

Sutham Nylocots Vs. Cce

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Tamil Nadu

Decided On : Mar-11-2003

Reported in : (2003)(87)ECC403

Judge : S Peeran, R K Jeet

Appellant : Sutham Nylocots

Respondent : Cce

Judgement :

1. This appeal is directed against the order in original No. 51/2001 dated 29.11.2001 passed by the Commissioner of Central Excise, Coimbatore whereby the Commissioner has classified Nylon x Nylon and nylon x cotton fabrics manufactured and cleared by M/s Sutham Nylocots (hereinafter referred to as appellants) under heading 5911.90 of the CET Act, 1985. He has also demanded a duty of Rs 68,09,407 under proviso of Section 11A of the CE Act, 1994 besides imposing equal penalty under Section 11AC of the CE Act, 1944 apart from demanding interest under Section 11AB of the Act.

2. The brief facts of the case are that the appellants who are a partnership concern are manufacturers of industrial fabrics of nylon x nylon and nylon x cotton and were clearing the same without payment of duty. The company was registered, as an SSI Unit in the year 1994 for manufacture of Grey Industrial Fabrics. The entire Fabrics manufactured by the appellants were sold to M/s Habasit lakota Pvt. Ltd. The Officers of the Central Excise Department visited the unit on 27.2.2001 and

studied the manufacturing process . It was learnt that for the buyers of the goods i.e. M/s Habasit the said fabrics are the main raw materials for the manufacture of spindle tapes transmission belts which are used as spares in the spindle drive system of the textile machinery. The security of the records revealed that they have filed two declarations the first one on 9.1.97 and the other one on 8.7.98 seeking exemption from licence Registration under Rule 174 declaring that they were manufacturing grey fabrics of nylon & cotton and nylon x nylon falling respectively under 6208.10 and 5406.10 and claimed full exemption under Notifications applicable for grey unprocessed fabrics falling under chapters 52 and 54. It was observed by the officers that the goods manufactured by the appellants are not eligible for exemption. A statement was recorded from Shri K.N. Narayanswamy, Managing Director of the appellants on 27.2.2001 Wherein he has stated inter alia that the company was floated in the year 1994 to cater to the needs of the customers requiring Industrial fabrics, and that they manufactured nylon x nylon and Nylon x cotton fabrics and sold them to the companies. He has also stated the process of manufacture including the use of various kinds of machines such as twisting machine wrapping machine, folding and testing machine for twisting and folding the industrial fabric to M/s Habasit lakota. He has also stated that during the period from Jan, 97 to May, 97 they had manufactured industrial fabrics on their own account and that they were not registered with Central Excise for manufacture of Industrial fabrics. He has further stated that the goods manufactured by them were as per the specifications of their buyer viz. M/s. Habasit lakota and as per the specifications for manufacture of nylon x nylon fabrics they used 210 D Nylon 6 yarn for warp and weft and for manufacture of nylon x cotton fabrics they used 210 D 6 yarns for warp and 2/3 cotton yarn for weft.

In support of his statement he also produced a letter-dated 12.11.1988 from their customer wherein the specifications as noted above was given. Statement was also obtained from Shri N. Subramanian, Managing Director of M/s Habasit lakota Pvt. Ltd., the customers of the appellants wherein he has stated that they were manufacturing among other things synthetic Spindle tapes which is also known as transmission belts, leather transmission belts etc. and that the industrial belts are used for the manufacture of their final product 'Spindle tapes' for use in the textile

industry. In short, his statement corroborated with the statement of the Managing Director of the appellants. Proceedings were therefore, initiated against the appellants by issue of show cause notice dated 11.5.2001 and the proceedings culminated in the order impugned against which the present appeal has been filed challenging the classification of the goods as held by the original authority and also invocation of longer period of limitation. They have also challenged the imposition of combined penalty under Section 11AC of the Act and 173Q of the Central Excise Rules, 1944.

3. On the date of hearing i.e. on 19.7.2002, Shri Arvind P. Datar, learned Sr. Counsel for the appellants produced a communication dated 17.7.2002 from the appellant's Company duly signed by the partner stating that the appellants are not contesting the classification of the goods as decided by the department and they would only contest the allegation of suppression of facts. Notes on submission was also submitted by the learned Counsel for the appellants in the court on 19.7.2002, wherein it is stated that "Classification made by the department under Chapter 59 of the tariff is accepted to avoid further litigation with the department".

4. In view of the above submission, the issue to be decided is confined only to be sustainability or otherwise of the invocation of longer period of limitation for demand of duty and whether the combined penalty imposed under Section 11AC and Rule 173Q is sustainable in law and also whether interest is demandable under Section 11AB of the Act.

5. As regards invocation of longer period for demand of duty in terms of proviso of Section 11 A(1) of the Act, it is contended by the learned Sr. Counsel that longer period cannot be invoked in this case as there was no intention to evade payment of duty in the absence of any suppression of facts as all the details about manufacture of goods and the process of manufacture are known to the department. He has further, submitted that appellants have also listed about various documents periodically submitted to the Department. Further, in the show cause notice there is no mention about the information, which the appellants have failed to furnish with the intention of suppression of fact and there can be no suppression of facts, if facts which are not required to be disclosed are not

disclosed. Further, when any action is done under the bona fide belief, the question of suppression of facts with intent to evade payment of duty does not arise. He has also submitted that at the time of commencement of manufacture, appellants filed declaration under Rule 174 of the CE Rules and there was no allegation to the effect that there was any mis-declaration and if there was doubt, the department should have asked the appellants to indicate its use or any other details required. He has also relied upon the Larger Bench decision of the Tribunal in the case of the Jyoti Overseas Ltd. v. CCE, 2001 (130) ELT 446 to submit that the Larger Bench decision shows that as there were conflicting opinions, there could be no question of mis-declaration or intention to evade payment of duty. It was also contended that the show cause notice does not give any particulars to establish the charge of mis-declaration as an ordinary clothing fabric. Further, the end use of the product was also known to the department and therefore the larger period cannot be invoked. In any case the issue is Revenue neutral as their buyer viz M/s Habasit lakota Pvt. Ltd. would have taken Modvat Credit. The learned Counsel also relied upon the following decisions in support of his pleas that longer period of limitation cannot be invoked in this case: (1) Pearls of Beauty v. CCE, New Delhi, 2001 (130) ELT 495 wherein it was held that if the use of the product is determinative factor, it was required on the part of department to make enquiry from the appellants about the product before approving the classification; Tubex India Pvt Ltd. v. CCE, Patna, 2001 (130) ELT 382 wherein it was held that mis-classifying under different heading based upon interpretation as understood by the assessee does not amount to mis-declaration and no suppression of fact involved for demand of duty and invocation of larger period.

(3) Gufic Pharma Ltd. v. CCE, Vadodra, 1996 (85) ELT 67 wherein it was held that extended period of five years not invocable by alleging suppression of a fact which was not required by law to be disclosed.

6. Shri C. Mani, learned DR appearing on behalf of the department defended the impugned order and submitted that the appellants have mis-declared the goods before the department. They have only submitted declaration under Rule 174 of the CE Rules, since as per the declaration, the value of the goods were expected to be not exceeding thirty lakhs. Therefore, no classification and price list was

submitted and so also RT 12 return. It was only on investigation that it was found that their value of the goods far exceeded. Had they declared their product as Industrial Fabrics, which they should have and could have done initially, the department could have asked them to pay duty.

But they intentionally withheld the information from the department and it was only on investigation it was found that the appellants had mis-declared the goods. He, therefore, sought for sustaining the order impugned.

7. We have carefully considered the rival submissions and gone through the case records. We observe that in the appeal the appellants having accepted the classification adopted by the department the durability of the goods is not in dispute and the only issue to be decided is about the sustainability or otherwise of invocation of the longer period of limitation for demand of duty, and whether the combined penalty under Section 11AC and Rule 173Q is backed by law and whether interest under Section 11AB is demandable. We observe that in this case, the description of the goods (item wise) manufactured by the appellants declared by them in terms of Rule 174 of the CER in their declaration dated 8.7.1998 reads as under: The appellants have declared before the District Industries Centre, Coimbatore, that they are manufacturers of Industrial Fabrics. In the agreement entered into by them with M/s Habasit lakota Ltd., their sole buyers. They have repeatedly stated that they are manufacturers of Industrial Fabrics only. From this it is clear that different description of the goods have been declared by them in the declaration filed before the department and before the buyers, and also before District Industries Centre for obtaining SSI certificate. The statements given by the Managing Partner of the appellant's firm and the Managing Director of the appellants' buyer via. M/s Habasit lakota Pvt. Ltd. also clearly stated that what has been cleared by the appellants and purchased by the latter was 'Industrial fabrics' only.

Thus mis-declaration of the product is clearly established by the appellants' own record more particularly when they gave up challenge to the classification adopted by the Revenue. Further, it is also observed that they have not filed any declaration under Rule 173B and 173C of the CE Rules, 1944 giving complete

details of the product manufactured by them. It is not the case of the appellants that they have sought any clarification from the department if they had entertained any doubt in regard to the description of the goods particularly in view of the fact that there was conflicting decisions. But they chose to remain silent and went on clearing the goods without payment of duty thus contravening the rules. Inasmuch as there was a wilful mis-statement with intent to evade payment on duty, longer period of limitation has been correctly invoked in this case, as held by the Five Member Larger Bench in the case of Nizam Sugar Factory, 1999 (114) ELT 429. We observe that in the instant case, the product "Industrial Fabrics" manufactured by the appellants have been classified under sub-heading 5911.90 which classification has been accepted by the appellants. They are therefore, not eligible for exemption. They have only filed declaration seeking exemption from taking licence/Registration under Rule 174 of the CE Rules, 1944. Such declaration by exempted assessee is filed once in a year with the Supdt. of Central Excise, incharge of the Range who has got jurisdiction over the Unit. Such declarant unit is not to be visited by the Supdt. or the Inspector of Central Excise to avoid harassment to them. The Central Board of Excise & Customs, have also issued instructions to the Commissionerates that they will not allow any officers below the rank of Assistant Commissioners to visit such declaration unit. If those officers have to visit any such unit as a part of investigation, they have to obtain permission from the Assistant Commissioner and it is only the officers who are empowered to visit the units can visit them. Therefore, there is no interaction with the Central Excise authorities for the whole year except when they visit the Central Excise Range for filing annual declaration seeking exemption from talking registration. In terms of Rule 174 of the Rule, in the said declaration the appellants have also to mention the types of goods which they are manufacturing the value of the goods so manufactured by them. In the present case, appellants have filed declaration intimating that they are manufacturing Nylon x Nylon and Nylon x cotton fabrics. Whereas in fact they were manufacturing industrial fabrics. Since they were exempted from licensing control they also did not file any classification or price list declarations.

Because of their mis-declaration that they were manufacturing man made fabrics and the said ordinary grey fabrics being completely exempt, they got themselves

away from the jurisdiction of the Supdt. of the Central Excise authorities. Further they were also not paying any duty because of the above mis-declaration and they have also not obtained any registration and have not been filing any statutory documents like classification and price list and other assessment returns like RT 12 returns etc. In other words since there was no inter-action with the Central Excise authorities except at the end of the year and that too for filing annual declaration seeking exemption from duty and Registration control of the Central Excise department, the appellants were not filing any reports/returns whatsoever, to the authorities based on which they could have detected the mis-declaration. It was only by way of investigation by the preventive Intelligence unit of the department that the department came to know from the records of the appellants' buyers and by referring to the Industrial licence obtained from the Small Scale Industries Directorate, that the appellants were manufacturing Industrial fabrics which was not exempted from payment of duty as the same was falling under SH 5911.90 of the CETA. The modus operandi adopted by the appellants in clearing the dutiable goods viz.

Industrial Fabrics under the guise of non-dutiable goods viz. Nylon x Nylon and Nylon x cotton fabrics was therefore detected by the department from the records. We are, therefore, of the considered opinion that extended period of limitation under the proviso to Section 11A(1) of the Act, is clearly applicable for demand of duty. In the circumstances the case laws relied upon by the appellants are not applicable to the facts of the present case inasmuch as the decision in the case of *Pearls of Beauty v. CCE*, 2001 (130) ELT 495, it was held that it was required on the part of the department to make enquiry from the appellants before approving classification whereas in this case there was no classification list filed. The decision in the case of *Tubex India Pvt. Ltd. v. CCE*, Patna, 2001 (130) ELT 382 also deals with a different situation from the present appeal as in that case. It was found by the Tribunal that the observation made by the Commissioner (Appeals) were based upon the fact that the appellant misinterpreted Chapter Note 1 of Chapter 83 and intentionally classified their product under Chapter 73 and there was also no finding by the Commissioner (Appeals) that there was any declaration as regards to the description of the products by the appellants. Further, in that case declarations filed by the appellants claiming the benefit of Notification was

granted permission by the proper officer. In the case before us the appellants have made different type of declaration in regard to their product before the departmental authorities, before their buyer and before the Directorate of Small Scale Industries and they have not filed any declaration under Rules 173B and 173C, The facts are therefore not similar. *Gufic Pharma Pvt. Ltd. v. CCE*, 1996 (85) ELT 67 relied upon by the appellants also is not applicable to the present case as in that case the matter related to failure to disclose details about financing of the units or common share holdings amongst five members. It was also held therein that longer period cannot be invoked by alleging suppression of a fact which was not required by law to be disclosed whereas in the present case before us. The appellants from the very beginning mis-declared their product and did not take licence when they exceeded the specified limit of clearance, did not file any declaration and price list.

8. We also observe that the appellants at the time of filing the appeal have filed paper book containing various case laws relied upon by them in support of their plea that the classification adopted by the Department was not acceptable to them. Inasmuch as the appellants have now accepted the classification as held by the department, we do not think it necessary to discuss those case laws. Further we also observe that the appellants have also taken a plea that even if the appellants paid duty, the buyer is entitled to take CENVAT credit and therefore, it is Revenue neutral. If this plea is accepted, then no such similarly placed manufacturer will be required to pay duty on the goods as they can always claim that buyer of their goods shall be entitled to Modvat Credit. We are therefore not able to accept this plea of the appellants. Further we observe that the Five-Member Larger Bench decision in the case of *Jay Yuhshin Ltd. v. CCE*, New Delhi, 2000 (72) ECC 407 (Tri-LB) : 2000 (109) ELT 718 (Tri-LB) has held as under: (a) Revenue neutrality being a question of fact the same is to be established in the facts of the case and not merely by showing the availability of an alternative scheme.

(b) Where the scheme opted for by the assessee is found to have been misused (in contradiction to mere deviation or failure to observe all the conditions) the existence of an alternative scheme would not be an acceptable defence.

(c) With particular reference to Modvat Scheme (which has occasioned this reference), it has to be shown that the Revenue neutral situation comes about in relation to the credit available to the assessee himself and not by way of availability of credit to the buyer of the assessee's manufactured goods.

9. The appellants have also taken a plea that they are entitled to the benefit of Cenvat credit. If they are to pay duty now, and they have relied upon various case laws in support of their plea. The Revenue has opposed this plea on the ground that it is not related to the issue and the eligibility or otherwise is to be considered by the proper officer only to the user and not to the appellants.

10. We have considered this plea and we are of the considered opinion that their plea for Cenvat credit on inputs used by them for the manufacture of their final product has to be reconsidered by the lower authority in the facts and circumstances of this case. The appellants shall submit to the original authority all the duty paying documents in respect of the raw materials purchased by them and used in or in relation to the manufacture of their final product. On Modvat/Cenvat Credit several judgments have been rendered by the Tribunal. The Hon'ble Apex Court has confirmed the judgment of the Tribunal in the case of *Formica India Div. v. CCE, 1995(77) ELT 511 (SC)* that Modvat/Cenvat Credit is required to be reconsidered while arriving at the exact amount of duty even in cases of clandestine removals. As regards their plea that the price charged is cum-duty price, we are of the view that they are entitled to abatement of duty under Section 4(4)(d)(ii) of the Act in view of the Larger Bench judgment in the case of *Srichakra tyres Ltd. v. CCE, 2002 (80) ECC 588 (Tri-LB) : 1999 (108) ELT 361*.

11. As regards demand of interest, we hold that in the facts and circumstances of the case as brought about above, appropriate interest under Section 11AB is also demandable.

12. As regards imposition of penalty, that in the absence of apportionment separately under Section 11AC and Rule 173 Q of the CE Rules, their plea that composite penalty is not sustainable in view of the judgments reported in *2001 (132) ELT 41* in the case of *Punjab Recorders v. CCE, Chandigarh 2001 (134) ELT*, in the case of *Monica Electronics Ltd. v. CCE, New Delhi*, is not acceptable,

in view of the fact that the facts in those two cases were different from the facts in the present case. The facts in the cited judgments were that the demand pertained to the period prior to 28.9.96 i.e. prior to the insertion of Section 11 AC whereas in the present case, period involved is 7.6.96 to 31.3.2001. Hence the demand pertaining to the period from 7.6.96 to 28.9.96 is not covered by Section 11AC. Therefore, for imposition of penalty under Section 11AC, the duty involved during the period from 28.9.96 onwards and up to 31.3.2001 has to be taken into consideration.

Since there is suppression of fact with wilful intent to evade payment of duty in this case, the provisions of Section 11AC has been rightly invoked and penalty has to be imposed under Section 11AC. In the result, the appeal is disposed of as under: (a) The product manufactured by the appellants are Industrial fabrics classifiable under heading 5911.90 as held by the Commissioner in the impugned order and now accepted by the appellants.

(c) Interest Under Section 11AB is demandable as held by the lower authority.

(d) With regard to availability of the benefit of CENVAT credit on the input used by the appellants, the matter is remanded to the lower authority for de novo consideration in the light of the judgments cited supra.

(e) Since the price charged by the appellants is cum-duty price they are entitled to abatement of duty under section 4(4)(d)(ii) of the Act.

(f) Duty shall be worked out after allowing Modvat/Cenvat Credit and after giving abatement of duty under Section 4 (4)(d)(ii) of the Act. However, appellants shall be afforded opportunity of being heard before confirming the duty finally to be paid by them.

(g) Aspect pertaining to imposition of penalty is remanded for de novo consideration. The original authority shall apportion the penalty under Section 11AC of the Act and Rule 173Q of the CE Rules, separately.

13. I have carefully considered the order prepared by my learned brother. I could not persuade myself to agree to his finding with regard to extension of larger

period in this case and for confirming duty on that count. I am of the considered opinion that demands are time barred as there is no mis-declaration for the purpose of invoking the larger period. The department had been having a doubt pertaining to classification of the item in question and the Board itself had issued a Circular in F. No. 52/1/97 CX dated 17.4.97 that the item is classifiable under tariff Chapter heading 52/54. Despite Board's a Circular the Larger Bench had not accepted the classification and had proceeded to classify under chapter heading 59. Earlier the Board's circular on the very item pertained to classify under chapter heading 59.11 which was consistently changed and different benches classified under different tariff heading resulting in the constitution of the Larger Bench. The matter is still not settled and it has been agitated before the Apex Court. In this context, Ld. Senior Advocate submitted that as the issue is still under dispute and that if they accept the classification under chapter sub-heading 5911.90 and pay duty, then in that case their buyers would be in a position to take Modvat credit.

For this reason, the party do not want to contest on the classification issue but would like to contest on time bar. Merely because the assessee had conceded the Board's circular for accepting the classification under chapter 59 to enable their buyers of the product to take Modvat credit on the duty paid by the appellants that by itself would not ipso facto lead to a conclusion that they had admitted mis-declaration and that department was not aware of any facts and hence larger period is invocable. I am not in a position to agree to this proposition. There has been a very clear cut declaration made by the assessee with regard to the type of the product they have manufactured and the declaration has been filed from time to time. The claim of Revenue that they were not aware of the material being industrial fabric cannot be accepted for the reason that the declarations had been filed under Notification No. 13/92-CE dated 14.5.92 for the year 1996-97 and declaration was also filed under Notfn. No. 22/98-CE (NT) dated 4.6.98 for the year 1998-99. The assessee had furnished the manufacturing process, tariff item, and all other details. The assessee had also by their intimation letter dated 10.10.96 to the AC under Rule 57F (3) intimated about the despatch of fabric to the processor for scoring and heating setting and the same had been filed by M/s Habasit Iokoka Pvt. Ltd. also. They had addressed a letter dated 14.11.96 to the ACCE Coimbatore II Division wherein all the information from the time of receipt of

yarn had been furnished by the buyer, M/s. Habasit lokoka Pvt. Ltd., including construction of the fabrics. Likewise, by intimation letter dated 25.12.96 under Rule 57F(3) to the ACCE Coimbatore II Divn. about despatch of yarn to the job worker for manufacture of fabrics was filed by M/s. Habasit lokoka Pvt. Ltd. M/s. Habasit lokoka Pvt. Ltd. on receipt of fabrics from the appellants had sent to the processor under Rule 57F(3) procedure and the processor while despatching the goods paid duty and collected from them. These facts clearly show that the appellants and their buyer M/s.

Habsit lokoka Pvt. Ltd. has informed the department about their manufacturing activity and each stage of transaction are known to the department. In a circumstance like this, it cannot be alleged that there was wilful suppression with an intent to evade duty. Appellants have pleaded that had they paid the duty, then the entire Modvat credit would have been available to M/s. Habsit lokoka Pvt. Ltd. and it would have led to Revenue neutrality and that there was no need for them to suppress any information, with an intent to evade duty. There is lot of force in this argument. They have also shown that they had no intention to evade duty. They filed declaration and details of the yarn which is manufactured by them was known to the department. In a circumstance like this, it cannot be held that there was mis-declaration with intention to evade payment of duty and that it was only after the investigation, the department has come to know about the type of yarn manufactured by the appellants. When a declaration is filed, it is for the department to have scrutinized the details and that they should have examined as to what the product is about? Such an exercise has not been done. Furthermore, the department itself have various opinions of the classification of the item. It was considered as classifiable under Chapter 52. Later they switched it to chapter heading 59 and various benches of the Tribunal also were taking varying stand on the classification of the product including the Larger Bench and the matter is now ceased before the Apex Court. In a circumstance like this, it is not possible to hold that larger period is invocable in the present case.

14. Furthermore, my learned brother Shri Jeet Ram Kait had agreed in a similar circumstance with learned brother Shri S.S. Sekhon to hold that demand in a similar facts was not enforceable to larger period. The findings recorded by my

brother on this point in his portion of opinion in Paras 7-9 of the final order in the case of S&S Power Switchgear Ltd. v. CCE, Chennai-II vide Final Order No. 681/2002 dated 31.5.2002.

is reproduced hereinbelow: 7. I have considered the submissions made by both the sides and gone through the orders recorded by learned M(T) and M(J). I find that learned M(T) Shri S.S. Sekhon has thoroughly analysed the whole issue and has recorded a very detailed order supported by various judgments as cited by him under Para 3. I have also perused the various classification lists and it is observed that in the classification list the assessee has clearly described the goods as HT circuit breakers. Further the matter was taken to the Central Board by the Indian Electrical and Electronic Manufacturers Association who had represented that there is no uniformity in the classification of circuit breakers above 1000 volts for the purpose of levy of Central Excise duty under Schedule to Tariff Act, 1985 (henceforth referred to as Tariff) The association had furnished a list of Such HV and MV circuit breakers manufactured in India and it was pointed out by the Association that the Central Excise Officers in different Commissionerate have been classifying such circuit breakers under headings 8535 & 8537 of the Tariff. In order to ensure uniformity in classification of this product, the Board examined the classification of circuit breakers and issued an order in exercise of the power conferred under Section 37B of the CE Act, 1944 for the purpose of ensuring uniformity in classification of the product and levy of duty, vide Order No. 32/8/94-CX issued from File F. No. 151/6/94-CX.4 dated 14.7.94. The list enclosed with the Board's order as noted above, covers circuit breakers manufactured by the appellants also. Since there was confusion in the minds of the trade as well as the Revenue whether the product in question viz. circuit breakers would fall under tariff heading 8535 or under 8537 of the Tariff and since there was no uniformity in the classification of circuit breakers as admitted by the Board while issuing the Section 37B order, the order issued by the Board will be applicable prospectively i.e. from the date of its publication. In view of the order recorded by learned M (T) in Para 3 (d) at page 7 and in view of the judgment in the case of HM Bags Manufacturing Co., 1997 (94) ELT 3 (SC) the order issued by the Board under Section 37B will be applicable from the date of its publication.

Therefore, no demand of duty can be raised for a period prior to the date of publication of such order. Learned M (T) has also relied upon the judgment of the Tribunal in the case of R.N. Polyasacks, 2000 (117) ELT 790 in which it has been held that the Section 37B order issued by the Central Board will be applicable from the date of issue of the trade notice by the concerned Commissionerate and not from the date of issue of the order by the Board. While rendering the above judgment the Tribunal had followed the judgment of the Hon'ble Apex Court in the case of H.M. Bags Manufacturing Co.

(supra).

(8) I am also in agreement with the finding recorded by learned M (T) in para 3 (e) at page 7 that as there was no suppression of facts, the proviso to Section 11 A(1) cannot be invoked for demand of duty. I also agree with the view taken by learned M. (T) Shri S.S. Sekhon that the demands have to be restricted to six months only following the ratio of the decision of the Tribunal in the case of Muzaffarnagar Steel, 1989 (44) ELT 552, page, 555 as contained in page 8 of the order recorded by learned M (T) as this judgment is squarely applicable to the facts of the present case. Therefore, the extended period cannot be invoked demand of duty in the absence of deliberate suppression or for misstatement of facts with intent to evade payment of duty. The Tribunal judgment in the case of Muzaffarnagar Steel was also followed by the West Regional Bench of the Tribunal in the case of Bombay Drums Manufacturing Co. v. CCE, 2000 (124) ELT 908. Further in the case of Fricks India Ltd v. CCE, 2000 (119) ELT 676, the Bench presided over by Justice K. Sreedharan, Ex-President has held that if the goods are cleared pursuant to approval of the classification list it is not open to the department to justify demand of duty invoking the longer period of limitation in terms of Section 11A. (9) In view of the above discussion, I agree with the view taken by learned Member (T) Shri S.S. Sekhon that the appeal is required to be remanded for re-determination of the classification issue and the demand of duty has to be restricted to six-months period only.

15. In view of the fact that in the present case also, the department had full knowledge about the manufacture and also about the appellants processors M/s.

Habsit lokoka Pvt. Ltd. Seeking permission under Rule 57F(3) and therefore it cannot be said in the said circumstances that larger period is invocable and demands are required to be confirmed in the matter. For this reason, I hold that entire demands are time barred and are not enforceable. However, the classification is confirmed under heading 5911.90 as prayed for by the appellants. The impugned order is confirmed only to the extent of classifying the product under chapter heading 5911.90 while the demands are set aside as barred by time.

Ordered accordingly.

In view of difference of opinion arisen between the Members in the matter, the following question arises for consideration by third Member: "Whether the larger period is applicable in this case in terms of findings recorded by Member (T) Shri Jeet Ram Kait and final order to be passed on the relives noted by Hon'ble Member (T)"; "the demands are required to be held as time barred as held by Member (J) Shri S. L. Peeran and appeal to be allowed accordingly." 16. The point to be considered in this appeal is whether the demands are required to be held as time barred or whether the larger period is applicable in terms of findings recorded by the Members who heard the matter. The Member (Judicial) has observed that demands are time barred as there was no mis-declaration for the purpose of invoking the larger period and on the other hand Member (T) was of the view that the department was justified in invoking the larger period.

17. Shri Arvind P. Datar, Ld. Senior Counsel appearing for Shri J.Sankararaman, Ld. Counsel on behalf of the party submits that the dispute was in respect of the classification of the product and whether the products are classifiable under Chapter 52/54 as contended by the appellant/assessee or under the Chapter 59 as per the department. In view of conflicting views of different Benches of the Tribunals, the matter was placed before the Larger Bench of the Tribunal to resolve the issue and it was decided in the case of Jyoti Overeas Ltd. v. CCE, 2001 (130) ELT 446 holding that the item is classifiable under Chapter 52 as claimed by the assessee, Further, he said that the declaration was duly filed by the assessee, and there was no suppression of facts since proper declaration has

been made to the department as required under Rule 174 and 57F. In support of his contention he relied upon the decision of the Hon'ble Supreme Court in the case of Jaiprakash Industries Ltd. v. CCE, Chandigrah, 2002 (84) ECC 722 (SC) : 2002 (146) ELT 481 (SC), wherein it was held that bona fide doubt as to non-excisability of goods due to divergent view of the High Courts for an extended period of five years not invocable as no evidence of any fraud, collusion, wilful mis-statement or suppression of fact available with the department. Mere failure or negligence in not taking licence or not paying duty not sufficient to invoke extended period. In this context, the department is on the view that since the appellant/assessee themselves declared before the State Government, it is not justified to invoke the Larger Bench in terms of Section 11A.18. I have carefully considered the matter. On going through the facts and circumstance and in view of the conflicting views in respect of classification of the product in question, I find that there was no justification to invoke the larger period as it was rightly pointed out by the Ld . Senior Counsel. Further, the decision rendered by the Hon'ble Supreme Court in the case of Jaiprakash Industries Ltd. v. CCE, Chandigrah (supra) strengthened this view. Accordingly, I agree with the findings recorded by Member (J) and therefore the appeal deserves to be allowed accordingly. The Registry to place the matter before the Original Bench to pass the final order accordingly.

In terms of the majority order the demands are required to be held as time barred and the appeal is allowed.

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