

**Nutech Polymers Ltd. Vs. Commissioner of Central Excise**

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

**Decided On :** Feb-09-2004

**Reported in :** (2004)(173)ELT385TriDel

**Judge :** S Kang, a T V.K.

**Appellant :** Nutech Polymers Ltd.

**Respondent :** Commissioner of Central Excise

**Judgement :**

1. The issue involved in these four appeals, arising out of a common Order-in-Original No. 6/2003, dated 26-3-2003 is whether M/s. Nutech Polymers Ltd., Appellants No. 1, were clearing their final products in the disguise of waste.

2.1 Shri K.K. Anand, learned Advocate, mentioned that M/s. Nutech Polymers Ltd., Appellants No. 1, manufacture PP/HDPE Tape, fabric, sacks; that when the Central Excise officers visited their factory on 19/20-3-2001, the stock of finished goods was found to tally with the balance recorded in RG1 Register; that stock of inputs, namely, HDPE Granules and Master batch was found short; that the officers also visited the premises of their job worker, M/s. Mateshwari Enterprises and the total variation in respect of all items came to 493.2 Kgs. from which 2,030 sacks were alleged to have been manufactured and removal involving duty Rs. 4,758/-; that it was also alleged that Appellant No.1 had despatched 1,18,546 bags without payment of duty amounting to Rs. 1,44,572/-; that the Department also alleged on scrutiny of Daily Production Slips for the period from November, 2000

to March 2001 (up to 18-3-2001) with RG1 register that the Appellant No. 1 had accounted inflated quantities of wastage (31,154 Kg) of PP/HDPE whereas the actual wastage was 9,466.90 Kgs.

2.2 He further mentioned that the Commissioner, under the impugned Order, has (iii) confirmed the duty amounting to Rs. 1,44,572 /- leviable on 1,18,546 sacks removed without payment of duty; (iv) confirmed the duty amounting to Rs. 28,00,917/- leviable on 2,16,307 Kg of PP/HDPE Fabrics cleared in the guise of waste.(c) Shri Nirmal Karanpuria, Rs. 2.5 lakhs Director(d) Kamal Kumar Mahajan, Rs. 25,000/-. Works Manager 2.3 As the learned Advocate has not pressed the Appeal against first two demands at serial No. (i) and (ii) above, the same are upheld.3. The learned Advocate, submitted that there is no evidence that the final product was removed without payment of duty in the guise of waste; that the waste which arises in the tape plant and fabric section are entered in the private records; that the production reports only showed the wastage till the stage of production of tape and of fabric stage; that the wastage take place at various stages after production of tape and fabrics such as trimming waste, quality control test, weaving defects, fabric cutting, improper cutting of fabrics, etc., that the waste in this type of industry is approximately 8% up to the stage of manufacture of tape and fabric and 10% up to the stage of manufacture of bags; that the standard Input-Output Norms, as per EXIM Policy with respect to HDPE Woven fabrics is 1.080 Kg of HDPE granules vis-a-vis the quantity that has to be exported as 1 Kg. of HDPE Woven fabrics; that in respect of HDPE Woven sacks the quantity allowed is 1.10 Kg of HDPE granules vis-a-vis the quantity that has to be exported as 1 Kg of HDPE woven sacks; that M/s. Reliance Industries, in their work order of woven sacks specifically provided for 10% as a waste; that the Plastic Manufacturers Association of Rajasthan has also certified in one case that the percentage of wastage in this industry is about 10% to 12%. He, further, submitted that the personnel of the Appellant No. 1 have deposed in their statements that the percentage of waste is very high and the wastage recorded in the statutory record (RG1) represents the actual wastage occurred in the production of fabrics and bags; that their personnel had never admitted that they had cleared the fresh PP/HDPE fabrics without payment of duty in the guise of waste; that waste fabrics had been cleared on payment of duty; that Revenue had not recorded any

statement of their buyers whom they allegedly had cleared the fabrics without payment of duty in the guise of waste; that in the absence of any concrete and positive evidence, no presumption could be drawn that there was clandestine removal of the goods; Reliance has been placed on the decision in the case of Oudh Sugar Mills Ltd. v. Union of India, E.L.T. (J172) (S.C.) and Dunlop India Ltd. v. CCE, 2001 (132) E.L.T. 345 (T). He also referred to the decision of the Tribunal in the case of Shram Shakti Polytex Pvt. Ltd. v. CCE, Jaipur, Final Order Nos. A/548-550/2002-NB, dated 17-5-2002; [2002 (144) E.L.T. 183 (T)] wherein the demand of duty had been set aside on the ground that there was no clandestine removal of bags by showing waste in excess; that the facts of Shram Shakti Polytex and the said decision is fully applicable. He also relied upon the decision in the case of Rajasthan Petro Synthetics v. CCE, Jaipur, Final Order No. A/231/2003-NB, dated 2-5-2003; [2003 (160) E.L.T. 297 (T)]. Finally the learned Advocate submitted that they have been directed to prove the negative by giving finding that they had not produced any documentary evidence about the generation of waste and reasons for not recording the waste in daily production report; the mere fact that the wastage was not recorded after tape and fabric stage cannot be made the basis for assuming that no waste had arisen after these stages; that in any case duty cannot be demanded for the period 1-4-97 to 18-3-2001 on the basis of the daily production report for the period November, 2000 to 18-3-2001; that at best the Revenue could rely on these reports for demanding duty for which the daily production reports pertain to; that Revenue cannot demand duty for the period prior to daily production reports.

4. Regarding confirmation of demand of Rs. 1,44,572/- the learned Advocate mentioned that the bags in question were cleared on payment of duty under invoice issued under Rule 52A of the Central Excise Rules, 1944; that, therefore, the confirmation of duty is totally incorrect, that no penalty is imposable on Applicant No. 1 under Section 11AC of the Central Excise Act as there is no suppression of fact or wilful misstatement on their part as they were regularly submitting RT 12 Returns and the Department was fully aware of their activities; that no penalty is imposable on Nirmal Karanpuria, Director and Shri Kamal Kumar Mahajan, Works Manager, of the Appellant No. 1; that there is no allegation in the show cause notice that Shri Karanpuria was either supervising the entire activities

of the factory or that Works Manager was reporting to him about the day to day activities of the factory; that Shri Mahajan is only an employee of the Appellant No. 1 and no penalty is imposable on him and reliance has been placed on the decision in the case of Z.U. Alvi v. CCE, 2000 (117) E.L.T. 69 (T) = 2000 (36) RLT 721 (CEGAT); that M/s. Mateshwari Enterprises are also not liable to any penal action under Rule 173Q of the Central Excise Rules as they are not the manufacturer of the goods; that penalty has also been imposed on the Appellant No. 1 treating them as manufacturer of the goods and as such there cannot be two manufacturers of the same goods.

5. Countering the arguments, Shri Virag Gupta, learned Departmental Representative, submitted that when officers visited the premises of the Appellant No. 1, they found, on physical verification, shortage of raw material; that they also found that the Appellant No. 1 had cleared the goods clandestinely without payment of duty (which had been deposited by them subsequently); that they were also found to have removed the HDPE sacks from the premises of their job worker without payment of duty; that they were recording excess waste in the statutory records than the actual waste generated; that all this goes to show that the Appellant No. 1 were intentionally evading the payment of duty. He, further, submitted that Shri K.K. Mahajan had admitted in his statement dated 3-5-2002 that the excess wastage shown in RG1 register was in fact the inferior quality of HDPEZ/PP fabric which was cleared in the guise of excess wastage; that Shri Mahajan has also admitted that Kacchi Slip prepared by the supervisors were destroyed by them; that Shri Nirmal Karanpuria had also admitted the destruction of records during construction work; that thus the Department was left with no other option but to calculate the quantity of wastage actually generated before November, 2000 on average basis arrived at from the daily production reports resumed for the period from November, 2000 onwards; that had there been any rejection of fabric/sacks by their customers on account of poor quality, it should have been reflected in RG1 register; that thus their contention that when fabric did not conform to the customers' parameters was rejected is not acceptable; that thus the percentage of wastage generation was only 2.16% of the total raw material consumed for the earlier period also. Regarding duty in respect of 1,18,546 bags, the learned Departmental Representative mentioned that this quantity has been

worked out from the registers resumed from the factory premises of the Appellant No. 1 which contained the details of number of cut fabrics sent to the job worker for stitching and printing, number of bags despatched to the various customers and the balance of cut fabrics lying with the job worker; that the scrutiny of Rule 52A invoice revealed that no invoices had been issued for the impugned quantity of bags; that Shri Mahajan had categorically admitted that no invoice had been issued by them in respect of the said quantity of bags. He also contended that the demand of duty is not barred by limitation, as claimed by the learned Advocate, as the Appellant No. 1 had indulged in evasion of duty by way of recording excess wastage in the RG1/Daily stock register and had removed the fabric in the disguise of wastage and they had removed bags without payment of duty; that consequently penalty under Section 11AC of the Central Excise Act is imposable on the Appellant No. 1; that the Director Shri Karanpuria was supervising entire activities of the unit and Shri K.K. Mahajan, was also reporting to him about day to day activities; that, therefore, penalty is imposable on both these persons; that M/s. Mateshwari Enterprises are also liable to penalty as a quantity of fabrics and sacks were found short in their premises.

6. We have considered the submissions of both the sides. Regarding duty amounting to Rs. 1,44,572/- in respect of 11,854 number of HDPE/PP bags, we observe that Shri K.K. Mahajan, Works Manager, who looks after works relating to Excise and despatch, has deposed in his statements dated 20-3-2001 and 30-3-2001 that no invoice under Rule 52A (i.e. duty paying invoices) was issued in respect of the said bags. The Adjudicating Authority has specifically recorded his findings that he had not retracted his statements and in fact duty of excise involved in the removal of these bags had been deposited by them. The Adjudicating Authority has also considered the submissions made by the Appellant No.1 in this regard subsequently and has recorded his specific finding that their contention is against the documentary evidence available on the record. The Appellant No. 1 has not succeeded in controverting the findings contained in the impugned order, in this regard. We, therefore, uphold the demand of duty of Rs. 1,44,572/- and hold that the Appellants are liable to penalty also under Section 11AC of the Central Excise Act as the excisable goods had been cleared without payment of duty and intent to evade payment of duty is apparent as no prescribed invoices were issued

at the time of removal of goods.

7. Regarding charge of clearance of fabrics in the disguise of waste, we observe that no direct material or evidence has been brought on record by the Revenue in support of the charge. It is well settled law that duty cannot be demanded merely on the basis of assumptions and presumptions. It has been held by the Supreme Court in Oudh Sugar Mills that the findings on the strength of a show cause notice, issued on the basis of average production is "without any tangible evidence and is based on inference involving unwarranted assumptions." The Supreme Court has further held therein that "the finding is thus vitiated by an error of law." In the present matters the demand has been computed on the basis of wastage reflected in the Daily Production Reports available for a limited period i.e. November, 2000 to 18-3-2001, and the duty has been confirmed for the period from 1-4-97 to 18-3-2001.

The Appellants' contention that these reports did not reflect the waste which had arisen after tape/fabric production has not been rebutted by Revenue. Further no material has been brought on account as to whom the good quality goods, said to be removed in the disguise of waste, were cleared. Moreover, we find substantial force in the submissions of the learned Advocate that the duty cannot be demanded for the period the daily production reports are not available. The onus of proof regarding clandestine removal is on the Department and cannot be shifted to the Appellants without discharging its onus. We find no force in the finding of the Adjudicating Authority that "in the absence of said reports for the earlier period, the Department had been left with no other option but to calculate the quantity of wastage actually generated before November, 2000 on average basis arrived at from the Daily Production Reports resumed for the period of November, 2000 to 18-3-2001 when no other documents had been produced by the assessee relating to actual generation of wastage." It is for the Department to bring evidence to prove that the wastage reflected in statutory records is not the actual wastage and the burden is not cast upon the assessee to produce the documents relating to actual generation of wastage. The learned Advocate has also contended that the input-output norm as per EXIM Policy is 8% in respect of HDPE Woven Fabrics and 10% in respect of HDPE Woven sacks. This contention has also not been

controverted by the Revenue. In a similar situation in the case of Rajasthan Petro Synthetics, supra, where the allegation was that the yarn had been removed clandestinely under the garb of waste which was shown higher, relying upon the sole evidence of entries in log books the Tribunal has held that "the entries in the log book did not provide any conclusive and tangible evidence regarding the clandestine manufacture and removal of the yarn. These entries at the most reflected excess wastage generated during the manufacture of the yarn." We, therefore, hold that the Revenue has not succeeded in establishing in the present matter that the Appellant No. 1 had removed good quality excisable goods in the disguise of wastage. We, therefore, set aside the demand of duty and penalty on this count. As observed by us earlier, penalty is imposable on M/s. Nutech Polymers Ltd. in respect of the duty demand upheld in this order. In the facts and circumstances of the case we are of the view that interest of justice will meet if they are ordered to pay a penalty of Rs. 25,000/-. We find no justification for imposing penalty on M/s. Mateshwari Enterprises as well as on Nirmal Karanpuria and K.K. Mahajan. Accordingly we set aside the penalty imposed on Appellant Nos. 2 to 4. 8. All the appeals stand disposed of in the above manner.

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