

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.12.2017

C O R A M

THE HON'BLE MR.JUSTICE S.MANIKUMAR

AND

THE HON'BLE MR.JUSTICE R.PONGIAPPAN

Civil Miscellaneous Appeal Nos.3407 & 3408 of 2017

The Commissioner of Central Excise
Coimbatore.

...

Appellant
in both CMAs

Vs

M/s.Sunshine Exporters (P) Ltd.,
No.397/2, Chettipalayam Road,
Seerapalam, Madukarai,
Coimbatore - 641 105.

...

Respondent
in both CMAs

Civil Miscellaneous Appeals filed under Section 35 G (2) of the Central Excise Act, 1944, against the Common Final Order Nos.98, 99/2010, dated 19.01.2010, passed by the CESTAT, South Zonal Bench, Chennai.

For Appellant : Mr.A.P.Srinivas
in both CMAs Standing Counsel for Central Excise.

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C O M M O N J U D G M E N T

(Judgment of the Court was made by S.MANIKUMAR, J)

Instant Civil Miscellaneous Appeals are filed against the common order of the Customs, Excise & Service Tax Appellate Tribunal (in short "CESTAT"), Chennai, dated 19.01.2010, made in Final Order Nos.98,99/2010.

2. As instant appeals have been preferred on the same set of facts and against the common order, dated 19.01.2010, impugned before us, they are taken up together and disposed of by means of this common order.

3. Short facts leading to filing of the appeals are that M/s.Sunshine Exports Pvt. Ltd., are manufactures of processed cotton fabrics with the aid of power. On a visit, the department officers, found that the processing done by the assessee on the cotton fabrics involved sanforising or shrink

proofing and the officers found that the lab reports maintained by the appellants shows that the residual shrinkage was less than 1.5% of the fabrics, after processing. On the reasonable belief that M/s. Sunshine Exports are engaged in the manufacturing activity of shrink proof fabrics, falling under Chapter 5207.29 and that the same are cleared without payment of duty, the officers have registered a case. After completion of the investigation, six Show Cause notices were issued, covering the period from 02/1997 to 11/2000 alleging that the assessee were manufacturing shrink proof cotton fabrics, as the fabrics, after wash, shown a shrinkage of 1.5% or below, either in wrap or weft wise, as per the lab test. The details of show cause notice are as follows:

Sl.No.	SCN No.	Date	Period	Amount
1	V/52/15/166/2000 Cx Adj	28.11.2000	2/97 to 12/99	Rs.67,91,728/-
2	V/52/15/255/2000 Cx Adj	23.01.2001	Jan 2000	Rs.38,64,284/-
3	V/52/15/255/2000 Cx Adj	06.02.2001	2/2000 to 3/2000	Rs.74,42,478/-
4	V/52/15/255/2000 Cx Adj	16.04.2001	4/2000 to 7/2000	Rs.85,91,244/-
5	V/52/15/255/2000 Cx Adj	12.06.2001	8/2000 to 10/2000	Rs.82,44,854/-
6	V/52/15/255/2000 Cx Adj	28.11.2001	Nov 2000	Rs.22,54,760/-

4. Out of the six show cause notices, the first five show cause notices were adjudicated by the Commissioner of Central Excise, Coimbatore, vide Order-in-Original No.52/2001 dated 29.11.2001 and the sixth show cause notice dated 28.11.2001, was adjudicated by the Commissioner of Central Excise, Coimbatore, vide Order-in-Original No.11/2002, dated 28.02.2002

5. The Adjudicating Authority/Commissioner of Central Excise, Coimbatore, while adjudicating the first five show cause notices dated 28.11.2000, 23.01.2001, 06.02.2001, 16.04.2001 and 12.06.2001, after due process of law, framed the following points for consideration:

"(a) Whether processing of 100% cotton fabrics by M/s.Sunshine Exports (P) Ltd., amounts to shrink proofing, in their compressive shrinking machine wherein their laboratory test reports maintained by them in which the test results of processed 100% cotton fabrics of various parties were shown as 0% to 1.5% of residual shrinkage in wrap and weft wise ?

(b) As in the test results of the processed fabrics, the residual shrinkage was shown as 0% to 1.5% in wrap and weft wise, the process carried out on the fabrics should be considered as manufacture in accordance with the Board's instructions contained in F.No.15/10/64Cx1, dated 27.04.1964 ?

Considering the facts and circumstances, the Commissioner of Central Excise, Coimbatore, has passed an Order-in-Original No.52/2001, dated 29.11.2001, as follows:-

"118. In the absence of any evidences to prove otherwise, the noticee's contention seems to hold ground in the later 4 cases. The Department, to make the demand hold good, has relied upon the Board's circular in F.No.15/110/64 Cx-1, dated 27.04.1964. By virtue of the said circular whether a processed fabric is shrink proof or not is determined. When the test report is absent to prove that the fabric processed by M/s.Sunshine Export is 'shrink proof fabric', such fabric at least should have been marketed as 'shrink proof fabric'. To that extent also the Department has not been able to prove that the processed fabric is marked or marketed as 'shrink proof fabric'. There were four subsequent show cause notices issued after the first show cause notice dated 28.11.2000. All the later show cause notices relied only on the statements of customers of M/s SEL. In all the statements they requested M/s SEL to process the cotton fabrics according to their requirements, where the residual shrinkage should be within the limitations of 1.5% or below. But during cross examination held on 8.8.2001, all of them retracted from their statements. M/s.SEL had not maintained lab test registers/books to show that the processed cotton fabrics was having a residual shrinkage of 1.5% or below. Also there was no evidences put forth by the Department that they had taken samples for analysis of composition of fabrics and percentage of residual shrinkage of processed fabrics. The Department has also failed to prove that the fabric processed by M/s.SEL is marked or marketed as 'Shrink proof fabric'. The Department has not proved to any record / evidence that the fabrics processed in their compressive shrinking machine has controlled the shrinkage to the extent to be called as 'shrink proof fabric' in terms of board's F.No.15/110/64 Cx-1 dated 27.04.1964. in these circumstances it is to be construed that the process has not imparted any lasting character into the fabric, thereby exemption under the Notification 5/99, 6/2000 is eligible to them.

In the absence of such evidence, the benefit of doubt goes to M/s SEL in all the subsequent show cause notices. In the absence of any evidence to prove the Department's contention, I am forced to drop the duty demanded, in the four show cause notices issued subsequent to the issue of first show cause notice dated 28.11.2000.

118. As M/s SEL were engaged in the manufacture of 'Shrink Proof Fabrics' during the period 2/97 to 12/99 and failed to pay appropriate duty without registering themselves with the Department, with an intention to evade payment of duty to the Government, there is a clear element of suppression of facts. Therefore the duty of Rs.67,91,728/- demanded under the first proviso to Section 11A as per the SCN covering the period 2/97 to 12/97 is sustainable.

119. Also the interest, as applicable for the duty amount of Rs.67,91,728/- is demandable under Section 11AB of the Central Excise Act 1944 from M/s SEL.

120. M/s SEL is liable for penalty under Rule 173Q of the Central Excise Rules, 1944 read with Section 11A of the Central Excise Act for the violation stated above.

121. Accordingly, I pass the following order.

ORDER

(i) I confirm and demand an amount of Rs.67,91,728/- (Rs.sixty seven lakhs ninety one thousand seven hundred and twenty eight only) demanded in the show cause notice No.V/52/15/166/2000-Cx Adj. dated 28.11.2000 covering the period from 2/97 to 12/99.

(ii) I also demand interest as applicable to the amount of Rs.67,91,728/- (Rs.Sixty Seven lakhs ninety one thousand seven hundred and twenty eight only) under Section 11AB of the Central Excise Act 1944 from M/s SEL.

(iii) I impose a penalty of Rs.67,91,728/- (Rs.Sixty seven lakhs ninety one thousand seven hundred and twenty eight only) under Rule 173Q of the Central Excise Rules 1944 read with Section 11AC of the Central Excise Act 1944 for the violations briefed in the allegations to the SCN.

(iv) I drop further proceedings initiated in the following four show cause notices.

- a) C.No.V/52/15/255/2000 Cx. Adj. dated 23.01.2001 (Period Jan 2000) Rs.38,64,284/-
- b) C.No.V/52/15/255/2000 Cx Adj. dated 6.2.2001 (period Feb 2000 to March 2000) Rs.74,42,478/-
- c) C.No.V/52/15/255/2000 Cx. Adj. dated 16.04.2001 (Period Apr 2000 to July 2000) Rs.85,91,244/-.
- d) C.No.V/52/15/255/2000 Cx. Adj. dated 12.06.2001 (period August 2000 to October 2000) Rs.82,44,864/-."

6. For the sixth show cause notice dated 28.11.2001, the Adjudicating Authority/Commissioner of Central Excise, Coimbatore, after due process of law, framed the same questions, as framed for the other five show causes notices and passed an Order-in-Original No.11 of 2002, dated 28.02.2002, as follows:-

"36. In the absence of any evidences to prove otherwise, the noticee's contention seems to hold ground in the present case. The Department to make the demand hold good, has relied upon the Board's Circular in F.No.15/110/64 CX-1, dated 27.04.1964. By virtue of the said circular whether a processed fabric is shrink proof or not is determined. When the test report is absent to prove that the fabric processed by M/s.Sun Shine Export is 'shrink proof fabric', such fabric at least should have been marketed as 'shrink proof fabric'. To that extent also the Department has not been able to prove that the processed fabric is marked or marketed as 'shrink proof fabric'. The show cause notice relied only on the statements of customers of M/s.SEL. In all the statements, they requested M/s.SEL to process the cotton fabrics according to their requirements, where the residual shrinkage should be within the limitations of 1.5% or below. But in their affidavit filed on 25.01.2002, all of them retracted from their own statements. Also, there was no evidence put forth by the Department that they had taken samples for analysis of composition of fabrics and percentage of residual shrinkage of processed fabrics. The Department has also failed to prove that the fabric processed by M/s.SEL is marked or marketed as 'shrink proof fabric'. The Department has not proved by any record / evidence that the fabrics processed in their compressive shrinking machine has

controlled the shrinkage to the extent to be called as "shrink proof fabric" in terms of Board's F.No.15/110/64 CX-1 dated 27.04.1964. In these circumstances, it is to be construed that the process has not imparted any lasting character into the fabric, thereby exemption under the Notification 6/2000 is eligible to them. In the absence of such evidence, the benefit of doubt goes to M/s.SEL in the present show cause notice. In the absence of any evidence to prove the Department's contention I am forced to drop the duty demanded, in the present show cause notice dated 28.11.2001.

37. Accordingly, I pass the following order:

ORDER

I drop further proceedings initiated in the show cause notice C.No.V/52/15/265/2000 dated 28.11.2001."

7. Being aggrieved, the Commissioner of Central Excise, Coimbatore, preferred Appeal Nos.E/2 (against Order-in-Original No.52/2001 dated 29.11.2001) and 172/2003 (against Order-in-Original No.11/2002, dated 28.02.2002), before the Customs, Excise & Service Tax Appellate Tribunal (CESTAT), South Zonal Bench, Chennai. Vide order, dated 19.01.2010, CESTAT, Chennai, has passed the following common Final order:-

"Vide the Order-in-Original No.52/2001 dated 29.11.2001, the Commissioner confirmed a demand of Rs.67,91,728/- together with interest on shrink proof cotton fabrics manufactured and cleared during the period February 1997 to December 1999 and imposed penalty of equal amount, and dropped the proceedings for duty and penalty covering the subsequent period namely, January to October 2000. The Revenue has filed the appeal 2/03 against the dropping the demand of total duty of Rs.2,81,42,870/- raised in four show cause notices dated 23.12.2001, 6.2.2001, 16.4.2001 and 12.6.2001 covering the period ranging from January to October 2000.

2. Vide the Order-in-Original No.11/2002 dated 28.2.2002, the Commissioner has dropped the proceeding raised in show-cause notice dated 28.11.2001 for duty demand on shrink proof cotton fabrics for the month of November 2000 and this has given rise to Revenue's appeal No.E/172/2003.

3. We have heard both sides. We find that in the first case the demand of approximately Rs.67 lakhs had been confirmed on the basis of the test report of the samples of the goods in question but even this demand was set aside by the Tribunal in its order reported in 2004 (168) ELT 363. The evidence in respect of the demand which was dropped by the Commissioner consists only of statements of recipients who have resiled from their original statements. When the demand based on the test result is itself had been set aside on the ground that the reports do not show that the fabrics are shrink proof cotton fabrics, the question of setting aside the dropping of the demand of Rs.2 crores in Appeal No.E/2/2003 does not arise. We uphold the impugned order insofar as it relates to the dropping of the demand for the period from January to October 2000, and reject Appeal No.E/2/2003.

4. The same reasoning applies insofar as the second appeal is concerned and we, therefore, uphold the Order-in-Original No.11/2002 and reject Revenue's Appeal No.E/172/2003."

8. Being aggrieved, the Commissioner of Central Excise, Coimbatore preferred the instant Civil Miscellaneous Appeals, on the following substantial questions of law:-

"1. Whether the Tribunal was right in deciding the case in favour of the party even after coming to know the fact of the withdrawal of the Circular issued during 1964 in 1994 because of which there is no need on the part of the department to prove the Residual shrinkage of the fabric within certain limits ?

2. Whether the Tribunal was right in deciding the case relying on the decision of another Tribunal in the case of M/s Omkar Textiles, when the facts of the case relied on and the case on hand differ to a great extent and thus warranting the Tribunal to decide the case on hand only on merits ?

3. Whether the Tribunal was right in arriving at a conclusion that a stenter attachment is a must for producing shrink proof fabrics when in fact it is needed only for a chemical process of shrink proofing and not for a mechanical process in a zero-zero / sanfrozing machine as stated by SITRA in

their letter dated 5th April addressed to the department ?

4. Whether the Tribunal was right in holding that for the purposes of the Notification 8/96 as amended if any process carried out in a zero-zero machine can be considered only as Calendaring when in fact the explanation given speaks otherwise and further when the machine is capable of carrying out shrink proofing also?

5. Whether the Tribunal was right in holding that the test of marketability as shrink proof fabrics had to be established by the department as per the rescinded Circular of 1964 when the department had other solid evidences to prove the manufacture of shrink proof fabrics by the party in dispute and that too when the Tribunal was aware of the fact of rescinding the Circular in 1994 which has the effect of abrogating the requirements of testing, proving the marketing of the same as shrink proof fabrics?

9. Heard Mr.A.P.Srinivas learned Standing Counsel for the appellant and perused the materials available on record.

10. The assessee is a manufacturer of processed cotton fabrics with the aid of power. On inspection, officers of the Revenue, have found that the processing done by the assessee on the cotton fabrics involves sanforising or shrink proofing and therefore assessee's manufacturing activity of shrink proof fabrics would fall under Chapter 5207.29 and as the same were cleared without payment of duty, the officers registered a case.

11. After completion of investigation, six show cause notices, as tabulated supra, were issued covering the period from 02/1997 to 11/2000 alleging that the assessee was manufacturing shrink proof cotton fabrics and there appears to be a deliberate suppression of production and clearance of excisable and dutiable manufactured goods with an intent to evade payment of Central Excise duty without registering themselves with the department.

12. Out of the six show cause notices, the Commissioner of Central Excise, Coimbatore, took the first five show cause notices covering the period from 02/1997 to 10/2000, for consideration and after considering the written replies, arguments advanced during the hearing, written submissions and documents placed on record, as well as the case laws relied upon, passed an Order-in-Original No.52/2001, dated 29.11.2001,

confirmed the amount demanded, in the first show cause notice covering the period from 2/97 to 12/99, but dropped the proceedings initiated vide, other four show cause notices, covering the period from 01/2000 to 10/2000.

13. Thereafter, the Commissioner of Central Excise, Coimbatore, has taken up the sixth show cause notice covering the period 11/2000, for consideration and after due consideration of the written replies, arguments advanced during the hearing, written submissions and documents placed on record, as well as the case laws relied upon, passed an Order-in-Original No.11/2002, dated 28.02.2002, dropping the proceedings initiated vide the sixth show cause notice covering the period 11/2000.

14. From the above, it is clear that out of six show cause notices, proceedings in the five show cause notices were dropped (i.e., show cause notices 2 to 5, vide Order-in-Original No.52/2001, dated 29.11.2001 and sixth show cause notice vide Order-in-Original No.11/2002, dated 28.02.2002 respectively) and only the first show cause notice has been confirmed (vide Order-in-Original No.52/2001, dated 29.11.2001).

15. Assessee, aggrieved over the Order-in-Original No.52/2001, dated 29.11.2001, confirming the first show cause notice, covering the period from 2/1997 to 12/1999, has filed an appeal before the CESTAT, South Zonal Bench, Chennai in Appeal No.E/142/2002.

16. Revenue has also filed two separate appeals viz., (i) appeal against the Order-in-Original No.52/2001, dated 29.11.2001, dropping the proceedings in the show cause notices 2 to 5 before the CESTAT, South Zonal Bench, Chennai in Appeal No.E/2/2003 and (ii) appeal against the Order-in-Original No.11/2002, dated 28.02.2002, dropping the proceedings in the sixth show cause notice before the CESTAT, South Zonal Bench, Chennai in Appeal No.E/172/2003.

17. From the above, it is evident that three appeals have been filed before the CESTAT, South Zonal Bench, Chennai. At the risk of repetition and for the purpose of better understanding, we would like to reiterate that Appeal No.E/142/2002 has been filed by the assessee, against Order-in-Original No.52/2001, dated 29.11.2001 and two appeals were filed by the Revenue viz (i) Appeal No.E/2/2003, against the Order-in-Original No.52/2001, dated 29.11.2001 and (ii) appeal No.E/172/2003, against the Order-in-Original No.11/2002, dated 28.02.2002.

18. For the sake of convenience, let us first take the Order-in-Original No.52/2001, dated 29.11.2001, for consideration. Against the Order-in-Original No.52/2001, two

appeals have been filed one by the assessee in Appeal No.E/142/2002 (against confirming the first show cause notice) and another filed by the Revenue in Appeal No.E/2/2003 (against dropping the proceedings in the show cause notices 2 to 5) before CESTAT, South Zonal Bench, Chennai.

19. Though two appeals have been filed against the Order-in-Original No.52/2001 dated 29.11.2001, Appeal No.E/142/2002, filed by the assessee was taken up for adjudication by CESTAT, South Zonal Bench, Chennai and after hearing the submissions advanced on behalf of the assessee and the Revenue, vide Final Order No.307/2004, dated 18.03.2004, CESTAT, South Zonal Bench, Chennai, allowed the appeal filed by the assessee and set aside the Order-in-Original No.52/2001 dated 29.11.2001, in so far as the first show cause notice is concerned. The CESTAT, South Zonal Bench, Chennai, has upheld dropping of the proceedings insofar as, it relates to the show cause notices 2 to 5 is concerned. CESTAT, South Zonal Bench, Chennai held as follows:

"9. On a careful consideration of the submissions, and on perusal of entire records, we notice that the Ld. Commissioner has committed a serious error in proceeding to confirm the demands solely on the basis of instructions given by the Board in the year 1964. The circular clearly indicated that the item should be considered as shrink-proof cotton fabric and it should be marketed as such. The department has not produced any evidence of test of marketability in the present case. It has not been shown that the item was marketed as shrink-proof material. be that as it may, the circular of 1964 is not longer in existence in terms of subsequent withdrawal in the light of the Circular No.38/38/94-CX. 4 dated 27.5.94. The second ground on which the Ld. Commissioner has proceeded is that they had used mechanical and chemical processes by which they achieved the shrinkage parameters and the item can be considered as shrink-proof material. It is seen from page 123 of the paper book which a test result certified by the department, the test result has been submitted by the Joint Director of Customs Laboratory, Custom House, Chennai to the Asst. commissioner of C.Ex.Combatore which clearly indicates the analysis results. The report clearly shows that there is expansion and shrinkage in the warp and weft which is

more than 1.5% in the specific samples supplied. This evidence along with the evidence of SITRA shows that appellants had not installed the stenter machine which is a requirement for bringing into existence a shrink-proof cotton fabric in terms of judgment rendered in the case of Omkar Textile Mills (P) Ltd. (Supra). The Ld. Commissioner has attempted to distinguish this judgment of the Tribunal, which is confirmed by the apex court, solely on the ground that shrinkage can be achieved through mechanical and chemical processes. This finding is a perverse finding and the Ld. Commissioner has attempted to sideline the ruling of the Tribunal which is applicable on all fours to the present case. The notification clearly applies to a factory which has installed zero-zero machine without a stenter and processes are carried out on cotton fabric. In the present case, the appellant is a job worker and they had carried out processes as required in the notification with the zero-zero machine without a stenter which is a requirement for the purpose of bringing into existence shrink-proof cotton fabric. The appellants have not installed the stenter machine which is an admitted fact from the records of the case. Therefore, the Commissioner's finding that the Omkar Textile Mills case is distinguishable cannot be appreciated. Judicial discipline requires that the Tribunal's judgment which is confirmed by the apex Court ought to have been accepted. Further as contended by the appellants and in terms of the citations produced demands cannot be confirmed solely on the basis of statement of co-workers and private record books in the absence of concrete evidence of installation of stenter machine and evidence of marketability of the cotton fabrics as shrink-proof fabrics. Further more, another infirmity which is noted in the order is that Ld. Commissioner has accepted the test result of the purchaser which clearly indicated that the item is not shrink-proof material. On this basis, he has dropped a portion of the demands. It is not the case of the department that those material which were supplied to

those purchasers were alone not shrink-proof and what was supplied to others in which demands have been confirmed is shrink-proof material. The process of manufacture is same in the appellant's factory. Therefore, there is clear contradiction in the Commissioner's finding. The finding arrived at in paragraphs 117 & 118 should be applied to rest of the case also. At page 45 of the order, the Commissioner has clearly indicated that the department has not proved through any evidence with regard to four show cause notices to confirm the demands. He has noted about the test reports and showed that fabric processed by the appellant was not a shrink-proof cotton fabrics. He has also noted that the item was not marketed as shrink-proof material. He has dropped demands on subsequent four show cause notices issued after the first show cause notice dated 28.11.2000. He has noted that the later show cause notices rely only on the statement of customers. He has also noted that in all the statements, they requested the appellants to process the cotton fabric according to their requirement within the parameters laid down. However, during examination they had retracted their statements. He has noted that the department did not produce any evidence to show that the samples taken for analysis of composition of fabrics and percentage of residual shrinkage of processed fabrics. He also noted that department also failed to prove that the fabric processed by the appellants is marked or marketed as 'shrink proof fabric'. He has also noted that department has not proved by any record/evidence that the fabrics processed in their compressive shrinking machine has controlled the shrinkage to the extent to be called as 'shrink proof fabric' in terms of Board's F.No. 15/110/64-CX 1 dated 27.4.1964. Therefore, in these circumstances, he has held that, it has to be construed that the process has not imparted any lasting character into the fabric. Therefore the exemption under Notification No. 5/99, 6/2000 is eligible to them. He has held that in the absence of such evidence, the benefit of doubt goes to the appellants in all the

subsequent show cause notices and he has dropped the demand. However, he very strangely on a different reasoning has confirmed the demands made in respect of first show cause notice. This clearly indicates the perversity in the Ld. Commissioner's mind. When he has noted that the process carried out by the appellant is the same and there was no evidence to sustain four show cause notices, it is surprising to observe why he has adopted a different reasoning to confirm the demand against first show cause notice. This clearly shows his non-application of mind. The appellant's contention that there is clear violation of principles of natural justice and that demands are also time-barred is well taken and it requires to be upheld.

10. The contention of the appellant that no duty liability arises as all the goods processed by them were ultimately exported has also not been examined by the Commissioner. Even other wise, the demands are not sustainable on this count also.

11. It is also observed that revenue has also not challenged the dropping of the demands in respect of four show cause notices which clearly indicates that revenue has accepted that portion of the order. The benefit of said portion of the order should be given to the appellants in respect of first show cause notice also. The impugned order is not sustainable and same is set aside with consequential relief to the appellants. The appeal is allowed."

20. The above Final Order No.307/2004, dated 18.03.2004, (arising out of Order-in-Original No.52/2001 dated 29.11.2001), has not been challenged by the Revenue, before the next appellate Forum viz., the High Court, and thus, the same has attained finality. The said Final Order No.307/2004, dated 18.03.2004 is also reported in 2004 (168) ELT 363 Tri Chennai.

21. Subsequently, after the Appeal No.E/142/2002 (against the Order-in-Original No.52/2001 dated 29.11.2001) filed by the assessee, which had culminated into a Final Order No.307/2004, dated 18.03.2004, which the CESTAT, South Zonal Bench, Chennai, nearly after 5 years and 10 months, has totally misdirected itself and overstepping jurisdiction, has entertained the appeal filed by the Revenue in Appeal No.E/2/2003, against the Order-

in-Original No.52/2001, dated 29.11.2001, dropping the proceedings in the show cause notices 2 to 5.

22. CESTAT, South Zonal Bench, Chennai adjudicated Appeal No.E/2/2003, against Order-in-Original No.52/2001, dated 29.11.2001, along with Appeal No.E/172/2003, against Order-in-Original No.11/2002, dated 28.02.2002 (against dropping the proceedings in the sixth show cause) and passed Final Order Nos.98, 99 / 2010, dated 19.01.2010.

23. In the Final Order Nos.98, 99 / 2010, dated 19.01.2010, the Tribunal, which is supposed, not to have entertained the Appeal No.E/2/2003, against the Order-in-Original No.52/2001, dated 29.11.2001, which has attained finality (vide Final Order No.307/2004, dated 18.03.2004, reported in 2004 (168) ELT 363), went on to hold that in the first case (Appeal No.E/2/2003, against the Order-in-Original No.52/2001, dated 29.11.2001) and the demand of approximately Rs.67 lakhs (demand made in first show cause notice) has been confirmed on the basis of the test report of the samples of the goods in question, by the Commissioner, but the same was set aside by the Tribunal in the year 2004 itself vide its Final Order No.307/2004, dated 18.03.2004, reported in 2004 (168) ELT 363. It went on to further hold that the evidence in respect of the demand which was dropped by the Commissioner consists only of statements of recipients who have resiled from their original statements. When the demand based on the test result is itself had been set aside on the ground that the reports do not show that the fabrics are shrink proof cotton fabrics, the question of setting aside the dropping of the demand of Rs.2 crores in Appeal No.E/2/2003 does not arise and upheld the order (Order-in-Original No.52/2001, dated 29.11.2001) insofar as it relates to the dropping of the demand for the period from January to October 2000, and rejected the Appeal No.E/2/2003. As far as Revenue's Appeal No.E/172/2003 against Order-in-Original No.11/2002, dated 28.02.2002 (against dropping the proceedings in the sixth show cause) is concerned, the Tribunal held that the reasoning stated in Appeal No.E/2/2003 will apply to Appeal No.E/172/2003 also and upheld the Order-in-Original No.11/2002 and reject Revenue's Appeal No.E/172/2003.

24. Being aggrieved over the impugned order passed in Final Order Nos.98,99/2010 dated 19.01.2010, the Commissioner of Central Excise, Coimbatore, after a delay of 2793 days (i.e. 7 years and 7 months) has preferred instant Civil Miscellaneous Appeal Nos.3407 & 3408 of 2017, before this Court. This Court on perusing the materials on record and considering the huge amount involved in the matter, took up the matter for hearing.

25. Mr.A.P.Srinivas, learned standing counsel for the Revenue, at the outset submitted that the Department did not

accept the Final Order No.307/2004 (which has attained finality and not impugned before us) and filed ROM on the ground that the Department also had filed appeal with the same Tribunal seeking to set aside that portion of the Order-in-Original No.52/2001, dated 29.11.2001, where demands proposed in the show cause notices 2 to 5 had been dropped. Learned counsel further submitted that the ROM petition filed by the Department was rejected by the Tribunal vide Misc.Order No.312/05 dated 27.04.2005, holding that "CESTAT has no power to condone the delay". The said order of the Tribunal was not received in the Office of the Commissioner and therefore they could not appeal against the same.

26. Mr.A.P.Srinivas, learned counsel for the Revenue further submitted that the order viz., Final Order No.307/2004, dated 18.03.2004, reported in 2004 (168) ELT 363, on merits, is not acceptable to the Department but the Department has to accept the same purely on technical grounds.

27. With regard to appeal against Order-in-Original No.11/2002 dated 28.02.2002 (against dropping of sixth show cause notices) is concerned, learned counsel for the Revenue submitted that the Tribunal dropped the proceedings on the ground that department did not put forward any evidence to show that they had taken sample for analysis of fabrics and percentage of residual shrinkage and that the department failed to prove that the assessee marketed the product as "shrink proof fabrics", it is to be construed that the process has not imparted any lasting character into the fabrics thereby exemption under Notification No.6/2000 is eligible.

28. The learned counsel for the Revenue further submitted that the Department aggrieved over the Order-in-Original No.11/2002, dated 28.02.2002, filed appeal before the Tribunal and the Tribunal heavily relying on the Final Order No.307/2004, dated 18.03.2004, reported in 2004 (168) ELT 363, held that when the demand based on the test result itself had been set aside on the ground that the report do not show that the fabrics are shrink proof cotton fabrics, the question of setting aside the dropping of the demand does not arise.

29. Mr.A.P.Srinivas, learned counsel for the Revenue therefore submitted that the impugned Final Order dated 19.01.2010, was decided relying on an erroneous order passed by the Tribunal viz., Final Order No.307/2004, dated 18.03.2004, reported in 2004 (168) ELT 363 is not legally correct and that the Tribunal ought not to have relied on an erroneous order to decide the present issue.

30. Further, supporting the substantial questions of law, Mr.A.P.Srinivas, learned counsel for the Revenue, made elaborating submissions assailing only the Final Order No.307/2004, dated 18.03.2004, reported in 2004 (168) ELT 363, which has become final and is not impugned before us.

We have considered the above submissions and perused the materials available on record.

31. When the Appellate Authority (Commissioner of Central Excise) passed an order in Order-in-Original No.52/2001 dated 29.11.2001, against which, two appeals were filed before the Tribunal (CESTAT), one by the assessee in Appeal No.E/142/2002 (against confirming the first show cause notice) and another by the Revenue in Appeal No.E/2/2003 (against dropping the proceedings in the show cause notices 2 to 5).

32. Unfortunately, the Tribunal, instead of trying both the appeals jointly together and pass a common final order, first took up the appeal filed by the assessee in Appeal No.E/142/2002 and after elaborately hearing the learned counsel for the assessee as well as the Department Representative for the Revenue, passed an elaborate Final Order No.307/2004, dated 18.03.2004, in favour of the assessee and against the Revenue by setting aside the first show cause notice and upheld the dropping of proceedings under show cause notices 2 to 5.

33. It is very surprising to note that the Department Representative for the Revenue, though made elaborate submissions, did not bring it to the notice of the Tribunal that the Revenue has also indeed filed an appeal against the very same Order-in-Original No.52/2001, dated 29.11.2001 and the same has also been numbered as Appeal No.E/2/2003 and pending before the very same Tribunal for adjudication.

34. After nearly 6 years, the Tribunal took up the appeal filed by the Revenue in Appeal No.E/2/2003 against Order-in-Original No.52/2001 for adjudication along with another appeal and after hearing the Department Representative for the Revenue and the Tribunal passed Final Order Nos.98, 99/2010, dated 19.01.2010, upholding the order impugned therein, in so far as it relates to dropping of proceedings under show cause notices 2 to 5 covering the period from 01/2000 to 10/2000. Thus, against the order of the Appellate Authority in Order-in-Original No.52/2001, dated 29.11.2001, two separate Final Orders dated 18.03.2004 and 19.01.2010 have been passed by the Tribunal.

35. The Final Order No.307/2004, dated 18.03.2004 passed in Appeal No.E/142/2002 arising out of Order-in-Original No.52/2001, dated 29.11.2001, was allowed to attain finality by

the Revenue, as no appeal has been preferred by them against the same. It can be seen from the records that a certified copy of the said Final Order has been communicated to the appellant herein viz., the Commissioner of Central Excise, Coimbatore on 18.03.2004 itself by the Tribunal through RPAD. The said Final Order was also reported in law journals in the year 2004 itself viz. 2004 (168) ELT 363 Tri Chennai.

36. In spite of the above fact, Mr.A.P.Srinivas, learned standing counsel for the Revenue ventured to submit before us that the ROM petition filed by the Revenue against the Final Order No.307/2004, dated 18.03.2004, was rejected by the Tribunal vide Misc.Order No.312/05 dated 27.04.2005, holding that "CESTAT has no power to condone the delay" and the said order dated 27.04.2005, was not received in the Office of the Commissioner and therefore they could not appeal against the same.

37. As far as the above submission is concerned, though the Final Order No.307/2004, dated 18.03.2004 and the Misc.Order No.312/05 dated 27.04.2005, is not impugned before us, without going into the merits of the abovesaid submission, we would like to clarify the legal position with regard to rejection of application for rectification by a Tribunal on the ground of limitation. For this purpose we would like to refer to a Division Bench judgement of the Karnataka High Court in Commissioner of Central Excise Vs. GE Medical Systems in C.E.A.Nos.64, 65, 86 & 87 of 2009 dated 11.11.2009, wherein, the Karnataka High Court relying on a Full Bench decision of the Hon'ble Supreme Court, at paragraphs 10 to 14, held as follows:

"10. Insofar as the order of the Tribunal rejecting the application for rectification of the earlier order which again is subject matter of another appeal u/s 35G of the Act, the submission is that the Tribunal had erroneously assumed that the period of six months operates even for examining the rectification application, that it is within the inherent powers of the Tribunal to entertain an application for rectification of this nature the statutory limitation imposed u/s 35C(2) which stipulates an outer limit of six months from the date of the order, that the submission is well supported by the authority of the judgment of the Supreme Court and has brought to our notice in the case of Sunitadevi Singhania Hospital Trust v. Union of India 2009 (233) E.L.T. 295 and would submit that as laid down by the Supreme Court in this judgment, the period of

limitation should not be a deterrant factor of the quasi-judicial Tribunal like the CESTAT to render justice, that the application filed by the Revenue seeking for rectification of the order of the Tribunal should not have been rejected with reference to sub-section (2) of section 35C of the Act. Mr. Bhaskar, learned Senior Standing Counsel would submit that even when the Department had sought to bring it to the notice of the Tribunal, that there was a failure of duty on the part of the Tribunal is not recording a finding relating to the question of levy of duty under the Act in respect of spares of Mobile Image Intensifiers and X-ray machine and as such the order of the Tribunal was silent on this aspect to that extent it was required to be corrected and finding recorded, but the Tribunal had missed the point and had simply rejected the application only on the ground of limitation that by itself would constitute question of law worthy an examination u/s 35G of the Act.

11. Sri Shivadas, learned counsel appearing for the assessee pointed out that the judgment of the Supreme Court in the case of Sunitadevi, referred to supra, is not conclusive, that the Supreme Court had an occasion to review the legal position in the case of CCE v. Hongo India (P) Ltd. 2009 (236) E.L.T. 417 (S.C.) wherein the Supreme Court had an occasion to make a distinction about the possibilities for entertaining applications/appeals beyond the normal period of limitation only when it is a limitation supported under the Limitation Act for which even section 5 may also come into play but where the particular statutory enactment itself prescribes a precise period of limitation, it is not open to the Tribunal or court to go beyond that period as submitted and in the present case. Section 35C(2) having contained an outer limit of six months which reads as under :

“(2) The Appellate Tribunal may, at any time within six months from the date of the order, with a view to rectifying any mistake apparent from the

record, amend any order passed by it under sub-section (1) and shall make such amendments if the mistake is brought to its notice by the Commissioner of Central Excise or the other party to the appeal:"

That the judgment of Sunitadevi Singhania Hospital Trust's case (supra) cannot govern the present situation and therefore it cannot be said that the Tribunal is in error in rejecting the application for rectification as barred by limitation.

12. Though Mr. Bhaskar, learned Senior Standing Counsel valiantly tried to submit that the law itself has been amended subsequently and relating to a procedural aspect would take effect from an earlier date also, but here again Mr. Shivadas learned counsel for the Assessee would point out that the amendment that was carried out to the period of limitation and conferring a discretion on the ground to entertain an appeal beyond the period was only to the statutory provision of appeal u/s 35G of the Act. No corresponding amendment of like nature having been brought about to section 35C of the Act. the position does not change from the law as declared by Supreme Court in Hongo India (P.) Ltd.'s case (supra) and that has to be applied.

13. Insofar as Appeal No. 64/2009 is concerned relating to the correctness or otherwise of the order of the Tribunal rejecting the rectification application on the ground of limitation, even assuming, that it is a question of law, there is no error in the finding on the question of law also and therefore there is no way of keeping this appeal pending on the board of this Court for further examination, the order of the Tribunal is fully in consonance of the law declared by the Supreme Court in Hongo India (P) Ltd's case (supra) the appeal inevitably has to be dismissed and it is accordingly dismissed."

38. Thus, from the above, it is clear that where a particular enactment itself prescribes a precise period of limitation, it is not open to the Tribunal or Court to go beyond that period.

39. Mr.A.P.Srinivas, learned counsel appearing for the Revenue in the memorandum of grounds has raised as many as five Substantial questions of law in the instant appeals. However, instead of assailing the impugned Final Order Nos.98,99 of 2010, dated 19.01.2010, he ended up assailing only the Final Order No.307 of 2004, dated 18.03.2004, which has attained finality and not impugned before us.

40. Be that as it may, going through the material on record, we could see that the Appellate Authority in its Order-in-Original No.11/2002, dated 28.02.2002 after analysing the evidence, in clear terms gave its findings as follows:

(i) The Department to make the demand hold good, has relied upon the Board's Circular in F.No.15/110/64 CX-1, dated 27.04.1964. By virtue of the said circular whether a processed fabric is shrink proof or not is determined. When the test report is absent to prove that the fabric processed by M/s.Sun Shine Export is 'shrink proof fabric', such fabric at least should have been marketed as 'shrink proof fabric'. To that extent also the Department has not been able to prove that the processed fabric is marked or marketed as 'shrink proof fabric'.

(ii) The show cause notice relied only on the statements of customers of M/s.SEL. In all the statements, they requested M/s.SEL to process the cotton fabrics according to their requirements, where the residual shrinkage should be within the limitations of 1.5% or below. But in their affidavit filed on 25.01.2002, all of them retracted from their own statements. Also, there was no evidence put forth by the Department that they had taken samples for analysis of composition of fabrics and percentage of residual shrinkage of processed fabrics. The Department has also failed to prove that the fabric processed by M/s.SEL is marked or marketed as 'shrink proof fabric'.

(iii) The Department has not proved by any record / evidence that the fabrics processed in their compressive shrinking

machine has controlled the shrinkage to the extent to be called as "shrink proof fabric" in terms of Board's F.No.15/110/64 CX-1 dated 27.04.1964. In these circumstances, it is to be construed that the process has not imparted any lasting character into the fabric, thereby exemption under the Notification 6/2000 is eligible to them. In the absence of such evidence, the benefit of doubt goes to M/s.SEL in the present show cause notice.

Thus, the Appellate Authority after considering the materials on record and in the absence of any evidence to prove the Department's contention, dropped the duty demanded through the show cause notice. After due consideration to the arguments advanced during the hearing, written submissions and documents placed on record as well as the case laws relied upon, the Tribunal has concurred with the findings of the Appellate Authority and upheld the Order-in-Original. The Tribunal has also made referred to the Final Order No.307/2004, dated 18.03.2004 reported in 2004 (168) ELT 363 Tri Chennai, which has attained finality, in its Final Order dated 19.01.2010. Therefore, we are not inclined to accept the submissions of the learned counsel for the Revenue, for the reason that both the Appellate Authority and the Tribunal, have analyzed the evidence and arrived at a categorical finding of the fact. There is no perversity in the finding of the fact, warranting interference.

41. Decision of the Tribunal does not require any interference as no question of law is involved, much less substantial question of law, except that challenge to the concurrent finding of the fact.

42. Before we conclude, we would like to say that the maxim vigilantibus non dormientibus jura subveniunt (law assists those who are vigilant and not those who sleep over their rights) aptly applies to the case on hand.

43. For the above reasons, Civil Miscellaneous Appeals are dismissed. No costs.

Sd/-

Assistant Registrar(CCC)

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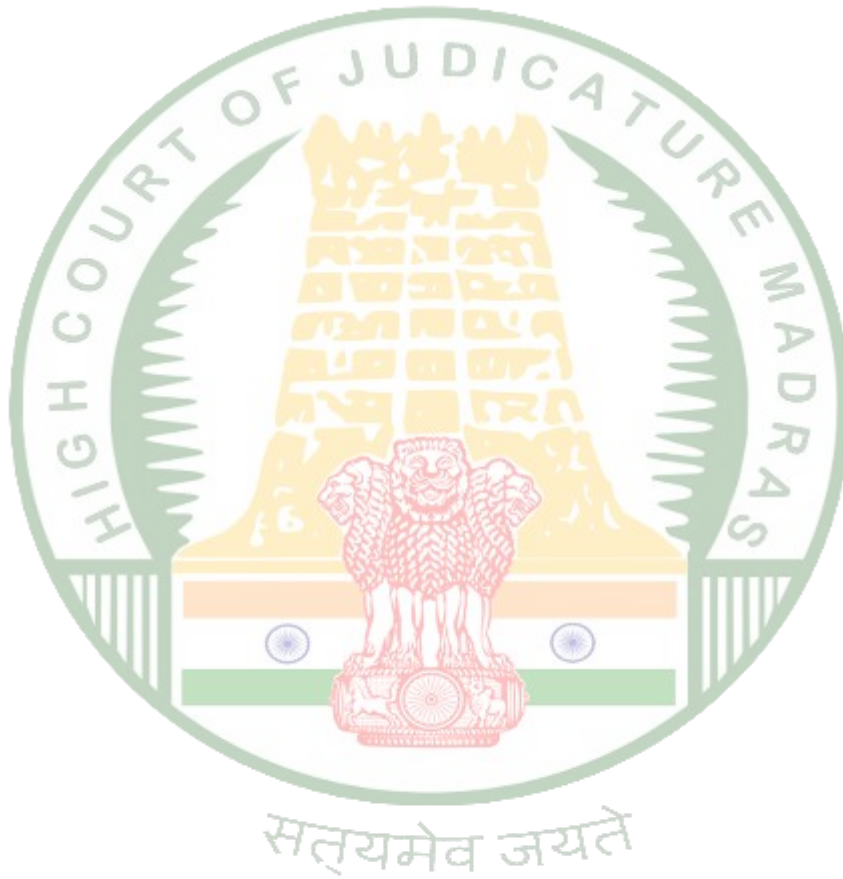
Sub Assistant Registrar

To

The Customs, Excise and Service Tax Appellate Tribunal, Chennai.

C.M.A.Nos.3407 & 3408 of 2017

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