**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI**
**REGIONAL BENCH**
**COURT No. I**

**Excise Appeal No. 970 of 2010**

(Arising out of Order-in-Appeal No. V2(A)/63/RT/M-II/2009 // YDB/187/M-II/2010 dated 31.03.2010 passed by Commissioner of Central Excise (Appeals), Mumbai-II)

**M/s. Subhash Silk Mills Ltd.** **Appellant**
5 C, Prem Kutir,
177, Marine Drive,
Churchgate,
Mumbai 400 020.

Vs.

**Commr. of Central Excise, Mumbai-II** **Respondent**
9th floor, Piramal Chambers,
Jijibhoy Lane, Lalbaug,
Parel, Mumbai 400 012.

Appearance:

Shri R.M. Malhotra, Director, for the Appellant
Shri Anil Choudhary, Deputy Commissioner, 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/86989/2019**

Date of Hearing: 20.08.2019
Date of Decision: 20.08.2019

PER: SANJIV SRIVASTAVA

This appeal is directed against order in appeal No V2(A)/63/RT/M-II/2009 // YDB/187/M-II/2010 dated 31.03.2010 of Commissioner of Central Excise (Appeals), Mumbai Zone II. By the impugned order Commissioner (Appeal) has allowed the appeal filed by the revenue against order in original No 81/94 dated 28.12.1994 dropping the demand of Rs 1,27,276.77/- (SCN dated 16.08.1989)+ Rs. 89,671.50/- (SCN Dated 22.08.1989)

2.1 Show Cause Cum Demand Notices dated 16.08.1989 & 22.09.1989 were issued to the appellant, seeking to demand duty in respect of the man made fabrics cleared by them, by denying the exemption claimed/ availed by them under Notification No 254/87-CX dated 25.11.1987. The said exemption was admissible subject to the condition that percentage of polyester in manmade fabric was upto 70%.

2.2 On the basis of the sample test reports received from Chief Chemist CRCL, Assistant Commissioner has vide his Order in Original No 81/94 dated 28.12.1994 dropped the demand.

2.3 Aggrieved by the order of Assistant Commissioner, revenue preferred the appeal before Commissioner (Appeal). Commissioner (Appeal) has by the impugned order set aside the order in original.

2.4 Aggrieved by the impugned order, appellants have preferred this appeal.

3.1 We have heard Shri R M Malhotra, Director with the Appellant and Shri Anil Choudhary, Deputy Commissioner, Authorized Representative for the revenue.

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments.

4.2 While dropping the demand Assistant Commissioner has recorded the findings as follows:

*"The issue involved is determination of % of polyester to ascertain the correct slab of duty rate to manmade fabrics under Notfn No 254/87-C. EX. There was dispute in respect of quality number mentioned in table below where testing by Dy Chief Chemist, Bombay showed % of polyester higher than 70%. The test results were challenged by the assessees & the samples were sent for*

*retesting to Chief Chemist, New Delhi. The table below shows % of polyester for each quality in each test.*

| *Quality No* | *As Given by Dy. Chief Chemist Bombay* | *As Given by Chief Chemist Delhi* |
|---|---|---|
| | *% Polyester Filament Yarn* | *% Polyester Filament Yarn* |
| *853* | *85.2* | *70.8* |
| *1035* | *78.6* | *52.6* |
| *847* | *80.3* | *64.7* |
| *1017* | *75.3* | *64.3* |
| *2018* | *74.9* | *76* |
| *2002* | *74* | *72.5* |
| *1047* | *70.5* | *Not Retested* |
| *1022* | *70.7* | *Not Retested* |

*From the table given above, Chief Chemist New Delhi have indicated % of polyester above 70% in respect of Quality No 853, 2018 & 2002. For quality 853, 2002 the assessee claimed benefit of Board's Letter 261/19/12/76-CX.8 dated 25.2.1977 giving allowance of 2.5% (2.5 unit) in test report in favour of manufacturer, by which the % of polyester would come below 70% in respect of these two qualities. While for quality 2018, they paid the differential duty of Rs 6210.97 under TR-6 Challan No 91/ dated 24.05.93. I find that assessee's claim of benefit under aforesaid Board's Letter admissible in respect of quality No 853, 2002, 1047, 1022, while for quality 847,1035, 1017 the test report indicates percentage below 70%."*

4.3 Commissioner (Appeals) has in the impugned order denied the benefit of the above referred Board Letter stating as follows:

*"Boards' letter No 261/19/12/76-CX.8 dt 25.02.77 gives an allowance of 2.5% while determining percentage of "rayon or artificial silk" contents of mixed fabrics in test, in favour of the manufacturer on account of unevenness in the denier of rayon or other yarn used in making up of fabrics and subsequent processing of fabric. Thus the*

*allowance of 2.5% extended vide Board's letter dt 25.2.77 is restricted to rayon/ artificial silk and not polyester. Further Notification No 254/87 dt 25.11.87 denies concessional rate of duty to fabrics containing polyester above 70 %. As such I find that the allowance of 2.5 % while determining the percentage of polyester as per Board's letter dt 25.2.77 is not extended to the fabrics manufactured and cleared by the Respondent. Consequently they are not eligible for concessional rate of duty in respect of quality Nos. 853, 2002 (retested) and 1047, 1022 (not retested) containing polyester above 70%."*

4.4 We are not in position to agree with the views expressed by the Commissioner (Appeal) for the reason that it is based on erroneous reading of the said letter. The principle laid down by the said letter has been applied by the tribunal, in case of New Shorrock Mills [1996 (84) ELT 53 (T-Del)] stating as follows:

***"5.*** *We have heard both sides. Notification No. 34/84, dated 1-3-1984 partially exempts cotton fabrics containing more than 40% by weight of polyester fibre. There is no dispute that, though the declaration indicated 42%, on test it was found to be only 39.2% In such cases, however, we find that it is not only Central Board of Excise and Customs, which vide their letter No. 261/19/12/76-CX. 8, dated 25-7-1977 recoginse the trade practice and permitted tolerance of 2.5% in such cases but ISI under Standard No. IS : 11195-1985 prescribed tolerance ± of 3% in case of composition blend for textile material. In the very nature of things a margin of error is built in when any scientific determination is done in the measurement etc. and this margin of error varies from commodity to commodity and the methodology of the test adopted and the instruments used for that purpose. Considering that ISI also has accepted such ± variance and prescribed a* *tolerance limit in case of textile we see no reason for not accepting such tolerance in determining the percentage in blend of the fabrics. We also note that the Tribunal in similar situations allowed the benefit of such tolerance in the case of the appellants themselves vide Final Order No. 110/1996-D, dated 16-2-1996. Thus, following the ratio of this order, we allow the appeal and set aside the impugned order."*

4.5 The finding recorded by Commissioner (Appeal) to the effect that the said Board letter applies only to rayon/ artificial silk and not polyester has been rejected by the tribunal in case of Morarjee Goculdas Spg. & Wvg. Co. Ltd [1998 (102) ELT 420 (T-Mum)]

*"**3.** By applying the tolerance factor in favour of the assessee, the Board's circular provides, it will be evident that the predominant fibre will be cotton. The departmental representative's first objection is that the Board's circular limited the extent of the tolerance factor to cotton or artificial silk content. A reading of the circular does not bear out this contention. In the third paragraph of the Board's circular says that it has been advised by the Chief Chemist that the procedure of extending tolerance followed for ascertaining cotton or artificial silk content may in marginal cases of composition may be followed for all mixed fibres irrespective of the fact whether they fall under Item No. 19-1, 9(1a), 22 or 22 of the Central Tariff. Item 9(1) was for cotton fabrics. It is evident therefore that in order to arrive at the classification, fabric made from yarn or a mixture of synthetic or artificial yarn with cotton or wool, the tolerance factor has to be applied.*

***4.** We are also not persuaded by the next objection of the departmental representative that the tolerance factor provided is in order to compensate for variations in tests and that since in the present case the goods have been tested more than once such compensation need not be* *rendered. This contention is open to two objections. The Board's circular did not say that the tolerance factor has been provided for possible variations in test resulting on account of differing methodologies imply in such tests. It says that the tolerance of 2.5% may be given in favour of the manufacturer on account of unevenness in the denier of the rayon and other yarn used in making of the fabrics and subsequent processing of the weaving fabrics. The reasoning in the Tribunal's orders no doubt laid emphasis on the fact that the test results may vary. In a matter where the application of the Board's circular is involved it would be more appropriate to go by the reasoning given by the Board itself in the circular applying is for interpretation of it. Apart from that even if we accept the reasoning for the tolerance given in the Tribunal's order the fact remains that on two test on two different compositions were found. It is therefore legitimate to say that the tolerance also provides for different test results by more than one test."*

5.1 In view of discussions as above we do not find any merits in the impugned order and set it aside. Thus the appeal is allowed.

(Order pronounced in the open court)

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

**(Sanjiv Srivastava)**
**Member (Technical)**

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