IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 10.06.2019

CORAM

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Writ Petition No.22989 of 2011
and
M.P.No.2 of 2011

M/s.Rohini Mills (P) Ltd.,
represented by its Director
Mr.K.G.Mageshkumar .. Petitioner

Versus

1. Customs, Excise and Service Tax Appellate Tribunal
Shastri Bhavan Annexe
No.26, Haddows Road
Chennai - 600 006.

2. The Commissioner of Central Excise,
Chennai II Commissionerate
692, MHU Complex,
Annasalai, Nandanam
Chennai. .. Respondents

Writ Petition has been filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorari calling for the records comprised in Final Order No.593/10 dated 28.05.2010 on the file of the first respondent and quash the same.

For Petitioners : Ms.Cynduja Crishnan
for Mr.S.Muthu Venkataraman

For Respondent-2 : Mr.S.Rajasekar
R1 Tribunal

ORDER
(Order of the Court was delivered by V.BHAVANI SUBBAROYAN, J.)

This Writ Petition is filed praying to quash the Final Order No.593/10 dated 28.05.2010 on the file of the first respondent/ Appellate Tribunal.

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2. The case of the petitioner is that the petitioner Mills is a manufacturer of Tarpaulin fabric and Tarpaulin made-ups falling under Central Excise Tariff Act ,1985 and are a registered unit. The second respondent / Commissioner of Central Excise, Chennai issued an Order-in-Original No.58/95 in C.No.V/59/15/3/93 CX Adj dated 24.07.1995 pursuant to the issuance of show cause notice classifying the coated cotton fabric (Tarpaulin Fabric) manufactured and cleared by the petitioner under CSH 5906.90 and demanded duty to the tune of Rs.73,60,116/- under proviso to Section 11A of Central Excise Act, 1944 by invoking extended period of limitation and also imposed penalty of Rs.5,00,000/- under erstwhile rule 173Q of Central Excise Rules 1944.

3. The petitioner preferred an appeal against the above order before the Tribunal and the Tribunal, vide its Final Order No.1402/1996 dated 03.08.1996 dismissed the appeal and upheld the order of the Commissioner of Central Excise. Aggrieved by the said order, the petitioner Mills have gone on appeal before the Hon'ble Supreme Court of India seeking reclassification of Tarpaulin Fabric and for dropping demand of duty and penalty thereof and the Apex Court vide its order dated 05.05.2004 in C.A.Nos.1778 & 1795-1796/07 interalia held that the application of extended period under Section 11A of the Act was not correct. Consequently, the part of the order where the Tribunal had rejected the prayer of the petitioner not to invoke Section 11A was set aside.

4. Consequent to the above order of the Hon'ble Supreme Court of India, the petitioners have discharged their duty liability of Rs.3,05,300/- in 12 instalments from 29.12.2004 to 05.06.2007 due to their bad financial position. Not content with the collection of the duty amount, the revenue demanded interest also in the impugned order. The petitioners have even agreed to pay interest for the period commencing from the date of the Hon'ble Supreme Court order i.e. 05.05.2004 as against the demand made by the revenue from the date of the earlier Order-in-Original ie., 24.07.1995 as the date of decision by the Hon'ble Supreme Court is to be rightly construed as the 'cut off' date. But vide impugned Order-in-Original No.24/2007 dated 27.12.2007, the Assistant Commissioner of Central Excise, Chennai-I Division, has demanded interest of Rs.6,08,142/- under Section 11AA of Central Excise Act, 1944.

5. Aggrieved by the above Order-in-Original No.24/2007 dated 27.12.2007, the petitioners preferred an Appeal before the Commissioner, Central Excise (Appeals), Chennai, who vide Order-in-Appeal No.02/2010 (M-II) dated 09.01.2010 upheld the Order-in-Original rejecting the Appeal. Against which, the petitioners preferred further appeal before the first

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respondent, who vide Final Order No.593/10 dated 28.05.2010 again upheld the Order-in-Original. Challenging the same, the petitioner filed an Appeal before this Court in CMA No.3461 of 2010. Since the High Court under Section 35G of the Central Excise Act, 1994 cannot try the issue of validity of the levy, the petitioner withdrew the CMA, with liberty to file a Writ Petition.

6. The learned counsel for the petitioner submits that for the subsequent period, the petitioner and others in the Trade challenged the very levy of duty on the premise that the activities engaged namely, cutting, stitching and eye-letting by the petitioner would not amount to manufacture. The learned counsel for the petitioner further submits that the Hon'ble Apex Court in the case of "Commissioner of Central Excise, Chennai -II, Commissionerate .vs. Tarpaulin International" reported in (2010) 9 SCC 103 has held that the process of cutting, stitching and fixing eyelets would not amount to manufacture, since tarpaulin continues to be a cotton fabric even after stitching and eyeleting. Therefore, it is the contention of the learned counsel for the petitioner that when the impugned process itself does not amount to manufacture, the question of levying duty does not arise at all and thus, the levy of duty for the period itself is unsustainable, without authority of law and in any view, when levy of duty is impermissible, levy of interest, which is consequential, cannot be sustained.

7. The Hon'ble Apex Court while answering the question whether the tarpaulin made-ups are covered under 6301.00 CETA Schedule and the said commodity in question resulted from manufacture as envisaged under Section 2(f) of the Central Excise Act, held that it is also now well settled that merely because certain article falls within the Schedule, it would not be dutiable under the Excise Law, if the said article is not "goods" known to the market. To the question "is there any manufacture when the tarpaulin sheets are stitched and eyelets are made" the Hon'ble Apex Court held that it does not change the basic character of the raw material and end products and the process does not bring into existence a new and distinct product with total transformation in the original commodity and the original material used i.e., the tarpaulin is still called tarpaulin made-ups even after undergoing the said process, hence, it cannot be said that the process is a manufacturing process and therefore, there can be no levy of Central Excise duty on the tarpaulin made-ups. The process of stitching and fixing eyelets would not amount to manufacturing process, since tarpaulin after stitching and eyeleting continues to be only cotton fabric. The purpose of fixing the eyelet is not to change the fabric. Therefore, even if there is value addition, the same is minimum. To attract duty, there should be a

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manufacture to result in different goods and goods sought to be subject to duty should be known in the market as such. Hence, the Hon'ble Apex Court upheld the finding of the Tribunal that conversion of tarpaulin into tarpaulin made-ups would not amount to manufacture.

8. At the relevant time, the expression "Manufacture" defined in Section 2(f) of the Act, as under:-

> `Manufacture' includes any process -
>
> i. incidental or ancillary to the completion of a manufactured product;
>
> and
>
> ii. which is specified in relation to any goods in the Schedule or Chapter Notes of the Schedule to the Central Excise Tariff Act, 1985 as amounting to manufacture.

9. The Hon'ble Apex Court held that the result of the definition contained in Section 2(f) of the Act is that the word 'manufacture' means production of an article for use from raw or prepared materials, by giving these materials new form, quality, properties or combinations whether by hand labour or machinery. The word includes any process incidental or ancillary to the process of manufactured product. The Hon'ble Supreme Court has, in several judgments, explained the meaning of the expression `Manufacture'. In all those judgments, the Hon'ble Supreme Court has observed that "manufacture implies a change, but every change is not a manufacture and yet every change in an article is the result of treatment, labour and manipulation. But something more is necessary....... There must be transformation, a new and different article must emerge, having a distinctive name character or use".

10. The definition was amended and Section 2(f)(ii) was introduced vide Central Excise Tariff Act with effect from 28.2.1986 by Act 5 of 1986. It is amended thus: "Manufacture includes any process which is specified in relation to any goods in the Section or Chapter Notes of the Central Excise Tariff Act, 1985 as amounting to manufacture".

11. The Hon'ble Apex Court further held that whenever a commodity undergoes a change, as a result of some operation performed on it or in regard to it, such operation would amount to processing of the commodity. However, the Hon'ble Apex court in the case of India Cine Agencies v. Commissioner of Income Tax, Madras, [2008 (233) ELT 8(SC)] observed, that, it is only when the change or a series of changes takes the commodity to the point where commercially it can no longer be regarded as the

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original commodity, but instead is recognized as a new and distinct article that a manufacture can be said to take place. The Hon'ble Apex court in the case of Union of India v. Delhi Cloth and General Mills, [1977 (1) ELT (J199)] referring to the meaning of expression manufacture explained in the case of Anheuser-Busch Brewing Association Vs. United States, stated :

> "Manufacture implies a change, but every change is not manufacture and yet every change of an article is the result of treatment, labour and manipulation. But something more is necessary and there must be transformation, a new and different article must emerge having a distinctive name, character or use."

12. It could be seen from the petitioner's case that tarpaulin made-ups are made out by cutting tarpaulins into required size to satisfy the requirement of the consumers. Since the classification of tarpaulins as coated cotton fabric does not amount to manufacture for the purpose of levy of Central Excise Duty as held by the Hon'ble Supreme Court in the case reported in 2010 9 SCC 103 (cited supra), the petitioner has rightly challenged the same by way of filing this Writ Petition.

13. It could be also seen that the petitioner on 17.03.2005 had informed the Department that they are ready to pay the said due in instalments and they have also paid the same and the department had not objected for the said payment. The respondent have accepted the payment without any interest when the show cause notice was issued on 31.03.1994 demanding the duty payable with penalty. Since in the show cause notice, only the amount has been demanded as duty and which is the amount the assessee can pay, they cannot demand more than that.

14. The petitioner's contention is that interest to be levied under Section 11AA will not apply to them, since the period for which the duty demanded and confirmed is prior to 1995 and at that time, Section 11AA was not introduced and it was introduced only in Finance Bill, 1995 and hence, there cannot be any interest levied for the period of duty demand when there was no provision in existence.

15. It could be also seen that the petitioner has also paid the duty demanded and as per the Hon'ble Apex Court's order that tarpaulin made-ups would not amount to manufacture, they do not come under Section 2(f) of the Central Excise Act, 1944 under the definition of “manufacture”.

16. It could be seen that the petitioner has also paid

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Rs.3,05,300/- in 12 instalments from 29.12.2004 to 05.06.2007 inspite of there being a bad financial position and as per Hon'ble Supreme Court's decision, on the "cut of date", there was no Section 11AA of the Central Excise Act, 1944, in existence and accordingly, the respondent cannot claim any interest for the said period and this Court is of the view that show cause notice classifying the coated cotton fabric (Tarpaulin Fabric) manufactured and cleared by the petitioner under CSH 5906.90 and the demanding of interest under Section 11AA of the Central Excise Act by invoking extended period and the Final order No.593 of 2010 dated 28.05.2010 on the file of the first respondent are quashed.

17. The respondent's contention is that the petitioner is liable to pay interest as per the rates applicable from time to time with effect from 12.09.1995 on the belated payment of duty, based on the provisions of Section 11AA r/w. Explanatory Note-1, as evaluated in Annexure-A enclosed to the show cause notice. Section 11AA of the Act reads as follows:-

> Section 11AA. Interest on delayed payment of duty. -
>
> (1) Notwithstanding anything contained in any judgment, decree, order or direction of the Appellate Tribunal or any court or in any other provision of this Act or the rules made thereunder, the person, who is liable to pay duty, shall, in addition to the duty, be liable to pay interest at the rate specified in sub-section (2), whether such payment is made voluntarily or after determination of the amount of duty under section 11A.
>
> (2) Interest, at such rate not below ten per cent and not exceeding thirty-six per cent per annum, as the Central Government may, by notification in the Official Gazette, fix, shall be paid in terms of section 11A after the due date by the person liable to pay duty and such interest shall be calculated from the date on which such duty becomes due up to the date of actual payment of the amount due.
>
> (3) Notwithstanding anything contained in sub-section (1), no interest shall be payable where,-
>
> (a) the duty becomes payable consequent to the issue of an order, instruction or direction by the Board under section 37B; and
>
> (b) such amount of duty is voluntarily paid in full, within forty-five days from the date of issue of such order, instruction or direction,

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without reserving any right to appeal against the said payment at any subsequent stage of such payment.

The respondent's contention that though the Hon'ble Supreme Court has finalised the order by restricting the duty for five years to six months and the petitioner company have also paid the duty due to the department in instalments, they cannot refrain themselves in paying the interest amount as it is contrary to Section 11AA of the Central Excise Act, is not acceptable.

18. The petitioner has challenged the said Order-in-Original No.24/2007 dated 27.12.2007 regarding the classification of coated cotton fabric (tarpaulin fabric) under Section 11AA by invoking extended period, which went upto the Hon'ble Apex Court, wherein it is concluded that the Appeal stands partly allowed to the extent indicated and restricted the demand to normal period of six months and maintained the order of CEGAT dated 03.08.1996. The petitioner paid duty, but they have not paid interest. Subsequently, when the matter was tested before the Hon'ble Apex Court in the petition filed by the petitioner and others, the Hon'ble Apex Court has held that the tarpaulin made-ups would not amount to manufacture, since the process does not bring into existence a new and distinct product with total transformation in original commodity and hence, the question of levying Excise Duty and consequently, claiming interest under Section 11AA of the Act is not acceptable.

19. Accordingly, this Appeal is allowed. No costs. Consequently, connected Miscellaneous Petitions, if any, is closed.

Sd/-

Assistant Registrar

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Sub Assistant Registrar

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To
1. Customs, Excise and Service Tax Appellate Tribunal
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2. The Commissioner of Central Excise,
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+1cc to Mr.S.Rajasekar, Advocate, S.R.No. 46656

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and
connected MPs.

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