

**CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHBAD
REGIONAL BENCH**

Excise Appeal No.50148 of 2014 (DB)

[Arising out of Order-in-Appeal No.GZBEXCUS000APP-140-13-14 dated 17.09.2013 passed by the Commissioner (Appeals), Customs, Central Excise & Service Tax, Ghaziabad].

M/s. Modipon Ltd.

(Formerly Modipon Fibers Company)

Hapur Road, Modi Nagar,
Ghaziabad-201 204 (U.P.)

Appellant

VERSUS

**Commissioner of Customs, Central Excise &
Service Tax,**

Ghaziabad, U.P.

Respondent

APPEARANCE:

Shri Nishant Mishra, Advocate for the appellant.

Shri Anupam Kumar Tewari, Authorised Representative for the respondent.

CORAM:

HON'BLE SHRI ANIL CHOUDHARY, MEMBER (JUDICIAL)

HON'BLE SHRI P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO.70068/2022

DATE OF HEARING:06.08.2021

DATE OF DECISION:09.02.2022

ANIL CHOUDHARY:

The issue involved in this appeal relates to classification of intermediate goods – Nylon/Polyester Filament Yarn, partially oriented yarn (POY)) and the final goods manufactured by the appellants. Admittedly, the appellant was using intermediate goods in the manufacture of the final products - Textured Nylon /Polyester filament Yarn.

2. The brief facts are that the appellant were engaged in the manufacture of Nylon/Polyester Filament Yarn, partially oriented yarn (commonly known

as POY) and Textured Nylon and Polyester Yarn. The Central Excise duty on the yarn was based on the denierage of the yarn; lesser the denierage (finer the yarn), the more is the duty. The appellant had been classifying their yarns as Filament Yarn or partially Oriented Yarn (POY) and were getting such yarn assessed on the basis of the denierage of the Filament Yarn or the POY, as the case may be. The appellant filed a classification list no.Yarn/37/83-84 dated 22.03.84 seeking approval of rate of duty of man-made non-cellulosic, other than textured filament yarn falling under T.I.18-II(1)(A) of the Central Excise Tariff, as it existed at the relevant time, declaring the products and rate of duty as under:-

Sl.No.	Continuous Sl.No. of the Classification list	Description of the Product	Rate of Duty	Notification No.
1.	153	Polyester Yarn 756 denierage	Rs.15/-per kg. (basic) + 10% SED of BED + 15% AED of BED	49/83 dt.1.3.83 as amended by Notif.No.261/83 dt.11.10.83 and 181/83
2.	154	Nylon Filament Yarn 148/10/0/902	Rs.41/-per Kg.(Basic)+10% SED of BED + 15% AED of BED	49/83 dt.1.3.83 as amended by Notif.No.181/83 dt.1.7.83 & 261/83.
3.	155	374/24/0/902	Rs.6.50 /- per kg. (basic) + 10% SED of BED + 15% AED of BED	-do-

3. The classification list of the appellant as aforesaid, indicated that they had sought approval in respect of 756 denierage polyester yarn, 148 and 374 denierage Nylon Filament Yarns, at appropriate rate based on the denierage of the yarn, declared by them.

4. The appellant also submitted a classification list No.Yarn/38/83-84 for 'Man-made Non-Cellulosic Textured Filament Yarn' to be made out of so called yarn of 756 denierage polyester and 148 and 374 denierage Nylon Yarn, (in respect of which classification no.Yarn/37/83-84 dated 22.03.84, discussed above), falling under T.I. 18-II(1)(B) of the Central Excise Tariff as it existed then, seeking approval of the same at Nil rate of duty in terms

of Notification No.178/83-CE dated 01.07.1983 in regard to Polyester/Nylon Textured Yarn made out of duty paid filament yarn by describing the product as under:-

Sl.No.	Continuous Sl.No. of the classification list	Description of the product	Rate of duty	Notification No.
1.	156	<u>Polyester Textured Yarn 220-48-1-Z-1014</u>	Nil	178/83 dt.1.7.83
2.	157	<u>220-48-1-Z-1015</u> (both made from 756/48/0/1002 other than textured polyester yarn)	Nil	-do-
3.	158	<u>Nylon Textured Yarn 40-10-1-S-903</u>	Nil	-do-
		<u>40-10-1-Z-903</u>	Nil	-do-
		<u>40-10-1-S-913</u>	Nil	-do-
		<u>40-10-1-Z-913</u> (made from 148/100/902 other than textured Nylon Yarn)	Nil	-do-
		<u>236/48/2/903-(2ply)</u> (made from 374/24/0/902 other than textured Nylon Yarn)	Nil	-do-

5. The classification list No.Yarn/37/83-84 dated 22.03.84 was approved provisionally and the samples of the products in question were sent to the Chemical Examiner for testing. The Chemical Examiner had given his reports under Test Memo no.33/84[in respect of declared product-Polyester Yarn(756/48/0/1002)], Test Memo No.34/84 [in respect of declared product-Nylon Filament Yarn (374/24/0/902)] and Test Memo No.35/84 [in respect of declared product-Nylon Filament Yarn (148/10/0/902)]. Based on these reports, a show cause notice dated 01.09.1984 was issued to the appellant alleging that products declared by them in Classification list No.Yarn/37/83-84 dated 22.03.84 are not classifiable as yarn, and not liable to duty, therefore, classification of the products claimed in classification list no.Yarn/38/83-84 is liable to be rejected and chargeable to duty as per Notification No.51/83 dated 01.03.1984 (being not manufactured out of duty paid yarn). The said show cause notice dated

01.09.1984 was decided by the Assistant Collector, Division-I, Central Excise, Ghaziabad vide Order-in-Original dated 19.07.1985, rejecting the claim of the appellant. The order-in-original dated 19.07.1985 was challenged by the appellant before Hon'ble Delhi High Court vide C.W.No.2205 of 1985. The Hon'ble High Court of Delhi vide order dated 23.09.1985 quashed the said order dated 19.07.1985 and remanded the matter to the Assistant Collector for fresh adjudication in accordance with the law, after giving opportunity to the appellant of cross examining the Chemical Examiner, after production of the relevant records, if available, and referred to at item No.1 and 2 of the appellant's letter of 20.04.1985.

6. As directed by the Hon'ble High Court of Delhi vide order dated 23.09.1985, the case was re-adjudicated by the Adjudicating Authority vide the order dated 22.04.87 confirming that the product referred to in classification list No.Yarn/37/83-84 was neither classifiable as Polyester/Nylone Filament Yarn as described by the appellant in the said classification list, nor as partially oriented yarn (POY), quashed the provisional assessment granted vide letter C.No.V-18(17) VC/59/84/5090 dated 11.07.84 with rejection of classification list no.Yarn/37/83-84. Further, the Adjudicating Authority also ordered for modification of the classification list no.Yarn/38/83-84 (as the textured yarn classified therein was not found made from duty paid base yarn), with duty of excise on the products declared therein at appropriate rate as per notification no.51/83 dated 1.3.83, denying the benefit of notification no.178/83-CE dated 1.7.1983. The adjudication authority in the said order further directed the appellant to pay differential duty after adjusting the duty already paid, if any, on the yarn cleared along with interest @ 17.5% on the total amount due and also ordered for the encashment of bank guarantees executed by them.

7. Further, with reference to the above said classification order dated 22.04.1987, the jurisdictional Assistant Commissioner vide letter dated 7.5.1987, informed the appellant that the total central excise duty to be recovered on such textured yarn (declared in classification list no.Yarn/38/83-84) including waste works out to be Rs.2,29,00,478.33 for the period 3.4.84 to 25.3.85 and after allowing set off of duty amounting to Rs.1,13,25,771.42 already paid by them, the duty to the tune of Rs.1,15,74,706.91 was recoverable in terms of the said order.

8. Aggrieved with the classification order dated 22.4.1987 and subsequent demand letter dated 7.5.1987, the appellant filed Writ Petition bearing no.1644 of 1987 before Hon'ble Delhi High Court on 22.05.1987 with request for stay of collection of the taxes, stating that the classification order dated 22.04.1987 has been passed in violation of the directions given by the Hon'ble High Court, by order dated 23.09.1985 passed in CW No.2205/85. The appellant also filed Civil Misc. Petition No.2337 of 1987 on 23.05.1987 in Delhi High Court requesting for stay of recovery stating that appellant has already made an ad-hoc payment of Rs.1.25 crore for excise duty on 6.10.86 which is available to the Revenue against the instant demand. Thereupon, Hon'ble High Court by ex parte order dated 26.05.1987 restrained the Department from collecting the tax demand subject to correctness of the statement of the petitioner.

9. The Writ Petition bearing no.1644 of 1987 was disposed by Hon'ble Court by Order dated 8.11.2011 considering the statement of the appellant before the Hon'ble High Court, that the impugned order dated 22.04.1987 is appealable before the CESTAT. On their request Hon'ble Court also granted liberty to the appellant to move an application under Section 14 of the Limitation Act, 1963 before the Tribunal within six weeks. The order was further modified by Hon'ble High Court on 13.12.2011 extending the time

of filing appeal by 15 days. Thereupon, the appellant filed appeal before the CESTAT, New Delhi. During the hearing appellant made submission that due to inadvertence the appeal has been filed before the Tribunal, whereas it is maintainable before the Commissioner (Appeals). This Tribunal vide Final Order No.A/734/2012-EX(DB) & S.O. No.975/12 & M.O. No.736/2012 dated 25.06.2012, dismissed the appeal as well as Misc. Application as withdrawn with liberty to appellant to file appeal before Commissioner (Appeals) within two weeks.

10. In view of the CESTAT order dated 25.06.2012, the appellant filed appeal bearing No.117-CE/APPL/GZB/2012 dated 5.7.2012 before Commissioner (Appeals), Central Excise, Ghaziabad, seeking condonation of delay under Section 14 of the Limitation Act, 1963, along with application for stay of the impugned order dated 22.04.1987 and the demand issued pursuant thereto dated 7.5.1987. The stay application filed by the appellant was rejected by the Commissioner (Appeals), Central Excise, Ghaziabad vide Order-in-Appeal No. 171-CE/GZB/2012 dated 28.09.2012, due to contradiction in statement of appellant relating to payment of duty. The appeal was dismissed by the Commissioner (Appeals) on the ground that the appellant is seeking condonation for 25 years, whereas he has no power to condone the delay beyond 30 days.

11. Aggrieved with the said order-in-appeal dated 28.09.2012, the appellant preferred an appeal before this Tribunal, New Delhi, which was decided by this Tribunal vide Final Order No.A/55466/2013-EX (DB) dated 01.02.2013, whereby the Tribunal set aside the Order-in-Appeal No.171-CE/GZB/2012 dated 28.09.2012 and given the direction to the Commissioner (Appeals) for fresh decision on the point of limitation as also on the point of pre-deposit of dues, after giving opportunity to the appellant to put forth their case.

12. Accordingly, pursuant to remand order by this Tribunal, Id. Commissioner (Appeals) vide impugned order-in-appeal dated 17.09.2013 condoned the delay in filing the appeal, but rejected the appeal on merits. It was further observed that the amount of Rs.1.25 crores deposited by the appellant on 6.10.1986 was deposited prior to the crystallisation of demand vide order-in-original dated 22.04.87/8.5.1987, and hence the same cannot be treated to be deposited against the impugned demand. Further, confirmed the findings of the Court below that the manufactured goods as per classification list no.37/83-84 are not dutiable.

13. Being aggrieved, the appellant is in appeal before this Tribunal.

14. Ld. Counsel for the appellant, Shri Nishant Mishra, *inter alia*, urges that the test report relating to classification list 37/83-84, clearly demonstrates that the samples were in the nature of 'partially Oriented yarn' (POY) and also had characteristics similar to POY. This is evident from the test report, which reads as under:-

"The samples consist of white polyester continuous filaments wound on a cone. The denier of sample is 759.9 denier (seven hundred fifty nine decimal nine). Like POY it is not fully drawn and has residual draw ratio (stretchability) greater in comparison to POY samples which have earlier been analysed in this laboratory from the unit. Like POY, it is stated to be used in the manufacture of textured yarn and is also not suitable for knitting, weaving and rope making."

15. Thus, the test report clearly states that not only the denier of sample is similar to that declared in the classification list, but also the fact that the samples are not fully drawn like FOY (Fully Oriented Yarn), and are not suitable for knitting, weaving and rope making like POY. The fact that POY can be of different qualities has been acknowledged by the Board in its Circular No.6/MMF/90-C.X.1 dated 20.02.1990, wherein in paragraph-1, it

has been stated that POY of 86 deniers is textured into 50 denier and other qualities of POY of 150 denier is textured to 75 deniers. He further urges that yarns manufactured could be UDY (undrawn yarn), POY (Partially Oriented Yarn) and FDY (fully drawn yarn), depending upon the winder speed and heat setting methods.

16. Further, urges that stretchability of samples was greater in comparison to POY Samples earlier analysed, makes no difference, inasmuch as stretchability of POY is dependent on the degree to which it has been stretched (as admitted in para 23 of Order-in-Original). Different qualities of POY will have different stretchability and therefore merely because samples had greater stretchability in comparison to samples tested earlier, cannot be the ground to hold that samples were not yarn.

17. He further urged that the court below has erred in exceeding the jurisdiction vested in them. The findings recorded by the Adjudicating Authority on the specific gravity, tenacity and stretchability, and thus concluding that product in question are 'filaments at take up stage', are based on the technical evidence. Thus, the Adjudicating Authority, who was not a technical expert, was not competent to record such technical findings. He was bound to rely on the test report given by the experts. On this proposition, he relies on the ruling of the Apex Court in the case of **Hindustan Ferodo Ltd. – 1997 (89) ELT 16 (SC)**, wherein it has been held that the technical knowledge of an authority is for better appreciation of records and not for its substitution. Thus, in the facts and circumstances of the case, the Court below have erred by substituting his own knowledge on technical findings ignoring the report of the expert and in absence of such technical data and literature. He further relies on the ruling of this Tribunal in the case of **Auto Tools International - 2017 (357) ELT 773**, wherein it has been held that the Adjudicating Authority not being an expert in the

matter of composition of goods, cannot have gone beyond the report given by an expert.

18. Thus, the Court below have erred in recording the finding that the products were having short shelf life and were not commercially known in the market as FOY or POY, in absence of any evidence or expert report.

19. At any rate, the appellant was not confronted with any such technical data relied upon by the Adjudicating Authority, inasmuch as, no such proposal was made in this regard even in the show cause notice after receipt of the expert report or test report. He further urges that, finding recorded by the Commissioner (Appeals) in the impugned Order-in-appeal are contrary to the circular dated 20.02.1990, and law settled by Courts, inasmuch as :-

- (i) Technical finding has been recorded by a person who is not a technical person, that too without confronting the appellant with any technical literature;
- (ii) Test reports were in favour of the appellant, as the same stated that the product in question is like POY;
- (iii) POY can be of different quality /variety depending upon the degree of their stretchability. Stretchability being directly linked with denier, POY of different denier are available, one of which was the product in question.

20. It is further urged that the finding recorded by the Id. Commissioner (Appeals) that Rs.1.25 crores deposited by appellant vide Challan No.148/1 dated 6.10.1986 cannot be treated as deposited against the instant demand, is also perverse and incorrect, inasmuch as it overlooks the fact that prior to the said deposit, litigation regarding the classification of products in C/L No.37/83-84 was going on with the department, and on

two occasions the issue was decided against the appellant and in these circumstances, appellant choose to deposit the amount of Rs.1.25 crores in respect of pending cases, which is also clear from the contents of letter dated 6.10.1986 (reproduced in paragraph 5.4 of Order-in-Appeal).

21. Accordingly, Id. Counsel prays for allowing their appeal with consequential benefits in accordance with law.

22. Ld. Authorised Representative for the Department/Revenue reiterates the findings in the impugned order.

23. Having considered the rival contentions, before recording our findings, it is beneficial to take notice of the aforementioned clarificatory circular dated 20.02.2019 with respect to the classification dispute of the POY and textured yarn, which is reproduced below:-

"According to the Ministry of Law, POY which is imported in raw materials or a base yarn subject to drawing and texturising done simultaneously on draw texturising machines. POY of 86 denierage is texurised into 50 denier and one other quality of POY which when imported is of 150 denier is texturised to 75 denier. This is the final stage when the yarn becomes a marketable commodity known to the textile industry. Therefore, it will be just and legal to make this as excisable and impose the tax at this stage only. For the purpose of security or surety to realise the amount of tax which will be imposed finally, bonds may be taken from the manufacturers or the importers at the point of importation. Classification for the purpose of duty is to be made at the final stage only. We presume that the yarn as referred to above to be at final stage is not subject to further stretching or texturising.

2. Subsequently, the matter was again discussed in fte 23rd North Tariff-cum-General Conference held on 17th and 18th December, 1985. In this

conference, it was pointed out that in the Heading 51.01/03 of CCN "POY is treated as yarn except that orientation of the molecules along the length is incomplete in this case. It was also pointed out that POY was being imported/manufactured and sold which goes to indicate its marketability. After discussion, the Conference felt that the POY had the characteristics of man-made filament yarn, in the sense, that it was of polyamide, had a running length and was in the form of a filament. The only difference was that it was partially oriented, in the sense, that the molecules had not been fully oriented. The duty levels were fixed keeping in mind the possible changes in the denierages or texturising at the then existing pattern of production.

3. The High Court of Bombay in Writ Petition No.176 of 1983 in the case of M/s.Krislon Texturised Pvt. Ltd., Bombay Vs. Union of India & Others, inter alia, observed that "CVD must be levied on the goods as they are when they are imported. The goods here as they were when they were imported by the petitioners was POY of 115 deniers. It was leviable to that rate of CVD as was provided for in respect of 115 deniers. The rate was, as the petitioners, rightly contended Rs.61.25 per kg. The court further observed that if excise duty upon texturising is leviable, it must be levied by the Excise Authorities.

4. The said issue was again referred to the Law Ministry for their opinion in F.No.357/21/83-TRU. The Law Ministry has viewed as follows:-

"The point for consideration is whether it is possible to charge excise duty on partially oriented yarn (POY) on the basis of its ultimate denier. It appears that POY used to be imported earlier and the importers were paying the lower rate of duty at the higher denierage stage. In the case of such imported POY, countervailing duty was charged on the basis of the ultimate denier of the resultant textured yarn. The point for consideration

is not regarding countervailing duty payable on imported POY. The question for consideration relates to indigenously produced POY. It has been mentioned in the referring note that under the Central Excise Law, duty is leviable on goods manufactured in a factory at the time of its removal, whether for captive consumption or for clearance outside. In view of this, it will not be legally in order to collect excise duty on indigenously produced POY on the basis of its finer denierage as in the case of imported POY. We are inclined to agree with this view. Our previous advice to which a reference has been made in the referring note may be treated as having been modified by this note”.

5. The Bombay Bench of this Tribunal in its order dated 21st August, 1986 No.ED(BOM) A.155/85 and C.O.(BOM) 15/85, held that POY is an indentifiable item and marketed as such and known as such in the market. It is a good which falls under item 18-II(a)(i) of the Central Excise Tariff. The end use of for both partially oriented yarn as well as fully oriented polyester yarn is for the manufacture of woven and knitted fabrics for apparels. A distinction between partially oriented and fully oriented polyester filament yarn is that, while in the case of fully oriented yarn the same can directly go in for manufacture of woven and knitted fabrics and it would only be an option to texturise the said yarn. In the case of partially oriented filament yarn, the same is necessarily to be further drawn and simultaneously texturised before it can go in for the manufacture of woven and/or knitted fabrics. This way, partially oriented yarn is semi-finished till it reaches the category of raw material after drawing and texturising.” The decision of the Tribunal has been accepted by the Board.

6. In the light of the above discussions and revised Law Ministry’s opinion and in view of the fact that partially oriented yarn is a commodity which is being bought and sold in the market both in the domestic tariff area as well as in international trade, it will not be correct to say that excise duty ought to be collected on the basis of its final denierage after drawing and texturising and not on the basis of its original denierage.

7. In view of the position stated above it is obvious that POY is a fully finished excisable product being bought and sold in the market as such, duty is chargeable on the basis of its own denierage at the take-up stage and not on the basis of the final denierage of the resultant textured yarn which comes into existence after further drawing and texturisation on the draw-cum-texturising machine. Further, if the duty liability in respect of POY has been discharged as per its own denierage before the take-up stage, the resultant textured yarn would be leviable to duty separately unless exempted, like under notification no.178/83-CE, irrespective of the fact that the denierage of the resultant textured yarn is less than the POY.

8. Ministry's earlier Circular No.YARN/2/80, dated 24.09.1980, in this regard is modified accordingly. Pending cases may be finalised accordingly."

24. Thus, we find that the findings in the impugned order, which are apparently based with reference to the earlier Circular No.YRN/2/80 dated 24.09.1980, which has been subsequently clarified by the aforementioned Circular dated 20.02.1990, clarifying that the partially POY/polyester yarn/nylon filament yarn, are dutiable at the appropriate rate of duty as per Notification No.49/83-CE dated 1.3.83 read with amending notification no.181/83-CE and 261/83-CE. Once the duty is held to be chargeable on the yarn as per classification list no.Yarn(intermediate product)/37/83-84, the duty on the final product viz. Polyester/Nylon textured yarn is nil as provided in notification no.178/83-CE dated 1.7.1983.

25. We further find that as per test report with regard to the samples of classification list no.Yarn/37/83-84, it has been reported that the samples are not fully drawn and can be further drawn or stretched. Thus, such yarn has characteristics of POY and accordingly, we find that the findings of the court below is vitiated as they have ignored the test report and have used their personal knowledge, without any cogent materials on record.

26. Accordingly, in view of our aforementioned findings, which are supported by the Board's Circular dated 20.02.1990, we allow this appeal and set aside the impugned order. The appellant shall be entitled to consequential benefits in accordance with law.

27. We also hold that the amount of Rs.1.25 Crores, deposited vide challan No.148/1 dated 6.10.1986, pending finalisation of the classification list, shall be treated as duty paid and the appellant shall be entitled to Refund or Credit of the same, as per law,

28. The appeal is allowed in above terms.

[Order pronounced on 09.02.2022]