CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH - COURT No. III

Excise Appeal Nos.40178 & 40179 of 2014

(Arising out of Order-in-Appeal Nos. MDU/CEX/000/APP/137 & 138/-13 dated 25.10.2013 passed by Commissioner of Central Excise (Appeals), Madurai)

M/s. Madura Coats Private Ltd., **.... Appellant**
(Centenary Mill),
New Jail Road,
Madurai – 625 001.

VERSUS

The Commissioner of CGST & Central Excise **...Respondent**
Central Revenue Building,
Bibikulam, Madurai – 625 002.

And

Excise Appeal Nos.42311 to 42317 of 2014

(Arising out of Order-in-Appeal Nos. MDU/CEX/000/APP/037 to 043/-14 dated 14.08.2014 passed by Commissioner of Central Excise (Appeals), Madurai)

M/s. Madura Coats Private Ltd., **.... Appellant**
(Centenary Mill),
New Jail Road,
Madurai – 625 001.

VERSUS

The Commissioner of CGST & Central Excise **...Respondent**
Central Revenue Building,
Bibikulam, Madurai – 625 002.

APPEARANCE :

Shri. J. Shankarraman, Advocate, for the Appellant
Shri. M. Selvakumar, Authorised Representative for the Respondent

CORAM :

HON'BLE MS. SULEKHA BEEVI.C.S., MEMBER (JUDICIAL)
HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

FINAL ORDER No.40714-40722/2024

DATE OF HEARING : 12.06.2024
DATE OF DECISION :21.06.2024

Per Ms. Sulekha Beevi. C.S

The issue involved in all these appeals being the same and connected they were heard together and are disposed of by this common order.

Appeal Nos. E/40178 – 40179/2014

2. These appeals are filed by M/s. Madura Coats who were manufacturing Polyester/ cotton rove twisted yarn and Nylon/ cotton rove twisted yarn for which classification list was filed by the appellant on 28.02.1986 classifying the goods under Sub heading No.5608.00. However, on 07.05.1986, the appellant sought for reclassification of the goods under Sub heading No.5607.90 with effect from 12.05.1986 and claimed exemption under Notification No. 271/86. The department issued show cause notice on 11.11.1986 proposing to classify the goods in question under Sub heading No.5608.00. The appellants opted for provisional assessment by reclassifying the product under sub heading 5607.90. The jurisdictional Assistant Commissioner ordered for provisional assessment on 25.08.1986. Meanwhile, samples of the goods were sent to the Chemical Examiner, Custom House, Madras for his opinion on the characteristics of the goods. As per report dated 12.01.1988, the Chemical Examiner opined that, "the said samples were composed of core polyester filament yarn to which cotton fibers have been embedded throughout its length by means of high twist".

3. Based on the process of manufacture of the goods and in view of the special type of composition & construction of the yarn as brought out from the test report, the department issued show cause notice dated 17.01.1989 proposing re-classification of the goods under Sub heading No. 5606.00 as "special yarns" and raised a demand for differential duty of Rs. 9,21,130/- (Basic Excise Duty) and Rs. 22,890/- (Special Excise Duty) total duty of Rs.9,44,020/-. After

adjudication, the original authority re-classified the goods under Sub heading No. 5606.00 and confirmed the differential duty as proposed in the show cause notice for the period from 9/86 to 12/88, as per Order-in-Original No.53/89 dt 28.03.1989.

4. Against such finalization of the provisional assessment the appellant filed appeal before the Commissioner (Appeals) and vide OIA No.165/89, the Commissioner (Appeals) held that, the goods are excisable but would merit classification appropriately under Heading No. 54.04 of Central Excise Tariff Act 1985 and would be eligible for exemption under Notification No. 53/87 dated 01.03.87. The classification of the goods was thus modified to be under Heading No. 54.02 by issuing a Corrigendum dated 04.01.1990.

5. Against this order passed by the Commissioner (Appeals), the department filed appeal before the Tribunal (CEGAT). After hearing of the appeal, the Tribunal passed Final Order No. 291/2000 dated 24.02.2000 remanding the matter for denovo consideration.

6 Pursuant to the remand order, the matter was taken up for fresh consideration and the adjudicating authority passed Order in Original Nos. 29,30 & 31/2001 dated 31.12.2001 where by further proceedings initiated in all the show cause notices issued against the appellants were dropped, thus setting aside the excise duty demand.

7. The department filed appeal before Commissioner (Appeals) against such order. The Commissioner (Appeals), Madurai there upon passed OIA Nos.114/117/2004 dated 31.03.2004 holding that the impugned product, intermediary yarn is classifiable under Heading

No.5606 of CETA, 1985 for the period prior to changes effected in Tariff descriptions in the year 1995 and directed the adjudicating authority to examine the marketability aspect of the subject goods and also to consider the issue of time bar before quantifying the demand.

8. Against the above order passed by Commissioner (Appeals), the appellants approached the Tribunal once again by filing appeal. There upon, CESTAT vide Final Order Nos. 389-391/2011 dated 02.03.2011, held that only if the goods are marketable, the issue of classification of the goods becomes relevant. The matter was remanded to the adjudicating authority to consider whether the goods are marketable. It would be open to the appellant to challenge the classification. The relevant para of Final order of CESTAT dated 02.03.2011 is reproduced as under: -

> *We have heard both sides. We are of the view that it is only in the event of the adjudicating authority holding that the goods are marketable, that the issue of classification of the goods becomes relevant. If the lower authority comes to the conclusion that the goods are not marketable then there is no relevance of the classification for the reason that the goods would not attract any duty liability. We, therefore, do not consider it necessary to entertain appeals at this stage on the issue of classification. However, we make it clear that in the event of it being held that the goods are marketable, it shall be open to the assessees to challenge the classification. [They have been claiming that the goods if marketable would fall for classification under Chapter Heading 54.02]. The question of marketability is to be decided afresh in the light of the evidence available on record.*

9. Pursuant to the above order passed by Tribunal, the Assistant Commissioner vide Order in Original dated 23.08.2012, held that the goods are marketable and held that goods are classifiable under Heading No. 56.06. The demand of duty proposed in the show cause notice was confirmed. The Assistant. Commissioner also imposed

equal penalty to the duty confirmed under Section 11 AC read with relevant Rules. The proceedings in respect of the demands for the period October 1996 to July 1997 was dropped.

10. Against the above order of confirming the demand and imposition of penalty, the appellants filed appeal before Commissioner (Appeals). As per order impugned herein dated 25.10.2013 the Commissioner (Appeals) upheld the order passed by the adjudicating authority. Hence, the appellants are before the Tribunal in the third round of litigation.

11. The Ld. Counsel Shri. J. Shankarraman, appeared and argued for the appellant. It is submitted that, the appellant interalia manufactured and cleared intermediate products namely Polyester cotton rove twisted yarn and Nylon cotton rove twisted yarn used for 100% captive consumption in the In-house manufacture of their specialty monopoly products namely Polyester Cotton coarse spun threads and Nylon cotton coarse spun threads in their factory at Ambasamudram. These monopoly products were manufactured against the specific orders of their customers.

12. These products viz., (i) Polyester cotton rove twisted yarn and (ii) Nylon cotton rove twisted yarn being intermediate products used for manufacture of final products were cleared to their factory at Ambasamudram for further manufacture of polyester cotton coarse spun thread and nylon cotton coarse spun threads. In the respective industrial textile division, these intermediate products were captively

consumed in the manufacture of finished products namely fabrics and the appellant has paid appropriate duty on the finished products.

13. It is submitted by the Ld. Counsel that, the Tribunal while remanding the matter had emphasized that the issue of marketability has to be considered, and only if the goods are marketable in nature would the issue of classification be relevant. It is submitted that the Commissioner (Appeals) has merely upheld the order passed by the adjudicating authority on marketability of the intermediate product without considering the fact that there is no evidence to show that the intermediate products are capable of being bought and sold in the market. The adjudicating authority has merely relied upon various judgements, without giving any finding of fact on the issue of marketability. Moreover, Shri. V. Karthikeyan, who is the technical person of the appellant company, had filled an affidavit dated 26.11.2001 stating that the goods are not marketable. The said affidavit has not been countered by the department in any manner by adducing evidence.

14. The Ld. Counsel adverted to para 11 of the impugned order dated 25.10.2013 to submit that, there is an observation that the goods are not generally being bought and sold and it has no demand in the market. However, this fact has been brushed aside as irrelevant. The adjudicating authority as well as the Commissioner (Appeals) has held that the goods are marketable observing that the goods are capable of being bought or sold in the market. The decision in the case of Nicholas Piramal India Ltd., Vs. Commissioner of C. Ex, Mumbai – 2010 (260) ELT 338 (S.C.) has been wrongly applied to decide the

issue of marketability. The facts in the case of Nicholas Piramal India Ltd., (supra) is that the appellant therein had opted not to sell the product in the market and the Hon'ble Court observed that the said option cannot be construed to mean that the goods are not capable of being bought or sold. Moreover, the contention of the appellant therein that the goods do not have any shelf-life was also not accepted as it was proved that the goods had shelf-life of 2 to 3 days. It was then observed by the Apex court that the goods are marketable. The question of marketability being a question of fact is to be determined on the basis of facts of each case and there cannot be straight jacket formula.

15. The Ld. Counsel urged that the department has not adduced any evidence to show that the impugned intermediate goods are bought and sold in the market. It is merely alleged that, since the appellant has the monopoly of manufacture of these intermediate products, it cannot be said that the goods are not capable of being marketed.

16. Section 2 (d) of the definition of excisable goods in Central Excise Act 1944 was pointed out by the Ld. Counsel to submit that an Explanation has been added to the definition with effect from 10.05.2008. The definition reads as under:-

> *Section 2 (d) "excisable goods" means goods specified in First Schedule to the Central Excise Tariff Act 1985 (5 of 1986) as being subject to a duty of excise and includes salt;*
>
> *The amendment w.e.f. 10.05.2008.*

> *Explanation:- For the purposes of this clause, "goods" includes any article, material or substance which is capable of being bought and sold for consideration and such goods shall be deemed to be marketable.*

17. It is submitted that the explanation has been introduced only with effect from 10.05.2008 and the period of dispute in the present appeal is prior to this date. The said explanation which makes goods deemed to be marketable when capable of being bought or sold cannot be pressed into application for the period prior to 10.05.2008.

18. The decision in the case of Macro Print Engineers (India) P Ltd., Vs. Commissioner of C. Ex., & S.T., Coimbatore – 2017 (358) ELT 672 (Tri.-Chennai) was relied by the Ld. Counsel to argue that, the Tribunal observed that the department has to establish that the goods are marketable. The Tribunal considered the argument of the appellant therein that prior to 10.05.2008, mere manufacture does not make goods excisable and the test of marketability has to be established.

19. The decision in the case of Cimmco Birla Ltd., Vs. Commissioner of Central Excise, Jaipur – 2015(319) ELT 552 (S.C.) was relied. It was held by the Hon'ble Apex court that it is for the department to prove that the goods are marketable by leading evidence. In the absence of evidence, the goods are not marketable.

20. In the case of Needle Industries (India) Pvt. Ltd., Vs. Commissioner of C. Ex., Salem – 2017(6) G.S.T.L. 159 (Tri.-Mad) the issue of marketability was considered with regard to the item Gold Potassium Cyanide Solution. The contention of the department that

the goods are marketable was not accepted by the Tribunal as there was no evidence put forward by the department to show that the goods are being bought and sold in the market.

21. It is submitted that, when the goods are not marketable the goods are not excisable and therefore the issue of classification does not have any relevance. When the goods are not marketable, they are not excisable goods as per 2(d) of the definition prior to 10.05.2008 and therefore the levy of duty cannot sustain. The Ld. Counsel submitted that though there is no proposal in the show cause notice to impose penalty the adjudicating authority has imposed equal penalty, under section 11 AC which has been confirmed by the Commissioner (Appeals). The proceedings having been emanated from a provisional assessment, there was no occasion to allege any violation of law so as to impose penalty. It is submitted that, the confirmation of duty or the penalty imposed cannot sustain. The Ld. Counsel prayed that the appeal may be allowed.

22. The Ld. AR Shri. M. Selvakumar appeared and argued for the department. The findings in the impugned order was reiterated. Para 11 to 14 of the impugned order was adverted to by the Ld. AR to submit that the appellant has the monopoly of manufacturing these intermediate products. Only for this reason these goods are not available in the market. It does not take away the marketability of the goods. The goods are capable of being bought and sold and would thus become 'excisable goods'. The decision in the case of Nicholas Piramal India Ltd., is applicable in the said case as the goods are being capable of bought and sold. This would make the goods 'excisable goods'. The

duty demand and penalty is legal and proper. It is prayed that the appeals may be dismissed.

23. Heard both sides.

24. The issues that arise are whether:-

i. The intermediate products, namely polyester cotton rove twisted yarn and nylon cotton rove twisted yarn, are marketable products.

ii. The second issue, the classification of these products

iii. The demand of duty and equal penalty whether sustainable or not.

25. As per the order of the Tribunal, by which the matter was remanded to the adjudicating authority to reconsider the issue of marketability, it has been specifically stated that if the goods are not marketable, then the issue of classification does not have any relevance.

25.1 The adjudicating authority has discussed the issue of marketability in para 7(A). There is no discussion on any evidence put forward from the side of the department to establish that the goods are marketable. It is to be noted that the technical person of the appellant factory has filed affidavit affirming that the goods are not marketable. In the entire discussion, the adjudicating authority has referred to judgments passed by various courts on the issue of marketability and there is no discussion as to how the fact of marketability stands established. Admittedly the goods are ordinarily not being purchased or sold in the market.

26. The appellant has argued that the intermediate goods were never ever sold by them or anyone else. These goods were only captively consumed in the manufacture of products of their company.

27. So also, the Commissioner (Appeals) has discussed the issue of marketability. It is observed by the Commissioner (Appeals) that the impugned products are monopoly products manufactured only by the appellant and such goods are not available in the market. He then proceeds to hold that goods are marketable by merely placing reliance on the decision in the case of Nicholas Piramal India Ltd., (supra).

28. There is a clear finding that the goods are not available in the open market. If the appellant manufactures excess of the impugned products, they would not be able to sell these products in open market as there are no buyers to purchase the same. So, also in case they have shortage of these intermediate products, they would not be able to buy it from the market as it is not available in the market. It is very much clear that the goods are not marketable. The decision in the case of Pyramid India Limited (supra) is not applicable to the facts of the present case. In the said case, the goods had a shelf life of at least 2 to 3 days and the Hon'ble Apex Court held that the option of the appellant not to sell the goods even though had a short shelf life cannot be make the goods not marketable. The goods were available in the market. Moreover, in the present case, the goods are intermediate products which are cleared to their own unit for being used in manufacture of finished products. The finished products are cleared on payment of duty.

29. In the case of Cimmco Birla Ltd., (supra), the Hon'ble Apex Court held that the goods would be exigible to excise duty only if it is proved that they are marketable. The burden lies on the department to demonstrate that the goods are marketable. The relevant para reads as under :-

> *The appellant was getting contract for manufacturing of Railway wagons from the Indian Railways. Inputs for manufacture of these wagons were supplied by the Indian Railways, meaning thereby the appellant was only doing job work. Insofar as Railway wagons are concerned, they are exempted from duty w.e.f. 1-3-1993. The only question as to whether the inputs/parts which were used for manufacturing of Railway wagons are to be subjected to Excise duty. It is not in dispute that these are intermediate products and captively used and would come within the definition of "manufacture". However, before these goods could be exigible to the Excise duty, it was also incumbent upon the Department to prove that the said parts were marketable. We find that a specific contention was taken by the assessee that the goods in question are not marketable. However, the Department did not lead any evidence to demonstrate that these products are marketable. On this ground alone the present appeal is liable to succeed.*
>
> ***2.*** *We, thus, set aside the impugned order of the Tribunal which has not even gone to this essential aspect of the matter.*
>
> ***3.*** *The appeal is accordingly allowed*

30. In the case of Macro Print Engineers (India) P Limited (supra), the issue as to marketability of the goods for the period prior to 10.05.2008 in particular was considered. It was observed by the Tribunal that mere manufacture does not make the goods excisable. Only if the goods satisfy twin tests, they become excisable goods. The first test is that the goods in question must have been manufactured and should find a place in the Central Excise Tariff Act. The second test is marketability in the common parlance. It was held that without

meeting the twin tests, the demand of duty cannot sustain. Relevant paragraph reads as under :-

> *Appellant says that prior to 10-5-2008, mere manufacture does not make the goods excisable. Only if the goods satisfy twin test, that becomes "excisable" goods following the ratio laid down by the Apex Court in the case of Board of Trustees v. CCE, A.P. - 2007 (216) E.L.T. 513 (S.C.). The first test is that the goods in question must have been manufactured and find place in the Central Excise Tariff Act. The second test is marketability in the common parlance. The goods manufactured by the Coimbatore unit of the appellant was only intermediate product and not marketable in the common parlance as tradeable commodity. Therefore, the goods came from Coimbatore to Pondicherry being used for manufacture of finished goods in its own unit shall not make the appellant liable in respect of the intermediate product.*
>
> ***3.*** *Revenue, on the other hand, says that when the intermediate product was manufactured, they are liable to duty.*
>
> ***4.*** *It does not appeal to common sense how non-excisable goods shall be dutiable without meeting the twin tests as has been held by the Apex Court in the case of Board of Trustees (supra). Added to that, show cause notice exhibits that Revenue has not discharged its burden of proof to bring the goods to be called as "marketable" and "traded commodity".*
>
> ***5.*** *In view of above, adjudication having no foundation in law is liable to be unsustainable for which appeal is allowed.*
>
> ***6.*** *To reach to the above conclusion, we have also been guided by the Apex Court in the case of Cipla Ltd. v. CCE, Bangalore - 2008 (225) E.L.T. 403 (S.C.) holding that manufacture does not ipso facto bring the goods to the fold of excisability without meeting the twin test.*

31. The Tribunal in the case of Needle Industries India Pvt Limited (supra) had occasion to consider a similar issue. The goods in question was Gold Potassium Cyanide solution and the issue considered was the marketability of this item. It was brought out from evidence that the said item is not only highly poisonous because of the presence of its cyanide molecule, but also unstable. The Tribunal held that the goods cannot be said to be marketable. The relevant paragraphs read as under:-

7. The literature submitted by learned AR pertains only to solid crystalline form of Gold Potassium Cyanide. The illustration thereto also involves crystalline forms only. Under the head Transparency, it has been Indicated that it is Clause 6.1 poisonous material. On the other hand, what is manufactured by the appellant is evidently Gold Potassium Cyanide Solution and not Gold Potassium Cyanide crystalline powder. Further, even at this point, it has not been established by Revenue as to the marketability of Gold Potassium Cyanide Solution manufactured by the appellant. This impugned product, therefore, fails to satisfy the twin tests namely (1) process constituting manufacturing and (il) marketability, as laid down by the Hon'ble Apex Court in the landmark judgment Board of Trustees v. Collector of Central Excise, A.P. reported in 2007 (216) E.L.T. 513 (S.C.). The relevant portion of the judgment is reproduced herein for better appreciation:-

"3. Therefore, the principal question involved in this civil appeal relates to exigibility of Cement Concrete Armour Units. At the outset we may state each of these units weight is about 50 metric tones. They are like Tripods which also keep the water calm and tranquil. In order to constitute "goods" twin tests have to be satisfied, namely, process constituting manufacture and secondly marketability. In the present case the second test of marketability is in issue. It is well-settled that goods are manufactured with the object of being sold in the market. If the goods are not capable of being sold then the test of marketability is not fulfilled. Further, the burden is on the Department to prove whether there is the process which constitutes manufacture and secondly whether the product is marketable."

8. It is also distressing to note that in spite of the two occasions that the matter has been remanded for de novo consideration, with specific instructions. Those instructions have not been complied with by lower authorities. Instead, the earlier orders seem to have been replicated ad nauseam. This has resulted in an appeal of 1994 year, traversing such a long course for over 27 years for closure. This certainly is not helping speedy dispensation of disputes.

9. In view of the discussions hereinabove and following judicial discipline, it is held that the product in question is definitely not marketable and therefore cannot be charged to duty as proposed by the department. The impugned order is therefore unsustainable and the appeal is allowed with consequential benefits, if any, as per law.

31.1 From the discussions made above and on the basis of evidence placed before us, we have no hesitation to conclude that the intermediate goods namely polyester / nylon / cotton rove twisted yarn are not marketable items. This issue is answered in favour of the assessee.

32. The second point to be analysed is regarding the classification. The Ld. Counsel has submitted that the appellant is no longer manufacturing these products. Further, the Tribunal while remanding the matter has categorically held that if the goods are not marketable, then the issue of classification has no relevance. The issue of marketability is decided in favour of assessee. Only if the goods are marketable, they fall into the definition of excisable goods. The levy of excise duty is attracted only for manufacture of excisable goods. As we have already held that the goods are not marketable and therefore not excisable goods, the issue of classification is of no consequence and the demand of duty cannot sustain. We therefore set aside the demand of duty confirmed in the impugned order.

33. The next issue is with regard to the penalty imposed. The adjudicating authority has imposed equal penalty under Section 11 AC of the Central Excise Act, 1994. Interestingly, there is no proposal in the show cause notice to impose penalty. Moreover, the appeals arise out of the finalization of assessment. The dispute being interpretation in nature and also with regard to classification of the impugned goods, the imposition of penalty is totally unwarranted. We therefore set aside the penalties imposed.

34. In view of the above, the impugned orders in appeal E/40178-40179/2014 are set aside. These appeals are allowed with consequential reliefs, if any.

Appeal Nos. E/42311 to 42317/2014

35. In Excise Appeal Nos.42311 to 42317 of 2014, the issue arising for consideration is whether the appropriation of the sanctioned rebate amount towards the pending arrears is legal and proper.

36. The facts in these appeals reveal that the appellant had filed rebate claims for various amounts as they had exported their finished products. After due process of law, the Assistant Commissioner of Central Exercise, Division I Madurai, though sanctioned the rebate amounts, ordered for appropriation of the sanctioned amount towards the outstanding arrears against the orders passed in E/40178 – E/40179/2014 appeals, wherein the demand of duty has been uphleld holding that the intermediate products are marketable and excisable goods.

37. The Ld. Counsel submitted that though the appellant had filed stay application along with appeal against recovery of the demand there was no stay granted by CESTAT. The adjudicating authority has therefore, ordered for appropriation of the rebate amount towards the demand confirmed by the Commissioner (Appeals).

38. We have already held that the demand of duty in regard to the impugned intermediate products cannot sustain. The impugned orders O-I-A Nos.137,138/2013 dated 25.10.2013, are set aside in para 34 above. Therefore the orders passed confirming the appropriation of the sanctioned rebate amount cannot sustain. In other words, consequent to the order passed by us setting aside the demand of

duty / penalty, the appropriation of the rebate amount in these impugned orders cannot sustain.

39. In view thereof, the impugned orders in these appeals are set aside. All appeals are allowed with consequential reliefs, if any.

(Order pronounced in the open court on 21.06.2024)

(VASA SESHAGIRI RAO)
Member (Technical)

(SULEKHA BEEVI. C.S)
Member (Judicial)

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