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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Feb-09-1983

Reported in : (1983)LC430DTri(Delhi)

Appellant : Ruby Mills Ltd.

Respondent : Collector of Central Excise

Judgement :

1. This is a Revision Application filed before the Central Government (hereinafter called Appeal) which, under Section 35-P of the Central Excises & Salt Act, 1944, stands transferred to this Tribunal and is to be disposed of as if it were an appeal presented before it.

2. The facts giving rise to the present appeal are that the appellants, who are manufacturers of cotton fabrics, had filed before the Central Excise authorities a classification list, as required under Rule 173-B of the Central Excise Rules, 1944, in respect of Sort No. 3289 manufactured by them describing the fabric as "Dyed, mercerised, printed (Brasso) polyester, cellulosic, cotton shirting, wash and wear, pre-shrunk finish". They had also declared the terene contents as 28% at the grey stage and 31.8% at the processed stage. The appellants sought classification of the fabric under Item No. 19-1(2) of the Central Excise Tariff Schedule (C.E.T.) which was allowed by the Assistant Collector of Central Excise, Bombay. Simultaneously, samples were drawn by the Excise authorities for chemical test to ascertain the composition of the fabric. A Show Cause Notice-cum-Demand dated 8-8-1975 was issued by the Range Superintendent for a sum of Rs. 10, 507.16

representing the difference in duty between that leviable under C.E.T. Item No. 19-I(la) and that paid under Item No. 19-1(2). The notice covered the clearances effected during the period from 14-5-1975 to 9-6-1975. On receipt of the test report from the Deputy Chief Chemist to the effect that the terene (a non-cellulosic fibre) content of the processed fabrics amounted to 32.1%, the Superintendent issued a second Show Cause Notice-cum-Demand dated 18-12-1976 for the period from 3-1-1976 to 3-2-1976. The appellants submitted in reply to the two notices that samples should have been drawn at the grey fabric stage only to ascertain the terene percentage. They also submitted that the stage for determination of duty was the grey fabric stage even though subsequently the fabric might have undergone processing and that, after approval of the classification list and RT 12 returns, such final approval could not be reviewed with retrospective effect. These contentions were rejected and both the demands were confirmed by the Assistant Collector of Central Excise. The matter was pursued in appeal by the appellants. By his order dated 17-3-1978, the Appellate Collector of Central Excise rejected the appeal. It is against this order that the appellants filed a Revision Application before the Central Government which, as stated earlier, stands transferred to this Tribunal for disposal.

(a) The composition of the fabric in question at the grey and processed stages were as follows:- Cotton 50% 47.37% Terene 28% 31.80% Viscose Cellulosic 22% 20.83% ------ ------ The non-cellulosic fibre content (terene) of the fabrics as manufactured was less than 30%. The fabric did not fall under any of the varieties specified in Item 19-1 (1) CET, nor did it fall under Item 19-I(1A) CET since the non-cellulosic fibre content was less than 30%. It, therefore, fell for classification under Item 19-1(2) CET. The only thing that was needed to be determined was the average count of the fabric, i.e. whether it was superfine or fine or any of the other specified varieties. The tariff item itself provided for the determination of the average count of the fabric by ascertaining the count of grey yarn. It followed, therefore, that it was the grey state of cloth that was to be taken into consideration for determining the correct classification. Analogy was drawn to the fact that for the determination of the count of cotton yarn also, the grey stage was the material stage.

(b) The action of charging the fabric to duty on the basis of its terene content being over 30% would result in the appellants having to fall foul of the Textile Commissioner's regulations requiring the appellants to stamp the exact percentage of each of the different types of fibres used in the cloth.

(c) The fabric was produced as soon as it came out of the loom. The Central Excise Department itself required that the production of fabric should be recorded in the RG 1 register at the grey stage.

(d) Only the Central Board of Excise & Customs action under Section 35-A of the Central Excises & Salt Act could have reviewed the decision taken by the Assistant Collector in approving the classification list, the price lists and RT 12 returns. The Assistant Collector could not have reviewed his own orders.

4. Dr P.V. Jois, Secretary (Law), Mill Owners' Association Bombay, appearing on behalf of the appellants stated that the grey fabric was subjected to the processes of scouring, bleaching, dyeing and printing.

The Brosso process of punting adopted by the appellants resulted in the liberation of acidic matter which burnt out part of the cotton fibre present in the fabric and that this explained the fact that the fabric, after processing, had a terene content over 30%. The manufacture of the fabric was complete when the fabric as' woven came off the loom, i.e.

at the grey stage. The terene content at the grey stage was less than 30%. Therefore, the proper classification of the fabric was under Item 19-1(2) as cotton fabrics-"others"-and not under item 19-I (1A) as "Cotton fabrics...containing 30% or more by weight of fibre, of yarn, or both, of non-cellulosic origin". The subsequent processing of the grey fabric did not amount to "manufacture" within the meaning of Section 2(f) of the Central Excises & Salt Act. However, the appellants were liable to pay "processing surcharge" as provided in Notification No. 88/69 of 1-3-1969, as amended from time to time. In support of his contention that "manufacture" of the fabric was complete as soon as it was woven, Dr Jois, relied upon the judgment of the Gujarat High Court in the case of Vijay Textiles v. Unoin of India (1979 E.L.T. 181). In reply to a query from the Bench whether Act No. 6 of

1980 did not include processing also come within the meaning of "manufacture" for levy of Central Excise duty, Dr Jois replied that the said Act only regularised the levy of processing stage duties which the appellants were not disputing. However, the basic classification in respect of even the processed fabric had to be determined with reference to the grey fabric. He also contended that once the proper officer had given his approval to the classification list and the assessee had complied with the prescribed procedures and the RT 12 returns assessed by the proper officer, he could not re-open the assessment. In any event, Rule 10-A was not attracted in this case. Notices issued under Rule 10A where really Rule 10 applied to the situation were struck down by Bombay High Court and this was upheld by the Supreme Court in the case of N.B. Sanjana v. The Elphinstone Spinning & Weaving Mills Ltd.-(AIR 1971 SC 2039). Reference was also made to the judgment of the Madras High Court in the case of Madras Rubber Factory Ltd. v. Assistant Collector, Central Excise, Madras and Anr. (1981 E.L.T. 565 (Mad.) which negatived Government's contention that there was an implied power of review in Rule 10.

5. Appearing on behalf of the respondent (Collector), Shri K. D. Tayal submitted that the fabrics in question had to be assessed having regard to their nature at the stage at which they were cleared from the factory. In this connection, he submitted that the very question involved in the present case came to be considered by the Board and they had clarified that where grey fabrics falling under Item No.19-1(2) CET were processed in the same factory and the processed fabrics fell under Item No. 19-(I A)-CET, it was the latter item that was relevant for assessment. He further submitted that the value for the purpose of levy of duty also had to be determined with reference to the stage of removal or clearance of the fabric from the factory.

Applying this criterion, the processed fabric correctly fell for classification under Item No. 19-1(1 A) CET. With regard to the appellants' submission on the applicability of Rules 10, and 10A Shri Tayal drew the attention of the Bench to the judgment of the Delhi High Court in the case of Bawa Potteries v. Union of India (1981 E.L.T. 114 (Delhi) and submitted that Rule 10 permitted a review of the order of assessment.

6. Replying to Shri Tayal's submissions, Dr Jois submitted that a quasi-judicial decision could not be reviewed by a Show Cause Notice.

He referred in this context to the judgment of the Gujarat High Court in the case of Bhor Industries Ltd., v. Union of India 1980 E.L.T. 752 (Guj.). He also submitted that with the retrospective amendment of Rules 9 and 49, the position has been made clear namely that excisable goods removed within the factory of production for further manufacture had to pay duty at the stage of such removal. In the appellants' case this meant that the fabric attracted duty at the grey stage when it was removed for processing and after processing, processing stage duties alone were applicable at the time of clearance of the fabric.

7. We have carefully considered the submissions of both the parties.

The crucial points for consideration in the case are :- (a) " The correct position regarding the classification under the Central Excise Tariff of the impugned goods and the stage or stages at which they attracted duty ; and (b) Was the Assistant Collector entitled to revise the assessment after having accorded his approval to the classification list and after assessments having taken place in accordance with such approval 8. The percentage composition of the fabric, both at grey and processed stages, is not a matter of dispute. Though the appellants did make a grievance of the fact that the Deputy Chief Chemist's Test Report was not made available to them, when it was pointed out that the results of the test, as referred to in the Assistant Collector's order, did not materially differ from the composition declared by the appellants in the classification list, the appellants did not pursue the point further.

9. Three sub-items of Item No. 19-1 ("Cotton Fabrics") of the Central Excise Tariff Schedule may be extracted for a proper understanding of the case : (ii) fabrics impregnated coated or laminated with preparations of cellulose derivatives or of other artificial plastic materials.

(1) Coating, Suiting, tussers, corduroy, gaberdine, bed-ford, satin, denim, lappet, butta fabrics, round mesh mosquito netting, lace, knitted fabrics, tapestry, furnishing fabrics including jacquard curtain cloth, gadlapet, mattress fabrics, terry

towel including turkish towel ; terry towelling cloth blanket, canvas, duck, filter cloth, tracing cloth, and bukram cloth.

(1A) Cotton fabrics other than those falling under (1) containing 30% or more by weight of fibre, or yarn, or both, of non-cellulosic origin.

(a) Cotton fabrics, superfine-that is to say fabrics in which the average count of yarn is 61s or more.

(b) Cotton fabrics, fine-that is to say fabrics in which the average count of yarn is 41s or more but is less than 61s.

(c) Cotton fabrics, Medium-A-that is to say, fabrics in which the average count of yarn is 26s or more but is less than 41s.

(d) Cotton fabrics, Medium-B-that is to say, labrics in which the average count of yarn is 17s or more but is less than 26s.

(e) Cotton fabrics, Coarse-that is to say, fabrics in which the average count of yarn in less than 17s.

10. From the percentage composition data noted in para 3, it is clear that though the grey fabric did not fall under Item 19-1(1 A) because of its non-cellulosic fibre content being less than 30% the processed fabric correctly fell within the purview of Item 19-1(1 A) since the non-cellulosic fibre content in it exceeded 30% as a result of part of the cotton content having been lost as a result of the processing. The appellants, however, strenuously contend that it is the grey stage composition that would determine the duty liability of the fabric. In support of this contention, they rely upon the judgment of the Gujarat High Court in Vijay Textiles v. Union of India 1979 ELT (J. 181), which lays down that the "manufacture" of fabric is over when the fabric is woven. The weaving of the fabric is over when the fabric comes off the loom in the grey stage. The subsequent processing of the fabric, according to the appellants, does not amount to "manufacture" of fabric, though they do not dispute their liability to pay processing stage duties in term of Notification 88/69 of 1-3-1969. The judgment referred to above lays down with reference to items 19 and 22 of the CET that "fabrics" means woven material or production of woven

substance which may be woven out of cotton or man-made fibre or yarn.

But, processing of cotton fabrics or man-made fabrics does not bring into existence any new woven stuff or substance. It is merely processing in the sense of bleaching, dyeing or printing fabric which was already in existence. Unlike embroidery and coated or laminated fabrics, no specific mention of processed cloth in the inclusive definition of Item 19 or 22 is found. Therefore, processing of cotton fabric or man-made fabric cannot amount to manufacturing of any variety of cotton fabric or man-made fabric falling under Item 19 or 22 CET. In this context, it has to be noted that by the Central Excises and Salt and Additional Duties of Excise (Amendment) Act, 1980 (Act No. 6 of 1980). Parliament had legislated to get over the difficulty resultant from the above law laid down by the Gujarat High Court. The entries relating to Items 19 and 22 of the CET, among others, were revised, along with the definition of "manufacture" in Section 2(f) of the Central Excises and Salt Act so as to specifically provide that processing amounts to manufacture and create separate sub-items for unprocessed and processed fabrics. These amendments were also, by Section 5 of the same Act given retrospective effect from the date these items were inserted in the Tariff Schedule. There is, therefore, no scope left for doubt on the question whether the process to which the grey fabric was subjected by the appellants in their factory amounted to "manufacture" within the meaning of Section 2(f) of the Central Excises and Salt Act and whether such processed fabric could be deemed to excisable under Item 19 of the CET. Both these questions have to be answered in the affirmative. The contention of the Counsel for the appellants that Act No. 6 of 1980 only regularised the levy of processing stage duties and that the basic classification even in the case of processed fabrics had to be determined with reference to the grey fabric is also not acceptable for the reason that the said Act had the effect of making processed fabrics as a distinct entry in the excise tariff under the relevant items in addition to unprocessed fabric. The appellants' contention that reclassification of the processed fabric under Item 19-1(1 A) would make them fall foul of the Textile Commissioner's stamping regulations lacks substance since the stamping regulations which may have their own rationale cannot be the determinant criteria for classification of the goods for levy of excise duty under the Central Excises & Salt Act. We, therefore, hold that though the grey fabrics in the instant case may

have fallen for classification under item 19-1(2), after the fabrics were subjected to processing which resulted in change in the relative percentages of the constituent fibres or yarn, the non-cellulosic fibre content going upto a figure above 30%, the processed fabrics were correctly classified under Item 191(1 A) of the CET since we have held that the processed fabrics did not fall under item 191(2), the question of applicability of Notification No. 88/69 dated 1-3-1969 would not arise.

11. The next question arising for decision is whether the Assistant Collector could have revised his order of assessment. The Counsel for the appellants has referred to the judgment by a single Judge of the Madras High Court (reported in 1981 E.L.T. 565 (Mad.), in which the Hon'ble Judge negatived Government's contention that there was an implied power of review in Rule 10 as also the judgment of a Bench of the Gujrat High Court (1980 EL.T. 752 Guj.) holding that a quasi-judicial order could not be re-opened by issuing a Show Cause Notice. The Senior Departmental Representative drew our attention also to the judgment or a Division Bench of the Delhi High Court (1981 ELT 114 Delhi) holding that there could be no non-levy or short-levy except by a process of assessment and that, therefore, Rule 10 permitted a review of an assessment or refund order if the appropriate authority comes to a conclusion that the earlier decision was erroneous that more duty should have been levied or that no refund ought to have been granted. Dr Jois has also contended that the review could have been made only by the Board acting under Section 35A of the Central Excises & Salt Act.

12. In the present case, the classification list submitted by the appellants under Rule 173-B bears a clear endorsement to the effect that "the samples have been drawn for test". In the memorandum on the reverse of the said list filled in and signed by the Assistant Collector, it is clearly stated that the tariff classification and rate of duty levied in respect of the goods covered by the list (including the impugned goods with the grey stage and processed stage compositions given) was approved "until further orders". It is clear, therefore, that the approval for the classification declared in the list was not final and was liable to be revised, if test results so warranted. It is not a case where the Assistant Collector had considered all aspects of the matter and passed an order of assessment in his quasi-judicial capacity while according approval to the classification list. Show Cause Notices-

cum-Demand, were issued to the appellants seeking to re-classify the goods and asking them to pay certain amounts of duty.

The Assistant Collector, after holding adjudication proceedings, made his order dated the 1st March, 1977. He was fully within his jurisdiction and powers in doing so. The question of the Board alone being competent to review the order of assessment does not arise in this case. There were two Show Cause Notices-cum-Demand, one dated 8-8-1975 covering the period 14-5-1975 to 9-6-1975 and the second dated 18-12-1976 covering the period 3-1-1976 to 3-2-1976. Both notices were made within the time limit of 12 months in terms of Rule 10 read with Rule 173-J. The submission of the appellants on the applicability or otherwise of Rule 10 and Rule 10-A are not relevant to the facts of the case.

13. The appellants' contentions with regard to the effect of the retrospective amendment of Rules 9 and 49 are also devoid of substance.

The effect of the said amendment read with amendments effected by Act No. 6 of 1980, is that grey fabrics and processed fabrics are made separately liable to duties as applicable to such fabrics subject, of course, to any set-off of duty permissible under the Rules and the applicable notifications.

14. In the result, the orders of the Appellate Collector of Central Excise is confirmed and the appeal is rejected.