

(1976) 07 MAD CK 0030

In the Madras High Court

Case No : Writ Petition No's. 5617 and 5618 of 1975

Madura Coats Ltd.

APPELLANT

Vs

Collector of Central Excise and Others

RESPONDENT

Date of Decision : 19-07-1976

Acts Referred:

Central Excise Rules, 1944 — Rule 10, 173Q, 9(2)

Citation : (1979) 4 ELT 16

Hon'ble Judges : Mohan, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Mohan, J.—These two writ petitions are for prohibition and they arise under the following circumstances. The petitioners carry on business

inter alia in the manufacture of textiles, having a composite mills both for spinning and weaving. Among the various kinds of fabrics manufactured

by the petitioners, cotton nylon duck is also one. It is made out of nylon and cotton and is used in the manufacture of T.V.C. belting which in turn is

used as a conveyor belt by the Neyveli Lignite Corporation and in coal mines. This product is manufactured in accordance with the specifications

and requirements of a few customers among whom Dunlop India Ltd. (hereinafter referred to as Dunlop) and National Rubber Manufacturers Ltd.

(hereinafter referred to as N.R.M.) are the principal purchasers. The said companies used to enter into contracts with the petitioners for the supply

of nylon cotton belting duck. The percentage of nylon content in the belting duck will range between 10 and 60. The nylon was supplied by

Dunlops and it was imported nylon on which countervailing duty was paid by them at the time of import, while N.R.M. supplies were indigenous

nylon. Both the nylon and cotton are blended together according to the specification of the purchasers to make the belting duck.

2. The said belting duck attracts excise duty under the Excise Tariff item 19(1) (i)- The duty payable is 15% ad valorem consisting of 12 1/2% and

additional duty of 12 1/2% plus handloom cess and auxiliary duty of 33-1/3%. On 11-7-1970, the Central Government made a notification under

Central Excise Rules being notification No. 144, which provides that the cotton fabrics falling under item 19(1) (i) of the First Schedule to the

Central Excise and Salt Act, 1944 (hereinafter referred to as the Act) shall be exempted from so much of excise duty and the additional duty of

excise leviable thereon as is in excess of duty and the additional duty calculated on the basis of the price fixed under the terms of the relevant

contract between the manufacturer and the buyer for the sale of such fabrics, provided the conditions laid down in the notification are duly satisfied.

In other words, option was conferred upon the manufacturers. The petitioners by their letter dated 3-9-1970, opted for the procedure laid down

under the notification. On 2-12-1970, the Superintendent of Central Excise granted permission to the petitioners. The petitioners also filed the

relevant contract with and orders by Dunlop and N.R.M. They were scrutinised, checked and signed by the Superintendent, Central Excise. Since

2-12-1970, the petitioners were adopting the procedure and accordingly assessments were made and completed till 30-6-1974.

3. On 2-7-1974, the Superintendent of Central Excise sent a letter to the petitioner calling for the price list and the petitioners replied on the same

day. However, on 4-7-1974, the Superintendent wrote a letter temporarily withdrawing the approvals accorded to the petitioners with reference

to the above said notification. A show cause notice was issued on 28-9-1974, which is the subject matter of the present with petition calling upon

the petitioners to show cause as to why a penalty should not be imposed on them under Rule 173Q of the Central Excise Rules as amended and

why the differential duty amount of Rs. 2,17,438-50 on the quantity and value of cotton nylon duck fabrics manufactured and removed by them

during 1-10-1973 to 30-6-1974, should not be demanded from the petitioners.

4. However, even before a reply to the above show cause notice was given, which ultimately came to be on 7-12-1974, the concession relating to

the notification No. 144 was withdrawn permanently on 7.-12-1974.

5. W. P No. 5618 of 1975 is based on similar facts, excepting that the show cause notice dated 27-2-1975 forming the subject matter of that writ

petition covers the period 1-3-1969 to 31-7-1969, demanding a sum Rs. 74,615-06 and 1-8-1969 to 30-9-1973, demanding Rs. 9,51,992-00.

It is under these circumstances the present writ petitions have been preferred.

6. Various grounds were raised in support of the writ petitions that the show cause notices are clearly violative of Rule 10 and time barred. There

was no misrepresentation at any point of time with reference to the declaration of contract price or in the matter of furnishing particulars. It is clear

beyond doubt that, the relationship between the petitioners and N.R.M. or Dunlop is that of seller and buyer. Such relationship is not in any way

influenced or tainted by considerations other than sale. The price mentioned though it may arrived at in the form of supply of cotton and conversion

charges is the sole price to be considered for the supply of the belting duck and therefore it is incorrect to state that there is any violation of the

conditions adumbrated in the notification. The price of nylon supplied by Dunlop and N.R.M. cannot be included in the price, since the petitioners

are not the owners.

7. A common counter affidavit has been filed by the Assistant Collector (the 2nd respondent) stating that with reference to the supply of nylon, it is

incorrect to state that it was not the property of the petitioners. The petitioners became the owner of the goods in terms of Rule 3, since it is

manufacture that is relevant, and they are naturally responsible for the discharge of Central Excise duty on the finished (manufactured) duck fabrics.

Therefore, the cost of nylon ought to have been declared, and included in the price which forms the basis of collection of Central Excise duty on

the value of fabrics. It may be mentioned that the petitioners themselves claim the transactions as only works contract and not a sale. The necessity

for the issue of show cause notice arose in pursuance of investigation conducted by the Inspection group in which certain irregularities were noticed

by them during the course of scrutiny and check of Central Excise records produced by the petitioners. It is not correct to contend that the show

cause notices are in any way violative of Rule 10. In fact, the petitioners were sought to be proceeded under Rule 9(2) read with Rule 173(Q) on

the facts mentioned in show cause notices. Lastly, it is submitted that the quasi judicial proceedings themselves have only just commenced, with the issue of show cause notices. It would be incorrect to contend that the petitioners were virtually deprived of the defence to the main question relating to notification. Therefore, these writ petitions are premature.

8. Mr. S, Govind Swaminathan, learned counsel for the petitioners, submits that the show cause notice dated 28-9-1974, is incorrect and that it proceeds as if there is a violation of conditions 3, 4 and 5 of the notification No. 144, dated 11-7-1970. This is an incorrect interpretation of the notification. It cannot be held that the petitioners were entitled to charge for the value of nylon supplied by Dunlop which did not belong to the petitioners at all. Therefore, whatever was incurred by them towards the manufacture of cotton nylon duck, namely, the actual value of cotton plus the conversion charges and other incidental charges were shown as prices. Nor could it be said that there is a violation of condition 5, in that there was no other understandings except to manufacture these goods in accordance with the specifications. In any event, there is a prejudging of the matter in so far as the concession was withdrawn even as early as 2-12-1974, before the petitioners could file their reply to the show cause notice which was done on 7-12-1974. Further, the show cause notice dated 27-2-1975 suffers from the same defect and in any event, it is clearly beyond the period of one year contemplated under Rule 10 of the Central Excise Rules and, therefore, it is barred by limitation. The learned counsel relies on N.B. Sanjana, Assistant Collector of Central Excise, Bombay and Others Vs. The Elphinstone Spinning and Weaving Mills Company Ltd., .

9. Mr. K. Alagiriswami, learned counsel for the department, would however meet this argument by contending that in the instant case, the price as shown in the price list did not include the value of nylon. Therefore, the price did not reflect the correct state of affairs. This apart, the attorney of the petitioner Mills, by his letter dated 21-8-1974, had himself admitted that the contracts filed by the petitioner Mills could not be claimed as sale contract, but they are only contracts for charges for work done. Therefore, there is a clear violation of conditions 3 and 4 of the notification and consequently the withdrawal of exemption was perfectly correct. It is not correct

to state that the show cause notice dated 27-2-1975 is barred by time and hit by Rule 10. In fact, action is not taken under Rule 10, but only for the violation of Rule 9(2) and Rule 173Q seeking to impose the penalty.

* * * *

11. In the instant case, the violation that is complained of is conditions 3, 4 and 3 in that the petitioners did not include the value of nylon supplied by M/s. Dunlop and N.R.M. It really passes my comprehension to appreciate the stand of the department as to how the price of nylon could ever be included by the petitioners. Nylon was actually imported by Dunlop as against actual users licence, while N.R.M. was able to get indigenous nylon which was supplied to the petitioners mills for the purpose of manufacturing cotton nylon duck. What they would be entitled to charge as a sale consideration, would be, as correctly pointed out by them, the value of cotton which went into the manufacture and the actual charges of conversion of nylon and any other incidental charges relating thereto. It is admitted that these were reflected in the price list which alone form the consideration for the sale. Therefore, there is absolutely no violation of conditions 3, 4 and 5 of the notification. Merely because the attorney of the Mills took a stand that the contracts were only for charges for work done, it does not mean that statement will be conclusive and the Mills could be made liable on that score. It is the duty of the department, while issuing the show cause notice, to examine the facts properly and then proceed to do so. Instead, they repeat in a parrot like fashion that the value of nylon was not included, which, as I have held above, could not be and should not have been included.

12. Both these show cause notices dated 28-9-1974 and 27-2-1975 proceed upon that basis. No doubt, Rule 10 may not apply to the show cause notice dated 27-2-1975. That is why Mr. Alagiriswami would try to bring this case under Rule 9(2) and 173Q and contend that it is open to the department In cases of violation of these rules to levy penalty under those rules. It may be so in normal cases. But, since the basis of the show cause notice, viz., violation of conditions 3, 4 and 5 is thoroughly incorrect, there cannot be any levy of penalty either under rule 9 (2) or 173Q. In

N.B. Sanjana, Assistant Collector of Central Excise, Bombay and Others Vs. The

Elphinstone Spinning and Weaving Mills Company Ltd., the

question arose as to when rule 10 would get attracted. It was laid down that in order to attract rule 10, it is not necessary that some amount of

duty ought to have been assessed and that amount ought to have been actually paid. This rule applies to a case wherein there has been a nil

assessment in which case entire duty later on assessed must be considered to be duty originally short levied. But the fact required to be noticed in

the instant case, as laid down by the Supreme Court in the above decision, is that there has not been any clandestine removal at all. At every point

of time, the removal was checked and countersigned by the authorities. All of a sudden to say as if there was a clandestine removal in that the value

of the price of nylon had not been included is not only unreasonable, but seems to be without any justification whatsoever.

13. A faint argument was urged on behalf of the department that the freight charges and the handling charges have been charged from buyers in

addition to the price mentioned in the contract, but the same had not been included in the contract price taken as an assessable value and therefore

the price as shown is not correct. This argument ignores the fact that the contract itself mentioned "freight to pay". Therefore, there was no

obligation on the part of the mills to include these items in the price. Therefore, this argument also fails.

14. Under these circumstances, I hold that the writ petitioners are entitled to succeed and accordingly both these petitions are allowed with costs.

Counsel's fee Rs. 250 one set.