its use subsequent to its manufacture.

41. It is thus seen that the premises of Shri Jagtiani that this Bench's decision in M/s Reliance Textile Industries case was based mainly on the grounds that excise duty is leviable on finished goods, and no excise duty is leviable on semi-finished goods and granting of permission to remove excise goods under Rule 56B would be opposed to the provisions of Rules 9 and 49 of the Rules is not correct. Besides the above, the Bench gave several other reasons for its conclusion that POY is a finished goods. On this ground alone this appeal is liable to be rejected.

42. We shall, however, refer to the contentions urged by Shri Jagtiani.

Shri Jagtiani contended that the view taken by the Bench in the case of The Reliance that excise duty was leviable only on finished goods and that no excise duty is leviable on semi-finished goods was incorrect.

He urged that Rule 56B itself envisages the payment of excise duty on semi-finished goods. In that connection, Shri Jagtiani referred to the provisions of Rule 56B and contended that the permission to be granted by the Collector is to remove excisable goods for carrying out certain manufacturing processes. By reason of the expression "excisable goods" employed in Rule 56B, Shri Jagtiani urged that it is only when goods have attained excisability stage that the question whether they are semifinished has to be considered. To bring home his point, Shri Jagtiani gave the illustration of a steel chair which required painting. He submitted that the chair might have attained excisability stage before painting or polishing and therefore Rule 56B would be applicable for removing the chairs for the purposes of painting and polishing. It is true that Rule 56B is applicable to excisable goods only. That does not mean that the goods should have attained excisability stage to permit their removal. There is a clear distinction between "excisable goods" and goods 'exigible to excise duty'. The expression "excisable goods" is employed in Rule 56B as descriptive of the goods in contra distinction to non-excisable goods.

The expression 'excisable goods' was not employed to indicate that the goods should have become exigible to duty before it could be permitted to be removed.

Rule 56B provides special procedure for removing in Bond of two kinds of goods, namely (1) finished excisable goods, and (2) semifinished excisable goods. In the case of finished excisable goods, the removal is permissible for carrying out tests and not for any other purpose. In so far as semi-finished excisable goods are concerned, the removal is permissible for carrying out further manufacturing processes so as to make it a completed product. Every manufacturer of an excisable goods is required to obtain L-4 licence. While obtaining this licence he has to furnish the processes of manufacturing. Therefore, if a manufacturer of steel chairs has included painting or polishing as manufacturing process of steel chairs then his product would be complete only when that processes are carried out. Rule 56B permits removal of steel chairs for the purpose of painting and polishing. The chairs after painting and polishing would remain as chairs and they do not get converted into a different excisable commodity. The contention of Shri Jagtiani that textured yarn and non-textured yarn are yarns, and therefore Rule 56B would be attracted for removal of POY for drawing and texturising cannot be accepted. Both may be yarns but for the purpose of Central Excise Law and also in the trade parlance they are considered as two independent commodities. When once POY is subject to texturisation, POY ceases to exist and therefore it cannot be sold as POY or can be brought back to the factory from it was removed as POY and what would be brought back is other than POY, namely, textured yarn.

43. The analogy of Rule 56-A before its amendment has no relevance. The decision of this Bench in M/s Reliance Textile Industries Pvt. Ltd. was not based solely on the ground that POY falls under one sub-item and textured yarn falls under another sub-item. Several reasons were listed in that case as to why POY cannot be permitted to be removed under Rule 56B and one of the reasons which is the main reason, was, that POY is a finished product and a finished product can be allowed to be removed only for the purposes of testing but the permission sought was not for the purposes of testing but for the purposes of drawing and texturising which process was not the process contemplated in Rule 56B.44. Shri Jagtiani could not give a single instance where excise duty was levied on semi-finished or unfinished commodity.

45. It was the contention of Shri Jagtiani that Rule 56B is not an exception to Rule 9. He, however, have it that Rule 56B contemplates postponement of payment of duty. If Rule 56B is not an exception to Rule 9 and if POY is a finished product, as has been held by us, then there is no scope to escape the applicability of Rule 9 or Rule 49 before POY could be removed from one factory to another. The postponement of payment of duty arises only if POY is held to be semi-finished and the further processing required is to make the semi-finished into finished product. The permission sought by M/s Orkay was not for carrying out further manufacturing processes so as to make POY a completed product but on the other hand, the permission sought was for drawing and texturis-ing the POY by which processes POY gets converted into a new excisable goods, namely, texturised filament yarn.

46. As a matter of fact, in the case of Reliance Textile Industries case, Shri Nariman had contended that the removal of POY will only result in postponement of payment of duty. The Bench did not accept this contention. The Bench further observed that "even assuming that it results in postponement of duty even then the Collector has not been authorised under Rule 56B to permit removal of a finished product for the manufacture of another finished product even if the manufacturer of both the products is one and the same person".

47. Shri Jagtiani next contended that shelf life of POY is limited and by its very nature it cannot be preserved for long. A manufacturer if he does not subject POY for texturisation would incur heavy loss when there is no adequate demand for POY. Rule 56B, according to Shri Jagtiani, was intended to minimise the loss that may be occurred to a manufacturer. This contention has been rejected by the Collector (Appeals). We also do not see any merit in this contention. We have in M/s Reliance Textile Industries' case considered in detail the scope and ambit of Rule 56B. We have held that the Collector can permit removal of a semi-finished excisable goods for carrying out further manufacturing processes so as to make it a finished or complete product. He cannot permit removal of a finished excisable goods for the manufacture of a different excisable goods. We have further held that finished form of POY is not texturised filament yarn. We have also observed that the nature and character of POY cannot be judged with reference to its end

use subsequent to its manufacture. We have rejected the arguments advanced on behalf of M/s Reliance that POY should be considered as semi-finished because it would not be suitable for weaving and knitting a wearable fabric. In that connection we have referred to the observation of His Lordship Justice Shri Pendse, namely, "merely because the manufactured goods is used subsequently for manufacturing another article, itcannot be concluded that the earlier manufactured goods are not finished one; the use of vegetable tallow for manufacture of soap or other articles would not make vegetable tallow as unfinished goods". We have also observed that subsequent use of POY would not make POY either finished or semi-finished. The contention of Shri Jagtiani that Rule 56B is intended to minimise the loss of a manufacture because shelf life of POY is limited is unacceptable. As a matter of fact, in the case of Reliance Textile Industries Ltd., Shri Nariman has argued that whether a product is finished or semifinished should be judged from the point of view of a manufacturer who applies for permission. The Bench rejected this contention by observing: "The contention of Shri Nariman if pushed to a logical conclusion would imply that the texturised filament yarn produced by The Reliance, though a finished product, would be a semi-finished product for a manufacturer of a fabric. But then under Rule 56B a finished product can be allowed to be removed only 'for the purposes of carrying out tests and to no other purposes. Therefore, the Collector cannot authorise removal of texturised yarn because for the purpose of Central Excise Law textured yarn is a finished product and the permission that can be granted by the Collector would be for its removal for the purposes of carrying out tests and not for its use in the manufacture of a fabric". We are unable to accept the contention of Shri 3agtiani that Rule 56B is intended to minimize the loss to a manufacturer. It is a facility granted to the manufacturer to remove the goods, which is in the nature of semi-finished for subjecting it to further processing so as to make it a completed product. There may be a manufacturer who may not have all the required machinery or equipments in his own factory or under one roof for completing an excisable product. Rule 566 is intended to such a manufacturer who without payment of duty but on Bond is permitted to remove excisable goods which is in the nature of semi-finished to his another factory where he has other facilities or to factory of another which has other facilities to complete the semi-finished into a finished product.

Rule 56B is not intended to permit a manufacturer to remove a finished excisable goods for manufacture of another finished excisable goods.

48. Shri Jagtiani then referred to the Notifications No. 55 of 78, dated 1-3-1978; No. 162 of 83, dated 25-3-1983 and No. 178 of 83, dated 1-7-1983 and contended that the said Notifications contemplated removal of POY without payment of duty and this is possible only if the facility jnder Rule 56B is granted. There is no force in this contention. In all these Notifications the effective rate of duty leviable on textured yarn is given. In Notifidcation No. 55/78, dated 1-3-1978, the effective rate of duty prescribed for textured yarn produced out of base yarn is "the duty for the time being leviable on the base yarn if not already paid plus Rs. 5/- per kilo but the effective rate of duty for polyester textured yarn below 33 deniers is Rs. 82/-. The Notification itself makes distinction between textured yarn produced out of base yarn and other textured yarn under which polyester textured yarn falls. This Notification does not support the contention of Shri Jagtiani that POY could be removed without payment of duty and this could happen only when permission is granted under Rule 56B. Thus the base yarn referred to in this Notification does not appear to cover POY if it was to cover POY then there was no need to provide a different rate of duty under different heading for polyester textured yarn. That apart even if we are to accept the contention of Shri Jagtiani that base yarn mentioned in this Notification would take within its ambit polyester textured yarn even then, the Notification does not support his contention. Non-payment of duty on base yarn may not necessarily because it was allowed to be removed under Rule 56B. It may be because the payment of duty on base yarn might have exempted Or a manufacturer of textured polyester yarn might have purchased duty paid POY. It may be stated here that M/s Orkay admittedly sell duty paid POY in open market. Notification No. 178 of 83, dated 1-7-1983 exempts textured yarn falling under sub-item II(i)(b) item 18 of the First Schedule to the Central Excise from the whole of duty of excise leviable thereon provided duty had already been paid in respect of filament yarn used in the manufacture of such textured yarn. It is not clear how this Notification support the contention of Shri Jagtiani that even the Government of India had contemplated removal of POY under Rule 56B. If Shri Jagtiani's interpretation of this Notification is correct, it only means if duty had been paid at POY stage, textured yarn is exempt from payment of duty. This Notification

or the other Notifications relied on by Shri Jagtiani cannot be interpreted to mean that non-payment of duty on POY could be possible only when POY was allowed to be removed under* Rule 56B. The liability to pay duty is on the assessee who seeks to remove texturised yarn. He can claim exemption from payment of duty if he establishes that duty had been paid on POY which was the same material or out of which texturised yarn was manufactured. This is possible when a manufacturer of textured yarn purchases duty paid POY either in the open market or through the manufacturers of POY. We therefore reject Shri Jagtiani's contention based on the Notifications.

49. Admittedly, M/s Orkay had applied L-4 licence for the manufacture of POY. They understood POY as a finished product. They have sold POY as a marketable commodity and in their invoices they described the POY as a polyester filament yarn. We find no difference between this case and The Reliance Textile Industries Pvt. Ltd.'s case. The Collector of Central Excise (Appeals) has recorded a finding that in so far as sale of POY effected by M/s Orkay is concerned the question of applicability of Rule 56B would not arise since they can be considered as a finished excisable goods. The Collector (Appeals), however, held that facility of Rule 56B can be extended to that portion of the POY which is sent out by M/s Orkay for purpose of texturisation and is ultimately used by the appellant in further manufacture. We are unable to appreciate the distinction the Collector of Central Excise (Appeals) sought to make.

POY cannot both be finished and semi-finished for the purposes of Rule 56B.50. In the case of Reliance Textile Industries Pvt. Ltd., this Bench, in detail, considered the nature and character of POY. It has also considered the scope and ambit of Rule 56B. After recording detailed reasons, the Bench held that POY is a finished product. Just because it cannot be woven or knitted or used in the manufacture of fabrics without converting into textured yarn, it does not cease to be a finished product. The Bench had also held that POY is regarded not only by the manufacturer but commercially and in the trade as a distinct commodity having its own identity and known in the market as such. We see no reason to take a view different from the view taken by us in M/s Reliance Textile Industries Pvt. Ltd.'s case. Since we have rejected the contentions urged by Shri Jagtiani, the question

of referring the matter for the consideration of a larger Bench would not arise.

51. In the result, this appeal is allowed. The order of the Collector (Appeals) is set aside.