13.

IN THE HIGH COURT OF DELHI AT NEW DELHI

W.P.(C) No. 1449 of 2007

Reserved on: 25th February 2010
Decision on: 12th May 2010

ROLEX PROCESSORS (P) LTD. ..... Petitioner
Through: Dr. Manish Singhvi with
Mr. Abhinav Ramkrishna, Advocates.

versus

TEXTILE COMMITTEE ..... Respondent
Through: Mr. Chirag M. Shroff with
Mr. Dattatray Vyas, Advocates.

WITH
W.P.(C) No. 3436 of 2008

PUJA SPINTEX P. LTD. ..... Petitioner
Through: Dr. Manish Singhvi with
Mr. Abhinav Ramkrishna, Advocates.

versus

TEXTILE COMMITTEE ..... Respondent
Through: Mr. Chirag M. Shroff with
Mr. Dattatray Vyas, Advocates.

AND
W.P.(C) No. 3620 of 2008

GANESH TEXFAB LTD. ..... Petitioner
Through: Dr. Manish Singhvi with
Mr. Abhinav Ramkrishna, Advocates.

versus

TEXTILE COMMITTEE ..... Respondent
Through: Mr. Chirag M. Shroff with
Mr. Dattatray Vyas, Advocates.

CORAM: JUSTICE S. MURALIDHAR

1. Whether Reporters of local papers may be allowed to see the judgment? ✗
2. To be referred to the Reporter or not? ✓
3. Whether the judgment should be reported in Digest? ✓

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JUDGMENT
12.05.2010

1. The three Petitioners are companies engaged in the processing of man-made fabric and ploy vinyl fabric falling under Chapter 55 of the Schedule to the Central Excise Tariff Act, 1985. By these petitions they challenge the notices of demand of cess under the Textile Committee Act 1963 (TCA) and the Textile Committee Cess Rules 1975 (TCCR) made by the Textiles Committee, Ministry of Textiles, Government of India. Each of the petitioners also challenges the orders passed by the Textile Committee Cess Appellate Tribunal ('Tribunal') dismissing each of their appeals and confirming the demand of cess.

2. The Petitioners state that they receive grey cloth for processing on job work basis from various traders considered to be 'deemed manufacturers' in terms of the Central Excises Act 1944 (CE Act). The grey cloth so received is subjected to the processes of bleaching, printing or dyeing and are then returned to the traders on payment of excise duty on the declared value of the grey fabrics after adding the processing charges. The Petitioners therefore contend that they do not 'manufacture', `cloth' or 'fabric' within the meaning of 'textiles' under Section 2(g) TCA.

3. It is further contended that in terms of the Proviso to Section 5-A TCA no cess can be levied on textiles manufactured from out of handloom or power-loom industry. It is claimed that the Petitioners are purchasing the grey cloth from units having less than 50 looms. Therefore, the charging Section 5-A is not attracted.

4. The decision of the Tribunal dated 30th April 2004 in ***Chandok Textiles Exporters Pvt. Ltd. v. Assessing Officer, Textile Committee*** is assailed on the ground that it is inconsistent with the law explained by the Supreme Court. It is submitted that even if it is assumed that the Petitioners are manufacturing textile, then the cess must be confined to the extent of the job work done and not be levied and collected on the entire value of the cloth. Otherwise the demand would amount to double taxation. It is submitted that the Tribunal in ***Chandok Textiles*** wrongly relied upon Rules 4 and 6 TCCR which cannot override the substantive provisions of the TCA. Further, it is submitted that the demand raised on Rolex Processors was barred by limitation in terms of Rule 10 TCCR.

5. On behalf of the Respondents, it is submitted that the Petitioners are under an obligation to pay cess in terms of Section 5-A (1) to 5-A (7) TCA. It is pointed out that as regards the exemption claimed in terms of proviso to Section 5-A of the TCA, the Petitioners are taking contradictory stands. On the one hand, it is stated that without knowing the status or the capacity of the weaving plant where the cloth is manufactured it is not possible for cess or duty to be levied. On the other hand, it is asserted that a unit where the grey cloth is manufactured has less than 50 looms which meant that the Petitioner was presumed to know the capacity of the manufacturer. It is pointed out that this Court had in ***Nath Bros. v. Union of India AIR 1997 Delhi 382*** opined that for exemption from payment of Textile Committee Cess the materials should come directly from the powerlooms (less than 50 looms) and handlooms and should not undergo any further processing. Although the word `manufacture' has not been defined under the TCA, it

was possible to incorporate the definition of that word in the CE Act as held in ***Nath Bros. v. Union of India***. In ***Ujagar Prints (II) v. Union of India (1989) 3 SCC 488***, the Constitution Bench of the Supreme Court affirmed its earlier three Judge Bench decision in ***Empire Industries Ltd. v. Union of India (1985) 3 SCC 314*** and held that processing activity by way of job work, i.e., bleaching, dyeing, printing, finishing etc. amounted to manufacturing. It is submitted that in ***CIT v. Benoy Roy AIR 1957 SC 768***, the Supreme Court permitted the adoption of a word from one statute into another but has restricted such adoption to the facts and circumstances of a given case. It is submitted that the Tribunal in ***Chandok Textiles*** case borrowed the terminology in the Industries (Development Regulation) Act, 1951 [hereafter IDR Act] and CE Act to interpret the word `manufacture' in the TCA. Reliance is also placed on the decision of the Supreme Court in ***Sirsilk Ltd. v. Textiles Committee AIR 1989 SC 317*** and ***Aditya Mills Ltd. v. Union of India AIR 1988 SC 2237*** where it was held that manufacture was complete as soon as the raw material underwent some change and a new substance or article was brought into existence. The new commodity must be commercially separate and distinct having its own character and use. It is submitted that the demand is not time barred and that Rule 10 TCCR has no application in the instant cases.

6. This Court has heard the submissions of Dr. Manish Singhvi, the learned counsel appearing for the Petitioners and Mr. Chirag M. Shroff, the learned counsel appearing for the Respondents.

7. The first question that arises is whether the petitioners can be said to be

manufacturers of textiles within the meaning of the TCA? The charging section of the TCA is Section 5-A which reads as under:

> "**5A. Imposition of cess on textiles and textile machinery manufactured in India.** (1) There shall be levied and collected as a cess for the purposes of this Act **a duty of excise** on all textiles and on all textile machinery **manufactured** in India at such rate, not exceeding one per cent, ad valorem as the Central Government may, by notification in the Official Gazette, fix :
>
> Provided that no such cess shall be levied on textiles manufactured from out of handloom or powerloom industry.
>
> (2) The **duty of excise** levied under sub-section (1) shall be in addition to any cess or duty leviable on textiles or textile machinery under any other law for the time being in force.
>
> (3) The duty of excise levied under sub-section (1) shall be collected by the Committee, in accordance with the rules made in this behalf, from every manufacturer of textiles or textile machinery (hereinafter in this section and in sections 5C and 5D referred to as the manufacturer).
>
> (4) The manufacturer shall pay to the Committee the amount of the **duty of excise levied under subsection (1)** within one month from the date on which he receives a notice of demand therefor from the Committee.
>
> (5) For the purpose of enabling the Committee to assess the amount of the duty of excise levied under sub-section (1),--
>
> (a) the Committee shall, by notification in the Gazette of India, fix the period in respect of which assessments shall be made; and
>
> (b) every manufacturer shall furnish to the Committee a return, not later than fifteen days after the expiry of the

period to which the return relates, specifying the total quantity of textiles or textile machinery manufactured by him during the said period and such other particulars as may be prescribed.

(6) If any manufacturer fails to furnish the return referred to in sub-section (5) within the time specified therein, or furnishes a return which the Committee has reason to believe is incorrect or defective, the Committee may assess the amount of **the duty of excise** in such manner as may be prescribed.

(7) Any manufacturer aggrieved by an assessment made under this section may appeal to the Tribunal, constituted under section 5B for cancellation or modification of the assessment."

8. The long title to the TCA states that it has been enacted "for the establishment of a Committee for ensuring the quality of textiles and textile machinery and for matters connected therewith". The word "textiles" has been defined in Section 2(g) TCA to mean:

"(g) "textiles" means any fabric or cloth or yarn or garment or any other article made wholly or in part of ---

(i) cotton; or

(ii) wool; or

(iii) silk; or

(iv) artificial silk or other fibre,

and includes fibre"

Are the goods emerging from the petitioners' units, 'textiles'?

9. According to Dr. Singhvi, since no new cloth, fabric or yarn comes into existence as a result of the bleaching of the grey cloth the Petitioners cannot be said to be manufacturing `textiles'. If the Petitioners did not manufacture

any textile then the TCA would not apply at all.

10. The above submission of the learned counsel for the Petitioners is unacceptable. The grey cloth which undergoes change continues to be cloth made wholly or in part of whichever material does mean whether it is cotton or silk or artificial silk or other fibre. The words "or any other article made wholly or in part of" occurring in Section 2(g) TCA would, in the considered view of this Court, include the dye and bleached fabric. It cannot be said that what emerges as the end product from the petitioners' units is not 'textiles'.

Do the processes of bleaching, printing and dyeing amount to manufacture for the purposes of the TCA?

11. The principal submission of the petitioners is that the activity carried on by each of them is only the processing of grey cloth in the form of bleaching, dyeing or printing and therefore does not amount to 'manufacture'. Section 5-A (1) TCA states that there shall be levied and collected as cess for the purposes of this Act "a duty of excise" on all textiles "manufactured" at such rate, not exceeding one per cent ad valorem as the Central Government may fix. It is plain, therefore, that the taxable event is the 'manufacture' of 'textiles'. What amounts to manufacture is not defined in the TCA. According to the Petitioners, without there being a specific provision which incorporates the provisions of the CE Act into the TCA, the definition of `manufacture' under the CE Act cannot straightway be borrowed for interpreting the corresponding word in the TCA. In other words, there is no incorporation of the CE Act into the TCA. There is also

no reference made to the CE Act in the TCA.

12. The Tribunal in its order dated 30th April 2004 in ***Chandok Textile Exporters*** considered the above question. It applied the decision in ***CIT v. Benoy Roy*** and held that to interpret a word in a statute it was permissible to adopt the definition of the same word in another statute. The Tribunal referred to the TCCR which talks of maintenance of registers. Rule 3 TCCR requires every manufacturer to maintain a register of production indicating therein the total quantity of textiles or textile machinery manufactured by him during a month, the quantity, if any used by him for the manufacturer of another commodity, the quantity removed on payment of duty under CE Act, the quantity removed for export without payment of such duty, the total value *ad-valorem* and the cess payable thereon. Consequently, the Tribunal concluded the reference to the CE Act in the TCCR, left no manner of doubt that the legislature intended to give the word "manufacture" in the TCA the same meaning as in the CE Act.

13. Before embarking on an analysis of the relevant provisions and the above submissions, this Court would first like to observe that the TCA is for all purposes a fiscal statute levying a cess and the provisions of which therefore require to be strictly interpreted. If the common parlance test is to be applied for the purposes of construing whether a particular activity constitutes manufacture or not, a reference will have to be made to one of the earliest decisions in ***Delhi Cloth Mills Ltd. v. Union of India (1963) Supp 1 SCR 586***. It was emphasized in the said case that not every process would amount to manufacture unless it is accompanied by totally new and

different article having distinctive name, character and use. In ***CCE v. Rajasthan State Chemical Works 1991 (4) SCC 473***, it was held in para 12 as under (SCC at p.478-79):

> "12. Manufacture implies a change but every change is not manufacture, yet every change of an article is the result of treatment, labour and manipulation. Naturally, manufacture is the end result of one or more processes through which the original commodities are made to pass. The nature and extent of processing may vary from one class to another. There may be several stages of processing, a different kind of processing at each stage. With each process suffered the original commodity experiences a change. Whenever a commodity undergoes a change as a result of some operation performed on it or in regard to it, such operation would amount to processing of the commodity. But it is only when the change or a series of changes take the commodity to the point where commercially it can no longer be regarded as the original commodity but instead is recognised as a new and distinct article that a manufacture can be said to take place."

14. In ***Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam v. Pio Food Packers (1980) Supp SCC 174***, in the context of the Kerala General Sales Tax Act, 1963, it was held in para 5 as under:

> "5. Section 5-A(1)(a) of the Kerala General Sales Tax Act envisages the consumption of a commodity in the manufacture of another commodity. The goods purchased should be consumed, the consumption should be in the process of manufacture, and the result must be the manufacture of other goods. There are several criteria for determining whether a commodity is consumed in the manufacture of another. The

generally prevalent test is whether the Article produced is regarded in the trade, by those who deal in it, as distinct in identity from the commodity involved in its manufacture. Commonly, manufacture is the end result of one or more processes through which the original commodity is made to pass. The nature and extent of processing may vary from one case to another, and indeed there may be several stages of processing and perhaps a different kind of processing at each stage. **With each process suffered, the original commodity experiences a change. But it is only when the change, or a series of changes, take the commodity to the point where commercially it can no longer be regarded as the original commodity but instead is recognised as a new and distinct Article that a manufacture can be said to take place**. Where there is no essential difference in identity between the original commodity and the processed Article it is not possible to say that one commodity has been consumed in the manufacture of another. Although it has undergone a degree of processing, it must be regarded as still retaining its original identity." (emphasis supplied)

15. Whether bleached or printed or dyed grey cloth can be construed as an entirely new commodity is the question. In the context of the CE Act, this question directly arose for consideration first in ***Empire Industries*** and later in ***Ujagar Prints (II) v. Union of India***. The challenge in the ***Empire Industries*** case was to the constitutional validity of the amendments made in 1980 to the CE Act and the Additional Duties of Excise (Goods of Special Importance) Act 1957 (ADE Act) whereby the processes of bleaching, dyeing and printing were included in the definition of the word 'manufacture'. Negativing the challenge a three-Judge Bench of the Supreme Court held that (SCC, p.332): "It appears in the light of the several

decisions and on the construction of the expression that the process of bleaching, dyeing and printing etymologically also means manufacturing processes." It was also observed that (SCC, p.338): "processes of the type which have been incorporated by the impugned Act were not so alien or foreign to the concept of "manufacture" that these could not come within that concept." Later the correctness of the decision in ***Empire Industries***, essentially on the question of valuation, was referred to a larger bench of five judges. Although the referring bench (***Union of India v. Narendra Processing Industries 1986 Supp SCC 652***) acknowledged that the three-Judge Bench in ***Empire Industries*** had categorically held that "the processes of bleaching, mercerising, dyeing, printing, water-proofing, etc. carried out by the processors on job work basis amount to manufacture **both under the Act as it stood prior to the amendment as also under the Act subsequent to the amendment** and the processed fabrics are liable to be assessed to excise duty in the hands of what may be called 'jobbers'", the referring bench nevertheless referred that question also to the larger bench. This led the larger bench in ***Ujagar Prints (II)*** to re-visit the question. It affirmed ***Empire Industries*** on this question.

16. In para 42 in ***Ujagar Prints (II)***, the Constitution Bench held as under (SCC at p. 511):

> "42. The prevalent and generally accepted test to ascertain that there is `manufacture' is whether the change or the series of changes brought about by the application of processes take the commodity to the point where, commercially, it can no longer be regarded as the original commodity but is, instead, recognised as a distinct and new article that has emerged as a

result of the processes. The principles are clear. But difficulties arise in their application in individual cases. There might be border-line case where either conclusion with equal justification be reached. Insistence on any sharp or intrinsic distinction between `processing' and `manufacture', we are afraid, results in an over simplification of both and tends to blur their interdependence in cases such as the present one. The correctness of the view in the *Empire Industries* case cannot be tested in the light of material--in the form of affidavit expressing the opinion of persons said to be engaged in or connected with the textile-trade as to the commercial identity of the commodities before and after the processing-placed before the court in a sub-sequent case. These opinions are, of course, relevant and would be amongst the various factors to be taken into account in deciding the question."

17. Thereafter in para 43 it was held (SCC at p. 511-512):

"43. On a consideration of the matter, we are persuaded to think that **the view taken in the *Empire Industries* case that `Grey fabric' after they undergo the various processes of bleaching, dyeing, sizing printing, finishing etc. emerges as a commercially different commodity** with its own price-structure, custom and other commercial incidents and **that there was in that sense a `manufacture' within the meaning of Section 2(f), even as unamended, is an eminently plausible view and is not shown to suffer from any fallacy**. Indeed, on this point the Referring bench did not disagree or have any reservations either. It is to be noticed that if the amending law is valid, this aspect becomes academic." (emphasis supplied)

18. What is important to note is that the Supreme Court in ***Ujagar Prints (II)*** reaffirmed that even *de hors* the amendment made in 1980 to Section 2 (f) of

the CE Act which defined 'manufacture in its well accepted legal sense – *nomen juris* – the said word included within its ambit the processes of bleaching, dyeing, printing etc.

19. Turning to Section 5-A of the TCA, the taxable event is 'manufacture' of textiles and the cess is levied as 'a duty of excise' on such manufacture. Even if the petitioners' submission is accepted and the meaning of the word 'manufacture' is not imported from the CE Act, then even in its ordinary legal sense it would in terms of the dictum in ***Empire Industries*** as re-affirmed in ***Ujagar Prints (II)*** include the processes of dyeing, printing and bleaching since they bring about a change, perhaps an irreversible change, to the grey cloth so processed and that amounts to manufacture. Therefore, there is no merit in the submission that for the purposes of Section 5-A TCA the processes of bleaching, dyeing and printing do not amount to manufacture.

Referential legislation

20. There is another way of looking at the issue. Section 5-A TCA does not refer to the CE Act when it talks of 'duties of excise.' Can it then be said that they carry the same meaning as those words carry for the purposes of the CE Act? The judgment in ***Ujagar Prints (II)*** provides an answer to this question as well. One question that arose in the said case was whether the definition of term `manufacture' in the CE Act as enlarged by the 1980 amendment applied equally to the ADE Act. Even while the definition of the word 'manufacture' in Section 2 (f) CE Act was amended to include the processes of dyeing, bleaching etc., the word 'manufacture' in Section 3 of

the ADE Act, i.e., the charging section, was left undefined. While Section 2 ADE Act adopted the definition of 'specified goods' as occurring in the CE Act it did not adopt the definition of 'manufacture' as occurring in the CE Act. The specific contention was that "even if the language of Section 3 (3) [ADE Act] is construed more liberally, it will be effective only to incorporate the definitions contained in the 1944 Act as on the date of commencement of the 1957 Act [ADE Act] but not its subsequent legislative expansions."

21. In answering the above question the Supreme Court in ***Ujagar Prints (II)*** discussed the law pertaining to legislation by incorporation and legislation by reference. It explained the concept thus (SCC, p.528):

> "Legislatures sometimes take a short cut and try to reduce the length of statutes by omitting elaborate provisions where such provisions have already been enacted earlier and can be adopted for the purpose on hand. While, on the one hand, the prolixity of modern statutes and the necessity to have more legislations than one on the same or allied topics render such a course useful and desirable, the attempt to legislate by reference is sometimes overdone and brevity is achieved at the expense of lucidity. However, this legislative device is quite well known and the principles applicable to it fairly well settled."

22. It was held that the ADE Act was intended to supplement the levy under the CE Act by an additional duty "of the same nature on certain goods". It was pointed out that by itself ADE Act was incomplete as to the basis of the charge and its provisions would become totally unworkable unless the concept of "manufacture" and "assessable value" as determined under the CE Act are carried into it. Thereafter the Supreme Court discussed the two

types of 'referential legislation': one where an earlier Act or some of its provisions are incorporated into the later Act and the second where the later Act made only a reference of a broad nature as to the law on a subject generally, or contained a general reference to the terms of an earlier statute which are to be made applicable. It was held that the ADE Act fell in the latter category.

23. Under Section 5-A TCA unless the words "duties of excise" are understood as carrying the same meaning as in the CE Act, the TCA which is supplemental to the CE Act, would be unworkable. The taxable event whether for the purposes of the CE Act or the TCA is the same i.e. manufacture of textiles. The impost is also as a percentage of the same value. Therefore even if the TCA is seen not to incorporate the CE Act it can certainly be construed as making a broad general reference to the CE Act when it uses the words 'duties of excise' in its charging section. This position is further strengthened by the fact that Rules 3, 4 and 8 TCCR make a reference to the CE Act. Therefore by applying the principle of legislation by reference, the words 'duties of excise' and 'manufacture' occurring in Section 5-A TCA should be construed as taking colour from the meaning of those words in the CE Act.

This Court's decision in *Nath Bros. v. Union of India*

24. In ***Nath Bros. v. Union of India*** a Division Bench of this Court was considering whether the export of textile garments would also come within the ambit of the TCA. In that case, it was held that the export textile units were also manufacturing units. However, there was a lengthy discussion on

whether the activities carried on in the export units amounted to manufacture. It was held (DLT at pp. 464-66):

> "Now turning to the third and the last ground that exporters cannot be brought within the purview of the Act, it would be necessary to again have a look at the charging Section 5A of the Act. From a hare reading of the said Section it is evident that the incidence of levy of cess is on the "manufacture" of textiles and textile machinery. Who "manufactures" the textiles or textile machinery is immaterial. therefore, the question which arises for consideration is whether the petitioner, who claims himself to be a mere exporter can he said to be "manufacturer" of textiles/garments which he is exporting? Assuming that he is not manufacturing any textiles himself. though the plea in the counter-affidavit that the petitioner is registered with the Textile Committee as a manufacturer-cum-exporter of readymade garments is not countered. The expression, "manufacture" or "manufacturer" are not defined in the Act. We may, therefore, look for then definition in some other statute. Under the Central Excise and Salt Act. 1944, the word "manufacture" has been defined as follows :
>
> > 2(f) "manufacture" includes any process :--
> >
> > (i) incidental or ancillary to the completion of a manufactured product :
> >
> > (ii) which specified in relation to any goods in the Section or Chapter Notes of the Schedule to the Central Excise Tariff Act, 1985 as amounting to manufacture, and the word "manufacture" shall be construed accordingly and shall includes not only a person who employs hired labour in the production or manufacture of excisable goods. but also any person who engages in their production or manufacture on his own account:

(ia) to (ix) .....

and the word "manufacture" shall be construed accordingly and shall include not any a person who employs hired labour in the production of manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account;"

"From the above definition it is clear that the expression manufacture includes, any process incidental or ancillary to the completion of the manufactured product and the word manufacturer includes not only a person who employs hired labour in the production or manufacture of goods hut also am one, who engages in their production or manufacture on his own account, if those goods are intended for sale. **It is thus clear that the word manufacturer does not merely include those persons who in common parlance are themselves engaged in the manufacturing of textiles but also includes those persons who engage themselves in getting the textiles, intended for export, produced or manufactured on their own account. In other words a person who brings into existence an article or a product even through the instrumentality of an agent or a servant has to be regarded as a manufacturer. An actual physical act of manufacturing cannot be said to be the essence of the definition of the word manufacturer. For instance, a person who supplies yarn to a handloom or power loom owner for weaving cloth according to his specifications/design/pattern on payment of labour charges is a "manufacturer"**. (emphasis supplied)

25. The above decision therefore categorically holds that the physical act of manufacturing alone cannot be said to be the essence of the definition of the word `manufacturer' and that a person who supplies the yarn to a handloom or powerloom owner for weaving cloth according to his

specifications/design/pattern on payment of labour charges is a manufacturer as well. The above decision is consistent with the law as explained by the Supreme Court in both ***Empire Industries*** and ***Ujagar Prints (II)*** although it does not expressly refer to those decisions.

26. An earnest attempt was made by Dr. Singhvi to persuade this Court to refer the correctness of the decision of this Court in ***Nath Bros.***, to a Division Bench of this Court. In the first place, this Court finds that there is nothing to doubt the correctness of the decision in ***Nath Bros.*** Secondly, and in any event, there is no question of a Single Judge of this Court referring the correctness of a decision of a Division Bench to a larger Bench. Such a decision of the Division Bench is binding on the Single Judge. At best the Single Judge could doubt the correctness of the decision of a coordinate Bench, i.e., of another learned Single Judge in which case a reference could be made to a larger Bench. However, where there are two decisions of Division Benches which are contradictory, a reference could be made to the Chief Justice to consider constituting a larger Bench.

27. The Supreme Court in ***Sirsilk Ltd. v. Textiles Committee*** was considering whether rayon and nylon fell within the definition of 'fibre' and 'yarn' as defined in the TCA. Although there was an extensive discussion on Section 2(g) of the TCA, the occasion to discuss the word `manufacture' as occurring in Section 5-A of the TCA did not arise on the facts of that case. Therefore, the said judgment in ***Sirsilk Ltd. v. Textiles Committee*** is not of much assistance in deciding the issues in the present case.

28. In view of the above discussion, it is held that that the processes of dyeing, bleaching and printing undertaken by the Petitioners amount to 'manufacture' for the purposes of Section 5-A TCA.

Are the demands time barred?

29. The next issue is whether under Rule 10 TCCR the Respondents can recover at any time cess that has been short levied or erroneously levied. Rule 10 TCCR reads as under:

> "10. **Recovery of cess short levied erroneously levied**. When the cess has been short levied through inadvertence or otherwise, or when it is erroneously refunded; the manufacturer chargeable with the cess so short levied or to whom refund has been erroneously made on a notice of demand from the Committee made within one year from the date on which the cess has been paid, shall pay the deficiency or, as the case may be refund the amount paid to him in excess within a month from the date of receipt of such notice."

30. Learned counsel for the Petitioner referred to the decision in ***N.B. Sanjana, Assistant Collector of Central Excise, Bombay v. Elphinstone Spinning & Weaving Mills Co. Ltd. 1978 E.L.T. (J 399)*** where it was explained that the word `levy' will have to be construed as meaning actual collection. According to the petitioners, the words "short levy" would include "non levy" as well. It is accordingly submitted, the demand for the years 2002-03 and 2003-04 had to be made within a period of one year thereafter else it would be time-barred. It is submitted that the demand notice dated 27th July 2006 issued to Rolex Processors (P) Ltd. was time barred.

31. On behalf of the Respondents, it is contended that in the present case Rule 10 has no application since for the first time a levy was made by issuance of the impugned demand notice referred to hereinbefore. This was not a case of short levy or erroneous levy. It is only in such cases that the limitation in Rule 10 would be attracted. On the other hand, there is no provision in the TCA or TCCR which restricts the right of the Textile Committee to initiate proceedings for recovery of cess.

32. It appears to this Court that the submission of the learned counsel for the Respondents is consistent with the wording of Rule 10. The limitation under Rule 10 will begin to run only if there was a levy in the first place. It is only with reference to a levy that there can be either short levy or an erroneous levy. If the thumb rule of limitation for recovery of money is to be applied then the demands were made within a period of three years from the date on which such liability arose. Consequently there is no merit in the contention that the demand raised on Rolex Processors is time barred.

Assessable value for purposes of Cess

33. It is finally contended that the cess had to be only to the extent of the value of the job work done by the Petitioners. Reference was made to an order passed by the Constitutional Bench of the Supreme Court in ***Ujagar Prints (III) v. Union of India (1989) 3 SCC 531***. The said order reads as under (SCC at p.531-32):

> "1. In respect of the civil miscellaneous petition for clarification of this Court's judgment dated 4th November, 1988, it is made clear that the assessable value of the processed fabric would be

the value of the grey-cloth in the hands of the processor plus the value of the job-work done plus manufacturing profit and manufacturing expenses whatever these may be; which will either be included in the price at the factory gate or deemed to be the price at the factory gate for the processed fabric. The factory gate here means the "deemed" factory gate as if the processed fabric was sold by the processor. In order to explain the position it is made clear by the following illustration: if the value of the grey-cloth in the hands of the processor is Rs.20 and the value of the job-work done is Rs.5 and the manufacturing profit and expenses for the processing be Rs.5, then in such a case the value would be Rs.30, being the value of the grey-cloth plus the value of the job-work done plus manufacturing profit and expenses. That would be the correct assessable value.

2. If the trader, who entrusts cotton or manmade fabric to the processor for processing on job-work basis, would give a declaration to the processor as to what would be the price at which he would be selling the processed goods in the market, that would be taken by the Excise authorities as the assessable value of the processed fabric and excise duty would be charged to the processor on that basis provided that the declaration as to the price at which he would be selling the processed goods in the market, would include only the price or deemed price at which the processed fabric would leave the processor's factory plus his profit. Rule 174 of the Central Excise Rules, 1944 enjoins that when goods owned by one person are manufactured by another the information is required relating to the price at which the said manufacturer is selling the said goods and the person so authorised agrees to discharge all the liabilities under the said Act and the rules made thereunder. The price at which he is selling the goods must be the value of the grey-cloth or fabric plus the value of the job work done plus the

manufacturing profit and the manufacturing expenses but not any other subsequent profit or expenses. It is necessary to include the processor's expenses, costs and charges plus profit, but it is not necessary to include the trader's profits who gets the fabrics processed, because those would be post-manufacturing profits."

34. Therefore, the computation of the assessable value would be a question of fact. It appears that at no stage of the proceedings before the Appellate Tribunal such a plea was raised. No such contention having been raised and no factual foundation having been laid for determining such question, it is not possible to entertain it at the stage of the present writ petitions. It is also not possible to determine whether in fact the Petitioners were supplied grey cloth manufactured in a power-loom or handloom industry. That too would be a question of fact. No material has been placed on record to determine this question. In the absence of the Petitioners submitting monthly returns, the Respondents had no option but to go by Rule 8 TCCR. Therefore, this Court finds no illegality having been committed by the Respondents on this score.

Conclusion

35. Consequently this court finds no ground having been made for interference with the orders passed by the Tribunal dismissing the appeals of each of the petitioners and affirming the demands raised on them for payment of cess in terms of the TCA.

36. For all of the above reasons, there is no merit in any of these writ

petitions. They are each dismissed with costs of Rs. 10,000/- which will be paid by each of the Petitioners to the Respondents within a period of four weeks.

S. MURALIDHAR, J.

MAY 12, 2010
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