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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jul-30-1996

Reported in : (1996)(87)ELT56TriDel

Appellant : Super Syncotex (India) Ltd.

Respondent : Collector of Central Excise

Judgement :

1. This appeal arises from the Order-in-Original dated 7-11-1994 passed by the Collector of Central Excise, Jaipur. The Learned Collector has confirmed the duty demand of Rs. 12,55,223.90 being the differential Central Excise duty payable on the yarn cleared by the assessee by misdeclaring its composition under Section 11A read with 9(2) of the Central Excise Rules, 1944, being the duty not paid by the assessee on the mill neps manufactured and captively consumed during the period 1-3-1986 to 20-12-1989. He has directed for confiscation under Rule 173Q of mill neps weighing 625.5 kgs. valued at Rs. 4,728.78 and has granted an option to redeem the goods on payment of a fine of Rs. 2,000/-. He has imposed a penalty of Rs. 50,000/- under Rule 173Q of the Central Excise Rules, 1944.

2. The facts of the case leading to adjudication are that the appellants are engaged in the manufacture of excisable goods viz.

various types of textiles. Acting upon intelligence, the Central Excise Officers paid a surprise visit to the factory premises of the assessee on 20-12-1989. While taking a round of the Mill No. 2 of the assessee, the Central Excise officers

observed that at the door of Bin No. 6, "NEPS AND HARD WASTE" was painted. Inside the Bin No. 6, some bags were found lying in which regular sized small balls of man-made fibres were packed. On enquiry Shri G.C. Jain, Commercial Manager of the assessee gave an evasive reply, denying that the stock in question was of mill neps and stated that it was carding waste. The mill neps were found in 55 bags. All the bags were got weighed in the presence of Shri G.C.Jain. The net weight of the mill neps worked out to 627.7 kgs. Out of the same, 11 samples of 20 gms. each were drawn for chemical analysis, in the presence of Shri G.C. Jain, and were affixed with the Seal No.122 of the Superintendent of Central Excise, Ajmer. The remaining quantity of 625.5 kgs. of mill neps were seized by the officers under Section 110 of the Customs Act, 1962 as made applicable to Central Excise vide Notification No. 68/63-C.E., dated 4-5-1963, issued under Section 12 of the Central Excises and Salt Act, 1944, under the reasonable belief that the said mill neps were liable for confiscation under the Central Excise Rules, 1944, as the same had been manufactured without their proper accountal in the statutory records; without filing the classification list under Rule 173B or the price list under Rule 173C in respect of the same and were intended for consumption without payment of appropriate amount of Central Excise duty, leviable thereon.

3. The officers later examined the mixing reports of the mill. It was found that the assessee was mixing the mill neps with the polyester and artificial staple fibres for the manufacture of nep yarn (pre-dominating artificial staple fibres) and were clearing such yarn under sub-heading 5506.21 of the Central Excise Tariff instead of the sub-heading 5506.29 which appeared to be the proper heading for the correct classification of such yarn as per the department. The records viz., mixing reports, lotwise registers, gate passes from 1-3-1986 onwards, were resumed by the officers for working out the quantity of the mill neps manufactured and already cleared for captive consumption and the quantity of nep yarn cleared under sub-heading 5506.21 and to quantify the amount of duty not paid on the mill neps and short-paid on the nep yarns.

4. From the mixing reports and the lotwise registers of the assessee, it was observed that the assessee had manufactured and cleared 12,161.5 kgs. of mill neps and 2,77,090 kgs. of nep yarn was made from the blend of polyester fibres,

viscose staple fibres and mill neps during the period from 1-3-1986 to 20-12-1989 involving the duty amount of Rs. 89,274.28 on the mill neps and another amount of Rs. 12,55,223.90 of the duty (differential) which had been short paid on the nep yarn after taking into account the duty paid under the incorrect Tariff Heading 5506.21. Therefore, a show cause notice dated 13-6-1990 was issued and also alleging various contraventions of the Central Excise Rules.

(i) they do not manufacture 'mill neps' as known in the market which could be classified under sub-heading No. 5601.00, the tariff does not define "Mill Neps"; (ii) they do not have the machinery to produce 'mill neps' capable of being sold in the market. The so-called neps used by them are made on their carding machine by making some adjustment in gauge and speed. Thus, mill neps are made by rolling between two discs; (iii) the so-called 'Neps' produced by them are neither regular sized balls, nor produced by rolling between two discs; (iv) the duty on yarn in which neps were mixed and cleared under the sub-heading 5506.21 was correctly paid because in this case it cannot be said that the yarn contained any "other textile material" except the permissible fibres, because neps were nothing but viscose or polyester fibre as the case may be. Hence there is no case of short levy as alleged in the show cause notice; (v) they had denied the allegation of wilful suppression of the facts of blending of mill neps in the classification list filed by them and the GP issued by them. They had stated that since the yarns contained only polyester staple fibre and artificial staple fibre.

It is stated that as per Chapter Notes of the Tariff and HSN "neps" cannot be treated as "any other textile material" but only as fibres of either artificial staple fibre, or synthetic staple fibre, as the case may be; (vi) the neps are not excisable and duty on nep yarn has been paid correctly under sub-heading 5506.21 and except for the period prior to 29-12-1989 the demand was wholly barred by limitation of time under Section 11 A. The period of the alleged short payment was 1985-86 to April, 1990 and the show cause notice was issued on 28-6-1990 and hence no duty is leviable.

6. The Learned Collector after a careful consideration of the proceeding rejected their pleas. The Learned Collector has relied on the definition of neps appearing in

Fair Child's Dictionary of Textiles which defines the neps as a small knot of tangled fibres, in the cotton, generally consisting of unmatured fibres. Mill neps are impurities, or short fibres which adhere to the surface of yarn.

Improper work at any stage upto and including carding, will produce mill neps. Taking into consideration this definition as well as Chemical Examiner's report that the samples were coloured fibrous mass composed wholly of artificial staple fibre. Therefore, the Learned Collector rejected the assessee's contention that mill neps are small regular sized balls and are produced by rolling fibres between two discs only is not acceptable. He held that the mill neps as per the Fair Child's Dictionary of Textiles, can be produced as the neps produced by the assessee are nothing but mill neps, which are known as such in the market. Therefore, he has rejected the assessee's contention that mill neps are not "goods" under the Central Excises and Salt Act. He has also referred to the mixing reports of the assessee where they had clearly stated that the use of dyed neps and grey neps in various lots of yarn. He has also relied on the HSN which specifically states that mill neps may be bleached, or dyed and are used in the manufacture of fancy yarn. He has noted the assessee's intentionally used of both grey neps as well as dyed neps in respect of particular yarns, which is enough to establish that the assessee had specifically manufactured these goods for captive consumption in the manufacture of fancy yarn. He has rejected the assessee's contention that they are not marketable in view of the fact that the marketability of goods does not mean that the goods are actually being bought and sold in the market, as they were themselves using the same. Therefore it satisfies the test of marketability. He has also held that the goods are rightly classifiable under sub-heading 5606.29 for the following reasons :- (2) The yarn is containing artificial staple fibre in the form of viscose fibre, or neps of the same fibre and polyester fibre.

7. He has held that the neps and staple fibres are two entirely different commodities, or textile materials. Nobody will buy in the market neps in lieu of viscose staple fibre. Neps may be wholly composed of viscose staple fibres but are distinctly different from the viscose staple fibre. Therefore, sub-heading 5506.21 clearly lays down that yarn of artificial staple fibre containing synthetic staple fibre should not contain any other textile material. He has held that in

Heading 5506.21 yarn made from artificial staple fibre and synthetic staple fibre, but not containing any other textile material, are covered. The word "textile material" has not been defined in the Tariff. The word "textile" has been used as an adjective qualifying the word 'material'. He has referred to Chamber's 20th Century Dictionary, textile when used as in adjective, means inter alia "capable of being woven". As per Fair Child's Dictionary of Textiles, the word "textile" means 'a broad classification of any material that can be worked into fabrics, such as fibres and yarns, including woven or knitted fabrics, felt, netted fabric, lace and crocheted goods. Also the woven or knitted fabric, felt, lace or crocheted goods. The word is derived from the Latin term "Textilis" which is based on the verb "Texere" which means to weave.

8. The Learned Collector has held that any material that can be woven, or worked into fabrics, is therefore, 'textile' as per this meaning in the Fair Child's Dictionary of Textiles. As the mill neps are obviously vised for the manufacture of textiles, they are to be treated as 'a textile material' which is different from artificial staple fibres and synthetic staple fibres and hence are duly covered within the meaning of the description "other textile material", used in the tariff heading. The Learned Collector has held that since the neps produced and consumed by the assessee are "other textile material" which is different from artificial staple fibre, or polyester staple fibre, the yarn in question cannot be classified under sub-heading 5506.21. He has rejected the assessee's contention that it will not be possible to classify yarn containing 40% neps of artificial staple fibres and containing 30% polyester in the Central Excise Tariff, is not at all relevant to the facts of the case, as the impugned yarn manufactured and cleared by the assessee did not contain 40% mill neps and artificial staple fibres. He has held that the mixing reports clearly showed that what had been used are artificial staple fibre, synthetic staple fibre and neps. Hence, the yarn cannot be classified under sub-heading 5506.21 as it contains textile material known as neps which is other than artificial staple fibre and synthetic staple fibre.

Therefore, he has rejected the assessee's contention that the neps are nothing but an artificial staple fibres and synthetic staple fibre and upheld the classification under sub-heading 5506.29 of the Tariff. The Learned Collector has rejected all

other contentions including time bar issue raised by the assessee.

9. We have heard Shri V. Sridharan, the Learned Advocate for the appellants and Shri Sanjeev Sachdeva, the Learned DR for the Revenue.

10. The Learned Advocate submitted that the mill neps are also viscose and hence it does not go sub-heading 5506.21 and hence not included in sub-heading 5506.29. The material should be of any textile fibre. It is his contention that the mill neps. are artificial staple fibre hence the item would not be covered under sub-heading 5506.21 unless there are more than one type of polyester fibre. It is his contention that in the present case neps are also artificial staple fibre hence its presence by itself will not be considered to take it out of sub-heading 5506.21. The Collector had classified the same under sub-heading 5506.29 which according to the Learned Advocate is not correct. He submitted that the allegation that the item had not been disclosed to the department is not correct as the register which has been duly checked and had been examined by the department officials. He submitted that the assessee had a bona fide belief that the items were classifiable under sub-heading 5506.21 and that the same is not excisable. He submitted that the show cause notice had been issued on the basis of the information culled out from the record which were scrutinised from time to time by the departmental officials and hence it cannot be said that the department did not have any knowledge of mill neps being utilised and captively consumed by the assessee.

11. The Learned DR submitted that the staple has a specific meaning and it does not include mill neps. He referred to the definition of the expression "staple" and nep appearing in Fair Child's Dictionary of Textiles and he submitted that mill nep will go out of the expression staple on the basis of the definition given and hence presence of any other artificial staple fibre would take out sub-heading 5506.21. He submitted that the expression "staple" being specific it can mean to include other artificial staple fibre which is not staple. He submitted that all the records maintained by the assessee were not produced for inspection and therefore, it cannot be said that the department had knowledge of the use of mill neps by the assessee. He submitted that the appellants had not disclosed in the classification list and hence the larger period was invokable.

12. The Learned Advocate in counter submitted that if the definition as appearing in Section 2(D) of Section XI of artificial staple fibre is applied then also the mill nep would fall within sub-heading 5506.21 and hence the demands are required to be dropped. He submitted that the department had verified all the registers and the same had been maintained duly under Rule 173G(v). Therefore, he submitted that the demands are required to be dropped. He relied on the ruling rendered in the case of Indian Rayon & Industries Ltd. v. Collector of Customs, as reported in 1993 (68) E.L.T. 367.

13. The Learned DR with permission submitted that Note 2(d) should be read with Note 2(a) and on such reading the classification adopted by the department is fully justified. He submitted that the citation of Indian Rayon & Industries Ltd.'s case is more helpful to the Revenue.

14. We have carefully considered the submissions made by both the sides and have perused the records.

15. On perusal of the entire literature produced by the appellants it is seen that the definition of the term 'nep', appearing in "Hand Book on Glossary of Textile Terms Bureau of Indian Standards" at page 172 is "a small knot-like aggregate of tightly entangled fibres, usually not larger than a common pin head (about 2 mm in diameter)". The question that arises for consideration is as to whether this mill nep which is admittedly an artificial staple fibre on being mixed with polyester and artificial staple fibre would go out of the Tariff sub-heading 5206.21 which reads :- "Containing artificial staple fibre and polyester staple fibre (not containing any other textile material), and in which the proportion of polyester staple fibre is more than 40% by weight of the total fibre content." 16. It is the contention of the Revenue that by mixing this mill nep along with other two items artificial and Polyester staple fibre, the item which comes out in the form in which it is removed from the factory would not be covered by sub-heading 5206.21 as 'mill nep' is a textile material and it is excluded from the said sub-heading. In our opinion, mill nep which is in the nature of a small knot-like aggregate of tightly entangled fibres, usually not larger than a common pin head (about 2 mm in diameter) is not a textile material. The reason being a textile material as defined in "Fairchild's

Dictionary of Textiles" at page 613 is "an inclusive term for fibres, yarns, fabrics, and products which keep relatively the same tensile strength, flexibility and properties of the original fibres". What is required to be considered is as whether this 'mill nep', which is about 2 mm in diameter in size and not larger than a common pin head can have the same tensile strength, flexibility and properties of the original fibre. In this regard, no evidence has been placed by the Revenue that it satisfies these criterion as stated in the definition of Textile material. In that view of the matter, we have to consider that mill nep being in the nature of common pin head cannot be considered as a textile material in the sense in which it is understood technically as well as in common trade and commercial understanding. The Revenue has also not placed any evidence to show that this 'mill nep' satisfies all the criterion of a textile material, as understood technically and as understood in the trade. It is also seen that the HSN Explanatory Notes at page 771 under Chapter 56.01 has categorised 'mill nep' in Category (C) at page 773.

Category (A) refers to "Wadding of textile materials and articles thereof". Category (B) refers to "Textile fibres, not exceeding 5 mm in length (flock) and textile dust". Category (C) refers to "Mill neps".

Therefore, "mill neps" has been separately categorised and not placed alongwith the category of wadding of textile materials and articles thereof as well as with textile fibres. Therefore, on a reading of these materials, it is clear that 'mill nep' cannot be considered as a textile material. It continues to remain as an artificial staple fibre.

In combination with artificial and polyester staple fibres, it continues to fall within the sub-heading 5606.21 and hence the contention of the appellants is required to be accepted. In the case of Indian Rayon and Industries Ltd. (supra) the Tribunal held that it is well settled that the terms used in the tariff have to be given their normal trade parlance meaning, obviously staple fibre (made of polyester) is a form of polyester staple. The Tribunal has further held that there is no warrant to give any restricted meaning to the term Polyester Fibre. Therefore, the Tribunal held that the Notification which extends to articles other than polyester fibre cannot be extended to staple fibre of polyester. Therefore, mill nep being in the nature of

artificial staple fibre continues to remain so and its addition to give attraction to the fibre, cannot change its characteristic and bring within the category of 'textile material'.

17. Even on limitation, we find that the contention raised by the appellants on time bar is sustainable. There are sufficient grounds for the assessee to hold mill nep as artificial staple fibre and not as a textile material and therefore, their plea that they were under bona fide belief that the item is covered under sub-heading 5206.21 has got merit, and requires consideration. The manufacture of the impugned goods has been going on for a long time and the clearances have been observed by the Revenue officials. There has been visits by the Revenue Officials, admittedly, therefore, it cannot be said that the department was not aware of the utilisation of 'mill nep' in the manufacture of the impugned product. Hence the appellant's plea of time bar is required to be accepted in the present case. In the result, the impugned order is set aside and the appeal is allowed.

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