

Dishti Inds. Ltd. Vs. Cce

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Aug-13-2004

Reported in : (2004)(117)LC352Tri(Mum.)bai

Judge : S T S.S., K Kumar

Appellant : Dishti Inds. Ltd.

Respondent : Cce

Judgement :

1. Shri S.M. Parikh, Ld. Advocate along with Shri S.P. Bharti, Advocate appeared on behalf of the appellant and Shri Sanjay Singhal, LD. JDR appeared on behalf of the Revenue.

2. The issue relates to classification of Bolting Cloth under Chapter Heading 5911.20 as claimed by the department. The appellant, however, claim classification under Heading 5406 claiming it to be nylon fabrics. The Ld. Counsel mainly contended that the appellants were denied the cross examination of Shri Amrit Utsavlal Chhajed, and representatives of Bombay Textile Research Association and Central Excise Laboratory who have given expert opinion and test report. Mainly on this ground the Ld. Counsel has sought for setting aside the impugned order and remanding the matter to the adjudicating authority for de novo adjudication.

3. The Ld. JDR contended that the issue of classification has attained the finality because the appellant have not challenged the order-in-original No. 25/CEX/1993 dated 31.3.1993, passed by the Collector of Central Excise & Customs Pune classifying the product in question as "Bolting cloth" as mentioned in para 8 of the impugned order and they were paying duty without any protest. As such it is not open for them now to agitate the same before this Tribunal. He also contended that the case is not only based on the test report which are already in favour of the Revenue. The case is based on other many strong documentary evidences relied on by the adjudicating authority as under: (a) Statements of 70 dealers/distributors who under statement recorded under Section 14 of the Act acknowledged the fact that the cloth received by them from the assessee is known in the trade as "Bolting cloth".

(b) 18 end users of the cloth who purchased if from the assessee or its dealers confirmed that it is used for screen printing.

(c) The assessee's own two technical persons confirmed the status of cloth as 'Screen Printing Cloth'.

(d) The assessee advertised the cloth as 'screen printing fabrics' in magazines and in industrial publications.

(e) The assessee's own documents, such as price lists/circulars and endorsements on the packing materials used as relied in the SCN refer the cloth as screen printing cloth.

(f) The assessee's own publication "Tips for Screen Printers" recommended the cloth for general screen printing, object printing and ceramic printing.

4. Besides, he has also contended that none of the grounds taken in the appeal warrant remand to the adjudicating authority. Therefore the question of any remand to the adjudicating authority may not arise. He has also contended that the appellant has not questioned the strong evidence as mentioned above and as such that is a fit case for dismissal of the appeal. He, however, pointed out that in paragraph 76.6, the Commissioner has, while arriving to the conclusion that the

product in question is a Bolting cloth relied on different sources are- (a) as to how the product is known in the trade, i.e. trade parlance.

5. He emphasised that assuming but without admitting that the appellants were denied the cross examination as mentioned above, still the case of the department stands on solid evidences as mentioned above which has not been demolished by the appellant and the same cannot be brushed aside merely on the ground of refusal of cross examination. The adjudicating authority in para 78 of the impugned order has given the reasoning and finding while denying the cross examination relying upon the Apex Court decision reported in 2002 (142) ELT 224 and the Tribunal's decision .

6. Keeping in view the above, we do not find any merits in the appeal filed by the appellant and the same is accordingly dismissed.(S.S. Sekhon) (Krishna Kumar)Member (T) Member (J) 7. I have gone through the order prepared by Ld. Member (J); I am not able to persuade myself to agree with it. I am recording this separate order.

(a) that the impugned entity being fabricated/manufactured in the appellant's factory premises has to be classified. While the Revenue is claiming it to be "blotting cloth" classifiable under heading 5911.20 of the Tariff while the appellants claim the classifiable to be under 5406 as "nylon fabrics".

(b) para 3 of the Ld. Member (J)' order has brought out, that the case is based on other many strong documentary evidence, as relied by the adjudicating authorities, as follows: (a) Statements of 70 dealers/distributors who under statement recorded under Section 14 of the Act acknowledged the fact that the cloth received by them from the assessee is known in the trade as "Bloting cloth.

(b) 18 end users of the cloth who purchased it from the assessee or its dealers confirmed that it is used for screen printing.

(c) The assessee's own two technical persons confirmed the status of cloth as 'Screen Printing Cloth'.

- (d) The assessee advertised the cloth as 'screen printing fabrics' in magazines and in industrial publications.
- (e) The assessee's own documents, such as price lists/circulars and endorsements on the packing materials used as relied in the SCN refer the cloth as screen printing cloth.
- (f) The assessee's own publication "Tips for Screen Printers" recommended the cloth for general screen printing, object printing and ceramic printing.
- (c) The perusal of the following paragraphs of the impugned order reveals: 10. ...One of the samples was shown to Shri Amrit Utsavlal Chhajed, B. Textile (MMTT), who is an expert in Textile technology, for examination and offering his opinion on the said sample. His statement was recorded on 2.9.2002 under the provisions of Section 14 of the Act. In this statement, he confirmed that the sample was of Bolting Cloth. He further explained in detail the characteristics of Bolting Cloth and its end-use, which was found to be squarely applicable to the cloth manufactured and marketed by M/s. DIL.
11. Representative samples were also sent for test to the Test laboratories mentioned below: i) The Bombay Textile Research Association, Lai Bahadur Shashtri Marg, Ghatkopar (West) Mumbai-400086.
- ii) Central Excise Laboratory, Extrella battery Compound, Dharavi Road, Matunga, Mumbai--400019.
12. The test results received from both the laboratories mention that the samples can be considered as Bolting Cloth.
15. Statements of 70 persons, as listed in the Annexure 'CI' to the Notice-to-show-cause, who are concerned with dealing in/distribution of M/s. DIL's cloth, were recorded under the provisions of Section 14 of the Act. In their statements, they, inter alia stated that they had been dealing in screen printing materials, and that they received Bolting Cloth/Screen Printing cloth from M/s. DIL, and that the end use of cloth received from M/s. DIL was in screen printing industry/Sago Mills for filtration, and that the buyers of the cloth were screen printers/Sago mills owners

only, and that the cloth was marketed by them as such without doing any processing thereon.

16. Statements of 18 persons, as listed in the Annexure 'C2' to the Notice-to-show-cause, who purchased the cloth manufactured by M/s.

DIL from their dealers/distributors, were recorded under the provisions of Section 14 of the Act. The said end-users of the cloth i.e. Screen printers, in their statements, inter alia, stated they used the cloth purchased by them for the purpose of screen printing, and that the cloth was used by them without subjecting the same to any processing.

17. Statements of 3 persons, as listed in Annexure 'C3' to the Notice-to-show-cause, who are concerned with the manufacture of filters, and concerned with the manufacture of filters, and ceramic tiles, were recorded under the provisions of Section 14 of the Act.

In their statements, they, inter alia, stated that the cloth purchased from M/s. DIL was used as filtering element in the manufacture of filters and screen printing on glazed tiles.

19. Statement of Shri S.V. Mirpuri, Factory Manager at plant-II of M/s. DIL that he had an experience of 25 years in Textile industries. He further stated that M/s. DIL manufacture Filament fabrics; and that the said fabrics were manufactured from Nylon yarn; and that the fabrics was used for industrial/technical purposes; and that it was used for screen printing and Filters; and that the fabrics could not be used for house-hold clothes like bed sheets, curtains and other furnishing articles; that the fabrics was not being subjected to any further processing after weaving is complete; and that after inspection of the fabrics to find out defects, if any, the same was cut into pieces as per the orders; and that the filament fabric manufactured by them was in rectangular shape.

20. Statement of Shri H.P. Shetty, Factory Manager at Plant-I of M/s. DIL, who is holding a Degree in Textile technology i.e. B. Tech (Textile) from Bangalore University and working with M/s. DIL since 1990 in various capacities stated that

he had been looking after production maintenance, and laborers handling and reporting to Shri Deepak Mehra. He stated further that M/s. DIL had been manufacturing Nylon fabrics since 1989; and that the said fabrics was manufactured from nylon mono-filament yarn; and that there was no change in the product manufactured since beginning i.e since 1989. He stated further that there was no difference in the manufacturing process at Plant-I and Plant-II; and that the fabrics was being not subjected to any further processing after its weaving. He stated further that the Nylon fabric manufactured by M/s. DIL was used for Screen printing and Filters; and that it could not be used for dress materials, bed sheets, curtains, apparel purpose. He stated further that the filament fabric manufactured by them was in rectangular shape.

(c) The appellants had relied upon various test reports and opinions, from experts, to prove that the entity being manufactured by them cannot be considered as "Bolting Cloth". Certificate from Government of India Institute of Textile, Textile Commissioner, Bombay confirming the classification issued by Mantra and Department of Chemical Technology & University, Bombay had confirmed that Bolting Cloth requires to be heat set, so as to avoid deformation by use. Certificate of Prof. V.B. Achwal, Head of Textile Chemistry Section, Department of Chemical Technology, Mumbai, dated 14.2.1987 reads as follows: For Proper use as a holding cloth, synthetic filament woven fabric will need to have dimensional stability so that they are not deformed in use. To impart above properties, grey synthetic fabric will need some preprocessing particularly heat setting. As such the grey synthetic fabric in unprocessed stage cannot be considered as bolting fabric.

Therefore, it is imperative to find out and establish where the appellants have manufactured "Bolting Cloth" i.e. a fabric, that after weaving, has been heat set, or have manufactured "nylon fabric" without any heat setting which could be used as filter elements and/or screen printing. From the statements of various persons, relied upon as extracted herein above, it is found, that the entity being manufactured is used as per advertisement, for screen printing fabrics and not as "Bolting Cloth". Test reports of the persons relied upon who have tested the samples drawn from the manufacturer's premises also do not confirm the fact that the 'fabric' in question after weaving has been "heat set". In fact the statements of

the weaving textile experts engaged, as relied upon, indicate that no process after weaving has been performed. It is only the statement of one Shri Chhajed, as relied upon, which indicates that the entity in question is a "Bolting Cloth". As certified by the Professor of Bombay University Textile Department "Bolting Cloth" emerges after being "heat set". The cross examination of chemists & Shri Chhajed, as sought for, as these results and statements have been relied upon by the Ld. Adjudicator, should have been granted. This would have enabled the appellants to have had an opportunity to prove their case and for bringing out whether 'heat set' process had been carried out or not. The denial of the cross examination has caused grave violations of principles of natural justice, as also it was necessary to establish that the entities being manufactured were "Bolting Cloth" and not 'nylon fabrics', awaiting heat setting after weaving, as classified by the appellants.

(d) The identification of the goods, is to be established first and foremost it is significant for it its classification has to be determined. This identification cannot be established in the facts of this case, in absence of the evidence of Shri Chhajed and two Chemist as relied upon having been denied in cross examination. The order therefore cannot be upheld. Since whether the fabrics, after weaving, were heat set or not to render them as "Bolting Cloth" and had achieved a stage different from 'nylon fabrics' cannot be established. This issue, which goes to the root of the classification, has to be re-determined.

(e) The identification of the goods is to be distinguished from the step which follows namely, the inquiry whether one or more of the Tariff provisions apply to the entity which has been identified. The provisions of the Tariff do not determine the relevant entity of the goods. They determine whether and under which entry, the identified entity attracts duty. The goods after being identified, have to be assigned to an appropriate heading or sub-heading under which they are classifiable. For finding the appropriate classification, of the Statutory Rules of Interpretation, are to be followed. The descriptions employed in the Tariff nomenclature should be appreciated having regard to the terms of the headings read with the relevant Section and Chapter notes, as also the provisions of other statutory rules" unless such headings and notes do not otherwise require." The latter qualification in Rule 1 of Rules mean that other interpretative rules are to be

invoked, only if the goods could not be classified by reference to headings and relative chapter and section notes. Thus it does not mean that for the application of the other interpretative rules the headings and the notes must expressly require their application. The other material relied upon by the adjudicator would only indicate application of non statutory rules of classification, which could be called, for assistance only where the classification by Statutory Rules is not possible.

(f) The reliance in this case, on non statutory rules of interpretation, Nomenclature, trade parlance test etc. has been relied upon by Revenue, are tests are non statutory principles of classification, which are in nature of secondary evidence. When classification, as in this case has to be determined after ascertaining the fact by determining whether the item is "Bolting Cloth" under 5911.20, it is imperative to find out what is "Bolting Cloth" and whether the entity in question meets the specification of Bolting Cloth. Therefore the reports of the of Prof. V.B. Achwal, Head of Textile Chemistry Section has to be considered by the Commissioner for 5911.20, and applied, after coming to a positive finding whether heat setting has been done or not. Since that has not been done, the order cannot be upheld. The Supreme Court in the case of Bharat Forge and Press Industries Ltd. had held that the 'trade nomenclature' did not cause pipe fittings to be other than pipes and tubes. In that case the distinctive name or badge of identification in the market namely 'pipe fitting' was held to be not to make 'pipe fittings' different commercial articles. The character remained the same in as such as there was no change in their basic physical properties and there was no change in their basic physical properties and there was no change in their end use.

In the present case also 'nylon fabric' without heat setting has remained as 'nylon fabric' classifiable under Chapter 5406, process of heat setting has to be undergone, to conform to the definition of 'Bolting Cloth' under heading 5911.20 even if it performs the functions of screen printing etc.

(g) As regards advertisements, labels and publicity material and their relevance to classification, it has been held, "that classification cannot be based only upon what is stated in the pamphlets. The contents of the pamphlets would only be relevant to indicate commercial targeting and desires. Advertisements were made to attract

the consumers and had nothing to do with the classification of a product for the purpose of levying excise duty.

Therefore the fact that the assessee had stated in its advertisements that the product 'Handyplast' helped to heal a wound was of no importance" See Leuko Plast India Pvt. Ltd. v. Union of India approved in . Therefore, reliance on how the assessee advertised the products, uses it etc.

are not relevant material to determine classification.

(h) All the materials available in this case except Mr Chhajed's statement and the test report opinions which are not tested in the cross examination, lead to, only prove, the use of the product under classification dispute for a particular end use i.e. screen printing. No independently tested, on the avail of cross examination, evidence, exist to conclude the entity to be 'Bolting Cloth' therefore cross examination as sought is important to conclude and confirm the classification besides being a requirement of natural justice. The matter therefore requires to be remitted back to enable the testing of the evidence on 'Bolting Cloth' on the avail of cross examination, before the classification can be confirmed under Chapter 59. The appeal is therefore required to be allowed and remitted to the original authority after wards and predeposit.

9. Since there has been a difference of opinion between the two members of the Bench who heard the matter, the same is, therefore, required to be referred to a third member as per law. Accordingly, the Registry is directed to place this file before the Hon'ble President to refer it to a third member.

10. The following question is, therefore, required to be referred to the third member for this opinion- (a) Whether in facts of this case, the classification could be arrived at under Chapter Heading 591120 as held by Ld Member (Judicial) or the matter is required to be remanded for redetermination after cross examination of the witness as held by Member (T).(Krishna Kumar) (S.S. Sekhon) 11. I have heard both sides on the issue referred to me and record my findings as under.

12. The plea of the appellants is that nylon fabrics manufactured by them have to undergo the process of heat setting before they become "bolting cloth" and they did not carry out any heat setting and therefore the products in dispute are not bolting cloth. It is for this purpose that they sought cross-examination of Shri Amrit Utsavlal Chhaged, and the BTRA Chemist and also the Central Excise Chemist who had given their opinions. I find that the department itself has recognised the relevance of heat setting inasmuch as the question relating to heat setting was put to Shri Amrit Utsavlal Chhaged.

Further the certificates from the Government of India, Institute of Textiles, and the Head of Textile Chemistry Section, Department of Chemical Technology, Mumbai also confirmed that bolting requires to be heat set so as to avoid deformation by use. In these circumstances it is necessary to establish whether the appellants have carried out the process of heat setting so as to find out whether the fabrics manufactured by them is bolting cloth as held by the Revenue. The cross-examination of the Chemists and Shri Chhaged should have been granted in order to bring out the above factual position and the denial of cross-examination in the light of the above has brought about contravention of the principles of natural justice.

13. The case law relied upon by the learned DR, namely, the decisions of the Tribunal in the cases of CCE v. Navdeep Chemicals (P) Ltd. 1988 (37) 62 : 1988 (18) ECR 322 (Cegat); Jamshri Ranjit Singh Spinning & Weaving Mills Co. Ltd. v. CCE Aurangabad Ciba Speciality Chemicals Ltd. v. CCE Goa and Hindalco Industries Ltd. v. CCE and the Apex Court judgment in the case of Ugam Chand Bhandari v. CCE Madras 2004 (167) ELT 491 (SC) : 2004 (114) ECR 636 (SC) to support the plea that in the event of non-acceptance of a test report by an assessee, re-test should be asked for, does not advance the case of the Revenue as the appellants herein asked for cross-examination of the Chemists and Shri Chhaged which was not granted.

14. In this view of the matter I agree with the order proposed by learned Member (Technical) that the case should be remanded to the original authority to enable cross-examination of the Chemist and of Shri Chhaged before classification of the

goods can be confirmed under Chapter 59.

15. The file is now returned to the original bench for passing the majority order.

In view of the opinion expressed by Ld Member (Judicial) Ms Jyoti Balasundaram, these appeals are to be allowed in terms of the findings of Member (Technical) Shri S.S. Sekhon hereinabove.

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