CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD

Single Member Bench

Court – I

Appeal No. E/1119/2006

(Arising out of Order-in-Originall No: 31/2005-Commt., dated 30.11.2005 passed by CC&CE, Hyderabad-III Commissionerate)

CCCE&ST, Hyderabad-I ….. Appellant(s)

Vs.

DEVIDUTT TEXTILES LIMITED ….. Respondent(s)

Appearance

Shri M. Muralidhar, Advocate for the Appellant.

Shri P.S. Reddy, Asst. Commissioner /AR for the Respondent.

Coram:

Hon'ble Mr. P.V. SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing: 07.05.2018

Date of Decision: 29.05.2018

FINAL ORDER No. A/30594/2018

[Order per: P.VENKATA SUBBA RAO]

1. This is the Department's appeal against Order-in-Original No. 31/2005-Commr., dated 30.11.2005 passed by Commissioner of Customs & Central Excise, Hyderabad-III on 30.11.2005, after denovo adjudication. Show cause notice in this case was issued on 25.11.1997 to the respondent and the following five other noticees:

a) Rajendra Kumar Agarwal, Director of the Respondent firm on whom a personal penalty under rule 209 (A) was proposed to be imposed.

b) Shri Natwar Agarwal, Director of the respondent firm on whom a personal penalty under rule 209(A) was proposed to be imposed.

c) M/s Rahul Textiles, Distributors of the Respondent, a firm who allegedly had stocks of fabric on which no excise duty was paid. It was proposed to seize the goods and impose redemption fine and penalty on the distributors.

d) M/s Ashish Textiles, Dealers of the Respondent, a firm who allegedly had stocks of fabric on which no excise duty was paid. It was proposed to seize the goods and impose redemption fine and penalty on the distributors.

e) The owner of vehicle No: AP 9T 8688 in which goods were being carried out without payment of excise duty. It was proposed to confiscate his truck and impose a redemption fine in lieu thereof.

2. The case was originally adjudicated by Order-in-Original No. 07/2001-ADJN. CEX, dated 27.11.2001, confirming the demands, confiscating the goods and imposing of fines and penalties as proposed in the show cause notice. Aggrieved, the Respondent (in this case) had filed an appeal before

CESTAT Bangalore Bench who, vide Final Order No: 1503-1508/2003, datedc14.11.2003 and Miscellaneous Order No. 417/2003, remanded the matter back to the Commissioner to adjudicate the matter, after following the principles of natural justice. Thereafter, the Commissioner of Customs & Central Excise, Hyderabad-III vide Order-in-Original No. 31/2005-Commr. Dated 30.11.2005 passed denovo adjudication order, dropping the entire proceedings. This appeal is filed by the Revenue seeking to set aside the order passed by Commissioner and uphold all the allegations made in the show cause notice. However, appeal has been filed with only one respondent i.e. M/s Devidutt Textiles Limited and no appeals against the remaining 5 noticees were filed. This fact was confirmed by Ld. DR as well as Ld. Counsel of the Respondent during the hearing.

3. Heard both sides and perused the records. The appeal is only against M/s Devidutt Textiles Limited. I confine myself to the Order-in-Original in so far as it relates to them.

4. Based on the intelligence that the Respondents, who are manufacturers of man made fabrics are evading duty, searches were conducted by Central Excise Officers at their factory premises as well as the premises of two of their Distributors M/s Rahul Textiles and M/s Ashish Textiles and a few residential premises of the concerned persons. Officers have also recorded statements of the relevant persons, took physical stocks of the goods in the factory as well as in the premises of two

distributors. This resulted in, allegedly, discovery of non-duty paid goods with the distributors as well as excess and shortages of fabrics in the factory of the respondents. During investigation, they also uncovered a truck carrying goods from the factory of the respondent was still on the road and had to reach the distributors. They intercepted the truck and found goods in excess of what was declared in the Central Excise invoices. The truck along with the goods was also seized. The officers have also recorded the statements of the contractor who supplies workers to fold the fabrics in the factory who gets paid on per metre basis. They have also examined work sheets available with the contractor and concluded that more fabric was produced and cleared than was recorded. Duty along with interest and penalty was proposed to be charged on the fabric so produced and unaccounted for on the basis of the statement and accounts of the folding contractor. The respondent was specifically called upon to explain why-

(a) an amount of Rs. 17,83,950/- + interest and a penalty of Rs. 23,23,233/- on account of unaccounted for fabrics manufactured and cleared based on the statements of the contractor and the documents recovered from their premises, should not be charged.

(b) An amount of Rs. 4,59,932/- on account of textiles manufactured and cleared without payment of duty which were found in excess with two distributors, should not be charged.

(c) An amount of Rs. 75,353/- on account of goods found short at the factory premises, should not be charged.

(d) An amount of Rs. 3,995/- on account of excess goods found in the vehicle No. AP 9T 8688, should not be charged.

(e) Why the cloth valued of 1175 linear mts of sarees found in excess in the vehicle as Rs. 19,975/- should not be confiscated.

(f) Why the goods valued at Rs. 411065/- available in the factory should not be confiscated.

5. As far as (a) above is concerned, the appellant's plea is that no duty liability can be fastened on them stating that the goods were manufactured and cleared without payment of duty only on the basis of statement of the folding contractor and his reports without any supporting documents to prove that the goods were manufactured. During the personal hearing in the denovo adjudication proceedings before the Commissioner, the respondent argued that each fabric got folded twice, once in the grey stage and again after processing; whenever any fabric was found defective it was returned and after reprocessing it was folded again and the contractor was paid twice – once for at the grey stage and again after processing (and if necessary again when the cloth was returned). Therefore, the private documents seized from the labour contractor and his statement alone do

not prove that there was excess production and clandestine removal. The labour contractor was cross examined during the denovo proceedings during which he explained that his rate was 6 paise per metre of cloth of 84 cm width and 8 paise per metre of cloth of 112 cm width. To a specific question as to how much he gets as total charges from grey stage to finished goods, he confirmed that he gets 12 paise per metre for 84 cm and 16 paise for 112 cm for fabric for checking at two stages together. He also confirmed that the statement as above made by the Director of respondent is true. The Ld. Commissioner dropped the demand on this account on the ground that of not having sufficient evidence. It is the argument of the Revenue that in case of clandestine removal, the department is not expected to prove it with mathematical accuracy as nobody would keep accurate records of such clandestine activities and in the case of Collector of Customs, Madras and others vs. D. Bhoormull [1983(13)E.L.T. 1546 (S.C.)].

6. The Hon'ble Supreme Court held that the department is not required to prove its case with mathematical precision but what is required is the establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of facts in issue. The Department also relied upon the judgment of Hon'ble Supreme Court in the case of Madanal Gulabchand Shah vs. Union of India [1997(93)ELT A 185 (S.C.)]. The argument of the Department is that the programme sheets contained the labour employed, the fabric handled by them and the charges involved

therein in the months of April 1997 and May 1997 by the labour contractor based on which it is clear that finished fabric was manufactured and cleared without payment of duty. Accordingly, the duty on this fabric needs to be charged along with interest and a penalty needs to be imposed on the respondents.

7. After considering both sides, I do not think that a prudent man will, only based on the above records, conclude that the fabric was manufactured and clandestinely removed, without payment of duty in the absence of corroborative evidence. The fact that during cross examination, the labour contractor himself said that he gets paid twice for the fabric, once at the grey stage and once at finished stage further dilutes the evidence to substantiate the allegation of clandestine removal of fabric. I, therefore, find that the duty demanded on this account and the interest and penalty thereon are not sustainable and needs to be dropped and the Commissioner had done so in the impugned Order.

8. As far as the duty on the goods allegedly cleared to M/s Ashish Textiles and Rahul Textiles, without payment of duty is concerned [(b) in para 4 above], I find these are proposed to be charged on the ground that the distributors had stocks of goods without payment of excise duty. The show cause notice also proposed to confiscate the stocks of goods and impose penalties on the distributors. The charges of holding such stocks by the distributors, confiscation of the fabrics and imposition of penalty

thereof were dropped by Ld. Commissioner in the Order-in-Original (denovo) and it was not appealed against by the department and has therefore reached finality. Once the charge that the fabric was cleared without payment of duty to the distributors and held by them is dropped, the demand of duty on the factory for the same fabrics does not sustain. As far as goods reportedly found short in the factory [(c) in para 4 above] are concerned, the respondent had submitted before the Commissioner, that in the cloth of 112 cm width, 7410 metres of grey fabric was found in excess as it was shown to have been issued for production but it was not put in the process. As a result, the corresponding shortage of 7294.65 metres of 112 cms fabric in the textiles and process stage can be seen from the show cause notice. Similarly, of the 84 cms width fabric, 37,389 metres of grey fabric is shown as excess fabric lying in factory as it was recorded as issued but it is not yet processed, therefore there is a shortage of 19342.7 metres of 84 cms width fabric of the textiles in process and a shortage of 1720.50 metres of 84 cm width fabric which has been in the finished goods category. Ld. Commissioner had agreed with the respondent relying on CESTAT Principal Bench order in the case of Beeta Metal Industries vs. CCE [2005(69) RLT 506(CESTAT-Del.)] in which it was held that "*excess quantity in one item corresponds to shortage in another – no allegation of clandestine production or removal – confiscation and penalty set aside – appeal allowed.*" Further, relying on para 48 of the Order-in-Original which remarked "*even if it is accepted that measurements were taken approximately such a difference cannot be accepted*", Ld. Commissioner concluded that the measurement was not done accurately and rejected the contentions of shortages and excesses and dropped that demand. The contention of the department is that the Commissioner has wrongly refused to confiscate the grey fabrics found in excess stating that details of verification of stocks conducted are missing in Mahazar drawn at the factory premises. It was categorically recorded that the Officers have verified the stocks of the man made fabrics i.e. textiles and raw material and compared them with Form IV respectively and found differences. I agree with the department that the Commissioner should not have ignored the mahazar which was drawn on the spot and instead relying on a passing remark made in the original O-I-O drop the entire demand while ignoring the recorded evidence. However, I also find force in the argument that there were shortages in one stage and excesses at another. When the stocks were taken on the same day, at same time, it would be reasonable to assume that there was some inaccuracy in recording by the assessee with some stock being shown as issued for processing and not actually being put in the process resulting in excess stock in one stage and a shortage in the other. These need to be taken into account. Thus, I find in the 112 cm fabric, there were the following excesses and shortages as per mahazar as recorded in the show cause notice itself.

Grey fabric	(+)	7410	metres
In process	(-)	7294.65	“
Finished goods	(+)	3685.45	“

Net excess	3800.80	“

Of the net excess of 3800.80 metres, 3685.45 metres is the finished goods and 115.35 metres are the grey fabric. There was no net shortage of fabrics in the 112 cm width category once the grey fabric and the fabric in process are reckoned together.

The correspondence figures for 84 cms width are s follows:

Grey fabric	(+)	37389	metres
In process	(-)	19343.70	“
Finished goods	(-)	1720.40	“
Net excess		16325.90	“

Thus, I find there was no shortage in the aggregate of 84 cm width fabric also.

9) I, therefore, find that the demand on goods found short at the factory premises amounting to Rs. 75353/- is liable to be dropped.

10) Goods found in excess in the vehicle No: AP 9T 8688 [(d) and (e) in para 4 above] and this vehicle was intercepted by the officers based on the information they received and the documents they recovered with the distributors and the Officers took stock of the fabric in the truck and found

there was an excess of 1175 metres of sarees in the truck over and above what was documented. These goods are valued at Rs. 19,975/-. The respondent, in their prayer before the Commissioner, argued that sarees which were supposed to be of uniform length of 5 metres will actually measure only 4.2 metres to 4.3 metres and therefore there was an excess of 1174 metres when the stock of fabric was taken. The Ld. Commissioner accepted their contention and held that since the officers had not actually measured the entire fabric which were in bundles at the time of mahazar, the benefit of doubt should go to the respondent. I find this argument and its acceptance unusual. If the contentions of the Commissioner are accepted, no stock can ever be taken anywhere if each and every packet which is already marked has to be re-measured and re-weighed. If this contention is accepted, the Officers would be required to open the entire fabric and measure each metre of the fabric which is definitely an unnecessary exercise. While the Commissioner had questioned the evidence provided by the department and examined it minutely, the vague and baseless statement by the respondent that 5 metres sarees should be taken as 4.2 metres only so that their figures match was accepted by the Commissioner without any basis whatsoever. I, therefore, find that the duty of Rs. 3,995/- is payable on this excess goods found in the truck and this along with recovery of duty, confiscation and redemption fine thereon be imposed. The quantity of excess fabric cleared without payment of duty is also liable to be confiscated. I find a redemption fine of Rs. 5,000/- is reasonable for the purpose.

11) Confiscation of excess goods found in the factory valued at Rs. 411065/- [(f) in para 4 above], it was proposed in the show cause notice to confiscate the excess stock found in the factory valued at Rs. 411065/-. Ld. Commissioner had in his O-I-O (denovo) dropped the demand on this ground on account of his finding that measurements were taken approximately based on a passing remark in the original O-I-O, ignoring the mahazar which recorded the stocks of the fabric and which found the evidence. The mahazar being a document drawn up at the time should be accepted along with the contention of the respondent that the excess and shortages of the fabrics need to be set off against each other in view of the fact that grey products supposed to have been issued for production were still lying in stock. As a result, I find the excess quantities of fabric as recorded above are liable for confiscation.

In conclusion, I uphold the O-I-A with the following modifications:

(a) The respondent assessee is liable to pay a duty of Rs. 3,995/- on the excess fabric of 1175 l. Metres of sarees found in the vehicle No. AP 9T 8688.

(b) This excess quantity of fabric is liable for confiscation and I impose a redemption fine of Rs. 5,000/- thereon.

(c) The excess fabrics of 3800.80 metres (112 cm width) and 16327.00 metres (84 cm width) found in the factory, after taking into account the shortages in other stages is liable for confiscation. I impose a redemption fine of Rs. 25,000/- (Rupees twenty five thousand only) on the respondent.

12. Appeal is allowed partly as stated herein above.

(Pronounced in the open Court on 29.05.2018)

(P. VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

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