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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
38,MG Marg Civil Lines,Old Red Building,Allahabad-211001
Regional Branch, Allahabad

To

Dated: 10/10/2017

Appellant as per address in table below
Respondent as per address in table below

Final Order No. A/71196/2017-EX[DB] dated 11/04/2017

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 35-C(1) of the Central Excise and Salt Act, 1944.

Asstt. Registrar

Application	Appeal	Name and Address of Appellant
1	E/1127/2011	SWADESHI POLYTEX LTD., KAVI NAGAR INDUSTRIAL AREA, GHAZIABAD (U.P.)
		Name and Address of Respondent
2		-C.C.E. GHAZIABAD C.G. O. Complex-II, Kamla Nehru Nagar, Ghaziabad 201302

Copy To
3Advocate(s) / Consultant(s):

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4 KAPIL VAISH
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35-c, Rampur Garden, Civil Lines,
Bareilly, Up
BAREILLY

5 Bar Association, CESTAT, Allahabad

6 Director Publications, Customs, Excise. I.P. Estate, Delhi

7 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, Opp ICICI Bank of Defence Colony New Delhi-3

8 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

9 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

10 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

11 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070

12 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad – 38

13 The ICFAI society, 52, Nagarjuna Hill,Punjagutta Hyderabad.-500082

14 M/S Knowledge Processing Pvt. ltd.(taxmanagementindia.com),FF-19,1st Floor,Cross River Mall,CBD Ground,Near Karkardooma Court,Delhi-110032

15 C.D.R. 16 Office Copy 17 Second Folder Copy 18 Guard File

Asstt. Registrar

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH : ALLAHABAD
COURT No. I

APPEAL No. E/1127/2011-EX[DB] with
ST/stay/1444/2011

(Arising out of Order-in-Original No. 41/Commr.GZB/2010-11 dated 15/02/2011 passed by Commissioner of Central Excise & Customs, Ghaziabad)

M/s Swadeshi Polytex Ltd. **Appellant**

Vs.

Commissioner of Central Excise, Ghaziabad **Respondent**

Appearance:

Shri Kapil Vaish, C.A. &
Shri Rahul Agarwal, Advocate for Appellant
Shri Rajeev Ranjan, Joint Commissioner (AR), for Respondent

CORAM:

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

Date of Hearing : 11/04/2017
Date of Decision : 11/04/2017

FINAL ORDER NO. 71196/2017.........

Per: Anil Choudhary

The present appeal is filed by the appellant-assessee against Order-in-Original No. 41/Commr.GZB/2010-11 dated 15/02/2011 passed by Commissioner of Central Excise & Customs, Ghaziabad.

2. This is the fourth round of litigation. The issue in this appeal is whether the appellant, in the garb of waste have been clearing the finished products.

3. Vide show cause notice dated 03/07/1978, the case of revenue is that the appellant without payment of appropriate excise duty, in the garb of uncut-crimped waste had removed their finished products being Polyester Fibre/tow, thereby evading a sum of Rs.1,42,67,764.60/- as duty on a quantity of 4,19,418.00 Kg of tow having been cleared on invalid gate passes in form G.P.-1. It further appeared that the appellant have suppressed production of a quantity of 23464.8 KG of polyester fibre without accounting for the same in the statutory records without getting the classification list approved, without issuing gate passes and without payment of duty amounting to Rs.84,15,521.12/- leviable thereon. As per inquiries conducted by revenue, it appeared that appellant consigned certain quantity of polyester fibre/tow initially to Shri Ram Silk Mills, Bombay, M/s Asha Wool Trading Company Panipat, Mahendra Jain, Panipat and M/s Synth Overseas Corporation, Bombay on G. P. as detailed in Annexure on various dates at a price ranging from Rs. 15 to Rs. 25 per Kg as per the details in the invoice of the appellant. Further, the aforesaid firms consigned the quantity of polyester fibre/tow. As stated above, Bharat Commerce and Industries Nagda without carrying out any process whatsoever and in respect of some consignments charged high price of Rs. 64 per Kg and in respect of others charged price ranging from Rs. 24 to Rs. 42.75 per Kg; that the delivery challan, the details of which are given in Annexure-2 of the show cause, that the consignments in question had been sent direct for the cutting of fibre and for manufacture of blended yarn by the said

Bharat Commerce and Industries Nagda without any processing by the intermediary firms. Further, the concerned parties like Bharat Commerce and Industry Nagda actually used, the said material for further manufacture of finished products. It further appeared that consignments detailed in Annexure-3 to SCN totaling 13,341 Kg of polyester fibre/tow were consigned and sold direct to M/s Bharat Commerce and Industries Rajpura, Jaya shri Textile Co., Rishra (West Bengal), Bharat Woollen Mills, Calcutta and others on different dates as stated in the said Annexure, but were shown as crimped uncut waste with a view to evading payment of excise duty leviable thereon. It further appeared that the said polyester fibre/tow so removed from the premises of appellant was actually used for cutting of fibre and for manufacture of blended yarn as per verification done by the excise officers. The statements of various third parties, that is purchaser of material from the purchasers who purchased from appellant was recorded and some of them stated that after obtaining the waste from the appellant, they further processed and thereafter pursuant to value addition have sold the same to others. The said show cause notice was adjudicated on contest and the demand of Rs. 1.39 Crores was confirmed out of the proposed demand of Rs.1,42,67,764.60/-. The other demand proposed for Rs.84,15,521.12/- was dropped. Further penalty was imposed and the land, building, plant and machinery also stood confiscated. Being aggrieved, the appellant preferred appeal before this Tribunal and thereafter this Tribunal by its Final Order dated 15th July, 1992, remanded the matter to the adjudicating authority, for a redetermination after considering fresh submissions to be made by the appellant. However, the Tribunal did not allow the prayer of the appellant for cross-examination. Being aggrieved the appellant preferred further appeal before Hon'ble Supreme Court and vide order dated 20/07/2000, the appeal of appellant was allowed in the following terms: –

"The Tribunal in the present case has remanded the matter to the Collector for a fresh decision after coming to the conclusion that there had been a denial of the principles of natural justice. While remanding the case, the Tribunal, however, upheld the finding of the Collector that the appellant herein will have no right to cross-examine the witnesses on whose statements the Collector had relied upon.

2. The point in issue in the present case was whether a commodity which is categorised as waste by the appellant can be regarded as good quality fibre by the department and excise duty levied thereon. In order to justify the levy of excise duty, the Collector had referred to and relied upon the statement of some persons who are alleged to have utilised the said waste for the purposes of spinning yarn.

3. The learned Counsel for the appellant submits that the appellant should be given an opportunity of cross-examining those witnesses in order to determine whether the waste in question could be categorised as fibre for the purposes of levy of excise duty. He does not wish to cross-examine any other witness on those other statements to which reference may have been made.

4. In the facts and circumstances of the present case, we consider that this contention is well-founded. When the Collector has to decide afresh, he should, if he intends to rely upon the statement of any such person, give an opportunity of cross-examination to the appellant. The appeal is disposed of in the aforesaid terms. No costs."

4. Thereafter, again the same demand was confirmed without providing opportunity of cross-examination and this Tribunal in appeal filed by the appellant being Final Order No.7476/2007-EX

dated 17.08.2007 again set aside the order with a direction to comply with the direction of the Apex Court with regard to cross-examination of the persons whose statements have been relied upon or the adjudicating authority wants to rely upon. Thereafter, again Order-in-Original dated 20th May, 2009 was passed again confirming the demand without cross examination and this Tribunal vide Final Order dated 24/07/2009 was again pleased to set aside the impugned order to pass a reasoned order complying with the directions of the Apex Court. Thereafter, the present impugned order No.41/Commissioner/Ghaziabad/2010–11 dated 15th February, 2011 has been passed and being aggrieved the appellant is again before this Tribunal.

5. The learned Counsel urges that the impugned order is bad and fit to be set aside as even after three remands, the learned Commissioner have failed to comply with the directions of the Apex Court and this Tribunal, for providing an opportunity to cross-examine the witness of the revenue. He also urges that the entire show cause notice is barred by limitation under the facts and circumstances and in law. The learned Counsel has taken us through the findings in the impugned order at para 5.2 wherein on the issue of cross examination, the learned commissioner have observed that the Hon'ble Apex Court in appeal filed by the appellant gave the verdict- "When the Collector has to decide the case afresh he should, if he intends to rely upon the statement of any such person, give an opportunity of cross examination to the appellant." The learned

Commissioner further observed that as such, all efforts were made by sending letters to the witnesses at the available addresses to enable the cross examination requested by the appellant. Further, observed that letters to all the 4 witnesses were sent by registered post, in case of 3 witnesses, namely Surendra Kumar Kalra of Nagda, Narain Bhai Patel of Ahmedabad and Banarasi Lal Luthra of Mumbai, the letters were received back from the postal authorities with the remarks "closed", "Receiver left", and "not known". Further in case of Mr. S.P. Kanoria, his employer M/s Raigarh Jute & Textile Mills Ltd. informed that he had left the firm 25 years back and his whereabouts were not known. Further the matter, being 32 years old, they did not have any record pertaining to the said person. Further, as the matter was very old and no other person conversant with the matter, they could not depute any other employee for the same. Since none of the witnesses were traceable, appellant vide letter dated 11/10/2010 was requested to provide the whereabouts of the witnesses, if known to them, so that they may be called for cross-examination. However, appellant also could not give any information about them. This office, which is quasi-judicial in nature, can only issue letters or summons under Section 14 of the Act and does not have the powers to issue bailable/non-bailable warrants for calling to the witnesses to appear for cross-examination.

6. It is further observed in para-5.5 of the order – the clearances of fibres in the guise of waste could not have been possible without the knowledge and consent of the purchasers who knew the actual

classification and use of the goods sold to them. Thus, the appellant was confident that even if some inquiry would be conducted from the purchasers they would support them. However, the Department conducted detailed enquiries and reached to the ultimate consumers of the impugned goods where it was found that the claimed waste was actually used as tow/fibres in the manufacture of yarn. There is no denial from the appellant side that their goods were actually not sold to the ultimate consumers and listed in the annexures to the SCN. In this regard, there are sufficient documentary evidences to support this allegation of the revenue. Further, in addition to documentary evidences, the statement of ultimate consumers were recorded under Section 14 of the Act before the Superintendent of the Central excise and recording of such a statement was a judicial proceeding within the meaning of Section 193 and 228 of Indian Penal Code, 1860. There is nothing on record to disprove the correctness of the said statements. There is also nothing on record to establish that the said statements were not tendered voluntarily. However, at this point of time due to lapse of so much period of time, it is not possible to trace the persons who stated the facts and all efforts to get them cross-examined have failed. Learned Commissioner mentions that the directions of the Hon'ble Apex Court as well as CESTAT have been complied with by affording opportunity of cross-examination of witnesses which could not be completed due to non-availability of witnesses. Further, in para-5.6 it is observed that I find that the insistence of cross-examination of the persons from ultimate users does not have much relevancy since the witnesses have just accepted that goods were belonging to appellant and received by them through intermediary parties were used as fibre/tow for spinning of yarn. The admission of the facts by the party in their defense reply is itself an evidence for the allegations made in the show cause notice by the Department. It is further recorded that enquiries conducted also revealed that although delivery challans/gate passes issued, showed movement to the middlemen but the material was sent directly to the spinners. Further on cross examination in para-5.9 the learned Commissioner states – I find that on 19th February, 2008 at the time of personal hearing before the then Commissioner, appellant requested for cross-examination of 4 persons only, namely, S.K. Kabra of Bharat Commerce Industries, Nagda, Shri N.B. Patel of Sarangpur Cotton Manufacturing Company, Shri S.P. Kanodia of Bharat woollen Mills, Calcutta and B.L. Luthra of Natsyn Fibre Processor. Cross-examination of any other person was never requested by them, thereafter. I thus find that the statement of other persons are acceptable to them and therefore are admissible as evidence in the case. Learned Commissioner directed to give the name of the persons to be cross-examined so that the directions of this Tribunal and the Apex Court may be complied. The appellants vide their various letters had stated that as per the directions of the Apex Court cross-examination of all such witnesses is required, the statement of whom revenue wishes to rely, particularly in the reply dated 1/7/2008. Referring to the order of the Apex Court, it was mentioned that all such persons whose statement, the Department intends to rely upon should be produced for cross-examination. The learned counsel further states that the adjudicating authority has failed to exercise the jurisdiction vested on him for producing its witnesses. In this view of the matter for non-compliance of the directions of the Apex Court and this Tribunal, the impugned order is vitiated and fit to be set aside. Learned Counsel has also taken us through the decision of this Tribunal in their own case being Final Order dated 12/12/1996, reported at 1999 (109) ELT 998 (Tri.) wherein it was held that the Department at all times was aware of the physical format and characteristics of confiscated goods, clearance of waste being under physical supervision and after physical examination by officers. Under such circumstances, extended period of limitation is not invocable. Learned Counsel also points out by reading a few paragraphs that the issue in this appeal and the other appeal were similar.

7. So far the issue of limitation is concerned, he points out that the impugned period is 14th August, 1973 to 29th November 1977. The show cause notice was issued on 03/07/1978. On the date of issue of show cause notice, the limitation was six months. This limitation of six months was increased from three months with effect from 06/08/1977. The learned Counsel further states that in view of the physical control system in operation during the relevant period and further the appellant have filed appropriate declarations as required under Rule 173B of the rules, no case of any suppression, clandestine removal or misstatement is made out. He further states that there is no

test report obtained by the revenue with respect to the samples of the products, that is finished products or waste, as cleared by the appellant on record. In this view of the matter the whole period under dispute is barred by limitation.

8. The learned AR for revenue has relied on the impugned order. He further emphasises that the learned Commissioner have categorically stated that he has done all that he could do to ensure the attendance of the witnesses of the revenue but they were not traceable and/or could not be located and as such there have been adequate compliance of the directions to cross examine and passed the fresh order in accordance with law.

9. Having considered the rival contentions and on perusal of record, we are satisfied that the learned Commissioner has failed to present the witnesses of revenue, the statements of which have been relied, for cross-examination. We are further satisfied that learned Commissioner has failed to exercise the jurisdiction vested on him to ensure the attendance of witnesses in the course of adjudication proceedings. We further take notice that under the provisions of law all the powers of a Civil Court are vested in the adjudicating authority in ensuring the attendance of witness, which we find from the findings on record, have not been resorted to. Thus the order is vitiated for failure to exercise jurisdiction vested in the learned Commissioner. Accordingly, we hold that the impugned order is not sustainable and the same has not been passed in accordance with the provisions of law and the directions of the Apex Court and this Tribunal as noted herein

above. In view of the findings recorded and, this appeal is allowed. We leave the question of limitation open.

10. Accordingly, the appeal is allowed and the impugned order is set aside.

(Dictated in Court)

-Sd/-	-Sd/-
(ANIL G. SHAKKARWAR)	(ANIL CHOUDHARY)
Member (TECHNICAL)	Member(JUDICIAL)

akp

प्रमाणित प्रति/Certified True Copy
25/10/17

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