CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI

REGIONAL BENCH - COURT NO. I

Excise Appeal No. 1152 of 2011

(Arising out of Order-in-Appeal No. M-I/RKS/127/2011 dated 31.3.2011 passed by the Commissioner of Central Excise (Appeals), Mumbai-I)

M/s Marathon Nextgen Realty & Textiles Ltd. ... Appellant
G.K. Marg, Mumbai - 400013

Versus

Commissioner of Central Excise, Thane-I .... Respondent
115, New Central Excise Building, Maharshi Karve Road,
Churchgate, Mumbai - 400020

Appearance:

Shri Prakash Shah, Advocate for the Appellant

Shri Sanjay Hasija, Supdt., Authorized Representative for the Respondent

CORAM:

HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO. A/87456 / 2019

Date of Hearing: 10.12.2019
Date of Decision: 10.12.2019

Per: Dr. D.M. Misra

This is an appeal filed against Order-in-Appeal No. M-I/RKS/127/2011 dated 31.3.2011 passed by the Commissioner of Central Excise (Appeals), Mumbai-I.

2. Briefly stated the facts of the case are that the appellants are engaged in the manufacture of cotton and man-made fabrics falling under Chapter 52, 54 & 55 of Central Excise Tariff Act,

1985. For the purpose of processing of the fabrics, the appellants used to prepare and consume within the factory "printing paste" falling under Chapter 32 of Central Excise Tariff Act, 1985. The printing paste was prepared from the duty paid standardized, formulated and prepared dyes and chemicals purchased from the open market. The appellants thereafter by adding Glauber's salt, dextrin and other chemicals prepared the said paste, which was used in printing of cloth within the factory premises. Alleging that the preparation of 'printing paste' fall within the scope of Note 6 to Chapter 32 hence resulted into 'manufacture' within the definition of 'manufacture' prescribed under Section 2(f) of Central Excise Act, 1944 and classifiable under sub-heading 3204.29 of Central Excise Tariff Act, 1985. Accordingly, periodical demand notices were issued from August, 1990 to February, 1993 demanding duty totaling to Rs.63,42,042.36 with proposal for penalty. On adjudication, the demands were confirmed by the adjudicating authority with penalty. Aggrieved by the said order, the appellant filed an appeal before the learned Commissioner (Appeals), who in turn, remanded the matter to the adjudicating authority for *de novo* consideration. The *de novo* adjudication was completed in the year 2006. The appellant filed appeal against the said order before the learned Commissioner (Appeals), who again remanded the matter to the adjudicating authority for verification of certain facts. On adjudication, again the duty was confirmed with penalty; on appeal it was upheld by the learned Commissioner (Appeals). Hence, the present appeal.

3. At the outset, the learned Advocate Shri Prakash Shah for the appellant submitted that the authorities below have erred in holding that the process undertaken by the appellant resulted into manufacture of printing paste falling under Chapter 3204.29 of Central Excise Tariff Act, 1985. He has submitted that no evidence or materials was produced by the Revenue to show that the printing paste was made out of non-prepared, non-standardized and non-formulated dyes. In the first remand order dated 20.10.1995, the learned Commissioner (Appeals) fixed responsibility on the Department to examine whether printing paste manufactured by the appellant was from the standardized, formulated or prepared dyes. He has submitted that the adjudicating authority thereafter neither followed the said order nor the principles of law laid down by the Hon'ble Bombay High Court in the case of *Phoenix Mills Ltd. Vs. Union of India – 2004 (168) ELT 310 (Bom),* wherein the Hon'ble Bombay High Court ruled that the burden squarely lies on the Revenue to prove that printing paste is prepared out of unstandardized, unformulated and unprepared dyes. The observation of the authorities below that the principles laid down by the Hon'ble Bombay High Court is not applicable to the facts of the present case, is unjustified as in none of the show-cause notice, it is alleged that the printing paste prepared by the appellant was out of the unstandardized, unformulated and unprepared dyes. He has submitted that in order to levy duty the burden to prove whether the process resulted into 'manufacture' always rests with the Revenue. In support, he placed the reliance on the judgments in the cases of *Board of Trustees Vs. Collector of Central Excise, AP – 2007*

(216) ELT 513 (SC) and Metlex (India) Pvt. Ltd. Vs. Commissioner of Central Excise, New Delhi – 2004 (165) ELT 129.

4. Further, he has submitted that in case of other mills on preparation of 'printing paste', the Commissioner (Appeals) vide Order-in-Appeal No. GS/910-914/B-I/1993 observed that dyes received by the mills were formulated, standardized or prepared dyes and hence printing paste prepared out of the said dyes does not result into manufacture in terms of Board's Circular No. 2/93 dated 21.04.1993.

5. The learned Advocate further submitted that during the course of adjudication process, the appellant had produced copies of invoices to substantiate their claim that the dyes and chemicals prepared by the appellant were standardized or formulated dyes, therefore, the printing paste prepared out of such formulated dyes does not result into manufacture. Also, they have produced certificates from various suppliers to prove that the printing paste is not marketable commodity and the same has very short shelf life. Besides, they have also produced certificate from SASMIRA and BRTA to substantiate that the process undertaken by the appellant in the preparation of printing paste does not result into manufacture.

6. It is his contention that even though the first remand order was passed by the learned Commissioner (Appeals) in the year 1995 with direction to consult the Dy. Chief Chemist/Chief

Chemist to ascertain whether the printing paste was prepared from unformulated, unstandardized and unprepared dyes or otherwise, the adjudicating authority did not take any action to draw sample and send the printing paste to Dy. Chief Chemist for testing. The remand case was finally adjudicated in 2006 i.e. after 11 years. In the second *de novo* proceedings, the adjudicating authority in his order dated 31.3.2006 observed that no test report of the impugned product was submitted pursuant to the direction in the second Order-in-Appeal dated 18.5.2007 when the Revenue referred the matter to the Dy. Chief Chemist to verify and opine whether dyes are standardized/formulated. The Dy. Chief Chemist expressed his inability to provide an opinion in absence of samples of printing paste. The learned Advocate has submitted that since the printing paste is prepared out of standardized, formulated or prepared dyes having short shelf life and not marketable, accordingly not dutiable in view of the Board’s Circular dated 21.4.1993 and the ratio of the Hon'ble Bombay High Court in the *Phoenix Mills’ case (supra)*.

7. Without prejudice to his submissions that the printing paste is not excisable, he has further pleaded that after filing their reply to the show-cause notice by way of corrigendum, a new classification was proposed and duty was enhanced by the Department from Rs.49,47,687.62 to Rs.63,42,042.36, which is bad in law and cannot be sustained. In support, he has referred to the judgment in the case of *Mahindra & Mahindra Ltd. Vs. Commissioner of Central Excise, Mumbai-V – 2006 (196) ELT 62*

(Tri-Mum), Century Laminating Co. Ltd. Vs. Commissioner of Central Excise, Meerut-II – 2009 (236) ELT 182 (Tri-Del).

8. Per contra, the learned AR for the Revenue reiterates the findings of the learned Commissioner (Appeals). He has submitted that the appellant could not establish before the authorities below even though sufficient opportunities were provided them from time to time to show that the printing paste is prepared out of formulated, standardized or prepared dyes. He has submitted that therefore the authorities below have rightly confirmed the duty holding printing paste as excisable goods and imposed penalty for non-payment of duty under Rule 173Q of the erstwhile Central Excise Rules, 1944.

9. Heard both sides and perused the records.

10. Even though the issue involves in very narrow compass i.e. levy of duty on 'printing paste' prepared in the factory and used for printing textile goods, however, the matter has been remanded by the learned Commissioner (Appeals) twice to ascertain the facts whether 'printing paste' prepared by the appellant in their factory premises is from formulated standardized or unformulated unstandardized dyes to apply Circular No. 2/93 dated 21.4.1993. There has been dispute relating to levy of duty on preparation/ manufacture of printing paste by the Mills owners, and used in the factory premises captively during the relevant period. To resolve the confusion prevailing on the issue, clarification was issued by the Board

under section 37B of Central Excise Act, 1944 bearing No. 2/93. The said circular reads as follows: -

"Circular No. 2/93, dated 21-4-1993
[From F. No. 95/7/92-CX.3]

Government of India
Central Board of Excise & Customs
New Delhi

Subject ***: Central Excise - Classification of Printing paste - Forwarding of Order No. 2/93 (See. 37B), dated the 21st April, 1993 - Regarding. Order No. 2/93 (Section 37B).***

After the issue of Order No. 5/92 (Section 37B) dated 28-5-92 regarding classification of "printing paste", representations have been received contending *inter-alia* that all the products used by printing industry for purpose of printing textiles are being classified under Sub-heading No. 3204.29 of the Schedule to the Central Excise Tariff Act, 1985 (henceforth referred to as Tariff).

2. The matter was re-examined in consultation with the Chief Chemist.

3. Printing paste is obtained from both unformulated, unstandardised or unprepared forms of synthetic organic dyes and formulated, standardised or prepared forms. Printing paste contains synrthetic organic dyes, kerosene oil, urea, water, enulsifier, binder and catalyst etc. The process of manufacture involves intimate mixing of all these ingredients in the form of dispersion and the solvent is used to increase the solubility of dyestuff, or colouring matter. The goods are steamed or otherwise treated to cause the dyes to transfer to and penetrate the fabric, the residue of the paste is removed in the finishing.

4. 'Note 6 of Chapter 32 stipulates that in relation to synthetic organic dyes of Heading 32.04 conversion of unformulated, unstandardised or unprepared forms (e.g. wet cake) of such dyes by (a) reduction in particle size, (b) addition of dispersing agents or diluents, or (c) adoption of any other treatment into formulated, standardised or prepared forms ready for use in the process of dyeing shall amount to "manufacture". By virtue of this, only unformulated, unstandardised or unprepared forms of dyes when converted into formulated, standardised or prepared forms ready for use in the process of dyeing by addition of dispersing agents or dilluents, etc., would amount to 'manufacture'.

5. Keeping this in view, it is hereby clarified that the printing paste prepared from formulated, standardised or prepared dyes by simple mixing with other materials shall not amount to manufacture and as such, not be classifiable under Sub-heading No.3204.29 of the Tariff.

6. This order is issued in exercise of the powers conferred under section 37B of the Central Excises and Salt Act, 1944 (1 of 1944) for the purpose of ensuring uniformity in the classification of excisable goods. It is further ordered that a copy of this order be sent to all Collectors of Central Excise for being observed and followed and for being made available to all other persons employed in the execution of the Central Excises and Salt Act, 1944 and for issue of trade notices."

In para 5 of the said Circular, it has been clarified that the printing paste prepared from formulated, standardized or prepared dyes by simply mixing with other material shall not amount to manufacture and as such not classifiable under sub-heading 3204.29 of Central Excise Tariff Act, 1985. After issuance of this Circular, in the first order dated 20.10.1995, the learned Commissioner (Appeals) remanded the matter to the adjudicating authority to ascertain the process employed by the appellant and also to find out whether or not the printing paste was prepared from unprepared, unformulated or unstandardized form of dyes. It is directed that the purchase invoice and the dyes procured from the manufacturer of such dyes be examined and in case of necessity, Dy. Chief Chemist/Chief Chemist be consulted to ascertain whether the printing paste prepared or manufactured from unformulated, unstandardized or unprepared dyes or otherwise. Further, it was also directed to examine whether these products are marketable or otherwise. From the records, we find that the *de novo* proceeding was completed in the year 2006 i.e. after eleven years. None of the directions have been carried out in letter and spirit by the adjudicating authority. The adjudicating authority confirmed the demand again for lack of evidence placed by the appellant to substantiate their claim that the printing paste was prepared by them in their factory premises from formulated, standardized or prepared dies and in support, placed purchase invoices and other evidence in this regard. We find that the Hon'ble Bombay High Court in *Phoenix Mills Ltd.'s case* being confronted with similar issue, whether printing paste prepared from formulated, standardized or prepared dyes or otherwise, observed that the burden lies on the Revenue to establish the said fact. Observation of the Hon'ble Bombay High Court reads as follows: -

> ***"16.*** *Having considered the rival submissions at length, the controversy lies in a very narrow compass which can be adjudicated upon the text of the show cause notices itself. The show cause notice dated 2nd*

November, 1992 incorporated at Exh. 'E' issued by respondent No. 3 specifically, states, "for the purposes of printing of fabric the petitioners require "printing paste", and the assessee bring duty paid colour from market and mix it up with other material such as chemicals and kerosene. The mixing giving rise to the substance known as "printing paste" is classifiable under Chapter sub-heading 3204.29 of the Tariff Act".

The second show cause notice dated 4th February, 1993 also incorporates same averments. When the show cause notices were issued the Order No. 2/93, dated 21st April, 1993 issued by the Board wad not in the field. Therefore, the "printing paste" prepared from formulated, standardised and prepared dyes by simple mixing with other materials bringing into existence a product known as "printing paste" was treated as 'manufacture' by the respondents for all the time till the clarification issued by the Board could see the light of the day. The clarification issued by the Board that the printing paste prepared from formulated, standardised and prepared dyes by simple mixing with other materials shall not amount to "manufacture", as such, not classifiable under Chapter sub-heading 3204.29 of the Tariff Act has taken out the wind of the show cause notices issued by the Revenue to the petitioners. As a matter of fact, the burden to prove that the printing paste used by the petitioners was not manufactured from the formulated, standardised or prepared dyes by simple mixing with other material was on the Revenue, especially, when the show cause notices issued were pregnant with the admission on the part of the Revenue as indicated in the opening part of this para. The Revenue having chosen to issue show cause notices, burden of proof was on the Revenue. Mr. Rana is not right in contending that the burden of proof was on the petitioners. The burden always lies on the person who asserts that the particular goods are excisable. It lies at first on the party who would be unsuccessful if no evidence at all was given on either side. There is essential distinction between burden of proof and onus of proof. The burden of proof lies upon the person who has to prove a fact and it never shifts, but the onus of proof shifts. Onus means the duty of adducing evidence. Assuming that onus, has shifted on the petitioner, then, the evidence produced by the petitioners has substantially established the link between the material supplied and used by the petitioners.

17. *The concept of marketability to which the respondent No. 2 had given go-bye cannot be said to be legal in view of the law laid down by the Apex Court in the case of Bhor Industries Ltd. (supra) and reiterated in the case of Ambalal Sarabhai Enterprises (supra); wherein the Apex Court ruled that marketability is an essential ingredient in order to make the goods dutiable under the Schedule to the Tariff Act. Thus, taking overall view of the matter the impugned order cannot stand to the scrutiny of law and the same is liable to be quashed and set aside. The impugned order dated 31st March, 1994 is thus quashed and set aside.*

18. In the result, petition is allowed. Rule is made absolute in terms of this order with no order as to costs.

11. We also find that recently the Constitution Bench of the Hon'ble Supreme Court in case of *Commissioner of Customs, Mumbai Vs. Dilip Kumar & Co. – 2018 (361) ELT 577 (SC)*

observed that when the issue is levy of duty liability on the assessee, the burden to prove such levy rest on the Revenue and in case of any ambiguity in the taxing statute it goes in favour of the assessee. Their Lordships observed as under: -

> *"**43.** There is abundant jurisprudential justification for this. In the Governance of rule of law by a written Constitution, there is no implied power of taxation. The tax power must be specifically conferred and it should be strictly in accordance with the power so endowed by the Constitution itself. It is for this reason that the Courts insist upon strict compliance before a State demands and extracts money from its citizens towards various taxes. Any ambiguity in a taxation provision, therefore, is interpreted in favour of the subject/assessee. The statement of law that ambiguity in a taxation statute should be interpreted strictly and in the event of ambiguity the benefit should go to the subject/assessee may warrant visualizing different situations. For instance, if there is ambiguity in the subject of tax, that is to say, who are the persons or things liable to pay tax, and whether the revenue has established conditions before raising and justifying a demand. Similar is the case in roping all persons within the tax net, in which event the State is to prove the liability of the persons, as may arise within the strict language of the law. There cannot be any implied concept either in identifying the subject of the tax or person liable to pay tax. That is why it is often said that subject is not to be taxed, unless the words of the statute unambiguously impose a tax on him, that one has to look merely at the words clearly stated and that there is no room for any intendment nor presumption as to tax. It is only the letter of the law and not the spirit of the law to guide the interpreter to decide the liability to tax ignoring any amount of hardship and eschewing equity in taxation. Thus, we may emphatically reiterate that if in the event of ambiguity in a taxation liability statute, the benefit should go to the subject/assessee. But, in a situation where the tax exemption has to be interpreted, the benefit of doubt should go in favour of the revenue, the aforesaid conclusions are expounded only as a prelude to better understand jurisprudential basis for our conclusion. We may now consider the decisions which support our view."*

12. In the present case, the show-cause notice was issued to the appellant way back in 1990 alleging that the appellant had manufactured and captively consumed printing paste in their factory premises falling under Chapter sub-heading 3204.29 but failed to discharge duty on the same. Therefore, in view of the ratio of the Hon'ble Supreme Court and also the observation of the Hon'ble Bombay High Court in *Phoenix Mills Ltd.' case*, the burden lies on the Revenue to prove that printing paste manufactured in their factory premises and consumed captively was out of unformulated, unstandardized or unprepared form of dyes. On the contrary, from the records, we find that the

appellant had produced purchase invoice of dyes issued by M/s Jaysynth Dyes Stuff (I) Ltd., BPCL, India Chemicals indicating that the dyes purchased by them were standardized one. Also, SASMIRA's certificate produced by the appellants reveals that printing paste prepared by the appellant are of short shelf life and cannot be marketable. Thus, in view of the overwhelming evidence and in absence of any contrary evidence produced by the Revenue to show that the printing paste manufactured by the appellant in their factory premises was from non-standardized, non-formulated or non-prepared dyes, the order confirming the duty holding that the printing paste prepared by the appellant resulted into 'manufacture' within definition of Section 2(f) of Central Excise Act, 1944 and accordingly dutiable under Chapter sub-heading 3204.29 of Central Excise Tariff Act, 1985, cannot be sustained.

13. In the result, the impugned order is set aside and appeal is allowed with consequential relief, if any, as per law.

(Operative portion of the order pronounced in court)

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

(Sanjiv Srivastava)
Member (Technical)

Sinha