

Vardhman Spinning Mills Vs. Cce

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jul-24-2007

Reported in : (2007)(122)ECC439

Judge : N T C.N.B., P Das

Appellant : Vardhman Spinning Mills

Respondent : Cce

Judgement :

1. The appellant is a manufacturer of various varieties of textile yarn, which are liable to excise duty. It is also to be noted here that 'manufacture' has an extended meaning in the context of Central Excise duty in as much as processes carried out on already manufactured yarns also attract excise duty. This is because of the deeming provision that specified processes themselves will be treated as manufacturing processes.

2. The appellant was also required under Rule 173-B to file declaration relating to goods manufactured. This declaration indicated, inter alia, the description of the goods, their excise classification and the rate of duty attracted. The appellant had been filing such declarations. For e.g. in a declaration filed on 1.3.99, the appellant, inter alia, made the following declarations: No. & date of the relevant notification(s) if any having bearing on the applicable rate of duty Viscose yarns which have been purchases as dyed yarns and only winding and/or bulking process have been carried out in the factor.

3. A perusal of the above entries makes it clear that the appellant had specifically declared that it was buying dyed yarn and subjecting them to processes like winding, bulking etc. and duty was proposed to be paid in terms of Notification No. 5/97 (Serial No. 137). In terms of the procedure prevalent during the said period, the appellant was also filing monthly RT-12 returns, showing the duty paid. The monthly returns filed mentioned the product as "acrylic yarn (dyed)" and indicated amount of duty paid and the rate at which the duty was paid.

3. While the above system of declarations and payment of duty carried on, show cause notice dated 4.6.2003 was issued alleging that during the period May 2002 to March 2003, there was short levy of about Rs. 2.12 crores in regard to 'bulked' yarn. (We are informed that the process of 'bulking' is one of passing yarn through hot water). The allegation was that such yarn is not entitled to exemption under Notification No. 5/99 and succeeding notifications. This notice was adjudicated on 23.12.2003. The finding was that, upon allowing modvat credit due, the appellant had paid excess duty of about Rs. 11 lacs as against the short levy of Rs. 2.12 crores alleged in the show cause notice.

4. Subsequent to the aforesaid adjudication, show cause notice dated 29.3.2004 was issued alleging a short levy of over Rs. 11 crores for the period March 1999 to April 2002 in respect of bulked yarn. The appellant contested the demand on ground of limitation as well as on merits. On merit, the contention of the appellant was that, the amount of duty has been incorrectly worked out and if, the appellant is granted the benefit of modvat credit and valuation of the goods is done on cum duty basis, there will be an excess payment as in the case of the earlier notice. The appellant failed in adjudication. Though most of the objections were accepted in the adjudication, demand was confirmed at a lower amount of Rs. 2.59 crore and penalties imposed.

The present appeal is directed against the said order.

5. The contentions of the learned Counsel are that the entire proceeding is barred by limitation and on merit also, the Revenue had no case. On limitation, the submission is that the appellant had disclosed full facts about the various varieties of yarn under manufacture/processing, including 'bulking' and that the appellant

had been filing RT-12 returns from month to month. The submission of the learned Counsel is that (as noted under para 2 above) declarations specifically mentioned bulking of yarn and the availing of the benefit of the notification. The rate of duty mentioned in the RT-12s also made the position clear. The learned Counsel also points out that the residual demand confirmed in adjudication is only on account of incorrect computation of duty. Thus, according to him, assessee was not suppressing any material facts and had no tax gain from the procedure followed by it. It is being emphasized that the duty demand of about Rs. 1.8 crores is merely because the Revenue has incorrectly adopted the sale price of the yarn in question for the purpose of valuation, instead of adopting the net price (cum-duty) for the purpose of computation of duty, as done in the earlier adjudication. The learned Counsel would further submit that the modvat credit computation made in the order is contrary to the factual position certified by the accountant.

6. The learned Counsel would emphasize that a second notice cannot be issued by Revenue by invoking the proviso (extended period) under Section 11A, in as much as facts were already known at the time of issue of the first notice. Reliance in this connection is being placed on the judgment of the Hon'ble Supreme Court in the cases of ECE Industries Limited v. CCE, New Delhi Nizam Sugar Factory v. CCE, A.P.(S.C.), Hyderabad Polymers (P) Ltd, v. CCE, Hyderabad and CCE, Vadodara-II v. SOTEX 2007 (209) ELT 9 (S.C). The submission of the learned Counsel is that the Hon'ble Supreme Court has ruled that it is evident from the first notice that Revenue has knowledge of facts and therefore, a second notice cannot allege suppression of facts. An additional contention of the learned Counsel in the present case is that as is evident from the computation itself that there could have been no intent to evade payment of duty.

7. The learned authorized representative (SDR) would point out that the question of limitation has been examined by the Commissioner in proper light and the Commissioner had found that the noticee "misdeclared actual description of goods (daffodil yarn) in their monthly RT-12/ ER-1 returns".

8. This is a proceeding for reopening of assessment on the ground that there was short levy. Under the impugned order, there is also a finding that there was

suppression of material facts with intent to evade payment of duty. The finding on suppression of facts is as under: (1) As regards invocation of extended period of limitation and imposition of penalty, I find that the noticee misdeclared actual description of goods (Daffodil Yarn) in their monthly RT-12/ ER-1 Returns and thus willfully suppressed the material facts from the department by not giving the exact/correct description of goods in their monthly RT-12 return. The noticee contravened the provisions of Rule 9, 52, 52A & 54 of the erstwhile Central Excise Rule 1944/Rule 4, 6, 8, 11 and 12 of Central Excise Rules 2001/2002 with intent to evade payment of duty. Therefore, the extended period of limitation is invocable in this case. On the above reasoning, penalty under Section 11AC of the Act is also imposable on the noticee.

9. We have already noted that the appellant had specifically mentioned 'bulking' of yarn in its 173-B declaration. That declaration also indicated assessment under a particular notification. Monthly R.T.-12 returns were also filed. Further, apprehending future dispute, the appellant also wrote a letter dated 11.3.99 stating that even though it was not claiming modvat benefit, it was keeping full record of receipt/consumption of inputs so that in the event of any dispute about concessional assessment, modvat credit will be available to it. A perusal of the return shows that under column 12 rate of duty was indicated. This rate is the exempted rate under the notification.

Therefore, the authorities could easily make out the identity of the yarn under assessment by correlating with the 173-B declaration.

Further, if the authorities needed separate RT-12 return in regard to each variety/brand, they could have sought that information as well, rather than raising delayed demands, alleging suppression of facts against the appellant.

10. As against this, the finding of the Commissioner is that the appellant 'misdeclared actual description (daffodil yarn) in their monthly RT-12 return'. 'Daffodil' being a brand name of yarn, the accusation would appear to be that yarns were not declared under respective brand names, and that constituted suppression of facts.

Assessment of yarns is based on what process is carried out and not based on brand. Therefore, non-mention of this factor, which is immaterial for assessment, cannot be treated as suppression of facts.

11. We have already noted that the first proceeding ended in a finding of fact that there was only excess payment of duty as against the alleged short levy. In the present proceeding also, the amount confirmed under the impugned order is a small part of the amount alleged in the notice. Most of that amount also is not due if the assessment is carried out on the correct value i.e. net of duty already paid. It is well settled that in all cases of short levy, valuation is to be made on cum-duty basis. It was done so in the adjudication order dated 23.12.2003 also. The assessee had raised this aspect in the adjudication proceedings also; but no valid reason, for not accepting that plea is mentioned in the order. Thus, the very fact that the demand is, by and large, not sustainable is indicative that the assessee could not have been resorting to a particular method of assessment with intent to evade duty.

12. From what is stated above, we are of the view that finding relating of suppression of facts with intent to evade payment of duty is not sustainable in the facts and circumstances of the present case, particularly, when the demand itself appears to be not viable on merits. This is apart from the ruling of the Hon'ble Supreme Court (para 6 supra) that a second demand cannot be raised on the ground of suppression of facts.

13. The entire demand falls beyond the normal period of recovery permitted under Section 11A. As proviso to that section is not attracted, duty demand is hit by limitation. As duty demand is not sustainable, penalties also cannot be sustained.

14. In the result, impugned order is set-aside and appeal is allowed, with consequential relief, if any.