CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
CHENNAI

Appeal No.E/496/2007

[Arising out of Order-in-Original No.8/2007-Commr.) dt.27.03.2007 passed by the Commissioner of Central Excise, Coimbatore]

Everwin Textile Mill (P) Ltd — Appellant

Versus

Commissioner of Central Excise, Coimbatore — Respondent

Appeal No.E/497/2007

[Arising out of Order-in-Original No.8/2007-Commr.) dt.27.03.2007 passed by the Commissioner of Central Excise, Coimbatore]

K.Periyasamy, M.D.,
Everwin Textile Mill (P) Ltd — Appellant

Versus

Commissioner of Central Excise, Coimbatore — Respondent

Appeal No.E/552/2007

[Arising out of Order-in-Original C.No.V/52/15/132/04-CX.Adj. dt.27.03.2007 passed by the Commissioner of Central Excise, Coimbatore]

C.Elango, Proprietor, M/s.Real Yarns — Appellant

Versus

Commissioner of Customs and
Central Excise, Coimbatore — Respondent

Appeal No.E/553/2007

[Arising out of Order-in-Original C.No.V/52/15/132/04-CX.Adj. dt.27.03.2007 passed by the Commissioner of Central Excise, Coimbatore]

R.Ganesan, Proprietor, GS Tex. — Appellant

Versus

Commissioner of Customs and
Central Excise, Coimbatore — Respondent

Appearance:

Shri M.Karthikeyan, Advocate
For the Appellant

Shri K.Veerabhadra Reddy, JC (AR)
For the Respondent

CORAM :

Hon'ble Ms. Sulekha Beevi C.S. Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of hearing / decision : 21.2.2018

Per Bench

FINAL ORDER No. 41437-41440 / 2018

The appellant company, M/s.Everwin Textile Mills P Ltd (ETM) are engaged in manufacture of cotton yarn and are registered with Central Excise Department. During the disputed period, hank yarn was exempted from payment of duty. Manufacturers of yarn were required to clear prescribed quantity of yarn as hanks for the benefit of Handloom Industry who can use only hank yarn. The cone yarns are used by Powerloom Industries.

1.1 On intelligence gathered by the DGCEI, that appellants (ETM) are removing cotton yarn without payment of duty, in the guise of hank yarn simultaneous search operations were conducted on 18.6.2002 in the appellant's factory, Administrative / sales depot, at residence of Managing Director of ETM, Sh.K.Periasamy, at Surya Impex who is buyer of yarn and at Saranya Impex / Saranya Garments – buyer. Various documents were seized. At the time of visit to the factory, the officers verified accounts relating to production of yarn on cones and hanks. They noticed that the reeling machines (for reeling yarn into hanks) was in a dismantled condition without any electricity connection. Officers found that there was no manufacture of hank yarn. The verification of records seized/recovered alongwith statements revealed that ETM had various group companies, such as Everwin Export Corporation (EEC), Everwin Apparel Corporation (EAC) functioning in the same address and another Trading firm called KPK Exports engaged in sale of yarn (procured from ETM) and fabric (manufactured on job work basis). Perusal of invoices seized and comparison with accounts showed that entire invoices were not accounted. Invoices raised for sale of cone yarn by ETM & KPK were not accounted and instead invoices as if hank yarn were sold was accounted. It was found that ETM was using one set of invoice for safe transportation of cone yarn and after delivery, these invoices are collected by the staff of administrative office and then they issued another set of invoices showing the sale of hank yarn which was being accounted. In this way ETM evaded payment of excise duty, by clearing cone yarn in the guise of hank yarn. Cone yarn was also cleared without proper invoices and proper accounting and thus ETM was indulging in clandestine clearance of cone yarn.

1.2 From the evidences gathered it appeared to the department that:-

i. ETM were not engaged in the manufacture of hank yarn.
ii. during the years 1999-2000, 2000-2001 and 2001-02 (upto February 2002) ETM manufactured and cleared cotton yarn on cones without payment of duty in the guise of hank yarn and grey hosiery cloth with an intent to evade payment of duty by wrongly availing Central Excise duty exemption vide Sl.No.93 of Notification No.5/99 CE dated 28/2/99 & 6/2000 CE dated 1/3/2000, Sl.No.108 of Notification No.3/2001-CE dated 1/3/2001);
iii. ETM raised hank yarn invoices on their sister concern, KPK Exports and KPK Exports in turn raised hank yarn invoices and prepared even delivery notes on Vetri Vinayagar Yarn Stores, Sri Mariamman Yarn Stores and Sri Sonakaruppan Yarns, Karur without actual dispatch of goods.
iv. While creating records to show such dispatch of hank yarn, even the Motor Vehicle Registration numbers of motor cycle and medium goods vehicles were used in the delivery notes of KPK Exports, a sister concern of ETM, wherein more than 8000 kgs of hank yarn were said to have been transported, using such vehicles.
v. The sale proceeds of cone yarn clandestinely cleared by ETM in the guise of hank yarn, through KPK Exports, was finally received back by ETM in cash.
vi. During the period from March 2002 to 18.6.2002, ETM cleared cone yarn clandestinely without accounting and without payment of Central Excise Duty and without raising Central Excise Invoices.

1.3 Show cause notices were issued (SCN dt.4.12.2002 – proposing confiscation of seized goods and SCN dt.7.6.2004 for duty demand and penalties for entire period) to the appellant which after adjudication culminated in the following order passed by Commissioner;

<u>"ORDER.</u>

*a. I confirm and demand an amount of **Rs.1,15,91,969/-** (Rupees one crore fifteen lakhs ninety one thousand nine hundred and sixty nine only) from M/s.Everwin Textile Mill P Ltd., Pollachi, towards excise duty (BED : Rs.1,00,79,973/- + AED : Rs.15,11,996/-) on the cotton yarn cones manufactured and cleared clandestinely under the guise of plain reel hank yarn by them for the period from February 2000 to 2001-2002 (upto February 2002) by wrongly describing the said goods as hank yarn and grey hosiery cloth and later without any accounting under Rule 9 (2) of the erstwhile CER 1944 and Section 11 A (2) of CEA 1944 after invoking the proviso to sub-section (1) of Section 11 A of the CEA 1944 enforceable under Section 38A of the CEA 1944.*

*b. I appropriate an amount of **Rs.10,00,000/-** (Rupees ten lakhs only) already paid voluntarily by them on various dates, towards the above duty liability.*

*c. I impose a penalty of **Rs.1,15,87,369/-** on M/s.ETM under Section 11AC of CEA 1944.*

*d. I impose a penalty of **Rs.50,00,000/-** (Rupees Fifty Lakhs only) on M/s.ETM under Rule 25 of erstwhile CE (no.2) Rules 2001 and Rule 25 of CER 2002.*

*e. I impose a penalty of **Rs.2,000/-** (Rupees Two Thousand) and **Rs.1000/-** (Rupees One thousand only) on M/s.ETM respectively under Rule 9(2) and 52A of Central Excise rules 1944 read with Section 38A of CEA, 1944.*

*f. I impose a penalty of **Rs.50,00,000/-** (Rupees Fifty Lakhs only) on M/s.ETM under Rule 173Q of erstwhile CER 1944 enforceable under Section 38A of the CEA 1944.*

*g. I confiscate the cotton yarn cone of 10 bags (500 Kgs) seized on 18.06.2002, to the Government of India under Rule 25 of CER 2002. However the same is liable to be redeemed on payment of fine of **Rs.5000/-** (Rupees Five Thousand only)*

h. I also demand interest at appropriate rates on the duty demanded in clause (a) above under Section 11 AB of the CEA, 1944.

*i. I impose a penalty of **Rs.10,00,000/-** (Rupees Ten Lakhs only) on Shri.K.Periyasamy MD of M/s.ETM under Rule 209A of the erstwhile CER 1944, Rule 26 of the erstwhile CE (No.2) Rules 2001, enforceable under Section 38A of the CEA 1944 and Rule 26 of CER 2002.*

*j. I impose a penalty of **Rs.50,000/-** (Rupees Fifty Thousand only) on Shri.R.Marappan Proprietor of Saranya Impex under Rule 209A of the erstwhile CER 1944, Rule 26 of the erstwhile CE (No.2) Rules 2001, enforceable under Section 38 A of CEA 1944 and Rule 26 of CER 2002.*

*k. I impose a penalty of **Rs.50,000/-** (Rupees Fifty Thousand only) on Shri.C.Elango of Real Yarns, yarn broker under Rule 209A of the erstwhile CER 1944, Rule 26 of the erstwhile CE (No.2) Rules 2001, enforceable under Section 38 A of CEA 1944 and Rule 26 of CER 2002.*

*l. I impose a penalty of **Rs.50,000/-** (Rupees Fifty Thousand only) on Shri.R.Ganesan, Proprietor of GS Tex, under Rule 209A of the erstwhile CER 1944, Rule 26 of the erstwhile CE (No.2) Rules 2001, enforceable under Section 38 A of CEA 1944 and Rule 26 of CER 2002.*

*m. I also impose a penalty of **Rs.50,000/-** (Rupees Fifty Thousand only) on Shri.R.Subramaniam, Proprietor of Sri Surya Impex, under Rule 209A of the erstwhile CER 1944, Rule 26 of the erstwhile CE (No.2) Rules 2001, enforceable under Section 38 A of CEA 1944 and Rule 26 of CER 2002".*

1.4 Aggrieved by the above order, the appellants are now before the Tribunal.

2. On behalf of the appellant, the Ld.Counsel Sh.M.Karthikeyan made submissions which can be summarized as under :

(i) The main allegation is that appellant was not having any facility to manufacture hank yarn. The appellant furnished the purchase invoices of reeling machines, and as per these documents, ETM had purchased 12 reeling machines and installed the same in their factory. The allegations that these reeling machines were not in working condition and had no electricity connection are factually incorrect. The department relies upon the Energy Audit Report to sustain the charge that there was no reeling facility and there was no manufacture of hank yarn. Though in the Energy Audit Report it was stated that the reeling machines were in idle condition, during cross examination, Sh.N.Muruganandham who gave the report has deposed that he has mentioned in the report that 5 Nos of lights are ON in the reeling section even though machine was in idle condition. This would show that appellant had reeling section and was manufacturing hank yarn. Though these reeling machines did not have electricity connection, these were operated by use of generator.

(ii) The department has relied on the personal diary recovered from the residence of Managing Director Sh.Periasamy and fax messages send from the factory to the MD. It is alleged that there was no packing materials for hank yarn seen in the factory and the invoices for clearing cone yarn, seized at the time of search were not accounted. He submitted that in the private diary, the quantity of yarn was mentioned as bags, and the production of cone yarn and hank yarn was clearly mentioned therein. Merely as it was mentioned as bags, the department has wrongly assumed that such references in the diary represents only cone yarn. Again, only because as there was no exclusive purchases of packing materials for packing hank yarn, the department assumed that hank yarn was not produced. The packing materials purchased for cone yarn was being used by appellant to pack hank yarn. The production of hank yarn was accounted and clearance of hank yarn was intimated to the department in their ER-1/RT-12 returns and there was no suppression at all. Annual stock taking was done by department on 11-11-2000 in which it was certified that during the period 26-6-1999 to 14-10-2000, 2,63,833 kgs of hank yarn was manufactured and cleared by appellant / ETM. Therefore allegation that appellant did not manufacture hank yarn is baseless.

(iii) Similarly, the department alleged that G.Senthilkumar, driver deposed that he had loaded only cone yarn in his vehicle. During cross examination on 14.12.2006, he deposed that he was not aware of the specification of goods transported. Sh.L.Rajendran, Proprietor of M/s.Sonakaruppan Yarns and Sh.K.L.S.Natarajan, Proprietor of M/s.Mariamman Yarns deposed that they purchased hank yarn for KPK Exports. This would show that ETM manufactured hank yarn which was sold to KPK Exports, which was further sold to the buyers as stated above.

(iv) Yet another allegation is that appellant cleared cone yarn clandestinely without invoices and without accounting. These evidences relied are from end consumers. The yarn from the factory reaches the end consumers after travelling through several hands. The yarn from the factory was cleared to consumers, to depot and to KPK Exports. From the depot as well as from KPK, the yarn is cleared to consumers. These consumers could have purchased yarn from various other sources. The department has wrongly assumed that the entire yarn at consumers place and shown in their account was cleared from appellant factory clandestinely. For eg :- It is alleged that Saranya Impex / Saranya Garments purchased yarn from ETM without invoices. The documents relied by department for this are the delivery challans of Saranya, its' job workers (M/s.JT Textiles) and statements of job workers. These delivery notes were maintained by labourers and department has not recorded statement from any of them. The quantity of yarn purchased from ETM directly and from KPK Exports is not furnished by department separately. With regard to Surya Impex, the allegation is that they purchased 6865 bags from ETM, whereas, invoices were issued only for 880 bags. This allegation is based on the notebook of Sh.C.Elango (B-49-yarn broker). The notebook of Sh.C.Elango cannot be relied as it was not kept systematically and the name of appellant, 'Everwin' was mentioned in the notebook only in few places. The statement made by Sh.C.Elango does not support or tally with details in the note book. So the allegations of clearing cone yarn without invoices to various persons like, Sri Karthika Trading Company on the basis of such note book cannot sustain.

(v) The diary recovered from the residence of Managing Director, Sh.Periasamy cannot be admitted in evidence. The description of yarn, whether it is cone or hank is not mentioned in this diary/document. Instead, it was mentioned only as bags. Merely for this reason, the department has assumed that the same were cone yarn and not hank yarn. That department has failed to establish wilful suppression or clandestine removal with intent to evade payment of duty. The SCN issued invoking extended period is therefore not legal or proper.

(vi) Without prejudice, the Ld.Counsel pleaded to set aside the penalties imposed. He argued that department miserably failed to prove that hank yarn was not manufactured in the factory. Therefore the allegation that appellant cleared cone yarn in the guise of hank yarn and evaded duty cannot sustain. The evidences relied to conclude that cone yarn was removed clandestinely are not admissible. That the equal penalty imposed under 11AC is highly harsh as there is no suppression on the part of appellant. The department having failed to establish any role or positive act on the part of the other appellants, viz; Sh.K.Periasamy, Sh.C.Elango, Sh.R.Ganesan, the penalties imposed on them may also be set aside. The Ld.Counsel relied upon various decisions as shown below:

(a) Sree Ganesan Textile Mills Ltd Vs CCE 2005 (180) ELT 334 (Tri.Bang.)
(b) CCE Vs Sangamitra Cotton Mills P Ltd 2004 (163) ELT 472 (Tri.Chennai)
(c) CCE Vs Universal Polythene Industries 2001 (130) 228 (Tri.Kolkata)
(d) M.H.Textiles Ltd Vs CCE 2004 TIOL 667 (CESTAT-DEL. & Others)

Against this, the Ld.AR, Sh.K.Veerabhadra Reddy supported the findings in the impugned order. His arguments are summarized as under :

(i) From the evidences gathered during investigation it was very much clear that ETM had not manufactured any hank yarn from 1999-2000 to 2001-02. They had accounted their cone yarn production by splitting the cone yarn production into cone yarn and hank yarn. In order to wrongly account that hank yarn was produced, they utilized their group companies mainly KPK Exports. This group company sold the cone yarn to various buyers. The clearance of hank yarn was thus only paper transactions.

(ii) Though appellants contend that they had reeling machines for production of hank yarn, it can be seen that these machines were not being used and were in idle condition without even any electricity connection. In the Energy Audit Report dt.22.01.2002, there is no specific mention of reeling process undertaken in the mill. The process flow diagram shows no reeling process. This was confirmed by the statement of Sh.N.Muruganandam who has stated that apart from lights, there was no other consumption of power in reeling section. The contention of appellants that, the reeling machines were operated using generator is only an after thought. In any case, no such generator facility attached specifically to reeling machine was pointed out to officers during their visit. The correspondences with TNEB supports the non-functioning of reeling machines in the factory. The Ld.AR referred to the Annual stock taking report for the year 2000 and submitted that this document also will not be of help to the appellants to contend that they manufactured hank yarn. Though this report is signed by an officer of department, it is issued by merely going through the accounts maintained by appellant. In such report also, the stock of hank yarn at the time of stock taking is shown as 'Nil' which goes to show that there was no hank yarn at all in the factory. The clearances of hank yarn shown in the report are merely figures adopted from the accounts of appellant.

(iii) During the search different invoices with same Sl.Nos with different dates for clearance of cone yarn was recovered. Some were not accounted. For eg. there was double invoice with Sl.No.459. One invoice was dated 30/1/2002, whereas, with same Sl.No. another invoice is dt.31/1/2002. On scrutiny it was seen that both invoices with sl.No.459 for cone yarn was not accounted by ETM. Instead another invoice with same Sl.No.459/31.1.2002 was used to account as if 4991 kgs of hank yarn was cleared. This is supported by statements. Sh.G.Senthilkumar deposed that he loaded only cone yarn bags in his vehicle. The buyers such as Sh.L.Rajendran, Proprietor of Sri Sonakaruppan Yarns, Sh.K.L.S.Nataraj, Proprietor of M/s.Mariamman Yarn Stores have stated that they did not purchase hank yarn from ETM/KPK.

(iv) Searches were also conducted at the premises of M/s.Saranya Impex / Saranya Garments on 18/6/2002. The officers noticed 10 bags of ETM cone yarn at the premises which was not covered by any invoice and these goods were seized. Documents like counter foils of cheque books, delivery note of Saranya Impex to the fabricators (job workers) and delivery notes/bills of fabricators to ETM/KPK were also seized. Statement of Sh.P.Suresh (Job worker, JT Textiles) was recorded. Documents seized from the residence of MD, Sh.Periasamy showed transactions of these buyers with ETM. Scrutiny and comparison of details of such transaction showed that ETM had not accounted the entire transactions.

(v) A note book was handed over to the officers by Sh.C.Elango who is a yarn broker. The said note book contains details of date-wise despatch of cone yarn in bags to Sri Surya Impex for the period 12.4.2000 to 22.4.2000 and from 30.8.2000 to 30.3.2001. The total number of bags despatched to Sri Surya Impex during the period as indicted in the diary works out to be 6865 bags, whereas, invoices were raised only for 880 bags.

(vi) The department had also conducted verification with RTO, Tirupur. Such enquiry revealed that the vehicle numbers noted in invoices were fake. The registration number TN 39A 7585 is a light motor vehicle and TN 39A 3585 is a motor vehicle. Further TAP 8272 is MMGV with ULW of 2325 kgs and RLW of 5950 kgs, and that TN 41Z 7355 is

LMVGV with ULW of 2660 kgs, and RLW of 5050 kgs. Perusal of delivery notes of KPK Exports indicated that on some occasions more than 8000 kgs of hank yarn were shown to have been transported in vehicles with numbers shown above which are motor cycle, medium and light motor vehicles. Statements of owners of vehicles proved that these vehicles were never used for transporting yarn as per these documents. Thus documents were fabricated by KPK Exports to make it appear that hank yarn was cleared to end consumers.

(vii) The file seized from appellant factory containing purchase invoices for packing materials, cone, cone labels etc. revealed that during the disputed period, there was no purchase of labels, or packing materials for hank yarn. Though there was account for purchase of cone labels, there was no account for purchase of hank labels which would go to establish that appellants have not at all cleared hank yarn.

(viii) Another evidence is the diary of Managing Director, Sh.Periasamy, recovered from his residence. This diary contains partywise details. The particulars in the diary were compared with kalaas coolie vouchers of ETM. It showed that no invoices were issued for consignments noted against 'H'. The diary also showed particulars of cash/cheque received and paid. The made up file seized from residence of Sh.Periasamy alongwith his diary and documents seized from KPK on comparison established that appellants cleared cone yarn without invoices and without payment of duty and also cleared cone yarn in the guise of hank yarn. The sum total of the evidences would establish clandestine clearance on the part of appellant. The Managing Director Sh.Periasamy had active role in such activities which is clear from his personal diary. He had noted 'H' against the consignments for which invoices were not issued. The diary also showed that the yarn broker Sh.C.Elango and Sh.Ganesan, Proprietor of GS Tex, had meetings together to arrange for clearances of cone yarn in the guise of hank yarn and also for clearing cone yarn without payment of duty. The appellant is guilty of suppression of facts and wilful mis-statement as they have not disclosed the entire production of cone yarn in their ER-1/RT-12 returns. They mis-stated that hank yarn was produced and evaded duty. The evidence bring out that extended period has been rightly invoked. He argued that the impugned order calls for no interference.

4. Heard both sides and perused records carefully.

5. The main allegations are (i) that appellant (ETM) had no facility for manufacture of hank yarn during the disputed period (ii) They cleared cone yarn in the guise of hank yarn and thus evaded payment of duty (iii) They did not account the entire production of cone yarn and cleared cone yarn clandestinely without payment of duty. Let us proceed to examine the evidences in this regard.

5.1 To allege that appellant factory did not manufacture hank yarn, department relies upon the Energy Audit Report dt.22/1/2002, statement of Sh.N.Muruganandam and correspondence with TNEB. On Perusal of Energy Audit Report at page 234 of the paper book, it is seen that summary of production process carried out in the factory is stated to include blow room operation, carding, Drawing, simplex, Spinning, conewinding and Packing. The percentage of power utilisation for these processes has been considered in the report. The various operations/processes stated in the report is silent about reeling process. The electrical energy needed for such reeling activity is not seen stated. It is necessary to point out that it is specifically stated that 5 Nos of light are ON in the reeling section even though the reeling machines are in idle condition. This definitely indicates that no reeling activity was undertaken in the factory and the only power consumption in this section was the 5 light bulbs. Though Sh.N.Muruganandam who gave the report was subjected to cross examination, nothing is brought out to discredit the Energy Audit Report. In cross examination he has merely given evasive replies. Apart from this report, the department has verified details of connected load of the factory from TNEB. Power was sanctioned to the factory with machinery details like blow room, carding, drawing, simplex, spinning, cone, winding, humidification plant, compressor and cooling tower. TNEB has clarified that no reeling machines were connected to power in the factory during the period. Appellants have relied upon the stock taking report dt.11/11/2000 to contend that they have cleared hank yarn. Though it is shown that hank yarn is cleared, it is pertinent to note that the quantity of hank yarn in stock noted in the report at the time of last stock taking and current stock taking is nil. This would only prove that stock taking was conducted there was no hank yarn at all. Appellants have merely showed in their accounts that hank yarn was cleared and these figures have been adopted in the report which was endorsed by the officer. The report certifies that it is based on figures in stock register. Thus, we do not think that this document will support the appellant in any manner, especially when the stock of hank yarn on both dates of stock taking is shown to be 'nil'. All these evidences leads to the strong inference that appellant company was not manufacturing hank yarn during the period of dispute.

5.2 The personal diary of Managing Director, Sh.K.Periasamy which was seized from his residence is another important evidence relied by department. The appellant has countered this document stating that the department has assumed that there is clearance of cone yarn in the guise of hank yarn and also unaccounted clearance of cone yarn merely because, the quantity of yarn was noted in the diary as bags. The evidence from the diary discussed in para 2.7 of the Order-in-Original would bring out the nature and reliability of this document and is reproduced as under :

Date	**Stock position**		**Date**
	ETM		
17.2.2000			
	Bags stock	236	15.2
	Bags produced	**50**	**16.2**

		286	
	Bags dispatched	60	16.2

		226	

18.2.2000			
	Bags stock	226	16.2
	Bags produced	**50**	**17.2**

		276	
19.2.2000			
	Bags stock	276	17.2
	Bags produced	**51**	**18.2**

		327	
	Bags dispatched	80	18.2

		247	
20.2.2000			
	Bags stock	247	
	Bags produced	**54**	**19.2**

		301	
	Bags dispatched	60	19.2

		241	

When the production particulars were compared with RG1 of ETM for the period 1999-2000, it was found to tally. For example, production of 50 bags and clearance of 60 bags on 16.2.2000 and production of 50 bags on 17.02.2000 tallies with RG1 register. Hank yarn production is shown to have been started from 18.02.2000. RG1 shows production of 1650 kgs of 30s hosiery cone yarn and 877 kgs of DHPR yarn on 18.02.2000 which totals to 2527 kgs, i.e., 50.54 bags (50 kgs each). As seen from perusal of the diary, 51 bags (same quantity) were produced on 18.02.2000. Again production of 1650 kgs of 30s hosiery cone yarn and 1028 kgs of DHPR yarn on 19.02.2000 was accounted in RG1 which totals to 2678 kgs i.e., 53.56 bags. The diary also mentions a production of 54 bags on the said date. When dispatch details shown in the diary were verified with RG1, it was noticed that even though 80 bags were dispatched on 18.02.2000 as per the diary entry, no such entry was available in RG1. The dispatch of 60 bags mentioned in the diary on 19.02.2000, tallies with

> *RG1. From the above, it appears that the daily production of yarn in ETM was being accounted in their RG1 either as cone yarn or hank yarn. The diary seized at the residence of Shri.K.Periyasamy, MD of ETM clearly indicates clearance of cone yarn as yarn bags produced and cleared, even though accounting was done in RG1 as cone yarn and hank yarn.*

5.3 The diary throws light on the method by which ETM was clearing cone yarn in the guise of hank yarn. Though in RG-1 the appellant accounted production in respect of cone yarn and hank yarn, the diary showed details of production of cone yarn only. Again, there were no packing labels or materials purchased by appellant for packing hank yarn. The purchase of packing materials showed purchase of labels for cone yarn only. The appellants have not been able to counter these evidences, with satisfactory explanation.

5.4 Some documents were seized from the administrative office which contained vouchers for payment of Kalaas Coolie for loading and unloading. These vouchers contain details such as date, count of yarn, number of bags, name of party to whom the yarn is to be delivered, vehicle number etc. The statement of Sh.R.Rangaraj, the clerk of ETM was recorded. He stated that the vouchers were prepared by him. On comparison of these vouchers with invoices for clearances, it was found that some of the clearances have not been accounted at all. Most of the yarn was cleared to the group company of the appellant M/s.KPK Exports. Proper accounts were not maintained by KPK Exports. On comparison and verification of clearances made by appellant to KPK and the details obtained from the buyers of yarn from

KPK, it was found that the invoices raised were not being accounted. In some instances double set of invoices were raised. As pointed out by Ld.AR, the invoice Sl.No.459 was raised on both dates 30.1.2002 and 31.1.2002, which was for sale of 50 bags of cone yarn to KPK Exports. Accounts showed that both these invoices were not accounted, and instead another invoice with same number 459/31.1.2002 is accounted showing sale of 4991 kgs of hank yarn. Similarly Invoice No.468/23.2.2002was for sale of 40 bags (30s) cone yarn to KPK; Invoice No.469/23.2.2002 was for sale of 12 bags (34s) cone yarn to KPK and Invoice No.468/25.2.2002 was for sale of 100 bags (30s) cone yarn to KPK. These invoices were not accounted at all. Whereas, on verification of Kalaas Coolie vouchers indicated that on 25.2.2002, vide Invoice number 468/25.2.2002, 100 bags were delivered to various parties (35 bags delivered to M.B, 25 bags to Janani and 40 bags to Surya Impex). From Kalaas Coolie voucher it was seen that as per Invoice No.469/23.2.2002, 12 bags were delivered at RVR. But the Invoice No.468/26.02.2002 is accounted by appellant, as sale of 348 bundles of hank yarn to KPK Exports, and Invoice number 469/26.02.2002 as sale of 348 bundles to KPK.

5.5 The modus operandi by raising such parallel invoices with same serial number is clear from the statement of Sh.N.Suresh who is a clerk of Everwin Export Corporation a group company of appellant who was taking care of accounts of all the units including appellant. He has deposed to the effect that by such invoices though raised in the name of KPK and not accounted the goods were directly sent to parties. After delivery, the invoices which were in the name of KPK was taken back by their staff. All invoices issued by ETM in the name of KPK were mere invoices, meant to cover delivery of goods made directly to parties and no goods were physically received at KPK. At KPK, the hank invoices are adjusted by way of creating sales to few fictitious parties and to Mariyamman Yarns and Sri Sonakaruppan Yarn etc. The cone yarn invoices taken back were destroyed immediately. The statement of the Managing Director, Sh.K.Periasamy supports the above wherein he has stated that the cone yarn despatched showing invoices raised in favour of KPK was not accounted in their records. These statements corroborate the documentary evidences including parallel invoices unearthed by the department.

5.6 In addition, during the time of inspection, conducted at Saranya Impex/Saranya Garments, the officers noticed at the premises 10 bags of cone yarn cleared from ETM without any invoice. The same were seized as per mahazar dt.18/6/2002. Sh.C.Elango was the yarn broker who did transaction with ETM, KPK etc. A note book was seized from him. The said note book contained details of date-wise despatch of yarn supplied to Surya Impex, which is a knitting unit. The diary of Sh.Periasamy mentioned the meetings he had with Sh.Elango and Sh.R.Ganesan (Proprietor of GS Tex, Tiruppur). That Sh.R.Ganesan agreed with the offer to supply one kgs of 40s carded yarn @ Rs.117/- with bill and @ Rs.114/- per kg without bill. Though ETM despatched 40 bags of 40s carded cone yarn, bill was raised only for 20 bags. In the diary of Sh.Periasamy, wherever 'H' was written GS Tex received yarn without invoices. The other evidences, like counterfoils of cheques, payment details in the diary of Managing Director, Sh.Periasamy all support the unaccounted clearance of cone yarn by ETM/appellant.

5.7 The evidence unearthed by department being voluminous, it is not possible to detail each and every piece of evidence in this order. From the records and as discussed above, we have to say that the strong probability is that appellants have indulged in clandestine clearance of yarn without payment of duty. Department has been able to establish with both documentary and oral evidence that appellant company was not manufacturing or clearing any hank yarn and was clearing cone yarn clandestinely. The appellant has not put forward even slightest evidence to establish that they have not indulged in clandestine removal of cone yarn. The red handed seizure of unaccounted clearances at the premises of Surya Impex has not been countered by appellant at all. The appellant has not been able to discharge the onus with reliable and cogent evidence. The evidences thus strongly establish deliberate suppression of facts and wilful misstatement with intention to evade payment of duty. We find that the SCN issued invoking extended period is not without grounds. The arguement of appellant on limitation also fails.

5.8 Having found that the invocation of extended period is legal and proper, the penalty imposed under Section 11AC equal to the duty demand is attracted. The Hon'ble Supreme Court in the case of UOI Vs Dharmendra Textiles Processor & Ors 2008 (231) ELT 3 (S.C.) followed by UOI Vs Rajasthan Spinning and Weaving Mills (2009) 238 ELT 3 (S.C.) has held that when contumacious conduct of the assessee in evading duty is established the penalty under 11AC will have to be imposed. From the totality of facts, evidence and the case laws, we are of the considered opinion that department has been able to establish case laws a strong case in their favour. We therefore find no grounds to interfere with the duty demand, confiscation or the penalty imposed under 11AC of Central Excise Act, 1944. However, we are of the view, that since equal penalty under 11AC is imposed, a further penalty of Rs.50 Lakhs on the appellant company, each under Rule 25 and Rule 173Q is unwarranted and requires to be set aside which we hereby do. So also the personal penalties imposed on the parties being on the higher side and to meet the ends of justice are reduced as shows below:

S.No.	Name	Penalty imposed	Reduced to
1	Sh.K.Periasamy	10 Lakh	5 Lakh
2	Sh.C.Elango	Rs.50,000/-	Rs.25,000/-
3	Sh.R.Ganesan	Rs.50,000/-	Rs.25,000/-

The appeals are disposed in above terms with consequential reliefs, if any.

(Operative part of the order pronounced in open court)

(Madhu Mohan Damodhar)
Member (Technical)

(Sulekha Beevi C.S)
Member (Judicial)

vsr