CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD.

Date of hearing/decision: 25.01.2018

Excise Appeal No. 2601 of 2011
(Arising out of Order-in-Original No. 16/CEX/Commissioner/2011 dated 29.07.2011 passed by the Commissioner, Central Excise, Kanpur).

M/s Asma Traders Appellant

Versus

CCE&ST, Kanpur Respondent

Appearance:

Sh. Amit Aswathi, Advocate for the appellant
Sh. Rajeev Ranjan, Authorised Representative for the Respondent

Coram:
Hon'ble Mr. Anil Choudhary, Member (Judicial)
Hon'ble Mr. Anil G. Shakkarwar, Member (Technical)

Final Order No. 70699/2019

Per: **Anil Choudhary**:

The appellant has filed the present appeal against the order-in-original No. 16/Commissioner /2011 dated 29/07/2011 passed by the learned Commissioner, wherein he has confirmed the duty along with interest and penalty and also imposed Redemption Fine.

2. The brief facts as per show cause notice is, the appellant is engaged in the manufacture of Poly Propylene Multi Filament Yarn (PPMFY) falling under Chapter heading 54026930 and Narrow Woven Fabrics (NWF) falling under Chapter Heading 58063700 of Central Excise Tariff Act, 1985. That Narrow Woven Fabrics (NWF) is chargeable to NIL rate of duty as per

Notification No. 30/2004 dated 9.7.2004 and for the manufacture of the said NWF, the appellant was using Poly Propylene granules, master batch of spin finish oil as inputs. During the course of manufacture of finished goods, an intermediate product (PPMFY) was also manufactured, which is being captively consumed in the process of manufacture of NWF. Now, the case of the Department is, since the final product NWF was exempted vide notification No. 30/2004 dated 09.07.2004, the exemption provided under Notification NO. 67/95 dated 16.03.1995 (an intermediate product) is not admissible, and the appellant is required to pay duty. It is also the case of the department the said PPMFY is also not exempted vide Notification No. 30/2004 dated 09.07.2004, as from test report the said PPMFY was of deniel 1062.8. It is also the case of the department that the said PPMFY is marketable as such in view of the statement of Shri Shravan Prasad Singh, Prop of M/s Saumya International, recorded under Section 14 of Central Excise Act. Based on the above allegations, a show cause notice was issued to the appellant asking as to why Central Excise duty should not be demanded along with interest and penalty & the intermediate goods should not be confiscated.

2. The said Show cause notice was contested by the appellant, however, the learned Commissioner confirmed the duty along with interest and penalty and also imposed redemption fine on the confiscated goods. Hence, the present appeal before the Tribunal.

3. The learned Advocate submitted that their unit is a composite unit, undisputedly, having a continuous manufacturing process wherein spinning of semi finished PPMFY is being done followed by subsequent process like

stretching, winding, warping and braiding is done on a needle loom and it is an undisputed fact that the subject PPMFY, alleged to be intermediate product, in the stage it is generated, is not marketable because being integral and inter-winded in a continuous process, the yarn threads are still open with oil contact and are not even open at the stage of being coned or paper coned or paper tubed' and still the said product are bound in loose form in heavy iron bobbins, which still was to undergo subsequent operation and the product is in semi-finished form. The said product as alleged by the department, fails the test of marketability because the said intermediate product which is claimed liable to duty, cannot be marketed in any manner, in the condition in which it emerges. Only on presumption it cannot be alleged by the department that the said intermediate product could be marketed by the appellants.

The appellant argues that, in the case of Bata India Ltd. vs. CCE – 2010 (252) ELT 492 SC the Hon'ble SC had held as follows:

> The test of marketability is that the product which is made liable to duty, must be marketable in the condition in which it emerges. He pleaded that in this case no evidence has been produced to prove that the sugar syrup as made by the appellants is marketable in the condition in which it emerges and that merely on the basis that the "invert sugar syrup" made by Dhampur Speciality Sugars Ltd. is marketable, it cannot be presumed the sugar syrup made by the appellant is marketable.

Because there is yet another decision of A. P. State Electricity Board vs. CCE Hyderabad – 1994 (70) ELT 3 SC wherein the Hon'ble SC had held as follows:

> Wherein this Court held that the marketability is essentially a question of fact to be decided on the facts of each case and there can be no generalization, and the fact that goods are not in fact marketed is of no relevance and the question whether they are capable of being marketed. Admittedly, the assessee is not marketing the product but still the question is whether the product is capable of being marketed.

In the case of Deccan Fibre Glass Ltd. vs. Union of India -2006 (193) ELT 261 Del HC, it was held as follows:

> Glass fibre – manufactured as intermediate product in a continuous and integrated process to manufacture mineral fibres and yarn – HELD : It was not excisable – Section 3 of Central Excise Act, 1944.

Further, reliance is placed on the case of Hon'ble Supreme Court in the case of CCE, Baroda v. United Phosphorus – 2000 (117) ELT 529 SC wherein the Hon'ble Apex Court had held as follows:

> Dutiability- Marketability – Intermediate products coming into existence in the course of manufacture of pesticides – No product is "goods" unless shown to be marketable by the Department – Mere specification in the dictionary, excise tariff and Drawback Rate schedule is of no consequence – Department's appeal dismissed – Sections 2(d) and 3 of Central Excise Act, 1944.

Further, reliance is placed on the case of Cipla Ltd., v CCE Bangalore - 2008 (225) ELT 403 para-11 wherein it was held that marketability is an essential ingredient to hold that an article is dutiable or excisable to duty, and it is well established principle of law that the burden is on the Revenue to prove that the goods are marketable or excisable and held that the product in question was neither marketed nor marketable and was only an intermediate product. It is useful to refer to the law laid down by this Court which reads as follows:-

> "Since marketability is an essential ingredient to hold that a product is dutiable or exigible, it was for the Revenue to prove that the product was marketable or was capable of being marketed. Manufacturing activity, by itself, does not prove the marketability. The product produced must be a distinct commodity known in the common parlance to the commercial community for the purpose of buying and selling. Since there is no evidence of either buying or selling in the present case, it cannot be held that the product in question was marketable or was capable of being marketed. Mere transfer of BMS by the appellant from its factory at Bangalore to its own unit at Patalganga for manufacture of final product was either marketed or was marketable".

Further, reliance is placed on the case of Hon’ble Supreme Court in the case of CCE vs. Amba Lal Sarabhai – 1989 (43) ELT 214 (SC) further laid down the test of marketability and held that mere captive consumption is no evidence of marketability. The Hon’ble Apex Court had held as follows:

> The duty of excise is on the manufacture of goods and for an article to be “goods”, there must be known in the market as such or they must be capable of being sold in the market as goods. Actual sale is not necessary. User in the captive consumption is not determinative of that the article is capable of being sold in the market or known in the market as goods. Even transient items of articles can be goods, provided that they were known in the market as distinct and separate articles having separate uses, there would still become goods if they were capable of being marketed even during the said short period. Thus the goods with unstable character can be theoretically marketable if there was a market of such transient type of articles but one has to take a practical view on the basis of available evidence- Tribunal decision in Anil Starch products vs. Collector in Appeal no. ED(SB) T 1534/81-D overruled.

That the Hon’ble CESTAT in case of Rishi Baker vs. CCE, Kanpur-2015 (328) ELT 634, at para 9 had addressed the identical issue, and relying upon the case of Bata India (supra) the Hon’ble Tribunal had held as follows:

> **“9.** Even if it is assumed that the goods, in question, are covered by sub-heading 1702 90 90, for attracting Central Excise duty the goods must be proved to be marketable. The Tribunal had remanded this matter to Commissioner (Appeals) for examining the question of marketability of the goods, in question. In this regard it is settled law that the marketability of a product has to be established in the condition in which it emerges. In this regard the Apex Court in the case of *Bata India Ltd.* v. *CCE, New Delhi* (supra) has held that the test of marketability is whether product is marketable in condition in which it emerges. In this regard the marketability of the goods produced by a particular manufacturer cannot be presumed on the basis of the marketability of the similar goods in different condition being produced by another manufacturer, unless it shown that the two products are identical. In these cases, the Commissioner (Appeals) has held that the goods, in question, to be marketable only on the basis that the “invert sugar syrup” being manufactured by M/s. Dhampur Speciality Sugars Ltd. is being sold to M/s. Britannia Industries, M/s. J.B. Mangaram Food Industries and M/s. ITC Ltd. In our view this basis of holding that the goods, in question, are marketable is absolutely wrong, as it has been presumed that the sugar syrup being made by the appellants is identical to the “invert sugar

> syrup" being made by M/s. Dhampur Speciality Sugars Ltd. for which there is no basis. Chemically, invert sugar is obtained by Hydrolysis of cane sugar (sucrose, a disaccharide with specific rotation of + 66.5°) and the same is a mixture of glucose (with specific rotation of +52.7°) and fructose (with specific rotation of - 92°), with net specific rotation of - 19.7°. The process of hydrolysis of cane sugar (which is dextrorotatory i.e. with rotation of + 66.5°) is also called inversion, as the mixture of glucose and fructose formed by this process is levorotatory with sp. Rotation of - 19.7° and for this reason the mixture of glucose and fructose formed by hydrolysis of cane sugar is called invert sugar. The invert sugar has longer shelf life. Whether a sugar syrup is ordinary cane sugar syrup or is invert sugar syrup has to be ascertained by chemical test which has not been done. It is, therefore, totally wrong to presume a given sugar syrup as invert sugar syrup without test. The judgments of the Apex Court in the cases of *Gujarat Narmada Valley Fert. Co. Ltd.* v. *CCE & Cus.* (supra), *Nicholaas Piramal India Ltd.* v. *CCE, Mumbai* (supra) and *Medley Pharmaceuticals Ltd.* v. *CCE & Cus, Daman* (supra) cited by the learned DR are not applicable to the facts of this case."
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> (Emphasis Supplied)

4. Further, the appellants argue and submit that the product in question, alleged to be intermediate product, is not marketable at the stage and in the form it is generated or emerges, and moreover as evident from the statement/ letter dated 14.06.2010 (RUD no. 7, internal para 8 SCN), along with the Test Reports, that the said product is not capable of being taken to the market and being bought and sold. In UoI v. Delhi Cloth & General Mill – 1977 (1) ELT 99 SC, the Hon'ble Court held, "Dutiability – 'Goods' – Meaning – To become 'goods' an article must be something which can ordinarily come to the market to be bought and sold – Section 3 of Central Excise and Salt Act, 1944.

5. The learned AR reiterated the findings of the impugned order and prayed for dismissal of appeal.

6. Having considered the rival contentions and perusal of records, we find that the appellants' unit is a composite unit and doing continuous manufacturing process wherein spinning of semi-finished PPMFY is being

done followed by subsequent process like stretching, winding, warping and braiding is done on a needle loom. We also find that PPMFY in the stage it is generated is not marketable, being integrated and inter-winded in a continuous process, the yarn threads are still open with oil contact and are not even open at the stage of being coned or paper coned or paper tubed' and still the said product are bound in loose form in heavy iron bobbins which still has to undergo subsequent operations and the product is in semi-finished form. We find that, the said PPMFY cannot be marketed in any manner, therefore, fails the test of marketability. Our view is supported by the decision of Hon'ble Supreme Court of India in the case of Bata India Ltd. vs CCE, [2010 (252) ELT 492 (SC) and also of this Hon'ble Tribunal in the case of Rishi Baker vs. CCE, Kanpur [2015 (328) ELT 634]. Hence, the said product is not liable for Central Excise duty.

7. Accordingly, we allow the appeal filed by the appellant by setting aside the impugned order. The appellant shall be entitled for consequential relief, as per law.

(Operative part of the order was pronounced in the open Court).

Sd/-

(Anil Choudhary)
Member (Judicial)

Sd/-

(Anil G. Shakkarwar)
Member (Technical)

Pant