

GRAM : CEGCANAL

REGISTERED/A.D

THE CUSTOMS, EXCISE & GOLD (CONTROL) APPELLATE TRIBUNAL,

West Block No. 2, R.K. Puram, New Delhi - 110066.

BENCH NB (SM)

Appeal No. E/3020/99-NB(SM)

Dated : 8/1/2001.

CEGAT
NEW DELHI
To,

_____ M/s Maya Spinners Ltd.,
_____ Manas Bhawan, RNT Marg,
_____ Indore (M.P)

In the matter of :

_____ M/s Maya Spinners Ltd., Appellant
vs.
_____ CCE Indore Respondent

I am directed to transmit herewith a certified copy of Final Order No. A/34/2001/NB(SM)
Dated : 29-12-2000 passed by the Tribunal under Section 35-C(1) of Central Excise
& Salt Act, 1944/Section 129 (B) of the Customs, Act, 1962.

Copy to :

Asstt. Registrar
NB(SM)

1. CCE Indore
2. CCE/EE/(Appeal) Bhopal
3. Chief Commissioner of Central Excise / Customs. Jaipur
4. Adv./ Consult. Shri A. I. Upadhaya, Adv.,
30/J, Chhipa Bakhhal,
Indore - (M.P)
5. S.D.R
6. JCDR
7. Bar Association, CEGAT, New Delhi
8. Library, CEGAT, New Delhi
9. Director (Review), C.B.E.C. North Block, New Delhi
10. Guard File.
11. M/s Deeparchic Publications, M-93, Marg-46, Saket, New Delhi.
12. M/s Centax Publications (P) Ltd., 1512-E, Bhishm Pitamah Marg, opp. Sachdeva P.T. College of
Defence Colony, New Delhi-110003
13. M/s Lex Site Com. Ltd., Mumbai
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Asstt. Registrar

CUSTOMS, EXCISE & GOLD (CONTROL) APPELLATE TRIBUNAL
NEW DELHI

Appeal No. E/3020/99-NB(S)

(Arising out of Order-in-Appeal No. 1122/Appeal/BPL/CE
dated 27.8.99 passed by the Commissioner (Appeals)
Central Excise, Bhopal (MP))

M/s. Maya Spinners Ltd. .. Appellants
(Rep. by Shri A.I. Upadhyay, Advocate)

vs.

C.C.E. Indore .. Respondent
(Rep. by Shri A.K. Jain, JDR)

FINAL Order No. A/34/01/NB (C/M)
dt: 29.12.2000

Per Justice K. Sreedharan:

Appellant herein is an E.O.U. They use High Speed Diesel (HSD) Oil for generating electricity used for the purpose of manufacture of Yarn CT-3 meant for export. On scrutiny of the records, Department found that 1980 ltrs. of high speed diesel oil was not properly accounted for and that 62,983 ltrs. were used for other purposes, other than for manufacture of Yarn CT-3, without payment of duty. When these defects were detected, the assessee was issued Show Cause Notice. He paid duty on 62,983 ltrs., diverted for other purposes. In the Adjudication proceedings, Dy. Commissioner levied Central Excise Duty amounting to Rs.73,971/-, being the duty realisable on 1,980 ltrs. short received by the assessee and 62,983 ltrs. diverted for other use. Invoking the provisions contained in Section 11AC of the Central Excise Act,

an equal amount was imposed as penalty. Rs.20,000/- was also levied as penalty under Rule 173Q of the Central Excise Rules. Adjudicating Officer also directed the assessee to pay a sum of Rs.5,080/-, being the duty on the Cotton Yarn sold illegally. The order passed by the Adjudicating Authority was taken up in appeal. The Appellate Commissioner, in his Order-in-Appeal No.1122-CE/BPL/CE dt. 27.8.99, confirmed the order passed by the Adjudicating Authority except the duty demand of Rs.5,018/- on the goods sold illegally. Hence, this appeal.

2. Ld. Counsel representing the appellant, raised the following points for consideration.

(i) 1,980 ltrs. of High Speed Diesel Oil was found by the Departmental authorities as short received by the assessee. In the light of this categorical findings of short delivery, according to the ld. Counsel, demand of duty in respect of that quantity is against law.

(ii) When the Department found that 69283 ltrs. were mis-used by the assessee, by not having been used in the manufacture of goods for export, duty on that quantity was deposited. Therefore, the assessee should not have been saddled with further penalties invoking the Section 11AC or Rule 173Q of the Rules.

(iii) Section 11AC prescribes only the maximum penalty and that cannot be taken as prescribing the minimum as mandatory penalty.

3. Show Cause Notice was waived by the assessee in the instant case. The order passed by the Adjudicating Authority proceeds on the basis that assessee did not receive 1,980 ltrs. of HSD Oil in his factory. The argument advanced by the ld. Counsel is that the assessee cannot be made liable for the duty in respect of HSD Oil which did not reach the appellant's factory. This argument, though quite attractive, cannot be of any assistance on the facts and circumstances of this case. Assessee was getting the HSD Oil presumably in conformity with the provisions contained in Rule 192. In such a situation, the liability to duty is governed by the provisions contained in Rule 196. Rule 196(1), inter alia, states that if any excisable goods obtained under Rule 192 are not duly accounted for as having been lost or destroyed by natural cause or by unavoidable accident during the transport from the place of procurement or from the appellant's premises or during handling or storage in the premises approved under Rule 192 applicant shall, on demand by the proper Officer immediately pay the duty liable on such goods. The Bond executed by E.O.U and the scheme of the Rules prove that if an E.O.U. takes delivery of excisable goods without payment of duty from the premises of the manufacturer of those goods, any loss in transit occurred thereafter cannot absolve him from the liability to pay the duty on the quantity claimed to be lost unless he gets clearance on the basis of proper records from the concerned Officer. In the instant case, Department and the assessee agree that

the entire quantity inclusive of the 1,980 ltrs. stated to have been lost in transit were taken delivery of from its manufacturer without payment of duty. The loss in transit, if there was any, was never reported to the concerned Officers. It is a fact that out of the quantity taken delivery by the assessee, 1980 ltrs. did not reach the appellant's factory. This situation will not absolve him from paying the legitimate duty on that quantity. Duty, as claimed on 1980 ltrs. of HSD Oil, calls for no interference.

4. The fact that 62983 ltrs. of HSD Oil was utilised by the assessee for purposes other than for which it was given is not in dispute. So, the duty levied on that quantity of HSD Oil cannot be faulted.

5. The question to be considered is whether the Department was justified in imposing the penalty invoking the provisions contemplated in Section 11AC of the Act. As per that Section, the person who is liable to pay duty as determined under Sub-section (2) of Section 11A shall also be liable to pay penalty equal to the duty so determined. Clause (2) of Section 11A envisages determination of duty payable by a person on whom notice under Sub-section (1) of that Section has been issued. Section 11A thus contemplates a situation where duty has not been levied or paid or has been short levied or short paid and consequently a decision is arrived at on the duty leviable. In this case, no such situation

contemplated by Section 11A has come into existence. This is more so because the noticee in this case was not the manufacturer of H.S.D Oil. Hence, the duty liability which has been imposed on the assessee cannot be taken as a levy coming under Section 11A(2) of the Act. Viewed in this perspective, the imposition of penalty under Section 11AC was not proper. The penalty imposed under that section amounting to Rs.73,971/- is vacated.

6. Invoking the provisions contained in Rule 173 Q of the Rules, a penalty of Rs.20,000/- has been imposed on the assessee. According to the ld. Counsel, since the assessee deposited the duty payable in relation to 62,983 ltrs. of HSD Oil, the imposition of penalty is not justified. I am not inclined to accept this argument. The assessee attempted to use the HSD Oil for the purpose other than for which it was made available to him. When he was caught red-handed, he paid the duty. That will not, in any way, absolve him from the penal action. So, the penalty imposed on him under Rule 173Q is confirmed.

7. In the result, the order of the appellate Commissioner impugned before this Tribunal, is confirmed except to the extent of penalty imposed under Section 11AC of the Act. In other words, the assessee is found liable to pay excise duty amounting

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to Rs.73,971/- together with penalty of Rs.20,000/-
imposed under Rule 173Q of the Rules.

8. Appeal is disposed of in the above terms.

(Pronounced and dictated in the open Court)

(Justice K. Sreedharan)
President:

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