

Vimal Textile Mills Vs. Commissioner of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Oct-07-2004

Reported in : (2005)(99)ECC342

Judge : A T V.K., P Bajaj

Appellant : Vimal Textile Mills

Respondent : Commissioner of Central Excise

Judgement :

1. The issues involved in this Appeal, filed by M/s. Vimal Textile Mills, are whether they were using power in the processing of the fabrics, whether Notification No. 35/99-CE, dated 4.8.99 which amended Notification No. 5/99-CE, is applicable retrospectively and whether the Proviso to Section 11 A(l) of the Central Excise Act is invocable for demanding Central Excise duty for the extended period.

2. Shri B.L. Narasimhan, learned Advocate, mentioned that the Appellants process cotton fabrics falling under Chapter 52 of the Schedule to the Central Excise Tariff Act since 1984; that they undertake bleaching, dyeing and printing on the cotton fabrics; that proceedings were initiated by show cause notice dated 2.7.1999 proposing to deny the benefit of the exemption on the ground that they were using ceiling fans in the halls for drying the fabrics, using motor for drawing water for use in the factory and using power for stirring of chemicals; that the Commissioner, under the impugned order has confirmed the demand of duty for the period June 1994 to May 1999 and has imposed equal amount of penalty.

3. The learned Advocate submitted that the Appellants had availed of benefit of Notification No. 28/94-CE, dated 1.3.94, Notification No.8/96-CE dated 23.7.96, Notification No. 4/97-CE, dated 1.3.97 (Serial No. 85), 5/98-CE, dated 2.6.1998 (Sl. No. 106) and 5/99-CE, dated 1.3.99 (Sl. No. 102); that all these Notification granted exemption to the cotton fabrics processed without the aid of power or steam; that they were undertaking the activities of bleaching, mercerizing, dyeing, printing, washing, drying and finishing before the fabrics were actually packed and cleared; that in respect of these processes, they had not used any power. He mentioned that the Larger Bench of the Tribunal in the case of Mathania Fabrics v. CCE, Jaipur, 2002 (142) ELT 49 (T-LB) has held that it cannot be claimed that power is not used in the processing of fabrics "when power is used for lifting water and pouring the same in the kier and bleaching vessels The pouring of water into kier and bleaching vessels are steps integrally connected with the whole process." He fairly mentioned that in view of the decision of the Larger Bench of the Tribunal, he is not contesting the plea that the power has not been used by the Appellants in processing the fabrics.

4.1 The learned Counsel mentioned that the Notification No. 5/99 was amended by Notification No. 35/99-CE dated 28.8.99; that the Explanation below serial No. 102 of Notification No. 5/99 was substituted as under: "Explanation -- For the purposes of this exemption, cotton fabrics subjected to any one or more of the following processes with the aid of power, shall be deemed to have been processed without the aid of power or steam, namely: (a) lifting to overhead tanks or emptying in underground tanks handling of chemicals such as acids, chlorine, caustic soda, or (b) mixing and stirring of dyes, kerosene, caustic, soda, gun paste and emulsion etc. by stirrer, or 4.2 He contended that the intention of the Government was always to allow the benefit of exemption even in causes where power is used in certain ancillary and incidental activities; that clarificatory amendment issued by the Government would apply retrospectively; that therefore, at all times, it would be construed that the use of power in respect of such activities as given in Explanation would not take the processed cotton fabrics from the purview of the Notification. In support of his contention that the amendment effected by Notification No. 35/99 is clarificatory and, therefore, would apply retrospective from 1.3.1999 (when Notification No. 5/99 was issued), he relied

upon the decision in the case of Gujarat Co-Op. Oil Seeds Growers Federation Ltd. v. CCE, Baroda, 2000 (67) ECC 12 (SC) : 1999 (114) ELT 376 (SC) wherein the Supreme Court has held that the subsequent Notification is merely a clarificatory one. Reliance has also been placed on the decision in Collector of Customs v. Shaw Wallace & Co. Ltd., 1990 (29) ECC 273 (T) : 1990 (50) ELT 143 (T) wherein the amendment in Notification No. 157/76-Cus was held to be clarificatory in nature and that the subsequent notification was issued to remove ambiguity in the earlier notification. He also mentioned that as there was dispute as to whether use of power for lifting of chemicals to overhead tanks and for stirring dyes etc. would mean use of power in the processing of fabrics, the Notification No. 5/99 was amended and the point of dispute was clarified. He relied upon the decision in the case of Central Machine Tool Institute v. CC, Bangalore, 2000 (124) ELT 231 (T) wherein the Tribunal has held that amending notification, being clarificatory in nature, making explicit what was implicit and to remove the ambiguity in the earlier notification, shall have the effect from the date of the original notification. Reliance has also been placed on the decision in the case of Rochi Ram & Sons v. CCE, 2004 (93) ECC 78 (T) wherein it was held that the amendment carried out to Notification No.1/64-Cus dated 18.1.1964 by Notification No. 61/2000-Cus dated 10.10.2000 was clarificatory since it was introduced after representation made by the Association. He contended that in the present case also the amendment carried out to Notification No. 5/99-CE was pursuant to representations made by the association at Pali and is, therefore to be treated as clarificatory in nature having retrospective effect.

5.1 Finally, the learned Advocate submitted that the demand is time barred (except for a few months) as the show cause notice was issued on 2.7.99 invoking extended period of limitation; that the Appellants, during the period in dispute, were under the bona fide belief that the benefit of the Notification would be available, even if power was used in the ancillary activities, like lifting of water, mixing of chemicals, etc.; that this bona fide behalf is supported by the fact that even the Appellate Tribunal in the case of Kanti Prasad Tibrewala v. CCE, Mumbai, 1999 (107) ELT 190 (T) has held that the process of mixing of dyes and packing and sealing of goods have nothing to do with the process of dyeing. Notification exempts fabrics from duty except certain specified processes carried

out with the aid of power or steam.

Notification does not envisage use of power in or in relation to those processes. Therefore, use of power in processes incidental or ancillary to the specified processes, as in the present case, will not make that the power has been used in the specified processes, i.e. dying herein." He contended that in view of this decision of the Tribunal, the Appellants were justified in holding the bona fide belief that the use of power in ancillary works would not amount to use of power in the processing of fabrics by them. He relied upon the decision in the case of Jaiprakash Industries Ltd. v. CCE, Chandigarh, 2002 (84) ECC 722 (SC): 2002 (146) ELT 481 (SC) wherein the Supreme Court has held that as there was a divergent view of the various High Courts, "it cannot be said that merely because the Appellants did not take out a licence and did not pay the duty the provisions of Section HA got attracted," 5.2 The learned Counsel mentioned that the bona fide belief was also supported by the following decision which had interpreted the similarly worded Notifications as understood by the Appellants. Gurukripa Resins Pvt. Ltd. v. CCE, Nagpur, 2004 (61) RLT 1042 (T). Mentha & Allied Products Ltd. v. CCE, Meerut, 2004 (67) ELT 494 (SC) wherein it has been held by the Supreme Court that when law is not clear on the matter and authorities also had to issue clarifications, "invoking of Section 11 A is not called for".

5.3 The learned Advocate contended that the amendment to the Notification also supports the view of the Appellants and, therefore, the extended period of limitation would not apply in the present case.

He contended that when the decisions of the Tribunal are holding the field during the relevant period, the change in law by subsequent decision cannot amount to suppression. He relied upon the following decisions: Raunaq International Ltd. v. CCE, Surat Extended period of limitation was held not to be applicable and the issue about excisability of the structure was in dispute. Afcons Pauling Joint Venture v. CCE, Jalandhar, 2004 (166) ELT 207 (T) wherein the Tribunal has held that larger period of limitation is not invocable as bona fide doubt existed as to whether crushing to bigger stones or boulders into smaller pieces amounted to manufacture in view of divergent views of various High Courts. K.K. Nag Ltd. v.

CCE, Chennai, 2003 (89) ECC 442 (T) : 2003 (58) RLT 159 (Cestat) 5.4 He also mentioned that no penalty is imposable since various processes which rendered the goods dutiable, were manufactured without the use of power.

6. Countering the arguments, Shri Vikas Kumar, learned Senior Departmental Representative submitted that the Appellants do the processes of bleaching, dyeing, printing on fabrics; that printed cotton fabrics were being dried up with the help of electric ceiling fans which were found to be used in winter when the Central Excise Officers visited the Appellants' premises on 11.1.1999; that they were using electrically operated stirrers for mixing of chemicals and they were also using electric motor to lift the water to supply it to different end use destinations in the factory as well as to lift the caustic soda from a tank to put into mercerizing padding machine for mercerizing the fabrics; that thus the cotton fabrics was processed by them with the aid of power making them ineligible for the benefit of exemption Notification. He emphasised that the fans were found operating during the winter months of January 1999 when no workers were present and the fabrics were being dried under the fan that the Appellants have not disputed the use of power operated stirrer for mixing the chemicals and electric motor for lifting the water and caustic soda; that the Supreme Court in the case of CCE, Jaipur v. Rajasthan State Chemical Works, 1991 (31) ECC 459 (SC) : 1991 (55) ELT 444 (SC) has held that the manufacture is the end result of one or more process and "any activity or operation which is the essential requirement and is related to the further operations for the end result would also be a process in or in relation to manufacture to attract the relevant clause in the exemption notification/"; that moreover the learned Advocate for the Appellants has now conceded that the power was used by the Appellants while processing the fabrics.

7.1 The learned Senior Departmental Representative submitted that Amendment in Notification No. 5/99-CE by Notification No. 35/99-CE is not retrospective in effect as it substituted the Explanation that the Explanation in Notification No. 5/99-CE reads as under: "Explanation: For the purpose of this exemption cotton fabrics subjected to the process of colour fixation by passing steam over such fabrics shall be deemed to have been processed without the aid of steam." 7.2 He mentioned that the Explanation was substituted by another Explanation by

Notification No. 35/99-CE dated 4.8.99 as under: "Explanation : For the purpose of this exemption, cotton fabrics subjected to any one or more of the following processes with the aid of power, shall be deemed to have been processed without the aid of power or steam namely: (a) lifting to overhead tanks or emptying in underground tanker or handling of chemicals such as acids, chlorine, caustic soda, (b) mixing and stirring of dyes, kerosene, caustic soda, gum paste and emulsion etc. by stirrer, or 7.3 He contended that by substituting the Explanation subsequently, the Government has widened the scope of exemption by a deeming provision; that the Supreme Court in the case of J.K. Spinning & Weaving Mills Ltd. v. Union of India, 1987 (14) ECC 239 (SC) : 1987 (32) ELT 234 (SC) has observed that "It is well settled that a deeming provision is an admission of the non-existence of fact deemed The Legislature is quite competent to enact a deeming provision for the purpose of assuming the existence of a fact which does not really exist." He submitted that originally in Explanation a deeming provision was provided to the effect that the cotton fabrics shall be deemed to have been processed without the aid of steam though the fabrics was subjected to the process of colour fixation which was carried out by passing steam over such fabrics; that thus deeming provision was limited to "passing steam over fabrics" and by subsequent amendment deeming provision was extended which cannot be given retrospective effect; that there was no stipulation in the Notification No. 35/99-CE, that it would be effective from a date prior to issue of the Notification.

8.1 The learned Senior Departmental Representative also contended that the extended period of limitation is invocable for demanding duty as they had not disclosed the facts to the Department and suppressed the fact of vising power from the Department; that there was no basis for the Appellants to hold the bona fide belief that the fabrics was processed by them without the use of power when actually they were using the power; that the bona fide belief was to be based on some tangible basis which is completely absent in the present matter; that subsequent events that too much after the relevant period involved in the present matter cannot be taken as the basis for holding a bona fide belief. He emphasised that during the relevant period 1.6.94 to 31.5.1999, the judgment of the Supreme Court in the case of Rajasthan State Chemical Works was available wherein the Supreme Court has held that use of power in pumping of the brine into the salt

pans or the lifting of coke and lime stone amounts to manufacturing of goods with the aid of power. He mentioned that in view of this judgment there was no basis for the Appellants to hold the belief that the power used by them for stirring the chemicals, for lifting the water and for drying the fabrics does not amount to use of power in the processing of cotton fabrics; that they had never sought any clarification from the Department inspite of the position regarding use of power having been clarified by the Apex Court of the land.

8.2 He also distinguished the decisions relied upon by the learned Advocate. He mentioned that Kanti Prasad Tibrewala decision 1999 (107) ELT 190 is not applicable as it relied upon the decision in the case of Chamundi Vastra Alankaran v. CCE, 1987 (32) ELT 131 (T) which was passed much more before the judgment of the Supreme Court in the case of Rajasthan State Chemical Works, which was also not cited before the Bench of the Tribunal which passed the Order in Kanti Prasad Tibrewala; that similarly the decision in Pram & Company was passed much before the judgment of the Apex Court in Rajasthan State Chemical Works case; that in Gurukirpa Resins case, the Tribunal allowed the Appeal on the ground that "The clarification of TRU on the same issue now being agitated is binding on the department and even on the Commissioner (Appeals) if such a circular is beneficial to the assessee". The learned Senior Departmental Representative mentioned that in Jai Prakash Industries case, the Appellants therein were engaged in construction activities and the excisability aspect is still not settled; that the facts are entirely different and the said decision cannot be made applicable to the facts of the present matter; that in Mentha & Allied Products Ltd., the Appellants therein had filed the classification list and returns in appropriate forms which is not the case in the present case; that further even the Supreme Court was not clear "as to whether the law is absolutely clear on the matter or not and the authorities also had to issue clarifications from time to time"; that in these circumstances the Supreme Court thought that invoking of Section 11A is not called for; that in the case of Raunaq International, the excisability of column, trusses, purline etc. was involved which was in dispute all the time and is still not settled; that in K.K. Nag case, the extended period was held to be not invocable as the assessee had filed classification list and price list alongwith sale contract showing free supply of moulds by the Customers; that in Tirupati Udyog

there were earlier decisions of Commissioner (Appeals), besides decision of Bombay High Court and Tribunal, holding that aluminium circles captively consumed are exempted from payment of duty; that in Afcons Pauling Joint Venture also there was basis for having a bona fide doubt on account of divergent views of various High Courts.

9.1 We have considered the submissions of both the sides. The learned Advocate has conceded the point that the cotton fabrics was processed with the aid of power or steam in view of the decision of the Larger Bench of the Tribunal in the case of Mathania Fabrics v. CCE, Jaipur, 2002 (142) ELT 49 (T). He has, however, contended that the amendment made in Notification No. 5/99-CE dated 28.2.99 is clarificatory in nature and accordingly is having retrospective effect from the date of Original Notification No. 5/99-CE i.e. 28.2.1999. We do not find any force in this contention of the learned Advocate. Notification No.5/99-CE (Sl. No. 102) exempts cottonfabrics processed without the aid of power or steam. Explanation to the said serial No. provides a deeming provision that even if the process of colour fixation is done by passing steam over the fabrics, the same shall be deemed to have been processed without the aid of steam. The Explanation has thus provided a deeming provision only in respect of one process [i.e.

process of colour fixation] even if carried out by using steam would not take away the fabrics from the category of being processed without the aid of power or steam. Any subsequent additions of the processes to the "deeming provision" could not amount to any clarification. As held by the Supreme Court in J.K. Spg. & Wvg. Mills case, supra, a deeming provision is an addition of the non-existence of the fact deemed. The subsequent amendment providing that cotton fabrics shall be deemed to have been processed without the aid of power or steam even if power is used for lifting of chemicals and mixing and stirring of dyes, kerosene, caustic soda etc. by stirrer, extends, the scope of deeming situation and does not clarify anything. The amendment gave a benefit which was clearly not available earlier. In view of this, it cannot be said that the amendment made subsequently was clarificatory in nature.

The amendment made in Notification No. 5/99(Sl. No. 102) cannot, therefore, be made applicable retrospectively.

9.2 The decision in the case of Gujarat Co-op Oil Seeds Growers Fed.

Ltd. is not applicable as the Supreme Court, after applying "our mind to the relevant Notification 12 of 1989" has "no hesitation to come to the conclusion that Entry 2 of that Notification relates to all goods other than Entry 1 and the subsequent Notification issued on 20th March, 1990 by the Revenue is merely a clarificatory one." Similarly the amending Notification in the case of Shaw Wallace & Co. Ltd. was held to be clarificatory in nature by the Tribunal to remove ambiguity in the earlier Notification. In the present matter before us, the subsequent amendment has not been made to remove any ambiguity in Notification No. 5/99 but to extend the scope of the deeming provision.

In the case of Control Machine Tools Institute, the Tribunal has held the amendment in Notification clarificatory as the Collectors' conference itself had referred the matter to DOE to seek clarification "as to whether the term "spare parts" could be considered as "computer software". Similarly in Rochi Ram case the Tribunal has treated the subsequent amendment as clarificatory as it was made in furtherance of the directions issued by the Central Board of Excise & Customs to the effect that consignment should not be detained/seized as the Board was considered the need for intention or otherwise of the Notification.

9.3 We also observe that there is nothing in Notification No. 35/99-CE, dated 4.8.99 to suggest that the amendment carried out has to be given retrospective effect. It is settled law that any subsequent change in the legal provisions cannot be made applicable for the period prior to such change unless the law confers such benefit with retrospective effect. Moreover, the Adjudicating Authority has held that power has been used by them in running of fans for drying the fabrics which is not covered by the Explanation to Serial No. 102 of the Notification No. 5/99 even after amendment. The Larger Bench of the Tribunal, after referring to the definition of "manufacture" in Section 2 (f) of the Central Excise and decisions of the Supreme Court in J.K. Cotton Mills v. S.T. Officers, 1997 (91) ELT 34 (SC) and decision in Rajasthan State Chemical Works, supra, has held that the lifting of

water from the underground tanks and pouring into Kits and bleaching vessels would amount to use of power in the process of cotton fabrics as it is an essential ingredient for the process of kiering and bleaching.

10.1 Now coming to the question of limitation, we find that the Commissioner has given his specific findings that in spite of clear-cut ruling of the Supreme Court in the case of Rajasthan State Chemical Works, the use of power in the operation of stirrer and electric motor for lifting water and caustic soda would amount to manufacture with the aid of power, they claimed that power used for these activities would not tantamount to manufacture with the aid of power, The learned Senior Departmental Representative has questioned, and in our view rightly, the bona fide belief that use of power by them in various processes would not mean processing cotton fabrics with the aid of power. In the case of Rajasthan State Chemical Works, they were manufacturer of crude sodium sulphate. In the process of manufacture of common salt from brine, in the salt pans in which the process of evaporation takes place some quantities of sodium sulphate present in the brine also crystallise and settle at the bottom as crust. Sodium Sulphate is thus obtained as a bye-product. For the purpose of the manufacture, brine is pumped into salt pans using diesel pumps. Another Respondent M/s Sunderson (Minerals) Ltd. manufacture lime from coke and lime stone.

The raw materials are lifted to the platform at the head of the kiln by aid of power. The Supreme Court has held as under; "Naturally, manufacture is the end-result of one or more processes through which the original commodities are made to pass.....There may be several stages of processing, a different kind of processing at each stage Manufacture thus involves series of processes....

Each step towards such production would be a process in relation to the manufacture. Where any particular process is so integrally connected with the ultimate production of goods that but for that process manufacture or processing of goods would be impossible or commercially inexpedient, that process is one in relation to the manufacture".

"The natural meaning of the word 'process' is a mode of treatment of certain materials in order to produce a good result, a species of activity performed on the

subject matter in order to transform or reduce it to be certain stage ... There may be a process which consists only in handling and there may be a process which involves no handling or not merely handling but use or also use. It may be a process involving the handling of the material and it need not be a process involving the use of material. The activity may be subordinate but one in relation to further process of manufacture." 10.2 The Supreme Court thus held that "The transfer of raw material to the reacting vessel is a preliminary operation but it is part of a continuous process but for which the manufacture would be impossible.

The handling of the raw materials for the purpose of such transfer is then integrally connected with the process of manufacture. The handling for the purpose of transfer may be manual or mechanical but if power is used for such operation, it cannot be denied that an activity has been carried on with the aid of power in the manufacturing process." 11. In view of this judgment of the Apex Court, there was no basis with the Appellants to hold a bona fide belief to the contrary. All decisions prior to this judgment, such as *Fram & Company*, cannot be relied upon in support of the contention that the Appellants had a bona fide belief. During the material period the Appellants had no reason to hold the bona fide belief that they were processing cotton fabrics without the aid of power. The learned Senior Departmental Representative has distinguished the decisions relied upon by the learned Advocate. We also observe that the Larger Bench of the Tribunal also in the case of *Mathania Fabrics*, wherein also the Appellants were carrying the process of bleaching of grey cotton fabrics with the aid of power as lifting water from the underground tanks and pouring into kit and bleaching vessel was being done by using power, has held that extended period of limitation is invocable for demanding the duty from the Appellants. The Supreme Court has held in *BPL India Ltd. v. CCE, Cochin*, 2002 (81) ECC 449 (SC): 2002 (143) ELT 3 (SC) that the Appellant's intention to evade duty is proved as they had manufactured the products and removed the same without any intimation to the Department. In the present case also the Appellants have not intimated the fact of manufacture and clearance of goods processed with the aid of power. Accordingly we hold that the extended time limit is invocable for demanding the duty in the present matter. The demand is thus not time barred.

12. We agree with the Appellants that the benefit of deductions towards duty in terms of Section 4(4)(d)(ii) would be available to them in terms of the decision of Larger Bench of the Tribunal in the case of Sri Chakra Tyres Ltd. v. CCE, 32 RLT 1 (Cegat-LB) which has been affirmed by the Supreme Court. The Appellants will also be eligible for Modvat Credit of the duty paid on the inputs subject to the production of duty paying documents, within one month of the receipt of this Order, to the satisfaction of the jurisdiction. Adjudicating Authority which would also recompute the duty liability and intimate the same to the Appellants. We also hold that penalty is imposable on the Appellants. However, in the facts and circumstances of the case, we reduce the penalty to Rs. 25 lakhs.

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