



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.03.2018

C O R A M:

THE HON'BLE MR.JUSTICE S.MANIKUMAR
AND
THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Civil Miscellaneous Appeal No.700 of 2018

The Commissioner of Central Excise
O/o. The Commissioner of Central Excise
Customs & Service Tax
6/7 A.T.D.Street, Race Course Road
Coimbatore 641 018. ... Appellant

vs

M/s.Vyas Textiles
2147 Trichy Road
Singanallur, Coimbatore 641 005. ... Respondent

Civil Miscellaneous Appeal filed under Section 35 G of the
Central Excise Act, 1994, against the Final Order
No.40867/2014, dated 2/12/2014 passed by the CESTAT, Chennai.

For Petitioner : Mr.A.P.Srinivas
Standing Counsel for Central Excise

J U D G M E N T

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

Instant Civil Miscellaneous Appeal is filed against the
order of the CESTAT, Chennai, dated 2/12/2014, made in Final
Order No.40867/2014.

2. Short facts leading to the filing of the appeal are that
M/s.Vyas Textiles, 2148 Trichy Road, Singanallur, Coimbatore and
M/s.Vyas Textiles, B Unit, 2147, Trichy Road, Singanallur,
Coimbatore were engaged in the manufacture of cotton yarn
falling under Chapter heading 5205 of Central Excise Tariff Act.
Based on intelligence, officers from Headquarters (Preventive)
visited the unit and noticed two sets of invoices maintained by
the respondent. It was also noticed that the respondent has
also registered a second unit in the name of M/s.Vyas Textiles,
"B" Unit in the same premises for manufacture of cotton yarn.
After conducting a detailed investigation and recording of
statements from the customers, workers, transporters, a show



cause notice dated 14.07.1999 was issued to both the units, on two issues, (i) clubbing of value of clearances of both the units and denying SSI exemption and demanded duty of Rs.3 lakhs (BED) and Rs.45,000/- AED (T) and (ii). Demand of excise duty of Rs.19,22,816/- (BED) and Rs.2,88,422/- AED (T) on the cotton yarn in cheese form, cleared in the guise of Plain Reel Hank (PRH).

3. After due process of law, the adjudicating authority/Commissioner of Central Excise, Coimbatore, vide Order-in-Original No.14 of 2001, framed the following points for consideration,

"(a) Whether the clearances of M/s.Vyas Textiles A Vyas Testiles 'B' unit were to be clubbed for the purpose of the SSI exemption.

(b) Whether the proviso to Section 11 A can be invoked for demanding duty if the claimants were clubbed.

(c) Whether the assessee have cleared cheese yarn is the guise of hank yarn.

(d) If so the quantum of such clearances and duty due thereon.

Considering the facts and circumstances of the case, the Commissioner of Central Excise, Coimbatore, vide Order-in-Original No.14 of 2001, dated 14.06.2001, held as follows:-

21. It is seen from the reply to the SCN that the assessee have taken the 2nd point as their primary point of argument. So I will discuss the same hereunder.

22. It is seen from the Show Cause Notice that the main evidence to allege suppression, relied by the department was the application for registration by unit B wherein it is alleged that the name of the Proprietor was shown as G.M.Vyas as against Shri M.G.Vyas. It is seen from the application that the application for both the units were signed by the same person. On the basis of this alone, the notice seeks to invoke the extended period under Section 11A.

23. It is seen from the application for registration in respect of Unit B that it was made on 12.3.93. It is seen from the notice that the allegation was that during the year 94-95 & 95-96 they have availed the SSI exemption wrongly by declaring the units as two different units with different proprietors. But while alleging this one point has not been taken into consideration. The point was that the applications were made by the unit during the year 92-93, during which period cotton yarn was not a commodity under SSI Scheme. Only from the year 94-95, the commodity was brought under SSI Scheme.



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24. Proviso to Section 11 A of the Act provides that the demand can be made for the period beyond the normal period if there exists fraud, collusion, suppression of facts, etc with an intention to evade payment of duty.

25. So it is clear that the wordings of the section that in order to invoke the proviso there should be a situation wherein the assessee have deliberately indulged in the acts like fraud, collusion, etc with an intention to evade payment of duty. In the present case since the applications were made during 92-93 during which period cotton yarn was not under the SSI scheme, the assessee could not have had any intention to evade payment of duty at the time of filing of the application for Registration. It would also appear absurd if it is said that he has anticipated the Governments note to include the item in the SSI list during 94-95. So there was no intention at the time of filing the application for registration.

26. Now, coming to the question whether there was any suppression at all in the case. I see from the file that the assessee have declared the unit as Unit 'B', the address as the same as that of the 'A' unit, the address of the applicant also the same as that of the unit 'A'. The unit is also situated in the same premises which has been clearly indicated in the ground plan filed along with the application. Both the units fall under the same Range Office. In the circumstances the department cannot say now that facts were not known to them, the department had the knowledge of existence of two units. The RT12 return (copies of some of the months available on file) were filed with same Range Officer and assessed by him. In such a situation, I do not agree with the allegation that there has been suppression of facts. So, in this case the existence of suppression of facts with intention to evade payment of duty has not been proved. Accordingly, the demand of Rs.3,45,000/- falls on the issue of time bar. This view is supported by many Tribunal and High Court judgments, wherein it had been clearly held that 'to invoke extended period, department has to prove suppression etc along with assessee's intention to evade payment of duty. Both the aspects has to be proved. Then only the demand can be made for the extended period. Since the department has failed on this score I have to drop the demand made in the notice.

27. Coming to the other aspect i.e. Clearance of cone/cheese yarn in the guise of plain reel hanks, I find that the assessee has vehemently denied the allegation. They have questioned the authenticity of



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the allegation based on the statements of the buyers, as they were not supported by any evidences.

28. The department has based reliance on three sets of evidences namely a) Statements from customers b) Statement from transporters c) Statement of one of the workers and d) Statement of the job worker. I will go by each of the evidence and appreciate their relevance hereunder.

28.1 First I would like to take the statements of the workers who has stated that they have never seen the 'half bale' being packed in their factory. To this the assessee has placed a counter argument that other than the set of workers referred to in the statement other set of workers were engaged and half bales were in fact been packed. I do see some merit in their argument. It is not the case that the unit has never manufactured hanks. The notice itself has accepted that the unit had facility to manufacture hanks. Further, it has been accepted that the clearance of hanks in other forms that is other than 'HB' bales were made. In the circumstances the argument of the assessee that "half bales" were infact been packed assumes greater credibility, as the hanks manufactured in the factory could have been packed into half bales, while they were packed in to full bales / chippam. So the evidence of the worker loses its relevance once the manufacture of hanks has been established.

28.2. Next comes the statements of customers. In all the statements the customers have stated that they require cheese yarn for their use, that they have received the goods under invoices describing them as 'HB' hanks, that they did not have any stock, that they did not maintain any stock book. Against these statements the assessee have argued that the statements were repetitive in nature and that none of the statements were supported by any documentary evidence. I have gone through all the statements of the customers and the case records. None of the statement is supported by any material evidence. Adding to this infirmity is the other factor that in all the statements the customers have stated that they have not maintained any stock books for the raw materials. This seems to be absurd. Further, none of the customers have questioned as to why cone/cheese yarns were invoiced as hank yarn. This also lacks logic as no manufacture would accept an invoice with wrong description that too over a period spanning few years. All these things point out that even if the statement were obtained without any duress, they may not be legally sustainable as they were not supported by any documentary evidence. I rely on the judgments of the



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Tribunal in the case of the Chandrabadan Bara Bhai 1987 ELT (29) 668 and Dhampur Sugar Mills 1999 ECR (63) 569, wherein the Tribunals have held that genuineness of veracity of the statements cannot be relied where there was no corroborated with records. In their order the Tribunal in the case of M/s.Chandrabadan Bara Bhai have observed that "it is certainly unsafe and even hazardous to rely on uncorroborated statements" (para 10).

The Tribunal further observed that " A statement may be voluntary. But then the voluntary statement by itself would not be sufficient to bring home the guilty of a person other than the person who made the statement. In order to bring home the guilt of a third person the statement to be relied upon would not only be voluntary but should be truthful" (para 11)

In the judgment quoted 2 supra the Tribunal has observed that "Clandestine removals is required to be established with sufficient positive evidence. The same has not taken place in the instant case. Accordingly, the appeal is allowed" Para 4.

29. Unlike other cases where the clearance is done clandestinely, in this case the clearance were duly supported by invoices. In such circumstances, the case can be proved only by means of evidences either at the manufacturers end (or) at the customers end. But in this case no evidence is brought on record either from the manufacturers and or from the customers end. Further even in his early statements Shri Manish Vyas, Authorised representative of the unit, has offered an explanation for the 'HB' hanks as to how the hanks were packed. This explains clearly why the 'HB' hanks contain 50 Kgs / 60 Kgs which was the subject of the allegations by the department. This explanation when seen with the argument that when there was facility to manufacture hanks packing them in to half bales was also possible, shuts the doors for the department with regard to the second allegation.

30. The other statements relied are the ones recorded from the transporters. In their statement M/s.Sakthi Transporters have stated that the goods with description as 'HB' were cheese only. I notice that the above transporters are not doing business with the assessee from the year 1997 onwards. I do not know as to how, considering the volume of traffic handled by the transporters, they could remember the contents of the consignments that were handled by them 3 years earlier; that too to say that the invoices with 'HB' description were infact cheese yarn bags. The transporter normally go by the weight of the consignment and the declaration in the invoice and I do



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not see any reason to suspect the contents. If they had suspected the contents they would not have entertained the consignment for fear of penal action by various agencies. So their statement lacks merits and does not support departments case.

31. The statement by the other transporter namely M/s.Kamalakkanan Transports is the other statement relied by the notice, also lacks merit as the same was not supported by any material evidence.

32. Now coming to the other aspects i.e the presence of different set of invoices in the factory I see from the statement of Shri S.M.Shanmugham, Authorised signatory that the circumstances for the same were properly explained. I do not see any observation in this aspect. They have explained that the consignments in respect of the invoices found were cancelled by the units. The investigation has not proved that the consignments in respect of these invoices have actually been despatched. In the absence of such evidence the allegation that they have maintained different set of invoices with ulterior motive cannot sustain.

33. At this juncture the argument that the investigation has also included cases were "CFM/bales" needs a discussion. The basis of the allegation that HB bales were infact cheese yarn only was that the weight per bag was 50 kg / 60 kg which cannot be the case in respect of hanks which are normally bundles in 4.6/4.54/4.8/5.00/5.1 kgs, which has been accepted in the general trade practice. That being the case I do not see any reason why a bundle of 50 kg/60 kg yarn need not be a cheese bag. The presence of "CFM bales" with 50 kg / 60 kg yarn need not be a cheese bag. The presence of "CFM bales" with 50 kg / 60 kg weight itself defies this logic. So the allegation that 50 kgs / 60 kgs bundle need be cheese only in baseless and not sustainable. Accordingly, there is every possibility that HB bales containing 50 kg / 60 kg yarn can be hanks even though the weights are matching that of cone / cheese bags.

34. Assessee has also produced copies of returns filed by them to Textile Commissioner giving details of the hank yarn manufactured by them, in fulfilment of the hank yarn obligation. It is seen that the obligation proof furnished, which match with the hank yarn production shown in their records has also been accepted, as statutory compliance. Textile Committee is a Govt. Organisation which stipulate that each manufacturer of yarn should produce a fixed percentage of yarn in the form of hanks. This obligation has been fulfilled by the assessee, which adds strength to their



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argument that hank yarn production shown in their records were correct.

35. In the circumstances explained above I am of the firm view that the allegation made in the show cause notices have not been conclusively proved. Therefore, the demand made towards yarn alleged to be cleared as hanks cannot sustain in the eyes of the law.

36. Since the allegation as to removal of goods without payment of duty have not been established the penal actions proposed under the SCNs would not also sustain.

37. As regards the seizure of 3 bags from M/s.Palanivel Textiles, Bhavani it has been admitted in the notice itself that the bags did not have nay serial no. or markings of the manufacturer. Further, the transporter M/s. Kamalakkanan Transporters have also stated that details of the goods delivered to the above unit were not known and they have delivered the yarn bags as directed by the consignee. In the circumstances the fact that the seized cheese yarn, were received from M/s. Vyas Textiles has not been conclusively proved. In the absence of the same the question of confiscation of the goods under 173Q does not arise.

38. Accordingly, I pass the following order.

ORDER

I drop all the proceedings initiated against M/s.Vyas Textiles and M/s.Vyas Textiles Unit 'B' in the Show Cause Notices C.No.V/52/15/100/99 Cx.Adj. Dated 14.7.99.

4. Being aggrieved, the Commissioner of Central Excise, Coimbatore, preferred Appeal No.E/381/2002, before the Customs, Excise & Service Tax Appellate Tribunal, South Zonal Bench, Chennai. Vide order, dated 2/12/2014, CESTAT, Chennai, has passed the following order:-

"9. We have carefully examined the submissions made by both sides. Revenue filed appeal against the impugned order on the grounds that there is suppression of facts with a clear intention to evade payment of duty and demand raised is sustainable and the adjudicating authority has not appreciated the facts and has not applied the preponderance of probability. The department also alleged that the appellants have obtained two registrations owned by the same proprietor and functioning in the same premises which is a clear intention to evade duty. Therefore, the demand was sustainable for denial of SSI exemption for both the units for the year 1994-95. On the second issue, the Revenue contended against the impugned order that the clearances of cheese yarn were made in the guise of PRH



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and the adjudicating authority has not appreciated the evidences of statements recorded from the customers / workers / transporters which is a valid document.

10. On the first issue of denial of SSI exemption for the year 1994-95, we find from the copy of Registration Certificates that the main unit of M/s.Vyar Textiles was issued with Central Excise Registration No.35/92 dt. 30.6.92 by the Superintendent of Central Excise, Range III E, Coimbatore III Division. On a perusal of the said certificate, at Sl.No.1 states the certificate was issued in favour of "Sri G.M. Vyas s/o Mulul Vyas" having undertaken to comply with the conditions prescribed in Central Excise Rules, 1944 to carry out manufacturing activities as per Schedule attached to the certificate. At Sl.No.(1) of the Schedule to the said registration certificate, the name and address of person stated as "G.M.Vyas residing in the address of No.158, D.B.Road, R.S.Puram Post, Coimbatore - 641 002." The address of factory premises is mentioned as "Vyas Textile, 2148, Trichy Road, Singanallore Post, Coimbatore 641 005". On a perusal of second Central Excise Registration Certificate No.122 dt. 12.3.93, issued by the Range Superintendent, Range III E, Coimbatore III Division, we find that registration was issued in favour of M/s.Vyas Textiles -B". Unit and at Sl.No.(1) of the Schedule to the Registration Certificate bears the name and address of person to whom the registration certificate was granted indicated as "Sri M.G.Vyas S/o.G.M.Vyas, residing at No.158, DB Road, R.S.Puram, Coimbatore 641 002". The address of the premises is mentioned as "Vyas Textiles - B. Unit, 2147, Trichy Road, Singanallur, Coimbatore - 5". From the above, it is seen that the proprietor of M/s.Vyas Textiles is Mr.G.M.Vyas s/o. Mulul Vyas and the second unit M/s.Vyas Textiles "B" Unit, the registration certificate was issued to "Mr.M.J.Vyas s/o G.M.Vyas."

11. It is evident from the above that the old unit was registered with Central Excise in the name of G.M.Vyas and the second unit viz. Vyas Textiles "B" unit was registered in the name of M.G. Vyas s/o G.M.Vyas. Therefore, we find that the department's allegation that the proprietor has deliberately obtained two registrations by changing the initials of G.M.Vyas and M.G.Vyas appears to be factually incorrect. The Revenue contention that respondent has deliberately given a wrong initials as G.M.Vyas and M.G.Vyas while applying for Registration in the Department. We find that Unit I was registered in the name of G.M.Vyas whereas the second unit was held by M.G.Vyas who is s/o.G.M.Vyas. As evident from the



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registration certificates, the department has not adduced any evidence to prove that M.G.Vyas is not the son of G.M.Vyas and both relates to same individual. Therefore, we do not find any merit in the Revenue's allegation that proprietor has obtained registration by falsely declaring the name by changing the initials.

12. On the suppression of facts alleged by Revenue, we find that both the units have obtained central excise registration certificates much prior to the SSI exemption extended to cotton yarn vide Notification No.90/94 dt. 25.4.94. We find from the documents submitted by the respondent is their cross objections, the respondents had adduced two letters vide No.311/VT/94 and No.312/VT/97 both dt. 12.5.94 to the Collector of Central Excise, Coimbatore requesting for allowing SSI exemption upto to the limit of Rs.30 lakhs as per Notification No.1/93 dt. 1.3.93 as amended by Notification No.90/94 dt. 25.4.94. The relevant extract of the letter is reproduced below:-

"We Vyas Textiles "B" Unit having R.C.No.122/93 declare that las year (for the period ending up to 31/03/94) we have made a turnover of Rs.1,17,36,456.60 (One Crore Seventeen Lakhs Thirty Six Thousand Four Hundred and Fifty Six & Paise Sixty Only) on complete yarn swales. So we request the Collector of Central Excise to given exemption on duty upto the limit of 30 lakhs under notification 1/93 to 01/03/93 as amended by notification No.90/94 dt. 25/04/94.

This year we are likely to cross the limit of 30 lakhs. So we wish to retain our R.C. With ourselves."

It is evident from the above that the respondent sought permission to avail SSI exemption. On a perusal of copy of RT-12 returns dt. 4.8.94 filed by the respondent "B" unit for the month of July '94, we find that the jurisdictional Inspector of Central Excise, Range "III E" had duly scrutinized the returns and it is duly approved by the jurisdictional Range Superintendent on 23.9.94. The assessment memorandum clearly shows that the assessing officers remarks that "assessee has paid the duty on the above goods correctly. Therefore, it is evident that returns were duly scrutinized and assessed by the proper officer and accepted the description, quantity manufactured and quantity cleared and duty paid. Therefore, we find that once the return is scrutinized and accepted by the jurisdictional Superintendent, the adjudicating authority has rightly held that there is no suppression of facts. Therefore, we are of the consideration view that the respondents are eligible for SSI exemption of Rs.30 lakhs for both the units in the year 1994-95. We find that there is no merit in the revenue contention



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and the adjudicating authority has rightly dropped the proceedings both on merits and on limitation.

13. On the second issue of mis-declaration of cheese yarn in the guise of PRH, we find that the entire demand of Rs.22,11,238/- was made on the basis of statements recorded from seven customers, transporters and few workers of the respondent factory, we find that the adjudicating authority has discussed the issue in para 28.1 and 28.2 of the impugned order which is reproduced as under:-

"28.1 First I would like to take the statements of the workers who has stated that they have never seen the 'half bale' being packed in their factory. To this the assessee has placed a counter argument that other than the set of workers referred to in the statement other set of workers were engaged and half bales were in fact been packed. I do see some merit in their argument. It is not the case that the unit has never manufactured hanks. The notice itself has accepted that the unit had facility to manufacture hanks. Further, it has been accepted that the clearance of hanks in other forms that is other than 'HB' bales were made. In the circumstances the argument of the assessee that "half bales" were infact been packed assumes greater credibility, as the hanks manufactured in the factory could have been packed into half bales, while they were packed in to full bales / chippam. So the evidence of the worker loses its relevance once the manufacture of hanks has been established.

28.2. Next comes the statements of customers. In all the statements the customers have stated that they require cheese yarn for their use, that they have received the goods under invoices describing them as 'HB' hanks, that they did not have any stock, that they did not maintain any stock book. Against these statements the assessee have argued that the statements were repetitive in nature and that none of the statements were supported by any documentary evidence. I have gone through all the statements of the customers and the case records. None of the statement is supported by any material evidence. Adding to this infirmity is the other factor that in all the statements the customers have stated that they have not maintained any stock books for the raw materials. This seems to be absurd. Further, none of the customers have questioned as to why cone/cheese yarns were invoiced as hank yarn. This also lacks logic as no manufacture would accept an invoice with wrong description that too over a period spanning few years. All these things point out that even if the statement were obtained without any duress, they may not be



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legally sustainable as they were not supported by any documentary evidence.....”

14. As seen from the findings of the Commissioner in the impugned order, we find that the officers conducted investigation by visiting the premises of all the seven buyers and drawn mahazar and recorded statements from the customers. The investigating officer failed to establish that they have done any physical verification of stock at Customer premises nor the customers maintained any stock at Customer premises nor the customers maintained any stock record of goods. Without any of these evidence, the department is alleging the clearance of cheese yarn in the guise of PRH. There is not even a single evidence either statutory document or private documents or even payment details or any other corroboratory statements of customers that they have received cheese yarn under the invoices which is described as Hank Yarn. The burden of proof is entirely on the department to establish that there was clearance of cheese yarn either from the respondents premises particularly when the demand of excise duty on cheese yarn of Rs.22 lakhs covering the period of 5 years. The department has to establish misdeclaration and evasion of duty, there should be statutory proof beyond doubt other than the statements. Even if preponderance is to be applied in the case of clandestine removal, the department has to establish through corroborative documentary evidence and not merely relying on a general statement from the customers.

15. We also find that the statement of the transporters relied on by the department has no relevance who has stopped business with the respondents for more than 2 years during the relevant period. Even no documents were recovered from the transporter to support his averments made in the statements. As seen from the list of customers appended to the cross - objection, the respondents have cleared the goods to more than hundred customers over the period of five years. If that being the position, relying on only seven customers' statements that too without any corroborative evidence would not be a valid proof. The very fact that respondent have cleared the goods to M/s.National Handloom Development Corporation which is a Public Sector Undertaking supports the fact that they have not cleared cheese yarn in the guise of PRH. The respondents have submitted returns to the Textile Commissioner giving full details of Hank Yarn manufactured in fulfilment of obligation by the Government shows that there was no intention on the part of respondents to suppress the facts. This fact



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has not been countered by the department by any documentary evidence. The adjudicating authority has brought out these facts in the impugned order.

16. There are number of judicial pronouncements of Hon'ble Supreme Court and High Courts and Tribunals wherein it has been consistently held that in the case of clandestine manufacture and removal, Revenue has to prove it beyond doubt. In this regard, we rely on the Hon'ble High Court's judgment in the case of CCE Vs. Brims Products (supra). The relevant portion of the order is reproduced below:-

"8. Facts emanating from the records, disclose that the Central Excise authority itself has held with regard to two consignments out of four, that the investigation is incomplete and has been carried out only at the transporters end, thus, does not reveal actual purchase by the buyers. The authorities with regard to the aforesaid two consignments have also extended benefit of doubt to the respondent. We are of the opinion that there could not have any reason for arriving at different conclusion with regard to the remaining two consignments.

9. In our opinion, since the charge was for clandestine manufacture and surreptitious removal of finished final product, the same is required to be proved beyond doubt by the Revenue. One has to keep in mind that, though being the main ingredient, betel-nut is not the only raw material which is used in manufacture of Pan Masala. That apart, since the investigation has been carried only at the transporters end, no presumption could be drawn with regard to manufacture and removal of the final product. Presumptions and assumptions cannot take place of positive legal evidence, which are required for proving the charge. Even if, it is assumed that some raw materials were received at the factory of the respondent during the said period, the same cannot become conclusive proof of production and clandestine sale to different parties. Due to lack of positive evidence, benefit of doubt will always go in favour of the assessee.

10. Accordingly, we answer the reference against the Revenue and in favour of the assessee and it is held that the receipt of one of the raw materials, does not conclusively prove clandestine manufacture and surreptitious removal of finished final product. Further, since the charge is regarding clandestine manufacturer and removal of finished product for evading excise duty, the same cannot be held to be proved on the basis of principle of preponderance of



probabilities and the Revenue has to prove the same beyond doubt. The reference is answered accordingly.

11. As a result, this reference case is dismissed. However, there will be no order as to cost."

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The above case law is squarely applicable to the facts of the case. As already discussed above, the department has demanded excise duty on cheese yarn on the ground that respondents have clandestinely removed in the guise of PRJ purely on oral statements without any corroborative evidence either from the respondent's premises or from the buyer's documents etc. Therefore, we find that the adjudicating authority has discussed the issues at length and has given a detailed order while dropping the demand proposed in SCN. By respectfully following the decision of the Hon'ble High Court (supra), we do not find any infirmity in the impugned order passed by the adjudicating authority.

Accordingly, we uphold the order of the adjudicating authority and reject the appeal filed by Revenue."

5. Aggrieved by the abovesaid order, the Commissioner of Central Excise, Coimbatore, has preferred the instant Civil Miscellaneous Appeal, on the following substantial questions of law:-

(i) Whether the CESTAT is correct in holding that M/s.Vyas Textiles and M/s.Vyas Textiles, B Unit are separate units, individually eligible for the benefit of Notification No.1/1993, as amended when the authorised signatory of both the units and son of the proprietor has clearly admitted that both units are owned by the same person?

(ii) M/s.Vyas Textiles has not resorted to any clandestine removal when the conclusions drawn from admissions of the customers and the evidences brought on record speak otherwise?

6. Supporting the substantial questions of law, Revenue has raised the following grounds:-

A. The CESTAT has not taken cognizance of the statement recorded from Shri Manish Vyas, S/o. Shri.M.G.Vyas, authorised signatory of M/s. Vyas Textiles and M/s. Vyas 'B' Unit wherein he has already admitted

(1) that both the units are Proprietorship concerns owned by his father Shri.M.G.Vyas;

(2) the RC numbers 95/92 issued to Vyas Textiles and R.C.No.122/93 issued to Vyas Textiles 'B' Unit referred to the same person Shri M.G.Vyas who is the



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applicant for both the Rcs but there was typographical error while mentioning the name as 'G.M.Vyas'. This admission has not been retracted by Shri Manish Vyas, the authorised signatory till date. It is a well settled position in law that admitted facts need not be proved which is laid down in the decision of the Hon'ble Madras High Court in the case of Asst. Collector of Customs Vs. Govindasamy Raghupathy {1998 (98) ELT 50 (Mad.)}. Here it has to be stated that there is also no retraction of any of the statements. Statements recorded under Section 14 of the Central Excise Act, 1944, is a valid piece of evidence under Section 25 of the Evidence Act as held by the Hon'ble Apex Court in the case of Romesh Chandra Mehta v. State of West Bengal {1970 AIR 1940}. When such inculpatory statement is given by the authorised signatory of both the units, the order passed by the CESTAT ignoring this important statement is not correct and sustainable as per law. Therefore, CESTAT has erred by not clubbing the turnover of both the units for the purpose of the SSI exemption.

(B). The CESTAT has erred in not holding that declarations opting under SSI scheme separately for both the units is a gross mis-declaration when they knew pretty well that they are proprietorship firms and owned by one and the same individual. This has been done with an intention to evade payment excise duty by wrongly availing SSI exemption for both the units and suppressed the information from the department with an intention to avail the ineligible exemption. In this regard, it is pertinent to refer to the decision given by the Hon'ble Tribunal in the case of M/s. Aspee Agro Vs. CCE, Surat, {2001 (134) ELT 139 (T)}, wherein it was held that instead of declaring the correct nature of goods, if the classification list merely describe the goods as parts of agricultural implements, then it is justifiable to invoke extended period. In this case also, Mr.M.G.Vyas, knowing that both the units are owned by him had filed option to avail SSI benefits for each units as if the both are separate units headed by separate individual. In view of the settled legal position brought out by the above referred decision of the Tribunal, the culpability of Mr.G.M.Vyas is clearly established. As such, the decision given by the Tribunal is erroneous and liable to be set aside.

C. The CESTAT has erred in holding that assessment of RT-12 will not attract suppression of facts. The intention to evade payment of duty were not known to the department since the registration were obtained in separate names, hence, on the reasonable



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belief, the RT 12 s were assessed. This is the relevant especially when the department is forbidden to visit the SSI unit. Had the case been such that the respondent had applied for registration after the cotton yarn were brought into SSI exemption, the Department is justified in entertaining doubts regarding the ownership of both the firms. This fraudulent availment of SSI exemption was unearthed only when the preventive team had entered the premises, therefore, in the circumstances, the Department is correct in invoking proviso to Section 11 A. There is clear suppression in this case. Hence, the fact that the RT-12 returns filed were assessed does not alter this position of suppression of facts, as brought out above. The Tribunal decision is clearly erroneous as per law.

D. The CESTAT has erred in holding that the statements recorded from customers, workers and transporters cannot be the basis for establishing the mis-declaration that cone yarn/cheese yarn were removed under the guise of Hank yarn. On examination of the statements recorded from customers it is seen that there is a clear admission of the mis-declaration of the description of the goods by the respondent in the invoices which mentions plain reel hanks instead of the cone/cheese yarn dispatched by them. The CESTAT has not appreciated the fact that the usage of plain reel hanks is not required by the customers who manufacture Terry towels and that there is a deliberate mis-declaration regarding the Plain Reel Hanks supplied by the respondent to its customers stands clearly proved in this case. In the face of admissions and clear factual position brought out regarding the use cone yarn by the customers, the Tribunal conclusion that no cone yarns in the guise of Hank yarn have been supplied to the customers is factually not sustainable. Further, the CESTAT has not correctly reasoned or given any finding as to how these statements cannot be accepted especially when the customers themselves have admitted the receipt of cone yarns which are used by them for the manufacture of Terry Towels which is totally different from the description given in the invoice. Such a decision cannot stand the test of legal scrutiny and liable to be set aside.

E. The CESTAT has not recorded nor adduced any reason to establish that the customers from whom statements were recorded have given their statements due to their animosity or to malign the respondents or that the statements were obtained under duress. It should be pointed out here that the statements given



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by the customers have not been retracted and in the absence of the same, the statements recorded are to be accepted as true. Further, no cross examination of the persons, viz., the customers, transporters, workers who have given statements were not true and thus absolve them of their guilt. Under these circumstances, it is clear that illegality has been committed by the respondent, the burden would shift to the respondent and not on the department to prove the offence beyond reasonable doubt. Against this factual and legal position, the Hon'ble Tribunal had erred in holding that the burden of proof rested with the Department. In view of the above, the decision of the CESTAT in upholding the order of Commissioner and rejecting the appeal filed by the revenue in its entirety is erroneous as per Law.

F. The Tribunal had erred in holding that relying the statements of few customers without corroborative evidences is not a valid proof for clandestine removal. CESTAT has not taken cognizance of the clear admission made by the customers that they were supplied with corn yarn/cheese yarn only while the same was invoiced as Plain Reel Hanks. It is not necessary for revenue to identify each and every buyer of final product and establish case in each and every case which is well brought out in the decision of the Hon'ble Tribunal in the case of Commissioner of C.Ex., Indore Vs. Pithampur Alloys Casting Ltd., {2014 (314) ELT 113 (Tri.Del.)}.

G. The CESTAT has erred in relying on the return submitted by the respondent to the Textile Commissioner in fulfilment of their Hank Yarn obligation to buttress the finding that the respondent has not cleared Cheese Yarn in the guise of Plain Reel Hanks. Even giving due credence to the returns filed with the Textile Commissioner, it has to be borne in mind that the obligation is only to manufacture a fixed percentage of yarn in the form of hanks which is declared in the returns. However, this does not mean that the respondent produced only Plain Reel Hanks and cleared the same to various other buyers. From these returns, no inference can be drawn that whatever supplied by them to other customers is only Plain Reel Hanks. Such a conclusion drawn by the Tribunal is clearly erroneous and not sustainable as per law.

H. The adjudicating authority has not given due cognizance and a clear finding as to how the parallel set of invoices recovered by the investigating agencies from the premises of the respondent is not a valuable evidence for clandestine removal of cotton yarn or at best a corroborative evidence for the



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removal of cotton yarn in the guise of Plain Reel Hanks. This has also not been examined by the CESTAT as well. This recovery of parallel set of invoices from the premises points out to illegal dealing on the part of the respondents. In view of the factual position, the finding given by the Hon'ble Tribunal that there is no sufficient corroborative evidence to sustain the case against the respondent lacks merit and hence liable to be set aside.

I. The CESTAT has not given cognizance on the following case laws which is very relevant in this case.

a. In the case of Collector of Customs Vs. D.Bhoormull AIR SC 859 - {1983 (13) ELT 1546 (SC)}, the Hon'ble Supreme Court, while discussing the admissibility of preponderance of probability has held that even with regard to burden in criminal prosecution, Department is not required to prove its case with mathematical precision to a demonstrable degree and that all that it is required is the establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of the fact in issue. This decision was also referred and relied by the Hon'ble Supreme Court in the case of M/s. Maganlal Gulabchand Shah Vs. U.O.I {1992 (59) ELT 235 (Guj.)}.

b. Further, the Hon'ble Tribunal in the case of Ramachandra Rexins Pvt Ltd., vs. Commissioner of C.Ex., Bangalore - I {2013 (295) ELT 116 (Tri.Bang.)} has held as follows:-

In a case of clandestine activity involving suppression of production and clandestine removal, it is not expected that such evasion has to be established by the Department in a mathematical precision. After all, a person indulging in clandestine activity takes sufficient precaution to hide/destroy the evidence. The evidence available shall be those left in spite of the best care taken by the persons involved in such clandestine activity. In such a situation, the entire facts and circumstances of the case have to be looked into and a decision has to be arrived at on the yardstick of preponderance of probability and not on the yardstick of 'beyond reasonable doubt', as the decision is being rendered in quasi-judicial proceedings.

C. In the case of Roxi Enterprises Vs. CCE, New Delhi {1992 (40) ECR 361 (T)}, the Hon'ble Tribunal has observed

"It is no doubt that the burden to prove clandestine manufacture and removal of excisable goods is on the department. Clandestine manufacture and



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removal of goods is an activity, which is done surreptitiously; secrecy and stealth are its covering guards. In such cases, direct evidences would rarely be forthcoming which would prove a case beyond all doubts. It is for this reason that the apex Court has held that the standard of proof in such cases has to be necessarily on the basis of preponderance of probability."

d. Again in the case of M/s. Poonam Plastics {1989 (39) ELT 634 (T)}, it has been held that "the Department need not prove actual clearance with mathematical precision and that reliance on documents is proper when transactions is veiled in secrecy."

In the face of clear evidence brought out on record and also in view of the settled law, as declared by various legal forums, as regards the standard proof relating to clandestine removals, the order passed by Hon'ble Tribunal regarding the factual legal position is clearly erroneous and liable to be set aside."

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

7. The Commissioner of Central Excise, Coimbatore, adjudicating authority, has extensively considered the evidence and submissions and ultimately, found that there is no ground to proceed against the assessee and thus, dropped all further proceedings, initiated in the show cause notice C.No.V./52/15/100/99 Cx.Adj., dated 14.07.1999. CESTAT, Chennai, has considered the facts of the case and after analyzing the evidence/statements, held that the adjudicating authority has discussed the issues at length and has given a detailed order, while dropping the demand proposed in the show cause notice. That apart, the CESTAT, Chennai, has held that there is no infirmity in the Order-in-Original, passed by the adjudicating authority.

8. Though Mr.A.P.Srinivas, learned counsel for the appellant placed reliance on the above judgments and submitted that the Tribunal did not assign valid reasons nor indicated application of mind, but misdirected itself, by not applying the correct legal position and therefore, the findings are irrational and perverse, going through the entire material on record, we are of the view that both the Order-in-Original No.14 of 2001, dated 14.06.2001 and Final Order No.40867 of 2014 in Appeal No.E/381/2002, dated 02.12.2014, do not attract rationality or perversity.

9. Burden to prove clandestine manufacture and removal is on the revenue. The standard of proof has to be necessarily



based on preponderance of probabilities. Conjunctures and surmises cannot be the basis of proof, when clandestine removal is alleged and for establishing the said charge, there should be positive evidence. Therefore, when the department has alleged clandestine production and removal of goods, without due proper accounting in the records and without payment of duty, the burden of establishing the allegation lies heavily on the department. In the case on hand, the department has not discharged the burden.

10. Concurrent findings of fact rendered by both the quasi-judicial authorities, do not call for any interference. No substantial questions of law, are involved. In view of the above, the Civil Miscellaneous Appeal is dismissed. No costs.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

mvs/skm

To

1.Customs, Excise and Service Tax Appellate Tribunal,
south Zonal Bench at Chennai.

2.The Commissioner of Central Excise
O/o. The Commissioner of Central Excise
Customs & Service Tax
6/7 A.T.D.Street, Race Course Road
Coimbatore 641 018.

+1cc to Mr.A.P.Srinivas, Advocate sr.no.21805

Civil Miscellaneous Appeal No.700 of 2018

sai(co)
nr 29/10/2018