Together Textile Mills India P. Vs. Commissioner of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Tamil Nadu

Decided On : Aug-31-2005

Judge : P Chacko, J T T.K.

Appellant : Together Textile Mills India P.

Respondent : Commissioner of Central Excise

Judgement :
1. This is appeal has been filed against Order-n-Original No. 28/2004 dated 29.10.2004 passed by the Commissioner of Central Excise, Coimbatore.

The appellants are engaged in the manufacture of processed fabrics, shrink proof 100% cotton fabrics and Polyester cotton mixed fabrics falling under Heading No. 5207.29 of the Central Excise Tariff Act, 1985. The appellants' unit was visited on 10.5.1999 by the departmental officers, it was noticed that the appellants' unit had manufactured and cleared the excisable goods without payment of duty for the period from 1997 to 2000. The unit was also not registered with the Central Excise department for manufacture of dutiable goods, it was also noticed that the appellants manufactured fabrics having residual shrinkage of less than 1.5%. Statements of the following persons were recorded.

The statement of the above persons revealed that fabrics with residual shrinkage of less than 1.5% were manufactured by the appellants' firm. The Officers drew eight samples of the fabrics of different sizes for testing the residual shrinkage in their in-house laboratory. The test results revealed that the residual shrinkage for

ail the finished fabrics was within 1.5%. Again samples were drawn and sent to the Chemical Examiner, Customs House Laboratory, Chennai for further test. Out of 10 finished samples of 9 fabrics had the residual shrinkage nil. The appellants maintained a note book indicating the shrinkage of the sample. The test results obtained by the departmental officers were in accordance with the test report contained in the shrinkage note book. Shri A. Farookdeen, Processing Manager had admitted that they had manufactured shrinkage proof fabrics having residual shrinkage 1.5% and below during the period 1977-2000. They also admitted that all the fabrics with certain exceptions were processed through jigger machines, stenter machine and sanforizing machine. Sanforizing machine was power operated and also capable of operating with the aid of steam. Shri A. Farookdeen admitted that apart from shrink proofing they also carried out certain other processing like stentering, damping and calendering. Stentering was done with the aid of stenter machine whereas clamping, calendering and shrinkage control were carried out on sanforizing machine. The jigger machine installed in the factory, according to Shri Farookdeen, would carry out bleaching, dyeing, etc. The department felt that prima facie the appellants are not entitled for the benefit of Notification No. 8/96-CE dated 26.3.1996 and its successor Notifications. Hence, the appellants were liable to excise duty for the fabrics processed.

They wee also liable to excise duty on the shrink proof fabrics. The appellants paid a sum of Rs. 10 lakhs on 12.9.1999 towards part payment of the duty liability. Revenue proceeded against the appellants by issue of show-cause notice invoking extended period.

The details of the show-cause notice issued are indicated in the tabular column.----------Sl.

SCN. C. No. SCN Period AmountNo. Dated involved involved Rs.----------1 V/5207/15/1 20/99 15.12.99 1.6.97-98 30741541 1998-99 &2.

V/52/15/63/99 31.12.99 4.6.90- 860381 30.6.999.

V/52/15/126/01 31.7.01 7/00-9/00 4304310---------- The show-cause notice at Sl. No. 1 had been issued for both shrink proof and other than shrink proof fabrics and the rest of the show-cause notices had been issued for shrink proof fabrics only.

The appellants challenged the test results of Custom House Laboratory, Chennai and wanted retest from the Chief Chemical Examiner, New Delhi. Retest was done as desired by the appellants.

After observing the principles of natural justice, the jurisdictional Commissioner issued the impugned order, in the impugned order, the Commissioner held that the Appellants are not entitled for the benefit of Notification No. 8/96 and suppressed facts with an intent to evade duty. The details of the impugned order are as follows:----------Sl.

SCN Duty Amount Period PenaltyNo. Dated Confirmed of duty Rs. Rs. dropped1.

15.12.99 19054897 1.6. 87 to 30741541/- 10.5.992.

31,12,99 93194 767187 4.6.99 to 50000/- 30.6.995.

4.4.2000 304725 1258512 9/99 to 1258512/- 10/998.

26.4.00 1571 4028255 4/00 to 500/- 6/20009.

31.7.01 3648 4300661 7/00 to 1500/- 9/00 In all the above cases interest under Section 11AB has also been demanded.

3. The appellants are aggrieved over the, impugned order. Hence they have come before this Tribunal for relif.

4. Shri S. Ignatius, Ld. Advocate appeared for the appellants and Smt. R. Bhagya Devi, Ld. SDR for the Revenue.

5. The entire thrust of the ld. Advocate's argument is that there was no willful suppression of facts with intent to evade payment of duty and therefore the first

show-cause notice dated 15.12.1999 invoking extended period is not maintainable. He also took pains to prove that the appellants did not carry out any processing of fabrics and this would be squarely covered by the exemption Notification No. 8/96-CE. Further, he tried to establish that the appellants did not manufacture shrink proof fabrics. He also urged that thee is no evidence to show that the fabrics have been cleared for home consumption. On the contrary, the fabrics have been supplied to their sister units at Coimbatore and other places for manufacture of readymade garments which have ultimately been exported. In these circumstances, no duty would be payable. By citing various case law, ld. Counsel urged that no penalty is imposable on the appellants. While making submissions, the learned Advocate relied on CBEC's circulars to which we would advert in our findings.

6. Ld. SDR reiterated ail the contentions in the adjudication order and prayed that the same should be upheld by this Tribunal.

7. We have gone through the records of the case and submissions made at the time of personal hearing. The following issues have to be decided.

a) Whether the appellants have willfully suppressed the fact with intent to evade payment of duty.

b) Whether the appellants are entitled to claim the benefit of exemption Notification No. 8/96-CX and its successor notification for the fabrics manufactured by them.

d) Whether the appellants are liable to pay duty Demanded by the adjudicating authority.

We shall deal with the above issues in seriatem.

i) Whether the appellants have willfully suppressed the facts with intent to evade payment of Central excise duty? The ld. Advocate invited our attention to the letters dated 14.10.96, 2.9.10.96, 4.2.97 and 18.3.97 addressed by the appellants to the Department to establish the bona fide of the appellants. in the first letter dated 14.10.1996, the appellants informed the Assistant Commissioner of Central Excise, Coimbatore III Division of their intention to set up a factory for the

manufacture of cotton processed fabrics at Samayarnpalayam with an annual capacity of 12 lakhs metres. It was further informed that the commercial production would commence in the month of January, 1997. They also informed that some machineries had already been received and they would like to avail Modvat credit on 29.10.96. The second declaration under Rule 57Q was filed in respect of certain machineries. Even they had declared that the capital goods should not be used for the production of a final product which is exempt from payment of duty.

Further, two more declarations were sent on 4.2.97 and 18.2.97.

After 18.2.97, the appellants did not communicate with the department. In otherwords they did not inform the department of the commencement of production. According to ld. Consultant, CBEC issued a circular No. 115/26/96-CX dated 6.4.1995, according to which the term "bleached woven fabrics or dyed fabrics" in the relevant subheadings will not include fabrics which have been woven from bleached or dyed yarn but have not been subjected to any processes.

The appellants actually manufactured the fabrics from bleached or dyed yarn. These fabrics themselves are not subject to any process in the appellant's unit. In the light of the above mentioned Board's Circular, the fabrics manufactured by the appellants would not qualify to be called bleached woven fabrics or dyed fabrics. In otherwords, they would not be processed fabrics. When the fabrics are not processed they are not liable to central excise duty. Ld.

Advocate submits that perhaps because of this reason the departmental officers also did not verify the installation of capital goods. Moreover it is quite possible that the department officials who visited the unit would have told the appellants that they are entitled for the exemption Notification No. 8/96-CX since they do not carry out any process in respect of the fabrics.

Therefore, the appellants were the bona fide belief that their goods were not liable for duty therefore did not take out any registration and observe further Central Excise formalities. This is the explanation given by id. Consultant for the appellants not informing the Central Excise department regarding the commencement of the manufacture of the good. For the same reason, the

appellants did not avail Modvat credit on capital goods as well as inputs. Had they been advised to pay duty they would have definitely availed of Modvat credit. Moreover, all the fabrics manufactured were cleared to their sister units for production of garments, which have ultimately been exported. There is absolutely no evidence that the fabrics manufactured by the appellants' unit had been cleared for home consumption. Even though the appellants informed the department on 14.10.1996 about the setting up their factory and filed their last declaration on 18.2.97 there is no record that the departmental officers visited the unit for any verification. Ld. Counsel has made a case that they were under the bona fide belief that no duty was payable on the fabrics manufactured by them in view of the Board's circular dated 6.4.95. The departmental officers visited the unit only on 15.10.1999 for the investigation, which culminated-in the issue of show-cause notices. No doubt it is the responsibility of the appellants to have informed the department regarding the commencement of the production. They should also have clarified in writing from the Department about the durability of their finished product. This is definitely a lapse on their part. However, there is no documentary evidence or otherwise to show their intention to evade payment of central excise duty. They have submitted that their production is meant for manufacture of export garments. This submission has not been negatived by any evidence collected by the department. In these circumstances, it is very difficult to sustain invocation of the extended period. The following case law cited by the appellants are relevant:Cosmic Dye Chemicals v. CCE, Bombay d) Collector v. Fodders Lloyds Corporation Ltd. v. CCE 2005 (182) ELT A.338 (SC) Hence for the first issue, our finding is that the extended period not invocablde.

ii. Whether the appellants are entitled to claim the benefit of exemption Notification No. 8/96-CE and its successor for the fabrics manufactured by them? The fabrics manufactured by the appellants fall under sub-heading against reference No. 52.15 in Notification No. 8/96-CE dated 23.7.1996. The relevant extracts of the Notification is given below :----------
52.15 52.07, Woven fabrics of cotton when NIL Specified 52.08 subjected processes any one in item or or more of the following No. (17) of 52.09 processes, namely: Conditions below.----------
(1) Calendering (other than (17) The exemption to woven fabrics of wool, cotton or

woven fabrics of man made fibres mentioned against reference Nos. 51.6, 52.15 and 55.19 in column (3) of the said Table contained in this Notification shall not apply to such fabrics processed in a factory having facility (including plant and equipment) for carrying out bleaching, dyeing or printing or anyone or more of these processes with the aid of power or steam.

A careful reading of the Notification revealed that the same will not apply to fabrics processed in a factory having facility including plant and equipment) for carrying out bleaching, dyeing or printing or any one or more than of these processes with the aid of power or steam. The adjudicating officer in para 25 of his order has given a very clear finding that the assessee had not fulfilled the conditions of the Notification No. 8/96. He has relied on a statement of Shri Rarookdeen.

It is not in dispute that the assessee had installed one jigger machine in the factory and it was functioning from 1.6.97 onwards. The jigger machine was operated with the aid of power for carrying the process desizing, scouring, bleaching, dyeing and finishing on the fabrics.

Even if no processes have been carried out on the fabrics the very fact that these facilities are available in the factory is good enough to deny the benefit of Notification to the fabrics manufactured by the appellants. Therefore we are in agreement with the adjudicating authority on the second issue.

As per Note 3 of Chapter 52 shrinkage proofing shall amount to manufacture. The shrink proof fabric is liable for duty. Therefore, if there is evidence that the appellants manufactured shrink proof fabrics and cleared them they are liable to pay duty. Shrink proof fabrics would be classifiable under heading 5207.29. Ld. Advocate invited out attention to CBEC Circular No. 15/110/61-CX dated 27.4.64 according to which shrink proof fabrics will be subjected to duty as processed fabrics only if they are "marketed" as shrink proof fabrics having residual shrinkage of 1.5% or below. It was submitted that the shrinkage in respect of the fabrics manufactured by the appellants is 3% and above. Therefore, as per the Board's Circular these fabrics cannot be considered as shrink proof fabrics. In this connection the ld. Counsel produced a copy of material minimum requirements which gives the various standards for the fabrics required by their foreign buyers.

According to the documents the minimum shrinkage stipulated is 3%. Therefore, there is no need for them to produce fabrics which shrinkage of 1.5% or less. In fact they produced fabrics strictly in accordance with the requirement of the foreign buyers of the garment.

Out of 1134 samples tested and confirmed as shrink proof, on retest, 1088 samples showed above 1.5 % leaving only 46 samples below 1.5% and even in respect of the 46 samples only a very few about 10 showed. 1.5% and the below in respect of both width and length. The adjudicating authority has taken into account the re-test reports of Chief Chemical Examiner, Central Revenue Control Laboratory, New Delhi and has held that duty on shrink proofing fabrics having residua! shrinkage less than 1.5% both warp is sustainable and accordingly he had adjusted the duty. In otherwords, where the fabrics passed the test of not being shrink proofing, the Commissioner has dropped the demand. In our view the approach of the Commissioner is fair enough and we cannot find any fault. It is only on the insistence of the appellants that the samples were sent to re-test to the Chief Examiner, Central Revenue Control Laboratory, New Delhi. Therefore, the appellants cannot complaint when duty is demanded on the fabrics which are shrink proofing as per Chief Examiner's test report. Hence on this issue, we uphold the findings of the Commissioner.

iii. Whether the appellants are liable to pay duty Demanded by the adjudicating authority As regards the duty demanded by adjudicating authority in respect of the various show cause notices, we observe the following:-- We have already held that longer period is not invocable. If at all, duty is to be demanded in view of our findings in issue Nos.2 and 3 the same is to be confirmed to the normal period. Even in this case it is the contention of the appellants that all the fabrics have been captively consumed by the sister units for export garments. The appellants have not produced enough evidence before the adjudicating authority. In view of this, the adjudicating authority has not considered this plea. Since the Revenue has not come out with any evidence that the appellants cleared the goods for home consumption, in the interest of justice and fair play, the appellants should be given an opportunity to produce evidence regarding use of the fabrics produced by them in the manufacture of garments and also proving of export of such garments.

Therefore, this issue is remanded to the jurisdictional Commissioner. The jurisdictional Commissioner shall give an opportunity to the appellants to demonstrate the facts of export of the garments manufactured out of the fabrics produced in the appellants' factory. Duty is demanded only on the quantity of fabrics which are not shown to the satisfaction of the Commissioner for having used in the manufacture of export garments. After examining these aspects the Commissioner shall compute the duty liability, if any. With these observation the matter to the commissioner by setting aside the duty demand.

In view or our findings that the appellants were under the bona fide belief that no duty was payable on the fabrics manufactured by them.

The imposition of penalty is not justified. As regards the interest the same will be depend upon the duty liability, which has to be quantified in terms of our remand order.