

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
EXCISE APPEAL BRANCH

Appeal No. E/1715/1997-1716/1997 - EX[DB]

Date 26/06/2012

Assistant Registrar
C.E.S.T.A.T, New Delhi

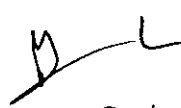
To :
M/S C.T.COTTON YARN LTD
INDUSTRIAL AREA MALANPUR DISTT BHIND
M/S C.T.COTTON YARN LTD

Appellant

Vs
Respondent

C.C.E. INDORE

I am directed to transmit herewith a certified copy of Final order No. A/723-724 2012 EX[DB] dated 25-6-12
passed by the Tribunal under Section 35-C(1) of Central Excises Act, 1944


Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent
C.C.E. INDORE
MANIK BAGH PALACE, POST
BOX NO. 10, INDORE 452001 (M.P.)

2. Adv. / Consult *SH. AJAY AGARWAL, ADV.,
1ST FLOOR, (REAR ENTRANCE)
JEEVAN VIHAR BUILDING,
3, SANSAD MARG, N. DELHI-1*
3. C.D.R
4. Bar association. CESTAT, New Delhi
5. Director Publications, Customs, Excise. I.P. Estate, New Delhi
6. M/s Centax Publications Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi-3
7. Company Law Institute of India Pvt Ltd., No.2 (Old No. 36), Vaithyaram Street, T. Nagar, Chennai -17
8. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A, Iscon Mall, Above Star India Bazar, Satellite Road, Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd, LAW House, 1-8, Sector - 10, Faridabad 121003 (Haryana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor, Vasant Arcade, Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file


Assistant Registrar
(Excise Appeal Branch)

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi - 110 066.
Principal Bench, New Delhi**

COURT NO. I

DATE OF HEARING : 11/05/2012.

DATE OF DECISION : 25/06/2012.

Excise Appeals No. 1715-1716 of 1997

[Arising out of the Order-in-Appeal No. 128-129/Commr/CEX/1997 dated 05/05/1997 passed by The Commissioner of Central Excise, Indore.]

Hon'ble Shri Justice Ajit Bharihoke, President
Hon'ble Shri Rakesh Kumar, Member (Technical)

1. Whether Press Reporters may be allowed to see :
the Order for publication as per Rule 27 of the
CESTAT (Procedure) Rules, 1982?
 2. Whether it would be released under Rule 27 of :
the CESTAT (Procedure) Rules, 1982 for
publication in any authoritative report or not?
 3. Whether their Lordships wish to see the fair :
copy of the order?
 4. Whether order is to be circulated to the :
Department Authorities?
-

M/s C.T. Cotton Yarn Limited

Appellant

Versus

CCE, Indore

Respondent

Appearance

Shri Ajay Agarwal, Advocate - for the appellant.

Shri Bharat Bhushan, Authorized Representative (DR) - for the Respondent.

CORAM : **Hon'ble Shri Justice Ajit Bharihoke, President**
Hon'ble Shri Rakesh Kumar, Member (Technical)

FINAL Order No. A/723-724/2012-Ex(BR)

Per. Rakesh Kumar :-

The facts leading to these appeals are, in brief, as under.

1.1 The appellants are a 100% EOU engaged in manufacture of 100% cotton yarn falling under Chapter heading 52.05 for export. The cotton yarn is made from ginned cotton of indigenous origin purchased by the appellants. In course of manufacture of cotton yarn, soft waste arises at carding and combing stage, which was being cleared by the appellants to DTA without payment of duty. According to Department, soft cotton waste became excisable with effect from 16/3/95 and was chargeable to Central excise duty at 12.5% adv. and the appellants during the period from 16/3/95 to 31/7/95, neither paid duty on DTA clearance of soft cotton waste, nor informed the Department about these clearances. It is on this basis that two show cause notices dated 4/12/95 and 22/7/96 were issued to the appellants for demand of duty in respect of clearances of soft cotton waste during period from 1/5/95 to 30/7/95 and 16/3/95 to 30/4/95 and also for imposition of penalty. Both the show cause notices were adjudicated by the Commissioner vide order-in-original No. 128-129/Commr/CEX/1997 dated 5/5/97 by which the duty demands of Rs. 15,02,211/- and Rs. 7,21,739/- were confirmed against the appellants and penalty of Rs. 5,00,000/- and Rs. 2,50,000/- respectively was imposed on the appellants company under Rule 173Q and 226 of the Central Excise Rules, 1944. The

order, besides duty, also sought recovery of interest on duty under Section 11AB.

1.2 On appeals to Tribunal against the above order, the Tribunal vide Final order No. 227-228/2000-D dated 19/7/2000 upheld the Commissioner's order except for reduction of penalty.

1.3 The appellant filed appeal to Hon'ble Supreme Court against the Tribunal's order dated 19/7/2000 and the Apex Court vide judgment dated 22/9/06 reported in **2006 (202) E.L.T. 385 (S.C.)** set aside the Tribunal's order and remanded to the Tribunal for denovo decision after examining the question as to whether a process of manufacture is involved when cotton waste is generated during the process of converting domestically purchased cotton into exportable yarn manufactured by the appellant. In this regard para 8,9,10 and 11 of the judgment is reproduced below :-

"8. It is clear that the product involved herein is not a left over after the end product is manufactured. Here the cotton waste is generated during the process of manufacture of yarn. In other words, when cotton purchased in the domestic market is used for manufacture of yarn by initiating the process of manufacture, at an intermediate stage, the so called cotton waste is produced, which is a marketable commodity and which is regularly marketed. Therefore, one of the twin tests, namely, that the commodity which is produced is marketable and is regularly marketed as a product, is satisfied. It is by now established that merely because a

commodity is included in the schedule, it will not be eligible to duty unless a process of manufacture is involved when that product emerges. Here, heading 52.02 has been brought in the Schedule by the Finance Act, 1995. Though it is shown as an item bearing nil duty, since the appellant is a 100 per cent export oriented manufacturing entity it will be liable to duty as provided in the proviso to Section 3(1) of the Tariff Act. Therefore, the question involved is whether a process of manufacture is involved when the cotton waste is generated during the process of converting domestically purchased cotton into exportable yarn manufactured by the appellant.

9. In *State of Maharashtra v. Pulgaon Cotton Mills Ltd.* [1995 (77) E.L.T. 790 (S.C.)], this Court held that where a subsidiary product is turned out regularly and continuously in the course of manufacturing business and is also sold regularly from time to time, there may be attributed an intention to the manufacturer to manufacture and sell not merely the main item but also the subsidiary products. This Court relied on an earlier decision in *State of Gujarat v. Raipur Manufacturing Company Limited* [(1967 (19) STC 1 (SC)] in support of the position that manufacture was involved in that situation. Cotton waste generated was hence held to be a process of manufacture. For the appellant it is submitted that the manufacture of a product may involve several processes and various changes in the raw material at different stages. Manufacture would occur at the point where the changes take the product to a point that commercially, it cannot be regarded as the original commodity, but, instead, recognised as a new distinct article. The decision of this Court in *J.G. Glass Industries* [1998 (97) E.L.T. 5

(S.C.)] is relied on in support.

10. The scope of the expanded definition of manufacture has been considered in the decision in *Shyam Oil Cake Ltd. v. Collector of Central Excise, Jaipur* [2004 (174) E.L.T. 145 (S.C.)]. The appellate authority has essentially proceeded on the amendment to the schedule and inclusion of cotton waste therein and the admission of the representative of the appellant that subsequent to the inclusion in the schedule, cotton waste is taxable. It appears to us that the question whether cotton waste is dutiable as a manufactured product requires to be reconsidered by the Tribunal in the light of the various decisions of this Court brought to our notice and which may hereafter be brought to the notice of the Tribunal. The argument that it was only after the process of manufacture has started that the product has come into existence and it has marketability and hence, it is dutiable and the counter argument that it was only impure cotton which has got separated from the cotton purchased from the open market so as to enable the appellant to manufacture the yarn intended for export and this product produced at the intermediate stage still remains cotton and it is not a manufactured product, have both to be considered in the light of the decided cases. In this situation, we think it appropriate to set aside the order of the Tribunal and remand the appeals filed by the appellant to the Tribunal for a fresh decision. We think that this aspect needs to be reconsidered by the Tribunal afresh and a fresh decision taken. We, therefore, set aside the order of the Tribunal on this aspect and direct the Tribunal to decide the appeals afresh based on the finding to be rendered on this question. All contentions including whether the

department could invoke the extended period of limitation are left open.

11. Thus, the appeals are allowed in part, the orders of the Tribunal are set aside and the appeals filed by the appellant before the Tribunal are remanded for a decision afresh on the questions referred to above. The parties are directed to bear their respective costs."

1.4 In denovo proceedings the Tribunal vide Final order No. 384-385/07-EX dated 27/6/07 allowed the appeals with consequential relief, holding that soft cotton waste is not a manufactured item, as it is a residue left after separation of unusable material from the cotton.

1.5 Against this judgment, the Department filed an appeal to the Apex Court. The Apex Court vide order dated 1/10/2010 set aside the Tribunal's order and remanded the matter once again to the Tribunal for fresh consideration of the question as to whether the soft cotton waste emerging in course of manufacture of 100% cotton yarn is a manufactured product attracting central excise duty in the light of the Apex Court's decision in case of **Commissioner of Sales Tax, Bombay vs. Bharat Petroleum Corporation Ltd.** reported in **1995 (77) E.L.T. - 790 (S.C.)** and also the question of limitation on which there are no findings in the Tribunal's order. In this regard, the relevant portion of the Apex Court's order dated 1/10/2010 is reproduced below :-

"3. Learned counsel appearing for the appellant has

submitted that the Tribunal held the issue arising for consideration in favour of the assessee and against the appellant herein. However, while doing so, the issue with regard to limitation which was raised by the respondent herein was not decided as the Tribunal went into the merits and decided in favour of the respondents. But the counsel for the appellant has drawn our attention to the decision of this Court in *Commissioner of Sales Tax, Bombay v. Bharat Petroleum Corpn. Ltd.*, reported in 1995 (77) E.L.T. 790 (S.C.) wherein it was held by this Court as follows :

".....other point is whether the assessee can be said to manufacture "acid sludge" and "cotton waste" respectively. It is suggested for the State that the assessees are purchasing acid and cotton for the manufacture of kerosene and yarn/cloth respectively and it is ludicrous to suggest that the assessees are purchasing sulphuric acid and cotton for manufacturing acid sludge and cotton waste. Put like that the assessee's contention seems a little artificial. But the contention is not really absurd. For, the assessees do purchase sulphuric acid and cotton for use in a manufacturing process which yields not only kerosene and yarn/cloth but also acid sludge and cotton waste. As pointed out in *State of Gujarat v. Raipur Manufacturing Co. Ltd.* (1967 19 STC 1), where a subsidiary product is turned out regularly and continuously in the course of a manufacturing business and is also sold regularly from time to time, an intention can be attributed to the manufacturer to manufacture and sell not merely the main item manufactured but also the

subsidiary products"

4. When the aforesaid decision was pointed out to the counsel appearing for the respondent, he has stated that the aforesaid decision has no relevance to the facts of the present case and in support of his contention, he sought to rely upon the decision of this Court in *Krishi Utpadan Mandi Samiti, Kanpur and Others v. Ganga Dal Mill & Co. and Others* reported in (1984) 4 SCC 516. He has specifically referred to paragraph 18 of the said judgment and particularly to the following observations :

".....In our opinion, the Court has strained the language to reach an unsustainable conclusion, holding that cotton waste is not the processed form of cotton but it is a by-product quite different form of cotton though containing cotton fibre which cannot be used as ordinary cotton. As its name indicates, cotton waste appears to be droppings, stripping and other waste product while ginning cotton. It cannot be said to be a by-product of cotton but it is cotton nonetheless minus the removed seed. In other words it is residue of ginned cotton. We, therefore, find it difficult to agree with the view of the High Court that cotton waste is not comprehended in the item "cotton ginned and unginned".

5. The aforesaid decision was rendered in the case of agricultural produce whereas the decision in the case of Bharat Petroleum was rendered in the context of Bombay Sales Tax Act, which provision was corresponding to Section 2(f) of Central Excises and Salt Act, 1944. Therefore, the decision of the

Supreme Court in *Bharat Petroleum Corpn. Ltd. prima facie* appears to have some relevance to the facts of this case.

6. At this stage, the counsel appearing for the respondent seeks to argue on the limitation also. Since no finding whatsoever was recorded by the Tribunal on the aforesaid issue, we are of the opinion that the impugned judgment and order passed by the Tribunal is required to be set aside and sent back to the Tribunal, for the purposes of giving its decision on all the issues like limitation raised and mentioned in paragraph 11 of the impugned judgment and order and also to give decision on merits after noticing and appreciating the aforesaid decisions which have been relied upon before us. The Tribunal may hear the parties and render its decision by giving reasons for it as expeditiously as possible.

7. In terms of the aforesaid observation, the appeals stand disposed of, by setting aside the impugned judgment and remitting it to the Tribunal for fresh consideration in accordance with law."

1.6 In pursuance of the above directions of the Apex Court this matter was taken up for fresh consideration.

2. Heard both the sides.

3. Shri Ajay Agarwal, Advocate, the learned Counsel for the appellant, pleaded that soft cotton waste, in question, emerges in course of subjecting the ginned cotton to the processes of cording and combining before being spun into yarn, that the soft

cotton waste emerging at the stage of cording and combing of cotton is nothing but cotton only and hence no manufacture is involved, that show cause notices in this case are merely based on the preposition that during the period of dispute, soft cotton waste was covered by heading 52.02 which covered – cotton waste (including waste yarn and garneted stock), that it is well settled law laid down by the Apex Court in case of **CCE, Chandigarh vs. Markfed Vanaspati and Allied Industries** reported in **2003 (153) E.L.T. 491 (S.C.)** that mere mention of an item in Excise Tariff does not make the same dutiable, that the Apex Court's judgment in case of **Commissioner of Sales Tax, Bombay vs. BPCL** (supra) is not applicable to this case as – (a) the said decision was in respect of a Sales Tax statute and not concerned with Central Excise Act, (b) the issue in that case had nothing to do with the issue of manufacture and (c) this decision does not consider the earlier binding decision of the Apex Court in case of **Krish Utpadan Mandi Samiti vs. Ganga Dal Mills & Co. and others** reported in **(1984) 4 SCC – 516**, that soft cotton waste is a part of raw cotton which has been separated from it to have better quality of yarn, that in this regard the appellant place reliance on the Apex Court's judgment in case of **Krish Utpadan Mandi Samiti vs. Ganga Dal Mills & Co. and others** (supra), wherein it has been held that "cotton waste" is covered by the entry "cotton ginned and unginned", that looked at from another angle, cotton waste being waste, does not emerge as a result of manufacture since no one would produce any such inferior thing by treatment through human

efforts, that in this regard, reliance is placed on judgment of Hon'ble Delhi High Court in case of **Modi Rubber Ltd. vs. Union of India** reported in **1987 (29) E.L.T. 520** wherein it was held that rubber waste and scrap obtained in course of manufacture of tyres, tube and flaps is not excisable as it is not end product of manufacture, that in any case, longer limitation period under proviso to Section 11A (1) is not applicable as the appellant vide letter dated 26/5/93 had informed the collector about clearance of cotton waste into DTA and vide letter dated 17/9/93 had filed a revised classification list, showing soft cotton waste as 'nil' rated product, that first show cause notice dated 4/12/95 for demand of duty on soft cotton waste for period from 16/3/95 to 30/4/95 is time barred, that for the same reason, the second show cause notice dated 22/7/96 for demand of duty for period from 1/5/95 to 30/7/95 is time barred, thus even on limitation, the Department has no case, and that in view of this, the impugned order is not correct.

4. Shri Bharat Bhushan, the learned SDR, defended the impugned order reiterating the findings of the Commissioner in the impugned order pleaded that during the period of dispute, 'soft cotton waste' was specifically covered by heading 52.02 of the Central Excise Tariff, that Apex Court in case of **CCE, Ludhiana vs. Aarti International Ltd.** reported in **2004 (167) E.L.T. 348 (Tri. - Del.)** has held that cotton waste is covered under heading 5202 of Central Excise Tariff and hence the same is excisable goods, that in terms of Apex Court's judgment in

case of **CST vs. BPCL** (supra) when a subsidiary product is turned out regularly and continuously in course of manufacturing business and is also sold regularly, there may be attributed an intention to the manufacturer to manufacture and sell not merely the main items but also the subsidiary item and, hence, in this case, soft cotton waste has to be treated as a manufactured product and since it is covered by heading 5202, the same has to be treated as an excisable goods, that though tariff rate of excise duty for 5202 is nil, since the soft cotton waste has been manufactured by a 100% EOUs, on the DTA clearances of the waste, duty would be chargeable in terms of proviso to Section 3 (1) of Central Excise Act, 1944 and under exemption Notification No. 2/95-CE, the effective rate of duty on DTA clearances made with the approved of the Development Commissioner, would be 12.5%, that the extended period under proviso to Section 11A (1) has been corrected invoked as the appellant had suppressed the relevant information from the department and that in view of this, there is no infirmity in the impugned order.

5. We have carefully considered the submissions from both the sides and perused the records.

6. The point of dispute is as to whether DTA clearances of "soft cotton waste" would attract duty in terms of proviso to Section 3 (1) of Central Excise Act, 1944, readwith exemption Notification No. 2/95-CE. Under Section 3 (1), duty is leviable on all "excisable goods, (excluding goods produced or manufactured in SEZ), produced or manufacture in India, at the rate set-forth

in 1st Schedule to Central Excise Tariff Act, 1985. Under proviso to Section 3 (1), duty on DTA clearance of a 100% EOU shall be the aggregate of duties of customs leviable on like goods produced or manufacture outside India, if imported into India and when the rate of customs duty on like goods is ad-valorem, the assessable value of the goods produced or manufactured by the 100% EOU and cleared into DTA shall be determined under Section 14 of the Customs Act, 1962. Notification No. 2/95-CE provides a concessional rate of duty of 50% of the rate specified in proviso to Section 3 (1) in respect of DTA clearances made within the DTA quota as determined by the Development Commissioner. Thus the key points for attracting the provisions of proviso to Section 3 (1) are -

- (a) the goods cleared into DTA by the 100% EOU are excisable goods and
- (b) the goods are the result of a process of manufacture.

5.1 The term "excisable goods" in terms of its definition given in Section 2 (d) means goods specified in the 1st and 2nd Schedule to the Central Excise Tariff Act, 1985 as being subject to duty of excise. Hon'ble Supreme Court in the cases of **CCE vs. Indian Aluminium Co. Ltd.** reported in **2006 (203) E.L.T. 3 (S.C.)** and **CCE, Patna vs. Tata Iron and Steel Co. Ltd.** reported in **2004 (165) E.L.T. 386 (S.C.)**, has held that the "goods" must be a marketable commodity.

5.2 Thus for deciding the question as to whether the DTA clearances of 'soft cotton waste' would attract duty under proviso to Section 3 (1) of Central Excise Act, 1944, three points have to be decided –

- (1) whether soft cotton waste has emerged as a result of a manufacturing process ?
- (2) whether it is covered by some entry in Central excise tariff as being subject to duty ?
- (3) whether soft cotton waste is a marketable commodity – known or traded commerce as a commodity which is brought and sold.

5.2.2 During the period of dispute i.e. w.e.f. 16/3/95 heading 5202 covered – "cotton waste (including yarn waste and garneted stock)". Heading 5202 of Central Excise Tariff is identical to HSN heading 5202 and hence HSN explanatory notes would be a good guide in understanding the scope of heading 5202 of Central Excise tariff. As per HSN explanatory notes to this heading, the same includes – combing waste, usually referred to as comber noils, strippings recovered from carding or combing cylinders; carding fly, broken fibres detached during drawing process, and fragments of slivers or roving. The 'soft cotton waste' in question, arising during carding and combing of ginned cotton consists of short fibres and other waste (dust etc.). In our view, this waste would be covered by heading 5202.

6. Coming to the question, as to whether 'soft cotton waste' is the resultant product of a process of manufacture, i.e. a product

with a new and distinct commercial identity with distinct character and usage from that of raw material, we find that it is nothing but short fibres and other waste material obtained in course of carding and combing of ginned cotton. The Department has not produced any evidence to show that 'soft cotton waste' is a product commercially distinct from cotton with different character and usages – the Department's decision to treat the same an excisable is based only on the fact that during the period of dispute, tariff heading 5202 covered "cotton waste", which by itself, in view of Apex Court's judgment in case of **CCE, Chandigarh vs. Markfed Vanaspati and Allied Industries** reported in **2003 (153) E.L.T. – 491 (S.C.)**, would not make this product excisable.

6.1 Hon'ble Supreme Court, in case of **Krishi Utpadan Mandi Samiti, Kanpur and others vs. Ganga Dal Mill & Co. and others** reported in **(1984) 4 SCC – 516**, while considering the question whether legume, whole grain, when notified as a "specified agricultural produce" within the meaning of this expression as defined in Section 2 (t) of the U.P. Utpadan Mandi Adhiniyam, 1964, would also comprehend its split folds or parts, commercially called Dal, so as to enable Mandi Samiti to levy market fee under Section 17 of the Act on the transaction of sale of Dal of legumes specified in the schedule to the Act, and whether the whole includes the parts (starting sentence of the judgment), and holding that the legumes specified in the Act comprehend both the whole grain of legumes and its split parts

called Dal, has, in para 18 of the judgment relied upon its earlier judgment in case of **Modi Spinning & Weaving Mills Co. Ltd. vs. State of U.P.** reported in **1980 UPTC – 1337**, wherein in the context of U.P. Krishi Utpadan Mandi Adhiniyam, 1964 it was held that the entry "cotton ginned and unginned" would also cover "cotton waste" which is clippings, stripping and other waste product while ginning cotton. We are of the view that it is this judgment of the Apex Court which is applicable to the facts of this case as it directly answers the question as to whether 'cotton waste' is essentially an inferior quality of cotton or is something totally different from the unprocessed cotton with different character and usages.

6.2 As regards the judgment of Hon'ble Supreme Court in case of **Commissioner of Sales Tax, Bombay vs. BPLC and others** reported in **1995 (77) E.L.T. 790 (S.C.)**, Bombay Sales Tax Act 1959 provided for set off of the sales tax paid in respect of certain specified goods purchased by a manufacturing dealer and used within the state in the manufacture of taxable goods sold by him The term "manufacture" was defined in Section 2 (17) of the Bombay Sales Tax Act as –

"manufacture with all its grammatical variations and cognate expressions means producing, making, extracting, altering, ornamenting, finishing or otherwise treating or adopting any goods, but does not include such manufactures or manufacturing processes as may be prescribed.

6.2.1 The dispute in case of BPCL was as to whether they would be eligible for set off of sales tax paid on Sulphuric Acid, used in Acid Sludge emerging in course of refining of crude oil for manufacture of kerosene, for which sulphuric acid had been used. Acid sludge had been sold and sales tax had been paid on that sale. Proportionate set off was sought to be denied by the sales tax authorities on the ground that what was manufactured was kerosene and not acid sludge.

6.2.2 In the case of Phulgaon Cotton Mills, also decided by the same judgment by the Apex Court, the assessee purchased raw unginned cotton from agriculturists and unregistered dealers which was used in the manufacture of cotton yarn and cotton fabrics in course of which some cotton waste and yarn waste was also generated. On the purchase of raw cotton, purchase tax was paid by the assessee. Cotton waste was sold on which sales tax was paid. Here also, the dispute was as to whether the assessee can be said to have manufactured cotton waste, so as to be eligible for set off of purchase tax paid on cotton contained in the cotton waste sold.

6.2.3 In this background the Apex Court held that when by-products, residues and waste and scrap arise in course of manufacture of main product regularly and continuously and are also sold regularly from time to time, intention can be attributed to manufacturer to manufacture and sell not only the main product but also the subsidiary products.

6.2.4 The above judgment only answers the question that when a manufacture manufactures a product 'A' for sale, and in course of manufacture of product 'A', an inevitable and unavoidable waste product 'B' also arises, which is also sold regularly alongwith the main product, whether the manufacturer can be said to have intention to manufacture waste product B also. The above question has been answered in the affirmative. But the question as to whether Acid sludge and cotton waste are the resultant products of a process of manufacture was neither raised in this case nor answered – the reason for this may be that these processes would be 'manufacture' within the meaning of this term, as defined in Section 2 (17) of the Bombay Sales Tax Act. The definition of manufacture in Section 2 (17) of Bombay Sales Tax Act, is totally different from the definition of manufacture as given in Section 2 (f) of Central Excise Act, 1944. The definition in Section 2 (17) of Bombay Sales Tax Act is a precise and exhaustive definition of manufacture, while the definition of this term in Section 2 (f) of Central Excise Act, 1944 is an inclusive definition which without precisely defining the term 'manufacture', simply enumerates the processes which also would be treated as manufacture. The term – "manufacture" in Section 2 (f), as interpreted by Apex Court in a series of judgment means a process which results in emergence of a commercially new product with distinct identity, usages and character from the raw material. In the present case the question as to whether 'soft cotton waste' obtained in course of carding

and combing of ginned cotton is the end product of a process of manufacture has to be answered by applying the above criteria. The judgment of the Apex Court in case of **BPCL and others** (supra) is therefore not applicable to this case. The question as to whether 'soft cotton waste' obtained in course of carding and combing of ginned cotton is a commercially new product with character and usages different from ginned cotton, is in our view stands answered by the Apex Court's judgment in case of **Modi Spinning and Weaving Mills Co. Ltd. vs. State of U.P.** (supra) wherein it was held that the entry – "cotton ginned and unginned" in U.P. Krishi Utpadan Mandi Adhiniyam, 1964 would also cover cotton waste which is clippings, stripping and other waste obtained while ginning the cotton. Soft cotton waste which consists of other short length fibres and other waste is nothing but inferior quality of cotton.

6.3 In view of our discussion in para 6.1, 6.2, 6.2.1, 6.2.2., 6.2.3 and 6.2.4 we, hold that obtaining soft cotton waste, in course of carding and combing of ginned cotton does not amount to manufacture and no new product with distinct name, usages and character emerges more so when the Department has not led any evidence in this regard. Hon'ble Supreme Court in case of **Union of India vs. Ahmedabad Electricity Co. Ltd.** reported in **2003 (158) E.L.T. 3 (S.C.)** has held that – "the onus to show that particular goods on which excise duty is sought to be levied have gone through the process of manufacture in India is on the Revenue.

7. Coming to the question of limitation, the details of the show cause notices and the period for which duty is sought to be recovered are as under.

Sl. No.	SCN date	Period of demand	Amount (Rs.)
1.	04/12/95	01/5/95 to 31/7/95	15,02,211/-
2.	22/07/96	16/3/95 to 30/4/95	7,21,739/-

7.1 The normal limitation period during the period of dispute was 6 months from the 'relevant date'. The longer limitation period of 5 years from the relevant date under proviso to Section 11A (1) could be invoked only in those case where there was allegation that non-levy, short levy, short payment or enormous refund of duty was due to fraud, wilful misstatement, suppression of facts or contravention of any provision of Central Excise Act, 1944 or of the rules made thereunder with intent to evade the payment of duty.

7.2 In the 1st Show cause notice dated 4/12/95 neither proviso to Section 11A (1) has been invoked, nor is there any allegation of fraud, wilful misstatement, suppression of facts etc. on the part of the appellant. The appellant vide letter dated 26/5/93 to Department had sought clarification as to whether DTA clearances of soft cotton waste would attract duty and to this, the Assistant Commissioner (Tech) vide letter dated 9/9/93 clarified that DTA clearance of soft cotton waste would not attract duty if only indigenous cotton had been used and on this basis the

appellant filed a revised classification list on 17/9/93. It appears that subsequently the department again had doubt as to whether the DTA clearance of soft cotton waste would attract duty or not. In this factual background, it is absolutely clear that the Department was aware of the fact about emergence of soft cotton waste in course of manufacture of cotton yarn from ginned cotton and clearance of soft cotton waste into DTA. Therefore if according to the department with changes in tariff structure of Chapter 52 by introducing a new heading 5202 for cotton waste w.e.f. 16/3/95, the position with regard to duty on DTA clearance of soft cotton waste changed, the department should have advised the appellant accordingly and even if it is held that w.e.f. 16/3/95 the DTA clearance of soft cotton waste attracted duty, the non-payment of duty cannot be attributed to fraud, wilful misstatement, suppression of facts or contravention of provision of Rules with intent to evade the payment of duty. We, therefore, hold that in respect of both the show cause notices only normal limitation period would be available. Thus the entire duty demand raised vide show cause notice dated 22/7/96 and bulk of the duty demand raised vide show cause notice dated 4/12/95 is time barred.

8. As discussed above, on merits, the entire duty demand is liable to be set aside.

9. In view of the above discussion, the impugned order confirming duty demands and imposing penalty on the appellant

is not sustainable. The same is set aside. The appeals are allowed.

(Pronounced in the open court on 25/06/2012.)

(Justice Ajit Bharihoke)
President

(Rakesh Kumar)
Member (Technical)

PK