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

Appeal No.E/112/2006

[Arising out of Order-in-Appeal No.193/2005-CE (SLM) dt.30.11.2005 passed by the Commissioner of Central Excise (Appeals), Salem]

Nandhi Spinning Mills P. Ltd. — Appellant

Versus

Commissioner of Central Excise, Salem — Respondent

Appearance:

Shri C.Saravanan, Advocate
For the Appellant

Shri S.Govindarajan, AC (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 : 13.12.2017

Per Bench

FINAL ORDER No. 43518/2017

Brief facts are that the appellant is engaged in manufacture of cotton yarn. An offence was registered by DGCEI on allegations interalia, that appellants had suppressed the actual value of clearances of cotton cone yarn, failed to account the raw material in their books of account, and cleared cheese yarn/cone yarn in the guise of hank yarn without payment of duty. Based on documents and statements recorded, the department issued Show Cause Notice demanding duty for the period, 1998-99 to 2001-02 (upto May 2001) and also proposing for penalties. After due process of law, the original authority confirmed the demand, interest and imposed penalty under Section 11AC besides separate penalty on the Director Sh.N.Shanthakumar. In appeal, the Commissioner (Appeals) upheld the same. The appellants have filed the present appeal challenging the said order passed by Commissioner (Appeals). This appeal was earlier disposed by the Tribunal, vide F.O.No.40386/2017 dt.1/3/2017. The appellant filed appeal against the said Final Order before the Hon'ble High Court and vide judgment dt.8/11/2017, the Hon'ble High Court remanded the matter for fresh consideration. Hence the appellants are once again before this Forum.

2. On behalf of the appellants, the Ld.Counsel Sh.C.Saravanan appeared and argued the matter. His submissions can be summarized as under :

(i) The main evidence relied by Revenue for confirming the demand are the statements recorded from the buyers of yarn from the appellant. The statements of the following customers / buyers were obtained.

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SL. NO.	DATE	STATEMENT OBTAINED FROM	RELATION WITH NSM	ANNEXURE NUMBER IN THE SCN
1	10.07.2003	C.Saravanan, Director of Peeyelcee Tex Exports (P) Limited	Customer	C-14
2	10.07.2003	L.Sivasankar Narayanan, Partner of Peeyelyes International and Sansons Exports	Customer	C-16
3	10.07.2003	J.Lakshmanan, MD of JaisarSpintex (P) Limited	Customer	C-27
4	22.01.2004	A.Chandrasekar, Partner of Anitha Traders	Customer	C-30

(ii) Out of these four persons, the partner of Anitha Traders, Sh.A.Chandrasekar, has deposed during cross examination that he has procured only three consignments from appellants, and out of these three, two consignments are hank yarn and one consignment is of cheese yarn. This statement was ignored by the authorities below to hold that appellant has not cleared hank yarn at all. Instead the department has relied heavily upon the statements of other three, who were not subjected to cross examination. Despite Notice, these three persons did not appear for cross examination. When they have not been examined, their statement cannot be admitted in evidence as per Section 9D of the Central Excise Act, 1944.

(iii) Statements were also obtained from jobworker/ convertors and employees. The details of such statements is as under :

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SL. NO.	DATE	STATEMENT OBTAINED FROM	RELATION WITH NSM	ANNEXURE NUMBER IN THE SCN
1	09.07.2003 & 21.07.2003	M.Ponnuswamy, Partner of Nalwar Knitting	Job Worker	C-8 & C-11
2	16.07.2003	N.Veerapathran	Employee [Accountant]	C-31
3	16.07.2003 & 17.11.2003	N.Santhakumar	Director	C-33 & 38
4	21.07.2003	K.Arunachalam, Proprietor of Balamurugan Doublers	Job Worker	C-12
5	06.01.2004	A.L.Thennappan, Proprietor of Thennammai Textiles	Job Worker	Not relied in show cause notice.

(iv) Though Sh.A.L.Thennappan has stated that he procured yarn from appellant for conversion into hanks, again, this statement has been given a go by by the department. The other job workers have stated in cross examination that their statements were obtained by co-ercion, and also stated that they had procured yarn for conversion into hank yarn and returned the same to appellant.

(v) The appellant cleared both cheese yarn and hank yarn. While cheese yarn was liable to merit duty, hank yarn was exempted from payment of duty in terms of notification No.5/1994-CE dt.23.02.1994. During the relevant period, appellant did not have facility for reeling hank yarn and therefore appellants cleared manufactured yarn for being converted into hank yarn to various job workers by following AR3-A procedure prescribed under Rule 96E of Central Excise Rules, 1944. The yarns cleared to job worker/convertor was received back by appellant after conversion as hank yarns and were cleared without payment of duty to customers as under the notification.

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(vi) The case of the appellant that yarn was send for conversion was not accepted by the department stating that it is not corroborated by evidence. In fact, the appellant has been availing the procedure of Rule 96E of Central Excise Rules for conversion of yarn to hank yarn through job workers. The procedure was done as per Rules under acknowledgment of Excise authorities. While complying such procedure documents pass through the excise authorities. Such documents relating to conversion activities undertaken during the disputed period were not found to have any discrepancy calling for any action. The records maintained by appellant reflected the actual conversion figures and procedures undergone, and no offending goods of the appellant were seized at anytime during the period or thereafter. The department has no case that the appellants have not maintained proper yarn conversion register, conversion documents, AR3A, DC, D3s, declarations filed under Rule 173B of Central Excise Rules etc. That when there is no dispute with regard to these documents relating to conversion of yarn into hank, the allegation of the department that appellant has not cleared any hank yarn and has cleared cheese yarn in the guise of hank yarn is without any basis. The letter dated 9.4.2003 (C.39) written by Superintendent, Dharapuram Range stating that he received the D3 intimation from appellants for the hank yarn received back after conversion is an important piece of evidence which would establish the case of appellants that they were sending yarn for conversion. These D3 documents carried the signature of the officer who received D3 intimation.

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(vii) Another allegation is that the vehicle numbers in the AR3-As used under Rule 96 E for conversion showed discrepancy when verified with RTO. Out of the 400 AR3-As, in about 14 Nos, the department has pointed out incorrect vehicle numbers. The error refers to vehicle numbers wrongly mentioned in 8 documents prepared by appellants and 6 documents prepared by the convertors. When out of the 400 documents, only 14 numbers have incorrect vehicle numbers, it would go to show that there is no discrepancy in these documents and was only inadvertent human error while noting the vehicle numbers. The vehicle numbers were wrongly mentioned as 7156 instead of 7186, as 6663 instead of 6669, as TN 29 instead of 39 as 8213 instead of 3213 etc. These were evidently mistakes involving no deliberate act.

(viii) The authorities below failed to note that entire final products of the appellants were supplied to the customers who were export units and were exporting terry towels. The appellant thus had option to supply cheese yarn under bond without payment of duty under Rule 19 CER, 1944 and even if duty was paid, they were rebatable under Rule 18 of CER, 1944. Therefore the issue is revenue neutral one.

(ix) Identical SCN issued against various persons were dropped by Commissioner (Appeals) and CESTAT. During the period of dispute, DGCEI had issued identical SCNs to other manufacturers namely M/s.Thanga Bhagya Mills & M/s.Erode Annai Spinning Mills. The said manufacturers had supplied yarn to the very same customers as the appellant. Both these SCNs were later dropped. The decision in ***M/s.Erode Annai Spinning Mills is reported in 2007 (219) ELT 966 (Tri.-Chennai).***

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(x) Though SCN alleges clandestine clearance, the same is without any basis. The concept of clandestine clearance is when there is surreptitious clearance without records. In the present case the appellant had cleared yarns on the strength of Form AR-3A for conversion into hank yarn and thereafter cleared the same on the strength of Central Excise Invoices and maintained proper records. Therefore, no clandestine clearance is made out. In para 74 of OIO, the adjudicating authority had observed that there is no case against appellant for removal of excisable goods without accounting and / or payment of duty.

(xi) The authorities below failed to note that the customers of appellant were engaged in manufacture of Terry Towel. It was necessary for them to procure grey hanks from persons like appellant for dyeing purpose and thereafter got it rewound for use in their power loom. In para 81 of OIO, the adjudicating authority has gone on an ipsi dixit that the buyers did not require hanks as they were using power loom. He failed to understand that even power loom required dyed yarn for cheaper materials like Hand Towels and for these only hanks were used by such manufacturers. The power loom technology that was prevalent and available during the period did not allow dying of yarn in the power loom. Therefore even manufacturer using power loom would buy hank yarn and get it dyed and thereafter get it wound to be used in their machines for manufacture of coloured terry towels. Some of these buyers have admitted this and the assumption made by authorities on such ipsi dixit would not stand. The fact that buyers

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used winders for winding purpose itself indicates that hank was procured by them from appellant.

(xii) The demand is barred by limitation. The appellant was filing quarterly returns (Q03) before the Textile Commissioner and Monthly returns (RT-12) with the department. Therefore the allegation that appellant suppressed facts is incorrect. Further during the disputed period, the movement of goods were under intimation to department as per procedures prescribed under Rule 96E of CER, 1944.

(xiii) In any case, there is no evidence that the Director had any direct role in the allegations raised in the SCN and the penalty imposed on the Director is unwarranted.

3. Against this, the Ld.AR, Sh.S.Govindarajan reiterated the findings in the impugned order. He submitted that on 19.2.2003, the Officers of DGCEI had visited the premises of M/s.Peeyelyes Interntional, M/s.Jaisar Spintex Pvt Ltd, and M/s. Peeyelcee Tex Exports (P) Limited, who are all terry towel manufacturers. Another unit Sri Muthu Industries which was a sizing mill and engaged in warping and sizing of terry towel was also visited. The documents seized included invoices / clearances of yarn from the appellant mill. It was seen that M/s. Peeyelcee Tex Exports (P) Limited had purchased 5000 kg of cheese yarn and 44780 yarn described as hank during 1999-2000 and 24,500 kgs of hank yarn during 2000-2001. The sizing reports of Sri Muthu revealed that gross weight of yarn sized (which are supplied by appellant) was 51,963 kgs for 1999-2000 and 24,451 for the period 2000-01. Records were recovered from the

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appellants which showed discrepancies in the vehicle numbers, used for transporting cheese yarn from appellants factory to that of convertors premises or for transporting back the hank yarn. On verification with RTO, these vehicle numbers pertain to two wheelers / motor car etc. which shows that the case of appellants that they had send yarn for conversion into hank yarn and cleared hank yarn is false. They were actually clearing cheese yarn in the guise of hank yarn. Statements of the buyers / customers who purchased yarn from appellant was taken. They have given statement to the effect that they have not purchased hank yarn from appellant. On the request of appellant, summons was issued to these customers for cross-examination. Three of them failed to appear. Their statements are fully reliable. The job worker / convertors have also stated that they did not undertake any work of conversion for appellant, but prepared bogus documents to show that hank yarns were cleared. Their retraction in cross-examination is an afterthought.

3.1 The partner of M/s. M/s.Peeyelyes Interntional, Sh. L.Sivasankar has given statement on 10.7.2003 to the effect that the main raw material for manufacture of terry towel is 10s and 16s cotton yarn on cheese/cone and only negligible quantity, i.e., around 1% of total purchase constitute 2/20s hank yarn which is used for stripes/border on the terry towels. They manufacture terry towels in power looms and not handlooms. If hank has to be used it has to be converted to cheese yarn which increases the cost of yarn and therefore they purchased and used only cheese yarn. It is categorically stated that they have not purchased hank yarn from appellants. Similar statement is given by other buyers of yarn.

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3.2 As the appellants were removing yarn for conversion to their job workers premises under AR3A procedure, the Range Officer, Dharapuram was asked to clarify whether the re-warehousing certificate were issued for hank yarn having been received from the jobworkers premises. In reply, the Range Officer has clarified that the appellant has filed D3 within prescribed time from the date of receiving converted goods, but no physical verification was done by him. The appellant therefore cannot rely on AR3A/D3 documents.

3.3 Further, the transport documents showed that vehicle numbers in AR3A were bogus. On perusal of AR3-A it is seen that appellants have despatched goods for conversion to four units namely Nalwar Knitting, Dharapuram, Balamurugan Doublers, Palani, Thennammai Textiles, Karur and Ruba Yarn, Karur. The vehicle number used for transportation from appellant factory to convertors and back were bogus and the vehicle numbers pertain to two wheelers and motor cars. The letter received from R.T.O. establishes this fact.

3.4 The retraction of the job workers in cross examination is immaterial as the documents establish that no hank yarn was cleared, as the vehicle numbers are incorrect. The AR3-As were created with ulterior motive of evading duty. As appellants have wilfully perpetuated fraud and suppressed facts, the invocation of extended period is legal and proper.

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4. Heard both sides.

5. The main allegation levelled against the appellant is that they cleared cheese/cone yarn in the guise of hank yarn and thus evaded payment of duty. Appellant being a manufacturer of yarn is required to sell 50% of manufactured yarn as hank yarn as per the provisions of the Textiles (Development & Regulation) Order, 1993 issued under Section 3 of Essential Commodities Act, 1956. During the period of dispute, admittedly appellant did not have reeling machine for production of hank yarn. Hence it is contended by them that they were getting the cheese yarn converted into hank yarn at the job worker / convertors end and clearing hank yarn without payment of duty.

5.1 The case of the appellant is that for removing cotton yarn from factory for the purpose of conversion and to receive it back after conversion, the Central Excise Rules provides for certain procedures to be complied. The appellant had followed all such procedures and documents were issued by department acknowledging the compliance of procedure as well as receipt of hank yarn after conversion. On the scrutiny of evidence placed before us we are able to see that the series of documents relating to the conversion activity including D3 (issued by Range Officer certifying that hank yarn has been received after conversion) has been rejected by the department on the basis of letter given by the Range Officer that though D3 intimations were given by him, he had not conducted verification physically whether such goods were received back after conversion.

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5.2 For better appreciation the relevant law of Central Excise Rules, 1944 is reproduced as under :-

RULE 96E : Procedure for removal of cotton yarn or [jute twist, yarn, thread, ropes and twine] from one factory to another without payment of duty. – (1) Cotton yarn or [jute twist, yarn, thread, ropes and twine] may be removed without payment of duty from one factory to another for the purpose of processing or packing or for the purpose of manufacture of cotton fabrics or jute manufactures subject to the observance of the procedure hereinafter prescribed.

(4) If cotton yarn, after being processed, is removed without payment of duty to one or more factories for the purpose of further processing, or to the originating factory, such removal shall be subject to and in accordance with the provisions of sub-rule (3).

RULE 96EE : Procedure for removal of yarn (other than cotton yarn or jute yarn) from one factory to another without payment of duty.

(3) When the said yarn is removed from one factory to another factory of the same manufacturer, the consignor shall, follow the procedure as required by rules 156A and 156B as modified by rule 173N.

RULE 156 A. Procedure in respect of goods removed from one warehouse to another. (1) The application for removal of goods from one warehouse to another shall be presented by the consignor in triplicate, and in the proper Form, to the officer-in-charge of the warehouse of removal, at least 24 hours before the intended removal, together with such other information as the [commissioner] may be general or special order require.

(2) Such officer shall then take account of the goods, and after completing the removal certificate on all the copies of the application, shall send the duplicate to the officer-in-charge of the warehouse of destination, and hand over the triplicate to the consignor for despatch to the consignee. He shall also deliver to the consignor a transport permit in the proper Form.

(3) On arrival of the goods at the warehouse of destination, the consignee shall present them together with the triplicate application and the transport permit to the officer-in-charge of such warehouse, who shall, after taking account of the goods, complete the rewarehousing certificate on the duplicate and the triplicate application, return the duplicate to the officer-in-charge of the warehouse of removal, and triplicate to the consignee for despatch to the consignor.

(4) The consignor shall present the triplicate application duly endorsed with such certificate to the officer-in-charge of the warehouse of removal within ninety days of the date of issue of the transport permit under sub-rule (2)

RULE 156 B. Failure to present triplicate application. – (1) If the consignor fails to present the triplicate application to the officer-in-charge of the warehouse of removal in the manner laid down in sub-rule (4) of rule 156A, and the duplicate application endorsed with the rewarehousing certificate has also not been received by such officer from the officer-in-charge of the warehouse of destination, the consignor shall, upon a written demand being made by the former officer, pay the duty leviable on such goods within ten days of the notice of demand and if the duty is not so paid he shall not be permitted to make fresh removals of any warehoused goods from one warehouse to another until the duty is paid or until the triplicate application is so presented or the duplicate application is so received.

(2) Where such duty has been paid, it shall be refunded to the consignor either on his presentation of the triplicate application to or on the receipt of the duplicate application by the officer at the warehouse of removal, duly endorsed, as provided in sub-rule (3) of rule 156A, with a certificate by the officer-in-charge of the warehouse of destination that the goods covered by the application have been satisfactorily rewarehoused.

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5.3 Thus, it can be seen that the procedure contemplated for removal for the purpose of conversion is self contained. The consequence of not adhering to the procedure is laid down in 156 B. The department has no case that any action was taken against appellant for not complying the procedure. To get the yarn converted into hank the appellant dispatches the dutiable cheese yarn without payment of duty under cover of statutory Form AR 3A with permission of concerned Range Officer and the yarn will get re-warehoused with the job worker concerned under the control of the jurisdictional Range Officer who records the fact of such re-warehousing. After conversion, the hank yarn is returned to the appellants who receives them under cover of statutory documents under intimation to the Range Officer in Form D3. Thus the removal for conversion and receipt of converted hank yarn is intimated to, and acknowledged by the department. In such event, the department cannot give a go by of such documents by relying on the statement of Range Officer that he was merely endorsing upon the document without physically verifying whether yarn was received by appellants after conversion. The endorsements made by an officer of the department cannot be brushed aside in such manner. Based on such statements of Range Officer the department cannot reject the AR3-As and D3s as bogus documents. Another reason for rejection of these documents of conversion is that the vehicle numbers noted there in are fictitious. The Ld.Counsel has pointed out that out of the 400 AR-3As, only 14 numbers have incorrect vehicle number. Out of these, 8 documents were prepared by them. He has submitted that it happened only due to error in noting the vehicle number. We find no reason not to accept this contention of the appellant. Out of 400 AR3-As, when the vehicle numbers mentioned only in 14 documents showed variation or incorrectness. The strong inference that can be made is that it was merely human error. This cannot in our view, be a ground to reject all 400 documents as bogus.

5.4 The department obtained statement from the convertors namely Nalwar Knitting, Balamurugan and Thennamai. Out of this the first two have stated during cross examination that they had given statement only under compulsion by department and that they indeed had converted cheese yarn into hank yarn for appellants. Though Sh.A.L.Thennappan at the very first occasion of giving statement itself, deposed that he undertook conversion for appellant. His statement has conveniently not been made part of SCN. Again, the department has not taken any statement from Ruba Yarns who has converted yarn for appellant. Records reflect that appellant has paid conversion charges to Ruba Yarn and Balamurugan which has been disregarded in toto. These evidences including the ARA-3s and D3s indicate the strong probability that appellant has send yarn for conversion.

5.5 The main evidence relied by is the statement of buyers of yarn from the appellant. The Partner / director of M/s. Peeyelyes International and Sansons Exports, M/s.JaisarSpintex (P) Limited, M/s. Peeyelcee Tex Exports (P) Limited and M/s. Anitha Traders had stated that they purchased only cone/cheese yarn and that they use

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only minimum quantity of hank yarn etc. Out of these Sh.A.Chandrasekar, Partner of Anitha Traders has stated in cross examination that they purchased hank yarn from appellant. Surprisingly, although documents recovered from Sh. Muthu Industries (sizing Mill run by and for Peeyelyes International) was heavily used by department for investigation as well as to base the allegations in the SCN, it is seen that no statement was obtained from any person connected with M/s.Muthu Industries. The counsel for appellant has strongly argued that the statements made by Sh.L.Sivasankar Narayanan (Partner of Peeyelyes International and Sansons Exports), Sh.J.Lakshmanan (JaisarSpintex (P) Limited & M/s.Peeyejay Fabrics) and that of Sh. C.Saravanan (Peeyelcee Tex Exports (P) Limited) cannot be relied as even after the request for cross examination by appellant, the department has not been able to procure the attendance of these witnesses. We therefore hold that in absence of examination their statements are not admissible in evidence under Section 9D. In the case of ***Jindal Drugs Pvt Ltd Vs UOI 2016 (340) ELT 67 P.H***, the Hon'ble High Court has stressed the necessity to follow the procedure in 9D before admitting the statement in evidence. The relevant portion of the judgement is noticed as under :

18. The rationale behind the above precaution contained in clause (b) of Section 9D(1) is obvious. The statement, recorded during inquiry/investigation, by the Gazetted Central Excise Officer, has every chance of having been recorded under coercion or compulsion. It is a matter of common knowledge that, on many occasions, the DRI/DGCEI resorts to compulsion in order to extract confessional statements. It is obviously in order to neutralize this possibility that, before admitting such a statement in evidence, clause (b) of Section 9D(1) mandates that the evidence of the witness has to be recorded before the adjudicating authority, as, in such an atmosphere, there would be no occasion for any trepidation on the part of the witness concerned.

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19. Clearly, therefore, the stage of relevance, in adjudication proceedings, of the statement, recorded before a Gazetted Central Excise Officer during inquiry or investigation, would arise only after the statement is admitted in evidence in accordance with the procedure prescribed in clause (b) of Section 9D(1). The rigour of this procedure is exempted only in a case in which one or more of the handicaps referred to in clause (a) of Section 9D(1) of the Act would apply. In view of this express stipulation in the Act, it is not open to any adjudicating authority to straightaway rely on the statement recorded during investigation/inquiry before the Gazetted Central Excise Officer, unless and until he can legitimately invoke clause (a) of Section 9D(1). In all other cases, if he wants to rely on the said statement as relevant, for proving the truth of the contents thereof, he has to first admit the statement in evidence in accordance with clause (b) of Section 9D(1). For this, he has to summon the person who had made the statement, examine him as witness before him in the adjudication proceeding, and arrive at an opinion that, having regard to the circumstances of the case, the statement should be admitted in the interests of justice.

Similar view was taken in the case of M/s.Ambika International vs UOI 2016-TIOL-1238-HC-P&H-CX, J&K Cigarettes Ltd vs CCE 2009 (242) ELT 189 (Del.).

5.6 From the discussions made above, we find that department has failed to establish that the appellant has not cleared hank yarn. The evidences, such as AR3-As and related documents, alongwith the deposition of job workers made during cross examination strongly indicate that during the disputed period appellant, though did not have reeling machine, was sending cone yarn for conversion into hank yarn and clearing the same without payment of duty. In such circumstances the demand cannot sustain, and requires to be set aside. In the result, the impugned order is set aside. The appeal is allowed with consequential reliefs, if any.

(Operative part of the order pronounced in open court)

(Madhu Mohan Damodhar) **Member (Technical)**	Sulekha Beevi **(Sulekha Beevi C.S)** **Member (Judicial)**

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प्रमाणित प्रति/Certified True Copy

सहायक पंजीकार/Asst. Registrar
सीमाशुल्क उत्पादशुल्क एवं सेवा कर अपील अधिकारी/(CESTAT)
चेन्नै/CHENNAI

14 MAY 2018