IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT NO. I

Appeal No. E/991 & 992/2007

(Arising out of Order-in-Original No. 01/SK/Th.II/2007 dated 31.3.2007 passed by the Commissioner of Central Excise, Thane).

M/s Jay Monofilaments Pvt. Ltd. Pankaj Rungta	Appellant

Vs.

Commissioner of Central Excise, Thane-II	Respondent

Appearance:

Shri Neerav Mainkar, Advocate	for Appellant
Shri N.N. Prabhudesai, Supdt. (AR)	for Respondent

CORAM:

HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MR. C.J. MATHEW, MEMBER (TECHNICAL)

Date of Hearing: 03.10.2018

Date of Decision: 27.03.2019

ORDER NO. **A/85633-85634/2019**

Per: Dr. D.M. Misra

This is an appeal filed against Order-in-Original No. 01/SK/Th.II/2007 dated 31.3.2007 passed by the Commissioner of Central Excise, Thane.

2. Briefly stated the facts of the case are that the appellants are engaged in the manufacture of Nylon Monofilaments of different gauges falling under Chapter hearing 5404.10 of Central

Excise Tariff Act, 1985. The appellant's factory was visited by the Central Excise officers on 5.11.1998 and on the reasonable belief that the provisions of Central Excise Act and Rules had been violated, a quantity of 2393.20 kgs of finished goods found in the factory premises were seized. Later, on completion of investigation, alleging that the appellant though manufactured Nylon monofilament of different diameters but were clearing the same in the guise of Nylon monofilaments yarn without payment of duty by claiming exemption Notification No. 5/98-CE dated 2.6.1998, two show-cause notices were issued, the first one dated 3.5.1999 proposing confiscation of the seized goods and for imposition of penalty; second show-cause notice was issued on 28.5.1999 proposing recovery of duty of Rs.39,44,643/- on the manufacture and clearance of 1,23,144.04 kg of nylon filaments during the period from 16.8.1998 to 5.11.1998 along with interest and penalty; personal penalty proposed on the Director under Rule 209A of the erstwhile Central Excise Rules, 1944. Both the show-cause notices were adjudicated; seized goods were directed to be confiscated and demands were confirmed with penalty. Aggrieved by the said order, the appellant filed an appeal before this Tribunal and this Tribunal vide order No. C-II/82-83/WZB/2004 dated 8.1.2004 partly allowed the appeal of the appellant observing that what manufactured by the appellants were Nylon monofilaments yarn and remanded the issue of admissibility of Notification No. 5/98-CE dated 2.6.1998 to the adjudicating authority. Consequently, in the de novo adjudication, the Commissioner dropped the show-cause notice proposing confiscation of the goods. However, he has confirmed the demand on clearance of nylon monofilaments yarn for the past period as alleged in the show-cause notice along with interest and equivalent penalty on the appellant company and Rs.5.00 lakhs personal penalty on the Director under Rule 209A of the erstwhile Central Excise Rules, 1944. Hence, the present appeal.

3. Learned Advocate for the appellant has submitted that report of the Dy. Chief Chemist indicating denierage of the nylon monofilaments yarn is based on the exact weight of the goods manufactured by the appellant i.e. the goods on which the test is conducted and not on any theoretical formula. In contrast, the method adopted by the learned Commissioner is by way of backward calculation i.e. Weight = Volume x Specific Gravity. Thus, while taking the specific gravity of Nylon monofilament yarn, the department has wrongly considered the specific gravity of its raw material viz. Nylon 6–chips. Therefore, the basis to arrive at the specific gravity of nylon monofilament yarn itself is erroneous and the weight of the product consumed in the whole calculation process goes wrong, hence, the reading would not give correct denierage of the nylon monofilaments yarn, so as to test eligibility notification. He has vehemently argued that the formula adopted by the Department is incorrect and hence the same should not be accepted. Further, he has submitted that the Department has drawn 5 samples in respect of 5 different diameters of yarn and there was no prohibition to get tested the different varieties of yarn available, some of which were also dutiable and duly declared under the classification declaration filed by them. It is his contention that when the samples were drawn and tested by Dy. Chief Chemist, it is found to be in

conformity with the denierage of nylon monofilaments yarn as claimed by the Appellant. There was no basis for any adverse inference and in respect of past clearance, which were neither examined nor samples were drawn and tested, hence the demand for the said period is not sustainable. Further, he has submitted that if the hypothetical calculation based on the formula adopted by the adjudicating authority is to be accepted then the formula adopted by the Dy. Chief Chemist becomes patently wrong. But, the said report has not been challenged before the Chief Chemical Examiner, hence binding on the Department. The adjudicating authority without any basis has discarded the expert opinion i.e. Dy. Chief Chemist's report on the denierage of nylon monofilaments yarn relating to the past clearances, and determined the same, which is purely based on hypothetical calculation and hence not applicable to their case. Further, he has submitted that the samples drawn from the lot were 'representative', hence applicable to entire lot. Hence, the finding in respect of the goods that the exemption is inapplicable is incorrect. In support, the learned Advocate placed reliance on the judgment of this Tribunal in the case of *San International Vs. Commissioner of Customs, New Delhi – 2016 (337) ELT 93 (Tri-Del).*

4. Further, the learned Advocate has submitted that even though specific submissions were made before the learned Commissioner, on the aspect of limitation, through their reply dated 17.1.2000, no finding has been recorded by them. He submits that they had filed classification declaration of all products manufactured which were dutiable as well as exempted indicating the description of the products in RG-1 register,

monthly RT-12 returns, invoices etc. Therefore, the department was fully aware of manufacture nylon monofilaments yarn by the appellants which were exempted. In the event, department did not agree with the claim of the appellant on the classification or exemption claimed by them, samples should have been drawn and analyzed way back in 1997 itself when the classification declaration was filed as per law. In support, he has referred to the judgment of the Hon'ble Supreme Court in the case of *Commissioner of Central Excise, Mumbai Vs. T.K.K. Pharma Ltd. – 2006 (198) ELT 481 (SC)* and *Pushpam Forging – 2006 (193) ELT 334 (Tri-Mum).*

5. Per contra, the learned AR for the Revenue, on the other hand, submitted that the formula that department has taken into account relates to the specific gravity of the raw material i.e. Nylon 6-chips in calculating the denierage, now claimed as incorrect was also before the Tribunal in the first round of litigation, and it has been pointed out that specific gravity of the material remain constant irrespective of the shape and sizes of the material, that is whether the material is in the shape of yarn or sheet, the specific gravity being constant will remain same. It is his contention that the issue for determination in the instant case is whether the appellant had correctly availed the exemption notification and the exemption was granted to nylon monofilaments of yarn of specific denierage. The formula for calculation of the denierage has been given in the Tariff and it has been established that the appellants were not measuring the actual denierage and they were only calculating the diameter and thereafter further applied the formula to arrive at the denierage

for the diameter. On being questioned by the department, they failed to provide the formula by which the denierage was calculated by them. There is no necessity to be an expert for using the formula when the diameter of gauges of yarn are known and not disputed. Therefore, as per the tariff formula, the products are not eligible for the exemption notification having denierage more than that prescribed in the said notification. Further, he has submitted that the demand notice was issued on the basis of the intelligence that the appellant had wrongly claimed the benefit of Notification No. 5/98-CE dated 2.6.1998.The panchanama drawn on 5.11.1999 reveals that the nylon monofilaments yarn has been entered in the RG-1 register as dutiable and exempted and not denierage wise. The classification declaration filed by the Appellant it is mentioned denierage wise. The denierage is calculated at the time of clearance of the yarn on application of the formula known to the appellant. Shri Pankaj V. Rungta, Director of the appellant in his statement dated 5.11.1998 deposed that the diameter of the nylon monofilaments yarn was measured with the help of micrometer and the same was recorded in their Books of Account and converted into denierage by using the formula, which he could not recall. Therefore, it can be established from the evidences on record that the appellant has suppressed the facts and wrongly availed the benefit of exemption notification with intent to evade payment of duty.

6. Heard both sides and perused the records.

7. This is the second round of litigation before this Tribunal. In the first round, two issues have been raised before this Tribunal for consideration. On the first issue i.e. classification of nylon monofilament, Tribunal observed that the goods manufactured by the appellants are nylon monofilaments yarn and accordingly classifiable under Chapter hearing 5404.10 of Central Excise Tariff Act, 1985. On the second issue regarding eligibility of benefit of exemption notification no. 5/98-CE , the matter was remanded to the adjudicating authority observing as follows: -

> *"11. We are therefore satisfied that benefit of the exemption would be available to the monofilament in question and therefore we have not considered the argument on limitation. We note however that the Commissioner has not dealt with the other ground in the notice, that monofilament was not of the denier specified in the entries of the table to the notification. We think it appropriate that a finding should be given on this aspect. For this purpose, therefore, the matter is remanded to the Commissioner for adjudication in accordance with law."*

8. Therefore, the limited question in the present appeal for determination is: whether the appellants are eligible to the benefit of exemption notification No. 5/98-CE dated 2.6.1998. While initiating the investigation against the appellant, goods lying in the factory premises of the appellants were placed under seizure and samples were drawn for ascertaining denierage of the impugned goods, namely, nylon monofilaments yarn on 5.11.1998. Since the quantity of samples drawn from the seized goods was found to be in short in length, at the request of the Dy. Chief Chemist, samples were re-drawn on 23.1.1999 and sent for testing. The test report by the Dy. Chief Chemist indicating as below: -

> *"The sample is monofilament yarn of polymide (nylon) having diameter size 61 mm, denierage 614 – 09."*

9. Later clarification was sought by the department on the said Report to indicate the gauges and density of the samples tested, which was responded by the Dy. Chief Chemist through his letter dated 19.3.1999. It is on record that the said test report has not been challenged by the Revenue disputing its correctness before the Chief Chemical Examiner. The appellant's contention is that in absence of any appeal against the said test report of the Dy. Chief Chemist, the same is binding on the department. We find from the impugned order that the learned Commissioner accepted the test report relating to the goods seized and dropped the show-cause notices proposing confiscation of the goods. However, the learned Commissioner has not applied the test result for the clearance from 16.8.1998 to 5.11.1998 for which different formula was applied by him in calculating the denierage of the product. Assailing the said approach of the learned Commissioner, it has been submitted by the appellant that for the said period i.e 16.8.1998 to 5.11.1998, neither samples were drawn nor any test had been conducted. Therefore, the confirmation of demand denying the benefit of exemption notification 5/98-CE is incorrect.

9. Without going into the merit of the formula, we are of the view that when samples were tested by the Department, and the result indicated that the denierage declared by the appellant in clearing the goods more or less in confirmity with the test report, hence, in absence of any contra test report for the period prior to 5.11.1998 indicating different denierage of the nylon monofilaments yarn cleared, it is incorrect to arrive at the

conclusion that the said yarns were of different denierage on the basis of a theoretical formula. Consequently, the denial of benefit of exemption notification cannot be sustained. Thus, the impugned order to the extent it confirmed the demand and penalty relating to the second show-cause notice is also liable to be dropped. In the result, the impugned order is modified by setting aside confirmation of the demand and penalty and appeals are allowed accordingly.

(Pronounced in Court on 27.03.2019)

(C.J. Mathew)
Member (Technical)

(Dr. D.M. Misra)
Member (Judicial)

Sinha