CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

EXCISE APPEAL NO: 552 OF 2009

[Arising out of Order-in-Original No: 21/MS-21/Th-I/2008 dated 31st December 2008 passed by the Commissioner of Central Excise, Thane – I.]

Topman Exports
931 New Tawre Compound, Narpoli, Bhiwandi … ***Appellant***

versus

Commissioner of Central Excise
Thane – I
4th Floor, Navprabhat Chambers, Ranade Road
Dadar (West), Mumbai – 400 028 ***…Respondent***

WITH

(i) Excise Appeal No: 553 of 2009 (Satish Agarwal); (ii) Excise Appeal No: 554 of 2009 (Ashok Agarwal); (iii) Excise Appeal No: 472 of 2010 (Satish Agarwal); (iv) Excise Appeal No: 473 of 2010 (Ashok Agarwal); and (v) Excise Appeal No: 474 of 2010 (Topman Exports)

[Arising out of Order-in-Original No: 21/MS-21/Th-I/2008 dated 31st December 2008 passed by the Commissioner of Central Excise, Thane – I and Order-in-Appeal No: 54/BR-50/Th-I/2009 dated 31st December 2008 passed by the Commissioner of Central Excise (Appeals), Thane – I.]

APPEARANCE:

Shri M H Patil, Advocate for the appellants

Shri Bidhan Chandra, Additional Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE DR SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO: A/87527-87532 / 2019

DATE OF HEARING: 18/01/2019
DATE OF DECISION: 18/01/2019

PER: C J MATHEW

Two disputes, identical in nature insofar as denial of CENVAT credit and of rebate, on activities carried out at Narpoli factory till August 2004 and thereafter at Saravalli factory by M/s Topman Exports, are to be decided by us in common proceedings along with two appeals appendant to each of these preferred by Shri Ashok Agarwal and Shri Satish Agarwal who are partners in the venture. The assessee undertook export contract of fabric for which yarn, grey fabric and processed fabric were being procured on payment of duty and CENVAT credit availed thereon. Claims for rebate of taxes paid on export goods were preferred and were being sanctioned.

2. In the Narpoli establishment, the conversion of yarn into grey fabric was undertaken on 12 looms that had been taken on lease from M/s Esskay Silks Pvt Ltd. The grey fabric so produced on leased looms were, along with grey fabric procured by them, sent to processors, in compliance with the procedure prescribed in rule 4(5)(a) of CENVAT Credit Rules, 2004 and, after processing, exported directly from those premises as permitted in rule 4(6) of CENVAT Credit Rules, 2004.

Processed fabrics that had been procured were being exported from the premises of their job-workers who were contracted for cutting into lengths, folding on rectangular cardboard pieces and packing in pre-printed plastic bags.

3. At the Saravalli establishment, conversion was undertaken on 23 looms owned by them and the grey fabric, both produced by them and procured by them, after being worked upon by processors, was returned to their premises for cutting and packing before export from there.

4. The proceedings, initiated by notice dated 18th March 2008 proposing denial of credit of ₹ 30,57,259 taken from 9th July 2004 to 31st March 2005 and further ₹ 20,10,039 pertaining to allegedly unaccounted stock, were concluded with the adjudicating authority confirming denial of the former, while dropping the proposal in the latter, and ordering recovery of rebate of like amount. The second proceedings, initiated by notice dated 26th August 2009, proposed denial of credit of ₹ 74,35,682 taken between August 2004 and May 2007 at Saravalli factory and recovery of rebate of ₹ 1,24,81,552 which was confirmed. It would appear that the impugned orders held that the assessees were not manufacturers as their activity was limited to cutting and packing. The entire credit, of duties paid on procurement of yarn, grey fabric, processed fabric and packing materials at Narpoli was denied while credit of duty paid on inputs, other than yarn, was

disallowed in Saravalli factory.

5. According to Learned Counsel for appellants, the assessee was, between 1st March 2003 and 8th July 2004, a 'deemed manufacturer' as provided for in the Rules. It was pointed out that procedure in rule 4(5)(a) of CENVAT Credit Rules, 2004 had been followed by the appellant-assessee without any objection from the jurisdictional central excise authorities. He submits that there is no finding that the inputs were not received or that exports had not been undertaken. That the existence, and use of looms, in both the factories were not disputed despite assertions having been made in the statements recorded by the central excise authorities is, according to him, confirmation that they were manufacturers. Relying on the decisions of the Hon'ble Supreme Court in *Collector of Central Excise v. Jay Engineering Works Ltd [1989 (39) ELT 169 (SC)]*, holding that any activity that was essential to marketability amounts to manufacture, and of the Tribunal in *Bala Handlooms Exports Co Ltd v. Commissioner of Central Excise, Chennai [2008 (223) ELT 100 (Tri-Chennai)]*, he contends that the impugned order is not in accord with settled law. He drew attention to *Explanation* in rule 12 of the erstwhile Central Excise Rules, 1944 which has expanded the scope of 'manufacture' for grant of rebate of duties paid on finished goods as well as materials used for manufacture. He also pointed out that paragraph no. 2.2 of circular no. 129/40/95-CX dated 29th May 1995 of Central Board of Excise & Customs clarifies

that goods do not have to be excisable, or even subject to levy, and that mere enumeration in the Schedule to Central Excise Tariff Act, 1985 would suffice for eligibility of rebate. He also draws attention to circular no. 489/55/99-CX dated 13th October 1999 of Central Board of Excise & Customs which also draws on the liberal construction of the earlier circular. It was also argued the rebate cannot be ordered to be recovered without the pre-requisite of adjudicating, that refusal to grant of refund was erroneous for which reliance is placed on the decision of the Hon'ble High Court of Karnataka in *Dynamitic Technologies Ltd v. Union of India [2005 (186) ELT 277 (Kar)]* and of the Hon'ble Supreme Court in *Collector of Central Excise, Bhubaneshwar v. Re-rolling Mills [1997 (94) ELT 8 (SC)]* following which it was directed in circular no. 423/56/98-CX dated 22nd September 1998 of Central Board of Excise & Customs that any erroneous refund cannot be recovered by an order that has bypassed the procedure laid down in section 11A of Central Excise Act, 1944 for issue of notice within the specified time limit.

6. Learned Authorized Representative contends that, in the light of clear finding that the activity did not amount to manufacture, there was no scope for availment of credit or for eligibility for refund. Relying upon the decision of the Tribunal in *Ajinkya Enterprises v. Commissioner of Central Excise, Pune – III [2013 (288) ELT 247 (Tri-Mumbai)]*, which held that reversal of credit availed on inputs cleared

as such is mandated by rule 3(5) of CENVAT Credit Rules, 2004, he reiterates that the inputs were not entitled to credit thereon.

7. On perusal of the show cause notices, it is seen that neither the details of sanction of the rebate nor ascertainment of the circumstances in which the rebate was sanctioned by the competent authority finds place therein. Hence, in the light of the decision in *re Re-rolling Mills* and consequent instructions of Central Board of Excise & Customs, the demand cannot sustain in the absence of intent to initiate independent proceedings.

8. As far as availment of CENVAT credit is concerned, the impugned orders have not taken into consideration the decision of the Hon'ble Supreme Court in *re Jay Engineering Works Ltd* which is categorical in holding that activities that are required to be undertaken to ensure marketability amounts to manufacture.

9. Accordingly, the impugned orders are set aside and appeals allowed.

(Pronounced in open court)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

(C J Mathew)
Member (Technical)

**/as*