In The Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad

Appeal No.E/1568,1569/2009-DB
[Arising out of OIA-KS/138/SURAT-II/2009 dated 24.07.2009 passed by the CCE (A)–Surat-ii]

M/s Vanita Texturisers (P) Ltd. Appellant
G M Solanki

Vs

C.C.E & S.T. Surat-ii Respondent

Represented by:
For Appellant: Mr. S. Suriyanarayanan (Advocate)
For Respondent: Mr. S.K. Shukla (AR)

CORAM:
HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR. RAJU, MEMBER (TECHNICAL)

Date of Hearing: 13.11.2018
Date of decision: 05.12.2018

Final Order No. A/ 12711-12712 /2018

Per: Raju

These appeals have been filed by M/s Vanita Texturisers (P) Ltd. & G M Solanki, Director of M/s Vanita Texturisers (P) Ltd.

2. Ld. Counsel for the appellant pointed out that Sh. G M Solanki, has since expired and he produced a Death Certificate. Consequently, appeal of Sh. G M Solanki is abated.

2.1 Ld. Counsel further pointed out that a case of clandestine clearance was booked against the appellant after a search was made in the appellants premises. During the search a diary was recovered. The said diary was alleged contained record of the clandestine production for the period 11.12.2001 to 31.12.2001 and clearance for the period 03.12.2001 to 12.12.2001. The illicit production recorded in the said documents worked out to 17005 KG and the illicit clearances were 6353 Kgs. The diary recovered from the premises was admitted by the

Director in his statement. The said diary was not challenged in the original adjudication proceedings also. The demand of SCN did not allow the benefit of Notification No. 3/2001-CE. Ld. Counsel further argued that another SCN issued in respect of seizure portion was decided earlier and in the said order the benefit of notification 3/2001-CE was allowed. He further pointed out that the said proceedings have attained finality as the said order allowing the benefit of Notification 3/2001-CE was not challenged by the Revenue.

2.2 Ld. Counsel sought to challenge the impugned order on the following grounds.

a) He argued that the author of the diary has not been identified, and therefore, the such document cannot be admitted as evidence.

b) The quantity of clandestine clearance was originally identified as 16089.80 KGs and the appellants had accepted their guilt and paid duty in respect of said quantity immediately after punchnama. The revenue cannot change the quantity on which demand has been made.

c) He argued that the SCN has been issued years after the said search was made and at this stage Revenue had sought to increase the quantity of which they have demanded duty which is incorrect.

d) He further argued that since the SCN for seizure was issued in the year 2002, it was not open to Revenue to wait till 2005 to issue the SCN on the same case. He relied on the following decision for this point.

- Rivaa Textiles Inds Ltd. 2015 (322) ELT 90 (Guj.)

- Rivaa Textile Inds. Ltd. 2006 (197) ELT 555 (Tri. Mum)

e) Ld. Counsel argued that in respect of clandestine clearance the yarn purchased should treated as duty paid yarn and benefit of Notification 3/2001 should be extended. In support of this argument he relied on the decision of Hon'ble Supreme Court in the case of Decent Dyeing Co. 1990 (45) ELT 201 (SC).

3. Ld. AR relied on the impugned order. He pointed out that the statements of buyers were recorded during 09.09.2002 to 12.09.2002 who accepted that receipt of the clandestinely cleared goods. The said buyers claimed that they had returned the goods. The said returned goods were then sold by the appellant to other six buyers out of which four could not been traced. The statement of such buyers was recorded who admitted, in their statement dated 03.10.2002 that they had received the clandestinely cleared goods. He argued that in these circumstances there was no delay on the part of the Revenue in issue of the SCN and in any matter the date of knowledge of the department has no relevant in computing the limitation period.

4. We have gone through the rival submissions. We find that the appellant have sought to disown the content of the diary recovered from their premises. It is seen that before the original adjudicating authority, the appellant had admitted their guilt and the data given in the diary and paid the duty. It is only before Commissioner (A) and in the Tribunals stage that the appellant are contesting the diary. In these circumstances Section 36A of the Central Excise Act, proscribes as follows:

> **"SECTION [36A. Presumption as to documents in certain cases.** — Where any document is produced by any person or has been seized from the custody or control of any person, in either case, under this Act or under any other law and such document is tendered by the

prosecution in evidence against him or against him and any other person who is tried jointly with him, the Court shall, —

(a) unless the contrary is proved by such person, presume —

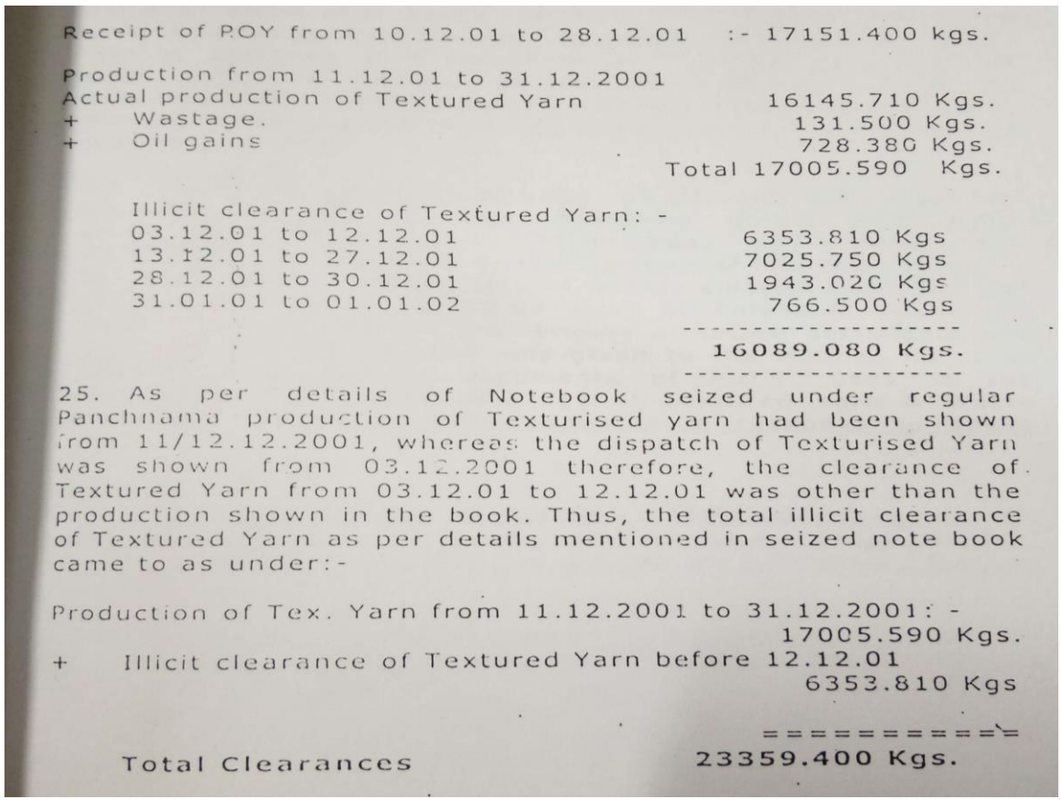
(i) the truth of the contents of such document;

(ii) that the signature and every other part of such document which purports to be in the handwriting of any particular person or which the Court may reasonably assume to have been signed by, or to be in the handwriting of, any particular person, is in that person's handwriting, and in the case of a document executed or attested, that it was executed or attested by the person by whom it purports to have been so executed or attested;

(b) admit the document in evidence, notwithstanding that it is not duly stamped, if such document is otherwise admissible in evidence.]

In the instant case the diary was recovered from the premises of the appellant and therefore unless contrary is proved by the appellant themselves, the said diary is an admissible evidence. Since no evidence to the contrary has been produced by the appellant, the diary can be relied as an admissible evidence.

4.1 The next issue relates to the quantification. A summary of the diary is recorded in para 24 and 25 of the SCN. The said data is as follows:



Receipt of ROY from 10.12.01 to 28.12.01 :- 17151.400 kgs.

Production from 11.12.01 to 31.12.2001

Actual production of Textured Yarn		16145.710 Kgs.
+ Wastage.		131.500 Kgs.
+ Oil gains		728.380 Kgs.
	Total	17005.590 Kgs.

Illicit clearance of Textured Yarn: -

03.12.01 to 12.12.01	6353.810 Kgs
13.12.01 to 27.12.01	7025.750 Kgs
28.12.01 to 30.12.01	1943.020 Kgs
31.01.01 to 01.01.02	766.500 Kgs
	16089.080 Kgs.

25. As per details of Notebook seized under regular Panchnama production of Texturised yarn had been shown from 11/12.12.2001, whereas the dispatch of Texturised Yarn was shown from 03.12.2001 therefore, the clearance of Textured Yarn from 03.12.01 to 12.12.01 was other than the production shown in the book. Thus, the total illicit clearance of Textured Yarn as per details mentioned in seized note book came to as under:-

Production of Tex. Yarn from 11.12.2001 to 31.12.2001: -	17005.590 Kgs.
+ Illicit clearance of Textured Yarn before 12.12.01	6353.810 Kgs
Total Clearances	23359.400 Kgs.

The appellants have sought to assert that demand should be restricted to only the illicit clearance of textured yarn recovered from 03.12.2001 to 01.01.2002. It is seen that the production recorded in the said diary is only from 11.12.2001 to 31.12.2001. Obviously the clearances before 11.12.2001 recorded in the diary need to be factored in the calculation of total illicit clearances. In these circumstances, we cannot find fault with the impugned order as regard the quantification of the quantity illicitly removed is concerned.

4.2 The next issue relates to the benefit of Notification No. 3/2001 being claimed by the appellant. The said Notification prescribes as follows:

Notification No. 3 /2001-Central Excise

In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excise Act, 1944 (1 of 1944), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts excisable goods of the description specified in column (3) of the Table below or specified in column (3) of the said Table read with the concerned List appended hereto, as the case may be, and falling within the Chapter, heading No. or sub-heading No. of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) (hereinafter referred to as the Central Excise Tariff Act), specified in the corresponding entry in column (2) of the said Table, -

(a) from so much of the duty of excise specified thereon under the First Schedule to the Central Excise Tariff Act, as is in excess of the amount calculated at the rate specified in the corresponding entry in column (4) of the said Table; and

(b) from so much of the Special duty of excise leviable thereon under the Second Schedule to the Central Excise Tariff Act, as is in excess of the amount calculated at the rate specified in the corresponding entry in column (5) of the said Table,

Subject to the relevant conditions specified in the Annexure to this notification, and referred to in the corresponding entry in column (6) of the said Table;

Explanation.- For the purposes of this notification, the rates specified in columns (4) and (5) of the said Table are ad valorem rates, unless otherwise specified:-

Table

S. No.	Chapter or heading No. or sub-heading No.	Description of goods	Rate under the First Schedule	Rate under the Second Schedule	Condition No.
126.	54.02	Textured yarn (including draw twisted	Rs. 2.50 per kg.	Nil	22

		and draw wound yarn) of polyesters manufactured by an independent texturiser who does not have the facilities in his factory (including plant and equipment) for producing partially oriented yarn (POY) of polyesters falling under sub-heading No. 5402.42			

Condition NO. 22	If- (i) Manufactured out of textured or draw twisted yarn, falling under Chapter 54 of the First Schedule on which, the appropriate duty of excise leviable under the Second Schedule the special duty of excise leviable under the Second Schedule to the Central Excise Tariff Act, or as the case may be, the additional duty leviable under the Customs Tariff Act, 1975 has already been paid; and (ii) No credit under rule 57AB or rule 57AK of the Central Excise Rules, 1944 has been availed in the process of dyeing, printing, bleaching or mercerizing in the manufacture of dyed printed, bleached or mercerized yarn.

It is seen that the benefit of said notification is available only if the goods are manufactured by using textured or draw twisted yarn on which appropriated duty has been paid in terms of condition No.22 to the said notification. The appellants have claimed that they have purchased the goods from the market and therefore, as per the decision of Hon'ble Apex Court in the case of Decent Dyeing Co. (supra) the said goods should be treated as duty paid goods and therefore they are entitled to benefit of Notification 3/2001. In the instant case it is seen that the appellant were asked to produce the purchase bills, invoices of the said textured of draw twisted yearn purchased by them. The appellants have failed to do so. It is seen that the decision in the case of Decent Dyeing (supra) applies to the goods purchased from the market. In that regard, the appellant have failed to produce any evidence that they have purchased the goods from the market and not obtained the same

without invoices cleared clandestinely without payment of duty. The goods in the market are deemed to be duty paid because they are in regular trade channel. In the instant case, the appellant did not have any evidence of purchase the goods from the market. The only other conclusion can be that goods were obtained from grey market. In these circumstances the goods cannot be deemed to be duty paid goods. In these circumstances, the benefit of Notification 3/2001 cannot be extended to the appellant.

4.3 The next issue relates to the limitation. Ld. Counsel has sought to argue that the entire issue of clandestine clearance was crystalize during the search made in the appellants premises on 02.02.2002 and the SCN was issued in the year 2005. It has been argued that the issue came to knowledge of Revenue in the year 2002 and hence period of limitation should be considered from the date when the issue came to the knowledge of Revenue.

4.4 It is seen that in the case of Neminath Fabrics (P) Ltd. 2010 (256) ELT 369 (Guj.) observed as follows:

> **"20.** Thus, what has been prescribed under the statute is that upon the reasons stipulated under the proviso being satisfied, the period of limitation for service of show cause notice under sub-section (1) of Section 11A, stands extended to five years from the relevant date. The period cannot by reason of any decision of a Court or even by subordinate legislation be either curtailed or enhanced. In the present case as well as in the decisions on which reliance has been placed by the learned advocate for the respondent, the Tribunal has introduced a novel concept of date of knowledge and has imported into the proviso a new period of limitation of six months from the date of knowledge. The reasoning appears to be that once knowledge has been acquired by the department there is no suppression and as such the ordinary statutory period of limitation prescribed under sub-section (1) of Section 11A would be applicable. However such reasoning appears to be fallacious inasmuch as once the suppression is admitted, merely because the department acquires knowledge of the irregularities the suppression would not be obliterated."

5. In view of the above, the benefit of limitation cannot be extended to the appellant.

6. As dictated above, the impugned order, is therefore, upheld. The appeal of M/s Vanita Texturisers (P) Ltd. is accordingly dismissed. The appeal of Shri G.M. Solanki (Director) is abated.

(Pronounced in the open court on 05.12.2018)

(Raju)
Member (Technical)

(Ramesh Nair)
Member (Judicial)

Neha