CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
WEST ZONAL BENCH
COURT No.

Appeal No. E/807/2008

(Arising out of Order-in-Original No.7/2008 dated 19.5.2008 passed by Commissioner of Central Excise & Customs (Appeals), Mumbai)

Standard Industries Ltd. **Appellant**
59, The Arcadia, 1st floor,
World Trade Centre,
Cuffe Parade, Colaba,
Mumbai 400 005.

Vs.

Commissioner of Central Excise Mumbai-IV **Respondent**
115, New Central Excise Building,
Maharshi Karve Road,
Churchgate, Mumbai 400 020.

Appearance:

Shri H.C. Daruwala, Advocate for the Appellant
Shri N.N. Prabhudesai, Authorised Representative for the Respondent

CORAM:

Hon'ble Dr. D.M. Misra, Member (Judicial)
Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

FINAL ORDER NO. **A/85698/2019**

Date of Hearing: 08.01.2019
Date of Decision: 08.01.2019

PER: SANJIV SRIVASTAVA

This appeal is directed against order in original No. 7/2008 dated 19.05.2008 of Commissioner Central Excise Mumbai IV. By the said order passed in remand proceedings Commissioner has held as follows:

"30 I confirm the duty amounting to Rs 30,49,975/- (Rupees Thirty Lakhs Forty Nine Thousand Nine Hundred and Seventy Five Only) for the period 1983-84 to 1986-87 and Rs 12,51,428/- (Rupees Twelve Lakh Fifty One

Thousand Four Hundred Twenty Eight Only) for the period 1987-8 and 1988-89 (upto 22.04.1988) under Section 11A(2) of the Central Excise & Salt Act, 1944.

31. I impose penalty of Rs 50,000/- (Rupees Fifty Thousand only) on M/s Standard Mill Co under rule 173Q(1), 9(1), 52(A), 210 & 226 of Central Excise Rules, 1944.

- *(a) The confirm amount of Rs 30,49,975/- shall be appropriated against an amount of Rs 30 lakhs & Rs 2 Lakhs cash security deposited with Bond by the assessee.*
- *(b) An amount of Rs 12,51,428/- shall be appropriated against the duty amounting to Rs 27,00,506.42 paid during the year 1987-88 to 1988-89 (upto 22.4.1988)*
- *(c) The penalty of Rs 50,000/- (Rupees Fifty Thousand only) shall be appropriated from the balance amount remaining after appropriation of duty amount as at (a) & (b) above."*

2.1 Appellants are manufacturers of cotton and Polyester Cotton blended textile fabrics and yarn. They also manufactured fusible interlining fabrics. They classified and cleared the fabrics under Tariff Item 19i(b) of the First Schedule of erstwhile Central Excise Tariff during the period 1982 to 28.02.1986. After introduction of Central excise Tariff Act, 1985 w.e.f 1st March 1986 they classified the said goods under Chapter 52 (5206) or chapter 55 with reference to the base fabric. The classification lists filed by them were approved by the jurisdictional Assistant Commissioner.

2.2 Officers visited their factory premises on 23rd March 1988 and seized raw material, finished goods and also documents. A show Cause Notice dated 05.08.1988 was issued to them alleging:

(i) that they had mis declared the said products under wrong tariff headings and had undervalued the said goods.

As per the show cause notice correct classification prior to 01.03.1986 was TI 19(iii) and thereafter 5903;

(ii) they were selling the goods through related persons so the sale price of the related person was made the basis for computing the duty demanded;

(iii) they had clandestinely removed certain quantity of the said goods without payment of Central.

The show cause notice proposed to recover duty on the confiscated goods and impose penalty.

2.3 Collector of Central Excise by his order dated 8th October 1991, confirmed the duty demand of Rs 2,10,85,579.60, confiscated the seized goods giving them option to redeem on payment of redemption fine of Rs 8,00,000/- and imposed a penalty of Rs 50,000/- The said order of Collector was set aside by tribunal vide its order dated 18th January 2000 and matter was remanded back to Commissioner for fresh consideration.

2.4 By his order dated 03.04.2003 passed in remand proceedings, Commissioner confirmed the duty demand of Rs 65,73,756/-, confiscated the seized goods giving them option to redeem on payment of redemption fine of Rs 8,00,000/- and imposed a penalty of Rs 50,000/- The said order of Collector was set aside by tribunal vide its order dated 21st December 2005 and matter was remanded back to Commissioner for fresh consideration.

2.5. Tribunal has while remanding the matter made following observations:

"The lower authority has held that the fabric is coated fabric on the ground that 60% of the surface of the fabric is coated with dots. The appellants have pleaded that the Hon'ble High Court of Allahabad and Gujarat [vide J D Patel and Another vs UOI - 1978 ELT (J540)] have held that in coating the intention would be to cover virtually the entire surface of the material sought to be coated and that the process which leaves a considerable area uncovered

would not be called coating. We find merit in the contention off the appellants and their reliance on the cited case laws. Hence we are of the view that the impugned material cannot be considered as coated fabric.

2. As regards valuation, it is the claim of the appellants that for the earlier period, following the Tribunal decision in their own case, the department has accepted that there was no mutuality of interest between the appellants and M/s Mafatlal Apparel Mfg Co Ltd. They also contended that even if the cost of the powder supplied to the appellants by M/s s Mafatlal Apparel Mfg Co Ltd is to be taken into account for valuation of fabric, the same has not been worked out and ascertained by the lower authorities. We find merit in the submissions made by the appellants. Accordingly we refer and the matter to the Commissioner for fresh adjudication who will pass a fresh order after allowing a reasonable opportunity of hearing to the appellants.

3. As regards the charges of clandestine removal, it is the case of appellants that the goods in question were very much in the factory and the request of the appellants was pending with the authorities for additional space. In respect of the appeal No E/3100/3, it is the contention of the appellants that no penalty clause was invoked in the show cause notice and hence the imposition of penalty is not justified. In consideration of the entire facts of the case, we set aside the confiscation and penalty ordered by the lower authority."

2.7 Impugned order referred in para 1, supra is the order passed by the Commissioner in the remand proceedings as per the order of Tribunal dated 21.12.2005.

2.8 Aggrieved by the order of Commissioner, Appellants have filed this appeal.

3.1 We have heard Shri H C Daruwala, Advocate for the Appellants and Shri N N Prabhudesai, Superintendent, Authorized Representative for the revenue.

3.2 Arguing for the appellants learned Advocate disputed-

a. The quantification of the duty on following counts

i. The figures of quantity of linear meters of cloth is incorrect;

ii. Total duty has been demanded instead of differential duty;

iii. Highest rate per linear matter of cloth is applied for determining the duty demand;

iv. Figure of quantity of DAN Powder assumed for manufacturing 1 meter of cloth is incorrect;

v. Demand of duty for the period 1987-88 onwards is incorrect.

b. Imposition of penalty of Rs 50,000/- was not in accordance with the tribunal remand order whereby the penalty imposed has been set aside and the matter remanded for computation of value and duty.

3.3 Arguing for the revenue learned Authorized representative submitted-

a. That the duty demand has been computed by the Commissioner in terms of the remand order of the tribunal after taking into account the relevant annexures to the Show Cause Notice.

b. It is not correct to say that the duty demanded is not the differential duty, because during the relevant periods as is evident from the annexures to show cause notice that appellants had not paid any duty in respect of these clearances.

c. Commissioner has in the present case taken into account all the relevant factors and has determined the duty payable.

d. Appellants have not substantiated their claims towards the so called errors pointed out by them in determination of duty demand.

3.4 When the matter was heard on 28.11.2018, Counsel for appellant sought time to ascertain whether the duty was paid on the impugned fabric at the time of clearance, to substantiate his claim that total duty was demanded instead of differential duty. When matter was again heard on 11.12.2018 he sought further time to ascertain the same. Finally when the matter was hard on 8.01.2019 he submitted that they do not have any records of the relevant period to substantiate the claim.

4.1 We have considered the submissions made by the Appellant in the appeal and by both the party's during the course of arguments along with the impugned order.

4.2 Commissioner has in para 27 of his order determined the value and quantified the duty as follows:

"27. In terms of Section 4(b) of Central Excise Act, 1944, where normal price of goods is not ascertainable for any reason then nearest ascertainable equivalent thereof is to be determined by resorting to Central Excise (Valuation) Rules, 1975. The Rule 5 of Central Excise Valuation Rules, 1975 prevalent during relevant period is as below:-

'RULE-5 – Where the excisable goods are sold in the circumstances specified in clause (a) of sub-section (1) of Section 4 of the Act except that the price is not the sole consideration, the value of such goods shall be based on the aggregate of such price and the amount of the money value of any additional consideration flowing directly or indirectly from the buyer to the assessee.'

Therefore, in view of the above provisions, the cost of coating, and amortised machine cost will have to be included in the assessable value of the impugned goods, since the mills have not provided these details and that the mills have closed down their manufacturing activities as also the matter being very old, I have no other alternative but to determine the value of such goods according to best judgment as provided under Rule 7 of Central Excise Valuation Rules 1975 prevalent during the period, as *valuation has to have all these elements to be added. The jurisdictional Assistant Commissioner was asked to ascertain such cost by inquiring with the other mills situated in his jurisdiction and also by referring matter to Technical Institute. He reported that the other organizations could not provide any information as the issue involved is very old pertaining to period 1983-88. In view of this position, I am inclined to add notional cost in terms of percentage of cost of powder, on account of conversation charges and amortization cost of machines used. Accordingly notional charges of 10% of the cost of powder is added to value of fabrics to arrive at reasonable aggregate value of the impugned goods for the purpose of determination of duty payable on the impugned goods. Such value addition approximately comes to 3.2% of fabric value per L.Mtr.*

(vi) that the Annexures to the Show Cause Notice do not provide figures of duty paid by them during 1983-84 to 1986-87 and since the same are not readily available with them, the figures of differential duty can be arrived at by multiplying the total quantity of linear meter by the cost of powder per linear meter to arrive at total value of powder that has escaped assessment. It was claimed that by doing so the differential duty cannot be more than Rs.8,73,563.00.

On perusal of Annexure-B-I & B-II of the Show Cause Notice, it is evident that during the period 1983-84 to 1985-86, they have not paid duty as seen from Sr.No.9 of Annexure B-I. However, the duty is paid for the year 1986-87 as can be seen from Annexure B to O-I-O No.5/2003 dated 31.3.2003. Therefore, only for this year i.e. 1986-87 duty payable now is required to be reworked out on cost of DAN powder. In view of the above the duty payable is worked out to Rs.43,01,403/- as detailed below:

Year	Rate per mtr. (Rs)	Cost of powder (Rs.)	10% Notional Charges of the cost of powder	Total L.Mtr / Total Sq. Mtr.	Value per L.mtr for duty (Rs.)	Total Value (Rs.)
				1,6388		
1983-84	11.50	1.32	0.132	168950 Lm/ 152055 Sqm	12.952	2188240
1984-85	14.00	3.90	0.390	365046 Lm / 328541.4 Sq.m	18.290	6895719
1985-86	11.00	1.13	0.113	779721 Lm / 701749 Sq.m	12.243	9546124
1986-87	--	1.66	0.166	974452 Lm / 877007 Sq.m	1.826	1779349

Total Value (Rs.)	Duty payable (Rs.) B.E.D	Addl. Duty of Excise in lieu of Sales Tax	Addl. (T & T)	Handloom Cess	Total duty payable (Rs.)
	@ 15% of Value		@15% of B.E.D	@1.90 Paise per Sq. Mtr.	
2188240	246177	82059	36927	2889	368052
6895719	775768	258589	116365	6242	1156964
	@ 12% of Value		@15% of B.E.D	@1.90 Paise per Sq. Mtr.	
9546124	763690	381845	114554	13333	1273422
1779349	142348	71174	21352	16663	251537
20409432	**1927983**	**793667**	**289198**	**39127**	**3049975**

Whereas for the period 1987-88 and 1988-89 (upto 22.04.1988) the duty paid by the mills is shown as Rs.26,64,071.74 for 1987-88 and Rs.36,434.68 for 1988-89 (upto 22.04.1988) in the Annexure B-III & B-IV of the Show Cause Notice. As against above duty payments, Central Excise duty now payable is worked out as under :-

Year	Rate per mtr. (Rs)	Cost of powder (Rs.)	Total L.Mtr / Total Sq. Mtr.	Value per L.mtr for duty (Rs.)	Total Value (Rs.)
1987-88	10.25	1.14	1447745 Lm/ 1302971 Sq. m	--	--
1988-89	9.16	1.14	24522 L.m/22070 Sq. m	--	--

Total Value (Rs.)	Duty payable (Rs.) B.E.D	Addl. Duty of Excise in lieu of Sales Tax	Addl. (T & T)	Handloom Cess	Total duty payable (Rs.)
	@ 50 Paise per l. mtr.	@ 25 Paise per l. mtr.	@15% of B.E.D	@ 2.50 Paise per Sq. Mtr.	
--	723873	361936	108581	36194	1230584
--	12261	6131	1839	613	20844
0	**736134**	**368067**	**110420**	**36807**	**1251428**

Thus, Central Excise duty payable is reworked out to Rs.30,49,975/- for 1983-84 to 1986-87 plus Rs.1251428/- for 1987-88 & 1988-89, as per the direction of the CESTAT and not Rs.8,73,563/- as claimed by the party

vii) that they have deposited an amount of Rs.30,00,000/- pending inquiry that was being conducted by the Department in the subject matter and that an amount of Rs.26,00,506.42 (actually Rs.27,00,506.42 as per Show Cause Notice) was paid under protest and therefore they requested to compute the duty amount and after taking *into consideration their submissions return/refund the balance amount with interest @ 18% from the date of deposit/payment.*

As per Show Cause Notice the mills has paid Rs.27,00,506.42 during the year 1987-88 and 1988-89. As against this duty payment for this period the duty payable now is worked out to Rs.1251428/-. This duty liability as shown above is liable to be appropriated against the duty paid as shown above.

As regard the duty liability for the period 1983-84 to 1986-87 which is worked out to Rs.30,49,975/-, the same is liable to be appropriated against an amount of Rs.30 lakhs & Rs.2 lakhs deposited by the mills.

Regarding the claim of refund of excess amount paid since this matter is not subject of the present case as the directions given by the Hon'ble CESTAT are specifically for determination of value of fabrics. Thus, I do not want to dwell with this at this juncture.

28. In view of above findings I hold that M/s. Standard Industries Ltd. are liable to pay an amount of Rs.43,01,403/- and the same amount is liable to be recovered under Section 11A(2) of Central Excise Act, 1944. The charge of suppression of facts would still sustain even after CESTAT order as they have suppressed the correct value of impugned goods."

4.3 Appellants have not been able to substantiate their claim that the demand of duty as determined by the Commissioner is not in accordance with the evidence available of record, nor have they been able to produce any document/ record to dispute the quantification of demand as made by the Commissioner. In absence of any tangible evidence in form of record or documents we do not find any merits in the submissions made by the appellants to this effect.

4.4 We also find that by the order dated 31.03.2003, Commissioner had imposed penalty of Rs 50,000/- on the Appellant stating *"I impose penalty of Rs 50,000/- (Rs Fifty Thousand) on M/s Standard Mill Company under Rule 173Q, 9(1), 52(A), 210 and 226 of Central Excise."* This penalty was completely set aside by the tribunal by its order 21st December 2005 while remanding the matter for quantification. (Refer para 3 of the order dated 21.12.2005, reproduced in para 2.5 above). Once the said penalty was set aside we do not find any justification on the part of Commissioner to impose the same penalty again. While imposing the penalty this time Commissioner has again stated *"I impose penalty of Rs 50,000/- (Rs Fifty Thousand) on M/s Standard Mill Company under Rule 173Q(1), 9(1), 52(A), 210 and 226 of Central Excise Rules, 1944."* Since penalty was set aside by the earlier order of Tribunal we are not in position to uphold the imposition of penalty this time.

5.1 The impugned order of Commissioner is modified to the extent of setting aside the penalty imposed by him. Appeal is disposed of accordingly.

(Order pronounced in the open court)

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

(Sanjiv Srivastava)
Member (Technical)

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