

**Cewat (i) Processors Vs. Commissioner of Central Excise**

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

**Decided On :** Feb-18-2005

**Judge :** S T S.S., T Anjaneyulu

**Appellant :** Cewat (i) Processors

**Respondent :** Commissioner of Central Excise

**Judgement :**

1.1 Appellants are an assessee engaged in processing and clearing on duty payment, MMF on one Stentor Machine with five chambers. They were discharging levy liability determined on & as per the provision of Rule 962Q read with Hot Air Independent Textile Processors Annual Capacity Determination Rules 1998 (hereinafter referred to as ACP Rules for short). On the basis of specific information of the assessee having installed another additional Stentor Machine with five chambers & was clearing the goods without declaring the same from the registered premises, the same were searched on 12/3/99.

1.2 a) The show cause notice issued after the search & the enquired made, alleged the assessee have constructed a huge premises which had not been declared to the department & in this view of constructed premises, it was seen that a Stentor Machine with 5 chambers manufactured by M/s SM Energy Textile & Electronics Ltd Baroda was installed. The same was found to be simmering nor, on touch on date of such, A sizing tank containing chemical solution Polysol & soap required for finishing was also noticed as seen from the panchanama. Sh Joseph Pereira the proprietor, of the appellant assessee firm, explained the

solutions in the Tank to be found due to a trial run effected.

b) Nearly 60 trolleys full of fabrics were noticed on the shop floor of the newly constructed premises & they were explained by Sh Pereira as use of the premises for spotting purpose on fabrics.

c) On a round, through the exit of the newly constructed premises, it was noticed that they do not have an independent gate entry separate from the gate entry of the old declared premises.

d) On 13/3/99, the officers again visited the premises and effected seizure of MMF which were subsequently released provisionally on a Bond.

e) Statements were recorded & enquiries made & SCN dtd 7/10/99, demanding duly issued, demanding - i) Duty at the rate of Rs 1.5 lacs per chamber on total of 5.37 number of chambers (with remark in Annexure to SCN to the effect "SUBJECT TO CHANGE AFTER FINAL APPROVAL OF COMMISSIONER), on goods manufactured and cleared by willful suppression of facts and contravention of provisions of the Central Excise Rules 1944.

Demands & recovery were proposed under Rule 962Q(5)(1) read with Rule 9(2) read with a proviso to Section 11A(11) ii) Penalty demands were proposed under Rule 962Q(5)(ii) along with interest under 962Q5(i) & confiscation liability on seized goods under 962Q(6) read with Rule 209 & appropriate of Rs 10 lakhs deposited doing the enquiries.

1.3 Commissioner ordered confirmation of duty demands as proposed & imposed penalty of equivalent amount under 962Q(5)(ii) with interest recovery & ordered confiscation of the goods and enforcement of Bond to an amount of Rs 6,48,505/-.

a) Appellants are contending, the additional stentor was not fully functional and or installed. Only a Test Run was being effected on 12/3/99, when the officers visited the premises. The charge of the department is that this additional stentor was in operation from December 1998. The stentor clips were procured and supplied vide invoice dtd 11/2/99, there is no allegation and or finding as to how the stentor could effectively process the fabrics without these clips which are necessary to

hold the fabrics in place while processing. No additional clips were found in the Pancham but search party.

b) The statement of Asst. Sales Manager of the manufacturer of the stentor dtd 16/3/99 which is a contemporaneous record, speaks of erection and commissioning of an additional Stentor. Statement of this person, pursuant to summon to attend on 26/3/99 reveals that order confirmation for purpose of this stentor was dtd 17/8/98 & supply started with effect from 18/8/99 onward & payments were effected in installments on various dates, the last being on 28/1/99. This statement records. - ...We have received amount of Rs 27,62,800.00 (Twenty Seven lakhs sixty two thousand Eight Hundred only) from M/s CEWAT (I) Processors Dahisar against the supply made by us to them against our invoice no BRD/09/98-99 of Rs 27,62,942.00....

...However copy of the invoice no 420 dtd 11/2/99 issued for the last consignment of stentor clips-680 nos is available on our record along with the copy of packing slip in respect of said consignment....

This would indicate, the supply of stentor clips crucial and essential to process the fabrics on that machine as delivered on a date subsequent to 11/2/99 for the additional stentor supplied & erected at appellants premises. The said stentor without the clips cannot be said to be installed & functional before 11/2/99 in any case.

c) This Commissioning certificate dtd 23/2/99 issued as per request of the appellants, after checking with his head office & verification & looking at the report of Erection Engineer Shri K N Sharma. This NK Sharma, who actually considered the erection, would be a vital witness, as to when the erection installation was complete was not questioned by the investigators, if questioned he did not disclose a situation favourable to them can be imputed.

However his version/ statement, crucial to establish the fact is not a relied upon document, as per list in Annexure 'C' to the show cause notice. Therefore, installation commissioning as on 23/2/99 cannot be challenged in this case. Demands based on the stentor being in operation before this date of installation /

commissioning cannot be upheld. The absence of an other completion and installation date not having been established by the investigators would be fatal to the demands determined.

d) On the date of the search, there were no fabrics found to be on the stentor or in the chemical processing tanks. The panchnama dtd 12/3/99 shows the concluding time 19.30 hrs like the panchnama dtd 13/3/99 which shows conclusion time on 17.45 pm. The time the panchnama start, is not available or recorded. The panchnama dtd 12/3/99 records the heating due to steam connection being common to old & new stentor. Surely, as it appears from the panchnama, no processing of MMF was underway on 12/3/99, when the officers visited by surprise. If the information was, that said stentor was functioning since December 1998, there was no reason for no fabrics being found on the Stentor & under process. The defence of Trial runs of machine, get strengthened, when it is observed from that letter dtd 23/3/99 of M/s CEWAT to the Commissioner, indicates & alleges that Sh. S.Y. Takulla the Superintendent, who visited on 12/3/99, with an information, had earlier visited the said premises on December 98 and that time the Asst. Commissioner Preventive had also reached in the evening hours and had seen the installation work of the new new stentor and also the bringing in the stock of 40 trolleys therein. This letter also indicates the proprietor having gone to the office of the Asst. Commissioner of the Division III to file an intimation & discuss the duty determination for the new stentor on 11/3/99 & intimate about Commercial production with effect from 15/3/99. It appears from the sequence of events, as mentioned in this letter ., which has been ignored by the Dy.

Commissioner, that the charge of an information /intelligence of the stentor working were a shame. There is no material to conclude that the said stentor was used for production use other than of a trial run is not accepted , as no evidence of its working for production, is established, since the contents of this letter are not denied while AC Preventive denied & contests retractions of letter dtd 19/3/99 & other letters of retraction d) Commissioner in the impugned order is relying on the steep rise in processed fabrics quantity after the compounded levy was introduced and is rejecting the explanation given by the assessee of transfer of Gray

Processing Operations from Surat to Bombay. Merely because sealing of the old stentor was sought on 15/3/99, can not lead to disbelieve the technical modifications, done to old stentor.

which was a fact that could be verified; non verification of a relevant fact and reliance on a predetermined view, of excess production in Jan. Feb 99 to be by use of a stentor, misses the accepted position recognized that the Commission Certificate dtd 23/2/99 was sought on 21/2/99 by the proprietor is not disbelieved by the adjudicator. Why should the Commissioner Certificate be sought and granted on 23/2/99, is apparent only for the mean that it was in the normal cause of business, thereafter efforts on part of the proprietor to start trial runs can be accepted. That date & the statement of Sh. Naik relied upon that supply of "pins" clips etc was a company policy to ensure payment and the date of payment & supply of such clips/pins, corroborating is vital to disbelieve the Commissioner finding. The excess produced on is explained as a natural corollary of a Compounded Levy Scheme which does not relate actual production with duty demands is a valid submission requiring acceptance - f) We find no reason to recover or order the duty on the new stentor with effect from 16/12/98 to 15/3/99 as per the number of chambers determined by the Commissioner vide his order dtd 3/11/99.

2.2 We find force in the argument that the Annual Capacity determination specify Rules (ACP Rules) that the capacity will be determined on the basis of the number of hot air stentors installed in the factory when the installation is not effected or and established upto the date of Commission Certificate i.e. 23/2/99, no Act Rules could be applied upto the date of receipt of intimation as prescribed vide Rules 3(2) of ACP Rules. A Declaration had been made & applied as per Commissioner order dtd. 3/11/99 as applied & no application is admitted made for the stentor impugned in this case. ACP determined cannot be applied for period retrospective to the date of an application made.

2.3 The plea of no seizure & confiscation & no penalty under Rule 962Q can be upheld as the goods are not proved to be not made by the stentor which was existing & for which the declaration has been made, as the new stentor has not

been proved to have been installed upto 23/2/99 and or working or in actual production after that date upto 13/3/99.

2.4 The demands as worked out cannot be upheld. Since liability to confiscate the goods under Rule 962Q(3) cannot be upheld, the goods not proved/established to be processed on the new stentor; the earlier stentor was declared & there can be no correlation of actual production with the Annual capacity determined, the redemption fine is to be set aside. The duty demands as arrived and penalty under Rule 962Q(6) and Rule 209 of the Central Excise Rules, is therefore not upheld.3.1 In view of the findings arrived, the order is to be set aside & appeal is allowed.

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