

R.K. Processors and ors. Vs. Commissioner of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Jun-03-2005

Reported in : (2005)(191)ELT1111Tri(Mum.)bai

Judge : S T S.S., T Anjaneyulu

Appellant : R.K. Processors and ors.

Respondent : Commissioner of Central Excise

Judgement :

1.1 Appellants, M/s RK processors (hereinafter referred to as RK) are processors of man made fabrics and are assessed under the Central Excise Act, 1944. The other appellants are Merchant-manufacturers who supplied grey fabrics to RK for processing and individual appellants are Directors and other including Excise clerk of the aforesaid appellant RK. 1.2 Gray fabrics for processing is received on job work basis from merchant/traders after compliance and as laid down in Notification No.27/92 CE(NT) dated 9.10.92. Being a job work, the computation of assessable value of processed fabrics was based on the information given by the traders/merchant manufacturers by furnishing the requisite price declarations along with cost sheet of gray fabrics. R K along with the merchant manufacturer were filing joint declaration about assessable value in terms of Notification No. 27/92-CE(NT) and Circular No. 39/93 dated 10.12.93 issued by the Department. R K also was availing the deemed Modvat credit in terms of Notification No.29/96-CE(NT).

1.3 It appears from the notice and the order, intelligence was received by the Central Excise officers that Appellants were including evasion of duty by not declaring the correct weight of gray fabrics per 100 L.

Mtrs Intelligence further revealed that Appellants in connivance with major merchant manufacturers were declaring lower weight per 100 L.

Mtr. Than the actual weight thereby undervaluing the processed man made fabrics and evading duty.

1.4 Factory of R K was searched on 10.12.1998 which resulted in recovery of a "recipe Book" and corresponding price declarations. On comparison of the weights of fabrics shown in the "Recipe Book" was higher than that mentioned in the price declarations to the extent of 20 to 30% 1.5 Consequent to the investigation conducted and statements of the Excise Clerk, Senior Supervisor, Partner and Technical In-charge of R K were recorded. During these statements, the officers showed the deponents the weight of gray fabrics shown in certain price declaration and the corresponding pages in the 'Recipe book' in that they are alleged to agree that the weight of the fabrics declared by trader in the price declaration was less than the weight recorded in the 'recipe book'. They also accepted that the figure mentioned on the right hand top corner of this 'recipe book' represents actual average weight of gray fabrics. In these statements. They also clarified that the value of Gray fabric depend on weight and quality of yarn. The Technical In-charge, in his statement dated 6.5.1999 stated that composition and weight of Gray fabrics were taken into consideration for the process of dyeing, bleaching and finishing and that for weight he considers the weight mentioned in the 'job cards.' Certain quantities of man made fabrics were detained in the factory of the appellants under detention memo/Panchnama dated 11.12.1998 which was later vacated by the Department vide letter dated 18.3.1999.

1.6 searches were also carried out in the premises of certain merchant manufacturers, who had supplied the gray fabrics to the Appellants for processing. Processed fabrics were detained/seized at the premises of merchant manufacturers since certain lumps on weighment were found weighing more than the declared weight in the price declaration in some case. Statement of these

merchant manufacturers were also recorded.

1.7 Upon completion of investigation, a Show Cause Notice dated 15.6.1999 demanding differential Central Excise duty of Rs. 21,687/- as well as demand of Rs. 12,974/- for clandestine removal of processed fabrics in the guise of gray return and proposing to deny the deemed credit availed amounting to Rs. 52,626/-, in respect of the processed fabrics seized in the premises of merchant manufacturers. Another Notice was also issued demanding differential Central Excise duty in the tune of Rs 36,44,685/- and proposing to deny, the deemed credit in the tune of Rs. 43,25,626/-. Demand of Rs 4,12,380/- was also raised alleging clandestine removal of processed fabrics in the guise of 'gray returned.'

1.8 Both the notices were adjudicated by the Commissioner of Central Excise, Mumbai II vide a common Order No. 12/2 dated 22.3.2000. Before the Adjudicator, the main plea of the notice was that the value of the cloth depend on quality of the yarn used in cloth and that when the purchase invoice of Gray fabrics was available on record, the weight of Gray fabrics per sq mtr is irrelevant for computation of value. It was also contended that the weight shown in the 'Recipe book' was only an approximate weight. As regards the duty demand on processed fabrics which were alleged to have been cleared in the guise of Gray fabrics, it was argued that no evidence whatsoever was brought on record by the Department and that neither any statements of the merchant manufactures nor the assessee was recorded or corroborating this aspect.

(a) Confirmation of Central Excise duty of Rs. 21,688.86 under Section 11A (1) of the Act from M/s R K Processors.

(b) Confirmation of duty of Rs 12,974.33 under Section 11A(1) of the Act from M/s R K Processors.

(c) Confirmed demand of deemed modvat credit of Rs. 52,626.40 availed on seized manmade fabrics on M/s R K Processors under Rule 571(1) read with Section 11A(1) of the Act.

(d) Confirmed duty demand of Rs. 36,4,685.68 as duty short paid, under Section 11A(1) of the Act.

- (e) Confirmation of duty demand of Rs. 4,12,380.80 on M/s R K Processors under Section 11A(1) of the Act.
- (f) Confirmation of deemed modvat credit availed of Rs. 43,25,926.00 on M/s R K Processors under the provisions of Rule 571(1) read with Section 11A of the Act.
- (g) Imposition of penalty of equal to duty under Section 11AC i.e. Rs. 40,91,729.67 under Section 11A(1) of the Act
- (h) Imposition of penalty of equal amount of deemed modvat credit under Rule 571(4) read with section 11AC of the Act i.e. Rs. 43,78,552.40 on M/s R K Processors.
- (i) recovery of interest at an appropriate rate, on the amount of duty recoverable from R K Processors i.e. Rs. 40,91,729.67 under Section 11AB of the Act.
- (j) recovery of interest at an appropriate rate on the amount of deemed modvat credit rejected from M/s. R K Processors i.e. Rs. 43,78,552.40 under Rule 571(5) read with Section 11AB of the Act.
- (k) Confiscation of plant and machinery etc under Rule 173Q(2) of the Central Excise Rules, 1944 to be redeemed them on payment of Redemption fine of Ra 3.00 lakhs
- (l) appropriation of Rs. 12,27,000/- paid by M/s R K Processors, as part payment towards total duty demand and adjustment against duty recoverable from them.
- (m) And imposed a penalty, of Rs 1.00 lakh on Abdul Kader Khatri, Premchandra Kriplani, Jayantilal U. Jain, Satyawar Kripalani and Surendra Kumar Arya.
- (a) the issues to be decided in these appeals are whether there is an under valuation of processed fabrics by resorting to the alleged modus operandi of misdeclared weight and whether there is evidence of clandestine removal of processed fabrics in the guise of grey fabrics. It is also to be decided whether the denial of deemed credit for violation of the condition in para 7 of the Notification No. 29/96 dated 3.9.96 could be upheld. (b) The Notices allege that the actual weight of fabrics is indicated in the 'Recipe book,' however the weight of the corresponding lot declared in the price declaration is lower than the same

mentioned in 'Recipe book.' Appellants contention is that the weight shown in the 'Recipe book' is not consequence as an actual weight but it is the actual estimate average weight of different lots and therefore the weights as shown in the 'Recipe book' should not be given any undue weightage or importance and be made the principal ground to allege evasion of duty by under valuation of processed fabrics. So far as clandestine removal of processed fabrics in the guise of Gray fabrics, their contention is that there is no iota of evidence to suggest any such clandestine removal.

(c) Weight of yarn per sq mtr of fabrics is relevant for computation of assessable value of processed fabrics, not wherever and whenever such Grey fabrics are got manufactured on job work by the merchant manufacturers, it is only when actual purchase price is not known, this method could be resorted. However, when such fabric is purchased straightaway by the merchant manufactures and the invoices evidencing the price thereof is available on record, the weight of Gray fabrics would be and is entirely irrelevant. In such cases assessable value of processed fabrics is to be computed by taking the price of Gray fabrics. Annexure "I-A" (B) of the Circular No. 39/93, issued by the Department referred to supra also stipulates accordingly and provided for adoption of price paid for gray fabrics by the merchant manufacturers. Resorting to valuation solely by determination of weight based formula would be a risk to revenue if actual price of procurement is higher based on quality of fabrics, weaver and yarn. Weight may be only on index and not the ultimate touch stone for valuation.

(d) appellants had urged before the Adjudicator that when the purchase price of gray fabric is available on record the weight of such fabric was entirely irrelevant. In para 15 of the order, while recording the findings, the Commissioner has also observed as under: "15. Their forceful submission is that the Department was required to rely upon the actual purchase invoices and the consideration of weight was secondary element when the invoice value of the grey fabric was readily available".

The Commissioner, after arriving at this finding, cannot revert back to weight basis without finding fault with the purchase invoices.

These invoices cannot be discarded and appears to have overlooked this forceful submission of the notice as no findings thereafter why he wants to stray from the same thereon appears to have been recorded in the impugned order. The confirmation of the undervaluation therefore appears to be a biased decision and not logical outcome of Commissioner's mind.

(e) There is sufficient force in the Appellant's contention that the instances where the supplier who had supplied the gray fabrics which were purchased from the market under an invoice and therefore price thereof is available, the weight of yarn per sq. mtr of fabric is entirely irrelevant for computing the value of the processed fabrics. Circular issued by the Department also support this view.

Consequently, differential duty demands on valuation is not sustainable.

(f) Ld counsel for the Appellants drew our attention to the copies of the 'Recipe book' in the Appeal compilation. Upon perusal of the few pages of the 'Recipe book', it is seen that more than one lot number (in few cases 6 or 7) are mentioned in the same page. But only one weight is shown at the right side top corner of that page.

In the statement recorded during the investigation, it is mentioned that the figure mentioned on the right hand top corner of the pages in 'Recipe boo' represents 'actual average weight' of gray fabrics.

As against this, in the statement of Shri Deepak Dharne, Technical In-charge of the Appellants recorded on 6.5.1999, he has stated that in the processing operations composition of the Gray fabrics and weight of Gray fabrics are taken into consideration and that for weight, they consider weight mentioned in the 'job cards' which were prepared by the Gray Department. Since the technical man relies on the weight shown in the job cards, and others whose statements were recorded, deposed the weight shown in the 'Recipe book' as an actual average weight arriving at a conclusion based on such conflicting statement to conclude undervaluation by pointing out a difference in such weights shown in the price declaration and an average weight found mentioned in the 'recipe book' cannot be ipso facto arrived at when it is on record that nowhere the weights are actually

arrived at and whatever entry is made is only on estimation and belief and not on fact. Reliance on difference in weight arrived at and entered cannot be but an error to question the valuation as proposed.

(g) Further, in the detention memo dated 11.12.98, the weight of few bolts (takes) as described as fabric of three different lots are mentioned. Even within the same lot, the weight are found varying.

If that be and is so, then there cannot be any uniform weight ascribed for different lots and in any case, the serious allegation of under valuation cannot be founded on weights shown in the 'recipe book' register. Though the Technical supervisor of the Appellants informed the investigation that he relied on the weight shown in the job card for processing the fabrics, the allegation is not framed on the basis of such weight shown in the job cards. No job card weight and recipe book weights tally is shown. Nor any reference is found to be made to any weight shown in the job cards which could be the actual weight.

(h) A huge stock of fabrics both processed/unprocessed was found in the factory or RK during investigations, but no discrepancy could be noticed in respect of these fabrics as there is no mention about any discrepancy noticed in respect of such fabrics in the notice. If these fabrics are not found to be misdeclared weight or as recipe book weight then the charge in the notice cannot be sustained.

Appellants repeatedly made this plea before the Commissioner. The various bolts (takes) of fabrics of lot numbers 8305, 8306, 8326 detained for investigation on 11.12.98 were unconditionally released and detention vacated on 18.3.99. This could lead to only one conclusion that the investigation could not find any discrepancy in these lots of fabrics which were detained for further investigation.

When on actual goods, no errors of weight could be established, or not found, the reliance on records of doubtful nature, as in this case, cannot be made to arrive at charge of misdeclaration.

(i) No adverse inference could be drawn on the count that during the investigation that weight per sq. mtrs of the processed fabrics found in the merchant

manufactures premises was more than the weight shown in the respective price declaration. It is a matter of common knowledge that after processing there is bound to be weight difference, as the weight of various dyes, chemicals and other materials get fixed to the fabrics and contribute to an increment in weight of the fabrics. The weight of Gray and processed fabrics cannot be compared and it is, surprisingly to note, how this aspect could be found and discovered only in the shop premises of trader and not in the stocks available with the manufacturer i.e. R K, when traders could have received stocks from different processors and different lots. The evidence is only a conjecture & cannot be relied.

(j) In the Annexures CI, CII, CIII to Show Cause Notice dated 15.6.99, it is observed that in certain cases, the declared weight of Gray fabric was more than the actual weight of the fabrics and consequently in all those cases, there was no differential duty demands made. This itself would give credence to the assessee's argument that the weight shown in the 'recipe book' is not the reliable or actual weight. Therefore it cannot be reliance for basing serious allegation on account of under valuation and consequent evasion of duty.

(k) Now coming to the second aspect, no evidence is mentioned in the notice, as to how the allegation of clandestine removal of processed fabrics in the guise of gray fabrics returned is arrived/based.

Commissioner records a finding that the Department's allegation is based on lot register, recipe book and job cards. Curiously there is neither any discussion on the evidence flowing from the job card nor there is any reference to job cards in the notice; job cards are not in the list of documents relied upon in the Notice. Commissioner also records that Shri Satayavan Kripalani in his statement dated 17.12.98, confirmed this allegation. Appellants have contented these findings of the Commissioner, stating that only one statement of Shri Satayavan Kripalani that of dated 21.12.98 was recorded and produced the said statement itself to support their claim that there is no reference whatsoever in his statement about clandestine removal of processed fabrics in the guise of Gray fabrics returned.

Perusal of this statement dated 21.12.98, confirms the Appellant's contention in this regard. Reliance on material not existing and not relied only exhibit and

confirm our view that the order is result of a biased mind if not also coupled with non application of mind. Such orders cannot be sustained.

(l) On this count, the adjudication, in para 21 of the order has recorded as under: "21. In this respect the assessee contended that the merchants were getting goods manufactured from other process houses also and co-incidentally the same lot number might be allotted by those process houses and, therefore, it is co-incidence only that the material of the same lot number was found with the merchants, which were appearing in the recipe book and job cards of the assessee.

This is a mere statement by the assessee in their defence, because they have not brought out any evidence to this effect or they have not produced any invoice showing that the said lot number fabrics was received by them from any other process house. In absence of any concrete evidence from assessee, there is no alternative for me to believe the evidence produced by the Department." Commissioner's logic appears to be that the Appellants ought to have proved their absolute innocence by producing the invoices of some other manufactures showing the lot numbers of the processed fabrics found in the premises of their merchant manufactures. The assessee under Central excise law has no power to recover documents and comply with the above view. In the investigation the commissioner could have done that. It was for the Department to prove the guilt of the Appellants beyond all reasonable doubts by marshaling sufficient evidence to show that all thee fabrics found in the merchant manufactures premise were processed and cleared from the appellant's factory. The allegation of clandestine removal arrived on insufficient material and presumptions therefore fails and consequently demand on this account is liable to be set aside.

(m) The deemed credit is denied as a consequence of Commissioner's findings on under valuation and clandestine removal. Deemed credit is denied for the reason that there is a violation of Condition Clause (7) of Notification 29/96 CE(NT) which stipulates that the said notification providing for deemed credit shall not apply in cases where there is evasion of duty on final products. Once findings on under valuation in this case and evasion of duty on account of clandestine removal are

not upheld, the denial of deemed credit and demands on account of such denial of deemed credit cannot be upheld. (n) Once no duty demands in this case are being upheld and the deemed credit eligibility is upheld and denial and denial of such credit is not upheld, we find no reason to uphold any penalty on any appellants herein under any of the provisions of the Central Excise law. Such penalties and other consequences are required to be set aside.

3.1 In view of the findings, the order is set aside and appeals allowed.

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