IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI

APPEAL NO.E/477/2011

(Arising out of Order-in-Original No. 05/2008 dated 02.04.2008 passed by the Commissioner of Central Excise Mumbai IV)

Apsara Metallica Industries : **Appellant**
44/45 Dubash Market, 1st Floor,
369, Sheikh Menon Street, Mumbai 400 002

VS

Commissioner of Central Excise, Mumbai IV : **Respondent**
New Central Excise Building,
115 MK Road,Opp. Chunchgate Railway Station,
Mumbai 400 020

Appearance

Shri M. N. Sukhaja, Adv for Appellant

Shri N. N. Prabhu Desai, Supdt (A.R) for Respondent

WITH

APPEAL NO.E/151/2011

(Arising out of Order-in-Original No. 05/2008 dated 02.04.2008 passed by the Commissioner of Central Excise Mumbai IV)

Pitambardas N. Chhabria : **Appellant**
6th Queen Palace
205 Water Field Road, Bandra (W)
Mumbai 400 050

VS

Commissioner of Central Excise, Mumbai IV : **Respondent**
New Central Excise Building,
115 MK Road,Opp. Chunchgate Railway Station,
Mumbai 400 020

Appearance

None for Appellant

Shri N. N. Prabhu Desai, Supdt (A.R) for Respondent

CORAM:

Hon'ble Dr. D.M. Misra, Member (Judicial)
Hon'ble Shri P Anjani Kumar, Member (Technical)

Date of hearing : 06.02.2019
Date of decision : 31.05.2019

ORDER NO. A/86024-86025/2019

Per : **P Anjani Kumar, Member (Technical)**

These two appeals are directed against OIO 05/2008 passed by Commissioner of Central Excise, Mumbai-IV.

2. Brief facts of the case are that the appellant No 1, M/s. Apsara Metalica Industries (E/477/11), carried out manufacturing of lacquered film and metallic yarn; appellants purchased duty paid polyester films from M/s Venlon Polyester Films Ltd, on payment of duty , from their factory at Mysore and directly sent to M/s. Pan Electronics Pvt. Ltd and C & N Ganges Metallizing Pvt. Ltd., Hosur.; the job workers of metallized film, cleared the same to the appellants on payment of duty; The appellants thereafter undertook the activity of colouring these duty paid polyester films with suitable lacquers; the lacquered metallized film was sold as such in the market in that condition by the appellants to its customers. Some of the metallized polyester film was further used by the appellants in their factory for the manufacture of metallic yarn; metallic yarn was sold as such in the market without payment of duty; in addition, the appellants bought duty paid nylon yarn /viscose yarn/ polyester yarn from the market; the yarns were then twisted together with the metallic yarn manufactured as above; composition of twisted yarn, also called as covered yarn, was 67% of metallic yarn and 33% of polyester yarn or nylon yarn or viscose yarn; appellants also regularly received substantial quantity of duty paid lacquered metallized polyester film from M/s. Pan Electronics Pvt. Ltd. and C & N Ganges Pvt. Ltd and sold as a trading activity; apart from receiving duty paid metallized polyester film, lacquered metallized film purchased form the market was also sold by the appellants. Appellants had availed MODVAT credit on input I.e. metallized polyester film used for making lacquered metallized polyester film. The appellants filed necessary classification list for metallized yarn falling under CETH 5605.10 (availing Notification 45/86), twisted yarn under CETH 5805.90 and lacquered metallized polyester film under Heading 3920.90 (under Notification 45/86(@25% duty under No.53/88-CE).

2.1. Central Excise Officers visited the appellants' premises on 23.4.91 and found that 8,605.57 Kg of LMPF (lacquered metallized polyester film) and 777.175 Kg of covered yarn were not accounted for in the RG-1. Officers recorded statements of various persons. Seized goods were released on execution of Bond and BG. A show cause notice dated 20.2.92 was issued by the Department seeking to demand a duty of Rs.72.39 lakhs from the appellants. Appellants submitted that there were errors in the computation and that if the exemption for covered yarn is granted and value of clearance of Rs.75 lakhs was re-computed, there will be no duty liability whatsoever against the appellants. Commissioner passed the impugned order dated 9.10.92, confirming the entire demand raised in the show cause notice apart from confiscating the seized goods and imposing penalty on the appellants and penalty on second appellant Shri P.N. Chabbria (Appeal E/151/2011). Commissioner relied upon a test report. However, no copies of sample and test report was given to the appellants.

2.2. On an appeal filed by the appellants, CEGAT, vide order dated 4.4.2000, remanded the matter directing the Commissioner to furnish a copy of the test report to the appellants. Copy of the Report was given to the appellants and passed the Order-in-Original dated 7.3.2002, confirming the demand of duty and imposing higher amount of penalty. On an appeal filed by the appellants again, CESTAT, vide final Order dated 30.8.2006, held that the process of lacquering would not amount to manufacture and remanded the matter of classification of covered yarn, with an observation that as regards the classification of the special type of yarn being manufactured by the appellants, from the test report given and the description of the yarn, we find that the dispute of classification of the yarn cannot be limited to Heading 5605.10 or 5605.90 and the classification of the yarn will have to be reconsidered, also, under Heading 5605.00 and the relevant HSN Notes. Commissioner passed Order-in-Original dated 2.4.2008, confirming the demand of Rs.25.97,206 holding that the activity of making covered yarn amounted to manufacture; covered yarn is classifiable under sub-heading 5605.90 as other metalized yarn and not under sub-heading 5605.10 and benefit of Notification No.45/86-CE was not available; as the covered has been sold to the related person i.e. Hiro Industries, the valuation needs to be done on the basis of price at which Hiro Industries sold the same to their buyer; covered yarn as per Annexure C to the SCN was removed clandestinely by the appellants and that Cenvat credit of inputs used in the LMPF is required to be revered.

3. Learned Counsel for the appellants submits that there is no manufacturing activity *vis a vis* covered yarn; 67% by weight of the metallic yarn is twisted with 33% by weight of any one of nylon yarn or viscose yarn or polyester yarn, as the case may be; The essential character of the product continues to be the metallic yarn; Since metallic yarn has already paid duty at nil rate as leviable under the central excise law, no further duty is leviable; In any case, the Covered yarn was classifiable under sub-heading 5605.10 and not under sub-heading 5605.90; classification of the product cannot be based on the test report; Covered yarn was exempt by Notification No.45/86-CE. He submits that the entire basis adopted in the impugned Order-in-Original for classifying the goods under sub heading 5605.90 is incorrect. It may be pointed out that there is no dispute between the parties that the covered yarn falls under heading 56.05. Heading 56.05 applies only to metallized yarn; therefore, there can't be a dispute that even the covered yarn has to be only a metallized yarn since the Department itself is classifying the goods only under a sub heading of Heading 56.05; Heading 56.05 is split into two such headings i.e. 5605.10 covering man-made filaments and 5605.90 covering others; Sub heading 5605.90 is clearly residuary; the Commissioner has failed to appreciate the fact that the nylon, polyester and viscose yarns used by the appellants are all filaments only. Therefore, the covered yarn can fall only under sub heading 5605.10 and not under sub heading 5605.90

3.1. Learned Counsel for the appellants submits that impugned order classified the covered yarn under sub-heading 5605.90 solely on the basis of the test report of the Chemical Examiner; the test report of the Chemical Examiner says that "*Sample of the yarn sent alongwith your letter cited above examined and found that the sample under reference is a metallized polyester yarn and composed of a core of metallized polyester yarn around which two nylon filament yarns are loosely twisted together. This is not a gimped yarn as the metallized yarn has not been covered fully with the two nylon filament yarn nor two nylon filaments have been fully covered by metallized polyester yarn. It may therefore fall as 'other metallized yarn under Chapter sub-heading 5606*.90''; It is well settled that the function of the Chemical Examiner is to furnish the analysis of the samples tested and not the classification of the goods. Classification of goods is the function of the Commissioner. Hence, the classification indicated in test report cannot be adopted; In any case, the test report does not go against the appellants. On the other hand, the test report jumps to conclusion to suit the case of the department; test report categorically states that the covered yarn is not a gimped yarn; hence, the exclusion provided in heading 56.05 is not applicable to the present case; test report clearly states that the yarn in question is a metallized yarn loosely covered by nylon filament yarn; it's a known fact that yarn can be made from fibres by a process of spinning or straightaway made into filament yarn by extrusion through spinneret; nowhere, it is stated that the yarn is not a filament yarn; hence, the test report is incorrect in its conclusion that the covered yarn in question is classifiable under sub-heading 5605.90; Sl. No.10 of Notification No.45/96-CE dated 10.2.86 grants exemption to man-made metallic yarn falling under sub-heading 5605.10 subject to the condition specified there in. The condition of the notification is fulfilled since the covered yarn is made from duty paid metallized yarn in question.

3.2. On the allegation of related person, learned Counsel for the appellants submits the appellants are a partnership firm; Hiro Industries is a different partnership firm having different set of partner; it is settled law that partnership firms having different partners cannot be said to be related persons; in any case, the department sought to support the charge of under-valuation by computing that the assessable value on the basis of alleged cost of manufacture; when actual sales price to independent buyers is available, the question of taking into account the cost of production for valuation is incorrect.

3.3. On the allegation of related person, learned Counsel for the appellants submits that allegation of the clandestine removal of covered yarn as mentioned in the Annexure C is without any basis; goods were removed on appellants' gate pass and sales invoice No. and delivery challan No. of Hiro Industries; they enclosed separate statement indicating sales invoice No. and delivery challan No. of Hiro Industries for each of the entries along with the factory gate passes issued by the appellants; the appellants have already enclosed, as Annexure 22 to the reply to show cause notice, a statement listing out gate-wise clearances of covered yarn for the year 1990-91 by the appellants to Hiro Industries totaling 13,483.835 kg; this exactly tallies with the total sales made by Hiro Industries for the year 1990-91 against their sales invoice;

3.4. Learned Counsel for the appellants submits that Commissioner's finding that the covered yarn cleared to the buyers other than the Hiro Industries are under-valued to the extent of Rs.2,24,478, as per Annexure H-1 to the SCN, is incorrect. Revenue is trying to compare the value allegedly shown in Annexure C vis-à-vis the value as per the excise duty gate passes for sale to parties other than Hiro Industries; the appellants had already established in relation to Annexure C that the entries shown therein relate to sale of Hiro Industries as the entire Annexure relates to Hiro Industries. Therefore, arriving at the under-valuation in Annexure H-1, the department is in fact taking into account the sale price of Hiro Industries to its customers and comparing it with the sales price of the independent customers of the appellants. This basis is entirely incorrect.

3.5. Learned Counsel for the appellants submits that it has been alleged that the appellant has removed the metallized polyester film itself as such after taking MODVAT credit on the same and without reversing the MODVAT credit; this allegation was made on the premise that in the factory gate pass and delivery challans seized by the Department and listed in this Annexure, the description of the goods has been given as metallized polyester film; it was pointed out that the very same factory gate passes relied upon in the show cause notice indicates the colour, of the film; the colour is indicated only for a lacquered film; the metallized polyester film does not have any colour and only lacquered film is referred by the colour depending upon the colour of the lacquer; appellants have enclosed, as Annexure 23, a chart along with the factory gate passes relating to Annexure D listing out the colour indicated in the factory gate pass/delivery challan to prove that items represented only lacquered metallized polyester film. The Commissioner finds that even if it is assumed that the appellants have cleared LMPF (finish product) and not the Metalized polyester film (inputs), the fact remains that the finished product have been cleared without payment of duty and hence, credit takes on the inputs is required to be reversed. The appellants submit that since inception of the proceeding, the department argued that the Lacquering amounted to manufacture; there is no proposal in the Show Cause Notice regarding the reversal of credit on the inputs used in the LMPF; Department had not taken alternative pleas of reversal of credit on the inputs used in the LMPF, at any stage of the proceedings. The ground now taken by the Commissioner regarding the reversal of credit on the inputs used in the LMPF is not sustainable and bad in law.

3.6. Learned Counsel for the appellants submits that demand as per Annexure-J to the Show Cause Notice related to the denial of benefit of the Notification No.175-86-CE is incorrect; If the covered yarn is extended the benefit of exemption under Notification No.45/86, then admittedly the value of clearances of the appellants for the year 1990-

91 was below Rs.2 crores limit; even if the allegation of under-valuation of the covered yarn is set aside, even then the value of clearances would fall within the Rs.2 crores limit. Hence, there is no basis for denying the benefit of exemption under Notification No.175/86 for the year 1991-92; In addition, if the covered yarn is held to be exempt from duty, then even for the year 1990-91 the aggregate clearance have to be re-computed and value of clearances of only LMPF ought to be taken for extending the exemption under Notification No.175/86; If this is done and the maximum quantity of alleged clandestine removal of 34,333.35 kg at the value of Rs.170 per kg is considered, then also there will be no differential duty payable whatsoever.

3.7. Learned Counsel for the appellants submits that the entire demand is barred by limitation; there is no suppression of facts; non-payment of duty, if any, is only due to the appellant's bona fide claim, that the covered yarn is exempt from duty, which was made repeatedly in the past; even if the Department is to view that covered yarn is not exempt from duty, this duty can be demanded only within the normal period of limitation; Assistant Collector vide order dated 17.1.92 granted the exemption to covered yarn. Confiscation of the seized goods is invalid and incorrect since the goods have already been provisionally released; goods are not available for confiscation; order of confiscation by the Commissioner is invalid. In the remand proceedings, the Commissioner has imposed penalty of Rs.20 Lakhs, while in the earlier proceedings, penalty imposed on the appellants was Rs.3 lakhs. The excess penalty imposed in the impugned order is not sustainable and violates natural justice. The present proceedings have been continued with the department consequent to the introduction of Section 38A of the Central Excise Act, 1944 with retrospective effect. Therefore, the appellants are entitled to the benefit of Explanation to Section 132 of the Finance Act, 2001. The appellants rely on the following decisions:

(i). CCEC Vs. RG Agarawal – 2009 (234) ELT 215 (Guj)
(ii). Agarwal Pharmaceuticals Vs. CCE–2002(146) ELT 190 (T)
(iii). Punjab Recorder Limited Vs. CCE – 2001 (132) ELT 41 (T)(iv). Kamlesh Kumar Goel Vs CCE – 2008 (223) ELT 65 (T)

4. The other appellant submits that he is an Individual, who was one of the three partners of M/s. Hiro Industries; In Appeal No. E/477/2011, the main appellant denied contravention of any Rules and have also submitted that the goods as processed and cleared by them do not attract any Central excise duty on the various grounds; as claimed in SCN he was not a market executive & authorized signatory of M/s. Apsara Metallica Industries; he was looking after the marketing side of M/s. Hiro Industries, one of the customers of M/s. Apsara Metallica Industries; his firm used to get goods under cover of Central Excise Invoices of the manufacturers; since his firm was not registered with Central Excise, they were clearing goods on delivery challans and commercial invoices to their customers; there was no financial arrangement or flow back of any kind between his firm and M/s. Apsara Metallica Industries; relation was only of buyer and seller; his firm used to buy goods from them as per prices as prevailing market prices; all payments to the manufacturer was through normal banking channels; their further sale prices depended upon market forces of demand and supply, terms of payment, quantity of goods required etc; when many Central Excise Officers raided their premises, he did sign some papers, statements as typed, written by the Officers due to fear psychosis and ignorance; some of these could be different from the correct facts and circumstances of the issues involved;

4.1. He submits that the impugned OIO is perverse, bad in Law; there are 3 OIOs passed by different (persons) Original Authorities; twice the Honourable CESTAT, Mumbai remanded the matter on various grounds; in the first OIO dated October 1992, amount of Rs.72, 23,979=77 was confirmed as duty payable by Main appellant and an amount of Rs.80,000=00 penalty was imposed upon him; in the second OIO dated March 2002, amount of Rs.72,23,979=77 was confirmed as duty payable by the main appellant and an amount of Rs.4,00,000=00 penalty was imposed on him; in the third OIO (impugned order) amount of Rs.25,97,206=00 was confirmed as duty payable by the main appellant and an amount of Rs.4,00,000=00 (Four Lakhs) penalty was imposed on him; fact that in *de novo* proceedings, penalty was increased from Rs. Eighty Thousand to Four Lakhs (five times), even when the amount of duty from the manufactures was decreased substantially by nearly to one-third, needs to be noted; a perusal of SCN, which is signed by the Collector, Central Excise, Mumbai – I Shri Gurbax Singh and attested by Shri C. K. Ninhavne, Assistant Collector, Central Excise, Mumbai – I , his name, Shri P.N. Chabria, is overwritten by someone with no signature or date (internal page 7 para 11(iv), internal page 9 para 12 and para 13; it is crystal clear that the said Collector was satisfied that there was no evidence against him in the case and thus did not wish to issue any Notice to show cause for imposition of any personal penalty; On this count itself the same may kindly be set aside. There is no iota of evidence, whatsoever in the whole of the SCN, on his role in alleged duty evasion; the SCN has not at all discussed his specific act/role or knowledge on his part, in rendering goods liable for confiscation; his firm was shut down in 1995 and at present he was 70 years old retired person have no source of income; penalty imposed on him may be set aside so as to allow him to lead tension free peaceful retired life.

5. Learned Authorised Representative for the department has reiterated the findings of OIO.

6. Heard both sides. Brief issues for discussion in this case are

(i). Classification of Covered yarn manufactured by the appellants whether under 5605.10 or 5605.90 or 5605.00.

(ii). whether the appellants are eligible for benefit of notification No 45/1986

(iii). Whether appellants are liable to pay duty of Rs 1,04,525 on the goods alleged to have been clandestinely removed; duty of Rs 16,58,853 on account of undervaluation of metallized yarn and Rs 1,21,321 on the alleged undervaluation of covered yarn.

(iv). whether the appellants are liable to reverse credit of Rs 7, 21,507 on inputs.

6.1. Coming to the issue of classification, the Appellants submit that the obtain metallic yarn by micro-slitting lacquered metalised polyester film; Department has accepted its classification under heading 5605.10; they purchased duty paid polyester / viscose / nylon yarn from the market which are twisted alongwith metallic yarn; the product is called covered yarn and contains 67% by weight, the metallic yarn and 33% by weight other yarns. The Appellants also submits that in terms of Section Note 2(A) to Section XI.

2(A) Articles classifiable under chapter 50-55 or heading 59.06 or 59.03 and all mixture of two or more textiles materials are to be classified as if consisting whole of that one textile material which predominates in weight over any other single textile material and that in terms of section note 14A

14A... *The products of chapter 56 to 63 containing two or more textile materials are to be regarded as consisting whole of that textile material would be selected under Note 2 above for the classification of the product of chapter 50-55 consisting of same textile material.*

The Appellants submits that in view of the above the product falls under 5605.10. It is required to go through the relevant HSN Notes of the heading 56.05 – Metalised yarn, whether or note gimped, being textile yarn, or strip or he like of heading 54.04 or 54.05, combined with metal in the form of thread, strip or powder or covered with metal.

This heading covers:

(1) Yarn consisting of any textile material (including monofilament, strip and the ike and paper yarn) combined with metal thread or strip, whether obtained by a process of twisting, cabling or by gimping, whatever the proportion of the metal present. The gimped yarns are obtained by

wrapping metal thread or strip spirally round the textile core which does not twist with the metal. Precious metals or placed metals are frequently used.

(2) Yarn of any textile material (including monofilament, strip and he like, and paper yarn) covered with metal by any other process. This category includes yarn covered with metal by electro-deposition, or by giving it a coating of adhesive (e.g. gelatin) and then sprinkling it with metal powder (e.g. aluminium or bronze).

The heading also covers products consisting of a core of metal foil (generally of aluminum), r of a core of plastic film coated with metal dust, sandwiched by means of an adhesive between two layers of plastic film.

The heading covers multiple (folded) or cable yarn containing plies of the yarn referred to above(e.g. fancy cords as used by confectioners, obtained by twisting together two or more metallised yarns as described above). It further includes certain other forms of yarn made in the same way and used for similar purposes, consisting of two or more parallel metallised yarns held together with a binding of metal thread or strip, and yarn or bundles of yarn gimped with yarn of this heading.

Metallised yarn may be gimped. It is used in the manufacture of trimmings and lace and of certain fabrics, as fancy cords, etc.

The heading does not include:

(a) Yarn composed of a mixture of textile materials and metal fibres conferring on them as antistatic effect (Chapters 50 to 55, as the case may be).

(b) Yarn reinforced with metal thread (heading 56.07)

(c) Cords, gallons or other articles having the character of ornamental trimmings (heading 58.08).

(d) Wire or strip of gold, silver, copper, aluminium or other metals (Sections IIV and XV)

6.2 On going through the above, it is clear that heading 5605 covers metalised yarn, whether or not gimped, being textile yarn, or striped or light heading No.54.06 or 54.07, combined with metal in the form of thread, striped or powder or covered with metal. It is evident that the covered yarn manufactured by the Appellants contained metalised yarn (67%) and nylon/polyester/viscose yarn (33%) in terms of Chapter Note 1 to the Chapter 54,

> *"Throughout the First Schedule, the term man-made fibres" means staple fibres and filaments of organic polymers produced by manufacturing processes, either:*
>
> *(a) By polymerization of organic monomers, such as polyamides, polyesters, polyurethanes or polyvinyl derivatives; or*
>
> *(b) By chemical transformation of natural organic polymers (for example, cellulose, casein, proteins or algae), such as viscose rayon, cellulose acetate, cupro or ….*

In view of the above, there is no doubt that nylon/polyester/viscose are man-made filaments. Therefore, metalised yarn of man-made filaments falls under 5605.10. The Appellants submits that metalised yarn predominates the covered yarn manufactured by them; the yarn is used for weaving of fabrics wherein shining line are pattern of metalised yarn is required; the metalised yarn by itself is very brittle and delicate; being very very thin it would not be useful in weaving fabrics; therefore, it is covered with other man-made filaments for giving extra strength and does not break-up while weaving. The revenue does not contend the fact that the predominant material in the covered yarn manufactured by them is man-made filament. In the instant case, metalised yarn is taken and twisted with 33% of polyester/nylon/viscose yarn obtained from market. As per the Chapter Note and HSN Note there is no doubt that metalised yarn falls under 5605. If the metalised yarn is covered with man-made filament yarn, it would falls under 5605.10 as contended by the Appellants. If the activity of covering was done by other than man-made filaments, the same would have been classifiable under 5605.90. Therefore, we uphold the classification of covered yarn under 5605.10. The Appellant submitted that the revenue sought to classify the covered yarn on the basis of chemical examiners report and it was held in many cases that it cannot be done on the basis of chemical examiners report. We find that classification requires to be arrived in terms of section notes and chapter notes and the references to the respective headings or sub-headings. We hold that the impugned goods are classifiable under 5605.10 and are covered by the exemption notification 45/1986 Central Excise dated 10.02.1986.

6.2. Coming to the issue of alleged clandestine removal of covered yarn for the period April 1990 to March 1991. The Appellants submit that goods have been initially cleared on payment of Excise duty against the gate pass issued by them to M/s. Hiro Industries; since the units are located in the same premises, at the time of physical removal of the material from the premises to outside area, the Appellants issued its factory gate pass so that the security staff permit the movements; clearance of 13483.835 kg of covered yarn by the Appellants tallies with total clearance of M/s. Hiro Industries. The Learned Commissioner has given a finding that the argument cannot be acceptable as it not substantiated by any documentary evidence and that the department has included only 1776.75 kg of covered yarn under clandestine removal and not all the quantity of 13483.835 kg as contended by the Appellants. We find that the Learned Commissioner has a point. The averment that the total clearances of the Appellant to

M/s. Hiro Industries tally with the invoices issued by M/s. Hiro Industries cannot be accepted. We find that the Appellants have not accounted for the clearance of 1776.75 kg of covered yarn. Therefore, we find that the Learned Commissioner had correctly confirmed the duty of Rs.1,04,525 on the Appellants.

6.3. Coming to the issue of under-valuation, it has been alleged that the Appellants have under-valued the goods in as much as they have cleared 90% of the covered yarn to M/s. Hiro Industries @ Rs.150 to Rs.200/Kg and that M/s. Hiro Industries sold the same to other buyers at Rs.425/kg. The Show Cause Notice also alleged that the Appellants and M/s. Hiro Industries are related in terms of Section 4(1)(a) (iii) and that the price charged by M/s. Hiro Industries to others should be treated as normal price. The Appellants contended that they have sold to independent buyers at the same rate; M/s. Hiro Industries are not related to Appellants; M/s. Hiro Industries is a partnership firm having 3 partners and are having separate registration for sales tax, income tax purpose; the Appellants' firm has two partners and are not common with M/s. Hiro Industries; the Appellants have no stake or interest in M/s. Hiro Industries and vice-versa; the dealings are on a principal to principal basis. The Appellants contended that the following case are in their favour.

(i)Mahavir Industries (RMD) v/s. CCE, BBSR-II 2004 (170) E.L.T. 27 (Tri.Kolkata).
(ii) CCE-II, Chennai v/s. Beacon Neyrpic Ltd. 2006 (193) E.L.T. 16 (S.C.)
(iii) Raliwolf Ltd. UOI 1992 (59) E.L.T. 220 (Bom.)
(iv) R.B. Agarwala & Co. P. Ltd. v/s. CCE. Bhubaneshwar II 2007 (217) E.L.T. 417 (Tri. Kolkata)
(v) CCE, Kanpur v/s. Palial Glass Works 1997 (94) E.L.T. 96 (Tribunal)

(vi) Shiva Tobacco Company v/s. CCE, New Delhi 1996 (87) E.L.T. 177 (Tribunal)

6.4. We find that department has not made out any case to establish that the Appellants and M/s. Hiro Industries are related; no mutuality of interest is established; no proof of flow back of money has been brought out. The value adopted by M/s. Hiro Industries to their customers cannot be adopted just for the reason that M/s. Hiro Industries are purchasing 90% of the clearance of the Appellants and for the reason that they are selling at higher price to their customers. Other than mentioning the entries in the petty cash book the department could not establish that the entries pertained to the sale of goods and monies recovered back by the Appellants. Moreover, the impugned period was under the regime of filing an approval of classification and price lists. Therefore, we find that extended period can also be not invoked. In the result the allegation of under valuation is not sustained.

6.5. Coming to the demand of duty of Rs.1,12,321 by holding that exemption under notification No.175/86 is not applicable to the Appellants during the year 1991-92, we find that as discussed above we hold that exemption under notification 45/86 as claimed by the Appellants is applicable to them. Therefore, the exemption contained under 175/86 is also applicable to them.

6.6. Coming to the allegation of confiscability of 777.175 kg of covered yarn seized under Panchanama dated 24.04.1991 we find that out of 1546.21 kg of covered yarn lying in the factory only 769.035 kg was accounted in RG1 register. We find that the Appellants have not given any satisfactory explanation for the same. Therefore, we find that the Learned Commissioner was right in confiscating the 777.175

kg of covered yarn. We find that redemption fine of Rs.1,00,000 was imposed for goods of a value of around Rs.3,00,000. We find that this is very high and therefore, restrict redemption fine to Rs.30,000.

6.7. Coming to the demand of Rs.7, 21,507 on account of clearance of metalised polyester film without reversing the credit availed on such raw material. Learned Commissioner finds that though CESTAT vide order dated 30.08.2006 held that there is no cause for any action with respect to lacquering. We find that though CESTAT has held that lacquering does not amount to manufacture, the fact that credit has been availed on the inputs used in the clearance of metalised yarn cleared as such or after lacquering. However, the Appellants submit that the issue raised by the Learned Commissioner is beyond the scope of the Show Cause Notice. On-going through the Show Cause Notice we find that the Appellants contention are correct. Learned Commissioner has travelled beyond the scope of the Show Cause Notice. Therefore, the demand is liable to be set aside.

6.8. The Learned Commissioner has imposed a penalty of Rs.20, 00,000 on the Appellants in terms of Rules 173 Q, 9(2), 52A, 210 & 226. As per the above discussions the sustainable demand is now limited to Rs.1, 04,525 we find that the penalty be also restricted to Rs.1,00,000.

7. Coming to the other appeal E/151/2011 we find that the Appellants submitted that penalty imposed on him has been increased in successive remand proceedings. He submitted that the impugned OIO is perverse, bad in Law; there are 3 OIOs passed by different (persons) Original Authorities; twice the Hon’ble CESTAT, Mumbai remanded the matter on various grounds; in the first OIO dated October 1992, amount of Rs.72, 23,979=77 was confirmed as duty payable by Main appellant and an amount of Rs.80,000=00 penalty was imposed upon him; in the second OIO dated March 2002, amount of Rs.72,23,979=77 was confirmed as duty payable by the main appellant and an amount of Rs.4,00,000=00 penalty was imposed on him; in the third OIO (impugned order) amount of Rs.25,97,206=00 was confirmed as duty payable by the main appellant and an amount of Rs.4,00,000=00 (Four Lakhs) penalty was imposed on him; fact that in *de novo* proceedings, penalty was increased from Rs. Eighty Thousand to Four Lakhs (five times), even when the amount of duty from the manufactures was decreased substantially by nearly to one-third, needs to be noted. We find that the submissions are acceptable. The role of the Appellants in the commissions and omissions of main Appellant is not established. Admittedly he is not a partner of the main Appellant. Therefore imposition of penalty on him is not sustainable.

8. In view of the above, in respect of main Appellants (E/477/11), we allow the appeal partly and hold that

(i) The impugned goods “covered yarn” are classifiable under 5601.10 of Central Excise Tariff Act; exemption under notification 45/86 is available to the Appellants and exemption under Notification No.175/86 is applicable to the Appellants during the year 1991-92.

(ii) Duty of Rs.1,04,525, on the 1776.75 covered yarn clandestinely removed, is confirmed.

(iii) Penalty imposed under Rules 173 Q, 9(2), 52A, 210 & 226 is reduced to Rs.1, 00,000 only.

(iv) Redemption fine imposed on, 777.175 kg of covered yarn, is reduced to Rs.30,000

8.1. In respect of the other Appellants (E/151/2011) penalty imposed is set aside.

(Order pronounced on 31.05.2019)

(D.M. Misra)
Member (Judicial)

(P Anjani Kumar)
Member (Technical)

HM