

(2014) 06 BOM CK 0086

In the Bombay High Court

Case No : Central Excise Appeal No. 100 of 2013

Hitkari Hitech Fibres Pvt. Ltd.

APPELLANT

Vs

The Commissioner of Central Excise

RESPONDENT

Date of Decision : 24-06-2014

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35G

Citation : (2014) 202 ECR 411 : (2014) 306 ELT 362 : (2014) 28 GSTR 48

Hon'ble Judges : S.C. Dharmadhikari, J;B.P. Colabawalla, J

Bench : Division Bench

Advocate : V. Sridharan, Sr. Counsel, Mr. Prakash Shah, Mr. Anil Galani and Mr. Jas Sanghavi i/b M/s. PDS Legal, Advocate for the Appellant; Vijay Kantharia and Mr. Neelesh Kalantri, Advocate for the Respondent

Judgement

B.P. Colabawalla, J.—Admit. By consent of parties, made returnable forthwith and heard finally.

This Appeal by the Assessee raises the following substantial question of law:-

(A) Whether under the facts and circumstances of this case, the impugned order passed by the CESTAT, holding that the loosely assembled fibre web in roll form emerging at a stage before the exempted finished jute carpet, is marketable and therefore liable to duty, without considering the relevant records and material submitted by the Appellants, is correct and sustainable in law?

2. By this appeal filed u/s 35G of the Central Excise Act 1944, the Appellant seeks to challenge the order dated 6th November 2012 passed by the Customs, Excise and Service Tax Appellate Tribunal (hereinafter referred to as "the CESTAT") confirming the order passed by the Respondent dated 28th November, 2011 that there was an emergence of excisable goods at the intermediate stage of manufacture of jute carpets that attracted a NIL rate of Excise Duty.

3. The brief facts giving rise to the present controversy are that the Appellant is a manufacturer of products falling under Chapters 56 and 57 of the Central

Excise Tariff Act 1985. According to the Department, the Appellant had not paid Central Excise Duty on the intermediate product viz. "non-woven fabrics" (hereinafter referred to as the "impugned product") falling under CETH 5603, used captively for manufacture of "jute carpets" which are cleared at "Nil" rate of duty. It was the case of the Department that the Appellant was manufacturing the impugned product and using the same in the manufacture of "jute carpets" and "jute backed floor coverings", assessable to "nil" rate of duty. The impugned product used captively for the manufacture of jute carpets, according to the Department, attracted Excise Duty that was not being paid by the Appellant.

4. Accordingly, 15 show cause notices were issued to the Appellant for the period from October 1991 to October 2002 on the allegation that the impugned product that emerged as an intermediate product during the course of manufacture of jute carpets was a marketable product classifiable under Heading 56.03 and hence duty was leviable thereon inasmuch as the final product namely jute carpets, was exempt from payment of Excise Duty. The Appellant denied this allegation and maintained that the impugned product was neither marketed nor marketable. They claimed that the goods sold by them as "non-woven fabric" on payment of duty during the period of dispute were different from the impugned product referred to in the show cause notices. Accordingly, the Appellant contested the demand of Excise Duty on the ground that the marketability of the impugned product in question, had not been established by the Department through positive evidence.

5. The show-cause notices were adjudicated by the Respondent vide his order in original No. 69-83/Commr./Raigad/2003-04 dated 31st December 2003. Being aggrieved, the appellant filed an Appeal before the CESTAT who, by its order dated 28th April 2010 allowed the same and remanded the matter back to the Respondent for de novo consideration. On a de novo consideration, the Respondent by his order dated 28th November 2011 confirmed the demand in respect of 14 show-cause notices alongwith interest and also imposed a penalty on the Appellant. Being aggrieved by the said order, the Appellant preferred an Appeal to CESTAT who in turn inter alia held that the impugned product viz. "non-woven fabric" that emerged during the manufacture of jute carpets, was marketable and therefore liable to Excise Duty.

6. Mr. Sridharan, the learned senior counsel appearing on behalf of the Appellant, submitted that the CESTAT had totally misdirected itself when it held that the impugned product (non-woven fabric) which was basically a loosely assembled fibre web in roll form, was marketable without considering the relevant records and material submitted by the Appellant. He further submitted that the CESTAT did not consider the entire evidence on record that was produced by the Appellant and in fact only took into consideration certain evidence whilst disregarding certain other vital evidence. In this regard, he pointed out that despite the fact that the CESTAT had relied upon paragraphs 7, 8, 12 and 13 of

the affidavit of the Appellant's General Manager, Shri Patwardhan dated 7th November 2008, the CESTAT overlooked and/or did not take into consideration paragraphs 9, 10, 11 and 14 wherein it was clearly stated that the impugned product was incapable of being marketed. Mr. Sridharan further submitted that the burden of proof that the impugned product is marketable in the very same form, is on the Department and the Department had not led any evidence in this regard and hence failed to discharge its burden. In this regard, the learned counsel placed reliance on a judgment of the Supreme Court in the case of Union of India and another Vs. Delhi Cloth and General Mills Co. Ltd. and another, .

7. Mr. Sridharan further submitted that the finding of CESTAT in the impugned order that the impugned product was having strength and stability and therefore marketable, was contrary to the process of manufacture relied upon by the Commissioner himself. He submitted that the Appellant had consistently stated that the impugned product emerging during the manufacture of jute carpets was not having any strength or stability to be treated as marketable. The Department, not having produced any contrary evidence whatsoever in this regard, the impugned order was incorrect and unsustainable in law. Mr. Sridharan further submitted that the CESTAT had failed to take into consideration its earlier orders passed in similar matters as that of the Appellant wherein the CESTAT had inter alia held that the intermediate product emerging in the course of manufacture of jute carpets is not marketable and relied upon the said orders of the CESTAT reported in 1999 (85) ECR 797; 2003 (162) ELT 1114; 2005 (119) ECR 436 and 2006(199) ELT 295. He therefore submitted that the impugned order is liable to be quashed and set aside on this ground also.

8. On the other hand, Mr. Vijay Kantharia, learned counsel appearing on behalf of the Respondent, supported the impugned order. He firstly submitted that this Appeal raises no substantial question of law and ought to be dismissed on this ground alone. He further submitted that the impugned product emerging in the manufacture of jute carpets is similar to the "non-woven fabrics" that are being cleared by the appellant on payment of Excise Duty and hence the impugned product is also dutiable.

9. With the help of the learned counsel, we have perused the memo of appeal as well as the annexures thereto. The main issue involved before the CESTAT was whether the impugned product emerging from the manufacture of jute carpets viz. " non-woven fabrics" was marketable and therefore excisable. It was the categorical contention of the Appellant that the impugned product does not have any dimensional stability and hence not marketable. As rightly submitted by Mr. Sridharan, the CESTAT has not taken into consideration the paragraphs 9, 10 and 14 of the affidavit of Shri Patwardhan, General Manager of the Appellant dated 7th November 2008. The said affidavit inter alia states that for the purposes of the present dispute, there are four final products manufactured and cleared from the factory. They are Geo Textiles, blankets, automobile carpets and jute carpets. Broadly speaking, the affidavit states that the process of manufacture of the

aforesaid products is similar/common upto a certain stage though there are significant differences even with the common process for the four final products. Thereafter, from paragraphs 7 to 18 of the said affidavit the process is set out in detail. In paragraph 14 of the said affidavit, it is stated as under:-

(14) The material emerging after first pass in finished needling machine which is subsequently used in the jute carpet manufacture is not subject to edge trimming or width control, since this material has to be subsequently punched a second time again in the finished needling machine with jute fabric in the next step. Therefore, edge trimming/width control is not undertaken at the time of first pass through the finished needling machine. As consequence the material emerging after the first pass in the finished needling machine subsequently used in the jute carpet making has uneven/uncontrolled edges, with no uniformity of width. Also loose unpunched fibres protrude from all along both the edges of the material at this stage. I therefore firmly affirm that, with these deficiencies, material emerging after first passage through finished needling machine is incapable being marketed at this stage.

We find that the CESTAT, being last fact finding authority under the Act, has not considered the said affidavit in its entirety and in it's correct perspective.

10. It is pertinent to note that the CESTAT at paragraph 10 of the impugned order comes to a finding that there is no dispute about the fact that the impugned product "goes through first pass only whereas goods cleared from the factory go through second pass. Therefore, compactness/tensile strength/dimensional stability of "non-woven fabrics" cleared from factory is much more than the intermediate product." Having come to the aforesaid conclusion and itself making a distinction between the impugned product and the "non-woven fabrics" that were being cleared by the Appellant on payment of the requisite Excise Duty, we find that the CESTAT misdirected itself by shifting the burden on the Appellant of establishing that the impugned product is not marketable. In this regard, the reliance placed by Mr. Sridharan on the judgment of the Supreme Court in the case of Delhi Cloth and General Mills Co. Ltd. (supra) is well founded. Paragraphs 6, 7 and 8 of the said judgment read as follows:-

6. Learned counsel for the appellant submitted that the calcium carbide manufactured by the respondents was marketable and he relied in this behalf upon the orders of the Appellate Collector and Government of India, to which we have made reference. He also submitted that the calcium carbide manufactured by the respondents was in fact marketed till 1967.

7. The order of the Collector shows that the calcium carbide that was manufactured by the respondent for further utilisation in the production of acetylene gas was not of a purity that rendered it marketable nor was it packed in such a way as to make it marketable, that is to say, in airtight containers. This is a finding of fact. Applying the ratio of the Moti Laminates judgment thereto, we must hold that the calcium carbide manufactured by the respondents is not

excisable.

8. Learned counsel for the appellant submitted that Tariff Entry 14AA(1) was attracted, whatever might be the further process that the calcium carbide manufactured by the respondent might have to undergo by way of purification or packaging for that would not be tantamount to further manufacture. We are unable to agree for the simple reason that the commodity which is sought to be made liable to excise duty must be a commodity that is marketable as it is and not a commodity that may by further processing be made marketable.

11. We find from the record that the Department led no evidence whatsoever to establish that the impugned product in the form that it is, is marketable and therefore dutiable under the provisions of the Act. Furthermore, we find that the CESTAT has not taken into consideration several orders passed by it earlier in similar matters such as that of the Appellant and which have been referred to by us, earlier in this judgment.

12. For all the aforesaid reasons, the appeal is allowed and the impugned order dated 6th November, 2012 passed by the CESTAT is set aside and the matter is remanded back to the CESTAT for a de novo consideration on the issue whether the impugned product i.e. "non-woven fabrics" emerging from the manufacture of jute carpets is marketable and therefore excisable under the provisions of the Act. All contentions of both parties are kept open and they are at liberty to produce such further evidence, documentary or otherwise, before the CESTAT in support of their respective cases. No order as to costs.