

(1999) 09 MAD CK 0086

In the Madras High Court

Case No : Writ Petition No. 15469 of 1990 and WMP No. 24743 of 1990

Madura Coats Ltd.

APPELLANT

Vs

Government of India

RESPONDENT

Date of Decision : 24-09-1999

Acts Referred:

Central Excise Rules, 1944 — Rule 173, 173B, 175
Central Excises and Salt Act, 1944 — Section 11, 11A, 2

Citation : (2000) 118 ELT 332

Hon'ble Judges : K. Sampath, J

Bench : Single Bench

Advocate : N.S. Sivam, for the Appellant; Thambasamy and V. Velumani, Addl. Central Govt. Standing Counsel, for the Respondent

Judgement

K. Sampath, J.—The prayer is for a certiorari to call for the records of the respondents culminating in order No. 16/90 Order-in-Original (De novo) dated 28-5-1990 in C.No. V/18-E/13/153/77-PF of the third respondent and quash the said order.

2. The Assistant Collector of Central Excise, Madurai, First Division, has held that under Rule 173B of the Central Excise Rules, 1944 the classification of the product cotton/nylon twisted yarn could be under Tariff Item 18-A (ii) of the first schedule to the Central Excises and Salt Act, 1944 since repealed by Central Excise and Salt Act, 1985.

3. The facts leading to the present writ petition are as under :

The petitioner company has a composite mill at Madurai having spinning and weaving facilities. One of the products manufactured by the petitioner company in its above factory is cotton/nylon duck. After twisting the cotton and nylon yarn together, the cotton/nylon duck is woven. With a view to give more durability and strength, the cotton and the nylon yarns are twisted together by a mechanical process and this twisted yarn is woven into duck fabrics. The cotton/nylon duck

is an industrial fabric mainly used by rubber industries in the manufacture of conveyer belts, fan belts, V belts and similar other industrial products. The cotton yarn is spun of raw cotton and the nylon yarn made by a process of extrusion out of chemicals purchased by the petitioner company from open market. Both kinds of yarns suffer duty at the yarn stage. Till September, 1974 the Central Excise Authorities accepted that the above twisting of cotton/nylon would not amount to manufacture and allowed clearance of duck fabrics charging ad valorem duty on fabrics under Tariff Entry 19(1) of the First Schedule to the Central Excises and Salt Act, 1944 (hereinafter referred to as the Act) and the twisting of cotton and nylon yarns was considered as an intermediary process in the manufacture of duck fabrics. However, on 21-9-1974 the Central Excise Department took the view that the twisting of cotton/nylon yarns would amount to a manufacture and the product twisted cotton/nylon yarns were liable to be classified under Tariff Entry 18-E of the First Schedule attracting further incidence of duty. A show cause notice O.C. No. 609/75 under Rule 173B proposing that proper classification of the twisted cotton/nylon yarn would be under Tariff Item 18-E was issued on 17-2-1975. The petitioner challenged the show cause notice in W.P. No. 3737/75 before this Court. In the meantime, on 8-8-1977 the Government of India issued notification directing that proper classification for such product would be under Tariff Entry 18-A (ii). When the writ petition came up for final disposal, the new classification was recorded and the writ petition was disposed of accordingly. However, the Central Excise Authorities preferred Writ Appeal No. 232/78 against the order in the writ petition. On 30-8-1978 the Excise Department issued show cause notice proposing re-classification for twisted cotton/nylon yarns under Tariff Item 18-A (ii). The petitioner company again objected to this reclassification submitting that no manufacturing process was involved and that no new product emerged by twisting. This was not accepted and an order confirming the proposed classification was passed by the third respondent on 25-11-1978. The petitioner filed W.P. No. 2877/79.

In the meantime, a Division Bench of this Court passed an order in the writ appeal on 6-3-1985 to the following effect:

"Before an article is brought under charge to excise duty it should be shown that that particular article is a product of manufacture, it cannot be brought under tariff merely because twisted yarn is different from cotton yarn and nylon yarn out of which it is made of. This aspect of the matter has not been gone into by the excise authorities. The submission of the learned counsel for the respondent that Tariff Item 18-E is a residuary entry and it will cover only spun yarns and not a mixture of cotton yarn and nylon yarn which has been already subjected to excise duty has also not been considered. In this view of the matter the show cause notice proposing to initiate action for contravention of Rules 173 and 175 has to be quashed with a direction to the appellant to consider the question of liability of the respondent for excise duty on twisted yarn in the light of what has been stated above within two months from today and to take such action as is necessary in the light of the said decision."

This was on 6-3-1985.

Thereafter, the Assistant Collector, Central Excise, the third respondent herein, informed the petitioner company by letter C.No. V/18/ A/15/2/74, dated 30-3-1985 that the question of levy of excise duty on twisted cotton/nylon yarn would be taken up for rehearing. On receipt of the said communication, the petitioner company sent their reply on 8-4-1985 stating that the contemplated action by the Assistant Collector was without jurisdiction as the provisions of the Act clearly impose a mandatory obligation on the Central Excise Authority to issue a show cause notice indicating the reasonings of the Department to propose a levy as only then the assessee would be in a position to make his submissions. This was particularly so when the show cause notice, dated 17-2-1975, had been quashed in the writ petition and confirmed in the writ appeal. The third respondent, however, informed the petitioner drawing its attention to the show cause notice, dated 17-2-1975. The petitioner sent its reply on 22-4-1985 stating that the Division Bench in the writ appeal has specifically held that imposing of second incidence of excise duty on twisted cotton/nylon yarn under the very same tariff entry would be illegal and improper and without giving sustainable reasonings, the Department had no authority in law to call upon the petitioner Company to give its views without issuing a show cause notice. However, the third respondent informed that on 2-4-1985 a personal hearing would be given and the petitioner should attend the same. The petitioner company attended the personal hearing and reiterated its specific submissions urged by it in its various letters. On 3-5-1985 the third respondent pronounced orders holding that since the matter had been remanded to the Department by the High Court for fresh consideration, the Department acquired the right to continue the enquiry without issuing any fresh show cause notice and that the twisting of cotton and nylon yarn amounted to manufacture of a new product and the classification under T.I. 18-E was the proper and correct one.

Challenging the said order, the petitioner company filed W.P. No. 5424/85. The writ petition was admitted on 21-5-1985 and interim stay was also granted. In the meantime, W.P. No. 2877/79 came up for final hearing and the learned Judge quashed the order, dated 25-11-1978 as twisting would not amount to manufacturing process and the same had been upheld by the Division Bench in Writ Appeal No. 232/78. On 24-9-1986 the third respondent directed the petitioner to produce materials to sustain its claim that twisted cotton/nylon yarns would not fall under Tariff Item 18-A (iii) as he was going to adjudicate the show cause notice, dated 30-8-1978. The petitioner company submitted a reply stating that the High Court has quashed the order, dated 25-11-1978 of the third respondent adjudicating the show cause notice, dated 30-8-1978 and the third respondent without issuing fresh show cause notice could not direct the petitioner to submit its case as only after knowing the stand of the Department in a show cause notice any reply could be given.

The third respondent by letter, dated 9-8-1989 directed the petitioner once again

to offer its explanation to the show cause notice dated 30-8-1978. The petitioner once again reiterated its objection by letter, dated 21-8-1989. On 23-1-1990 the third respondent after referring to the order in W.P. No. 2877/79 issued show cause notice proposing classification T.I. 18-E(ii) for twisted cotton/nylon yarns. The petitioner submitted in reply on 19-3-1990 that the High Court had quashed the classification T.I. 18-A (ii) held by the Department and therefore the same classification could not be proposed once again by the Department. On 28-5-1990 the third respondent herein passed orders holding that appropriate classification for twisted cotton/nylon yarns would be under T.I. 18-A(ii) and the Tariff Amendment 29/80, dated 24-5-1980 would not apply. It is against this order the present writ petition has been filed.

4. The third respondent has filed a counter on behalf of the respondents and the same is to the following effect:

The product manufactured by the petitioner company is obtained by twisting duty paid cotton yarn and nylon yarn. As required under the Central Excise Rules, 1944, the petitioner company filed a classification list claiming the goods under T.I. 68 and the erstwhile Tariff. The then Assistant Collector of Central Excise, Madurai-I. Division classified the goods under T.I. 18-A of the erstwhile tariff. In conformity with the classification of cotton yarn for purposes of rate of duty, the then Assistant Collector decided that the product, viz. Cotton/nylon twisted yarn fell under T.I. 18-A (ii) as it contained more than one sixth by weight of non-cellulosic fibre. Against this order W.P. No. 2877/79 was filed. While disposing of the writ petition the High Court directed the third respondent to reconsider the excisability and classification of the product after considering certain points which in the opinion of the Court were not considered earlier by the respondents. Pursuant to the directions of the High Court, the classification was finalized under T.I. 18-A(ii) after considering all the points relevant to the excisability and the classification under T.I. 18-A(ii). The present case has nothing to do with the show cause notice O.C. No. 609/75, dated 17-2-1975 and W.P. No. 3737/75 as they were under T.I. 18-E prior to 18-6-1977 and the present case relates to the classification of the said product under T.I. 18-A(ii) from 18-6-1977. The Division Bench order in W.A. No. 232/78 was issued prior to the judgment of the Supreme Court in the case of Aditya Mills Ltd. Vs. Union of India (UOI), wherein the Supreme Court had held that the twisting together of two different yarns amounted to manufacture u/s 2(f) of the Central Excises and Salt Act, 1944 and therefore there could be little dispute over the involvement of manufacture in the production of the twisted yarn under subject. Equally, the subject matters of W.P. Nos. 5424/85 and 2877/79 were different, in that W.P. No. 5424/85 was in respect of the classification of the twisted yarn under T.I. 18-E for the period prior to 18-6-1977 and W.P. No. 2877/79 was for the classification of the yarn under Tariff Item 18-A(ii) from 18-6-1977. The order in W.P. No. 2877/79 clearly states that,

"...Without, therefore, entering upon consideration of the merits, the order of the

respondent, dated 25-11-1978 is quashed on the ground that it has not taken into account matters which would be relevant for considering the inclusion of the item under 18-A (ii) of the Tariff Items...The respondent is directed to consider afresh the liability of the petitioner for excise duty in respect of the cotton/nylon twist yarn produced by it. It is needless to point out that it will be open to the petitioner to place such materials as are available with it to substantiate its stand that the product in question would not fall under Tariff Entry 18-A (ii) as claimed by its and the respondent is directed to give every opportunity to the petitioner to do so. The respondent will also give the petitioner an opportunity to be heard through a representative, if so desired by the petitioner."

The High Court quashed only the order in original, dated 25-11-1978 and not the show cause notice issued for the reclassification as claimed by the petitioner. There was also no direction to the Assistant Collector to issue any fresh show cause notice. However, the petitioner company with a view to prolong the issue had harped on the issue of the show cause notice. The present order only confirms the classification under Tariff Item 18-A(ii) and it is not going to affect any future clearance of the cotton/nylon twisted yarn by the petitioner. The petitioner may therefore be directed to avail the alternative remedies available to them under the statute.

5. I have heard the learned counsel on both sides and perused the relevant materials.

6. The learned Counsel Mr. N.S. Sivam made the following submissions :

(1) The impugned order is without authority, power or jurisdiction as Section 11A of the Central Excises and Salt Act, 1944 empowers the Assistant Collector to demand duty for the six months preceding the date 23-1-1990 of show cause notice. The determination of duty liability for the period 1977 to 1980 in 1990 after 13 years is beyond the power vested u/s 11 and had become time barred.

(2) In the show cause notice, dated 23-1-1990 it was stated that it was issued pursuant to the order dated 25-11-1985 in W.P. No. 2877/79. After five years of the order, show cause notice could not be issued and it was not valid and time barred.

(3) The conclusion of the Adjudicating Authority that twisting of cotton/nylon yarn amounts to manufacture is not sustainable in law and in view of the order, dated 6-3-1985 in W.A. No. 232/78 and order, dated 25-11-1985 in W.P. No. 2877/79. In respect of the very same product between the same parties, the High Court had held that twisting would not amount to manufacturing and the twisted yarn could not be reckoned with new excisable marketable product.

(4) The conclusion of the adjudicating authority that Tariff Advice 29/80, dated 24-5-1980 would not apply, was not tenable in law.

(5) As per the law laid down by the Bombay High Court in Garware Nylons Ltd. Vs. Union of India and others, which was upheld by the Supreme Court in 1988

(27) E.L.T. 471 twisting of two duty paid yarns could not be construed as a manufacturing process.

7. Mr. Thambusamy, learned Counsel appearing for the Department submitted that it was only the petitioner company which had dragged on the matter under some excuse or other and there was no question of limitation involved as the proceedings had not come to an end at any earlier point of time and had only continued. The learned Counsel submitted that the petitioner company had been blowing hot and cold, at one point of time it would state that there should be a fresh show cause notice issued, and at another time it would say that the Department had no right to adjudicate upon a matter more than 13 years old. On the question of classification/the learned Counsel submitted that the Supreme Court in *Aditya Mills Ltd. Vs. Union of India (UOI)*, has settled the issue. The learned Counsel further submitted that if a Tribunal comes to the conclusion on a question of classification of an item for tariff purposes, that finding cannot and should not be interfered with by the Court.

8. Let us now dispose of the question relating to limitation raised by the learned counsel for the petitioner company. Section 11A of the Central Excise Act, 1944 relating to recovery of duties not levied or not paid or short levied or short paid or erroneously refunded, is relied upon by the learned Counsel for driving home his point that there had been enormous delay in the matter and the determination of duty liability has become time barred.

9. Section 11A no doubt says that,

"When any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded, a Central Excise Officer may, within six months from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short levied or short paid or to whom the refund had erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice :

Provided that where any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty by such person or his agent, the provisions of this sub-section shall have effect, as if for the words "six months", the words "five years" were substituted.

Explanation : - Where the service of the notice is stayed by an order of a Court, the period of such stay shall be excluded in computing the aforesaid period of six months or five years, as the case may be."

10. Relying on this provision Mr. Sivam, learned Counsel for the petitioner, submits that in respect of liability which arose in the seventies the show cause notice cannot be issued in the year 1990. In my view, such a contention is not

available to the writ petitioner in the instant case. It is not a new show cause notice that had been issued. If we look at the events leading to the issuing of the impugned notice, it will be seen that the proceedings had been a continuous one and possibility at every stage there was disruption in the course of events before orders were passed by this Court in writ petitions and writ appeals.

11. On 30-8-1978 the Central Excise Department issued notice to the petitioner requiring it to show cause why the classification of cotton/nylon twist in which cotton predominated in weight (goods) in respect of which they had contested its classification under Tariff Item 18-A(ii) of the Central Excise Tariff Schedule, should not be confirmed under Rule 173B of the Central Excise Rules, 1944. The petitioner company filed its objections against reclassification stating that no manufacturing process was involved and no new product emerged from twisting. However, on 25-11-1978 the Assistant Collector of Central Excise, the third respondent herein, confirmed the proposed classification under Tariff Item 18-A(ii). Against the order of the Assistant Collector, W.P. No. 2877/79 came to be filed. In the meantime, there was a Tariff Amendment notified by the government of India stating that fancy yarns produced by doubling of duty paid filament yarns with spun yarns on doubling machine fell under Tariff Item 68. The Writ Appeal against the order in W.P. No. 3737/75 came to be disposed of on 6-3-1985. In the Writ Appeal the quashing of the earlier show cause notice was confirmed. Thereafter, the Department directed the petitioner to appear for personal hearing for adjudication of the show cause notice, dated 17-2-1975. The petitioner took the stand that the show cause notice had been quashed and the authorities could not take any action without a fresh show cause notice. The third respondent passed fresh order on 3-5-1985 stating that it was passed pursuant to the order of the High Court in W.A. No. 232/78 directing the Department to consider the duty liability in the light of the observation contained in the judgment of the Bench and therefore, the show cause notice, dated 17-2-1975 was once again adjudicated directing that the classification under Tariff Item 18-E was the proper and correct one. Against this order W.P. No. 5424/85 came to be filed. The writ petition was admitted and interim stay of the order impugned was granted on 21-5-1985. In the meantime, W.P. No. 2877/79 challenging the proceedings culminating in the show cause notice came to be disposed of by a learned single Judge of this Court on 25-11-1985.

12. It would be worthwhile to notice the reasoning of the learned Judge at this stage itself as it may have some relevance for the further discussion in the matter.

"... The first and foremost question which should have been considered by the respondent is whether the cotton/nylon yarn is the result of a manufacturing process. Before an article can be subjected to excise duty, it should be the product of manufacture as defined in Section 2(f) of the Act read with Section 2(f)(iv). Unless the product which is subjected to excise duty is brought into existence by a process of manufacture as defined in the Act, no excise duty can

at all be levied. If the cotton/nylon yarn is not the product of manufacture, merely because it is twisted from out of the cotton yarn and nylon yarn, it cannot automatically be brought under Tariff Item 18-A. Precisely, on this ground, the Division Bench in W.A. No. 232/78 directed a reconsideration of the matter. Unfortunately, the order of the respondent does not advert at all to this aspect of the matter."

"The next aspect that had escaped the attention of the respondent is whether the cotton/nylon twist would be cotton yarn all sorts. It is in this connection that it has to be remembered that the cotton/nylon yarn produced by the petitioner is a combination of cotton yarn and nylon yarn merely twisted. Can the resultant yarn be called yarn of a new sort in relation to the manufacture of which a power process is employed and in which cotton predominates by weight, and if so, whether its composition is such as to bring it within Tariff Item 18-A(ii). If the cotton/nylon twist cannot be treated as cotton yarn of all sorts, then, Tariff Item 18-A(i) and 18-A(ii). Admittedly, nylon yarn is not made out of non-cellulosic fibres or by resorting to a process of spinning for producing yarn out of such fibre. Nylon yarn is a chemical product extruded by a continuous process and under these circumstances, the question whether it would be appropriate to classify cotton/nylon yarn as containing non-cellulosic fibre content would also be very relevant. In addition, the distinction attempted by the petitioner between filament and fibre has also not been borne in mind by the respondent. He has proceeded that fibre would include filament. The possibility of differences between fibre and filament also does not appear to have been borne in mind. Yet another aspect, which would be relevant in considering the classification of the cotton/nylon yarn produced by the petitioner, would be whether the cotton yarn contemplated under Tariff Item 18-A is a single end product known as yarn but made of two constituent elements for instance, terry cotton yarn made out of cotton and terrene, viz. two or more fibres or filaments. Whether the benefit of Tariff Advice No. 29 of 1980, dated 24-5-1980 could be claimed by the petitioner is also a matter which would have vital bearing on the classification of the product made by the petitioner. The aforesaid, would, in my view, be relevant aspects, which should have been considered by the respondent, apart from those pointed out by the decision of the Division Bench of this Court in W.A. No. 232/78 already referred to. The order of the respondent has not proceeded to consider or bestow any attention to the aforesaid aspects, without considering which it may not be right to classify the cotton/nylon yarn produced by the petitioner as one falling under Tariff Item 18-A (ii). Without therefore, entering upon consideration of the merits the order of the respondent, dated 25-11-1978 is quashed on the ground that it had not taken into accounts matters which would be relevant for considering the inclusion of the item under 18-A(ii) of the Tariff Items."

13. The third respondent was directed to consider the question on the liability of the petitioner for excise duty on twisted cotton/nylon yarn in the light of what has been stated in the order and what had also been pointed out in the judgment

of the Division Bench in W.A. No. 232/78. It was also stated that it would be open to the petitioner to place such materials as were available with it to substantiate its stand that the product in question would not fall under Tariff Entry 18-A(ii) as claimed by it and the third respondent was directed to give every opportunity to the petitioner to do so. There was also a further direction to the third respondent to give the petitioner an opportunity to be heard through a representative, if so desired by the petitioner. Thereafter, on 24-9-1986 the third respondent addressed a letter to the petitioner stating that pursuant to the directions issued by the High Court, it has been decided to take up the classification of cotton/nylon twist yarn with effect from 18-6-1977 under Tariff Item 18-A(ii) of the then Central Excise Tariff, that the tariff item spoke of cotton yarn in which cotton predominated in weight, that it did not speak of how the cotton yarn was manufactured, that therefore, it appeared that the cotton/nylon twist yarn in which cotton predominated in weight would fall under T.I. 18-A(ii) of the then Central Excise Tariff and that the petitioner was given an opportunity to place before him such materials, which were available with the petitioner to substantiate its plea that the cotton/nylon twist yarn would not fall under T.I. 18-A(ii). The communication directed the petitioner to submit its reply with its evidence and documents to substantiate its plea within 30 days of that letter. The petitioner was also required to indicate if it desired to be heard in person before the classification of the product was decided.

14. On 21-10-1986 the petitioner sent a reply stating that the High Court had quashed the order, dated 25-11-1978 of the third respondent adjudicating the show cause notice, dated 30-8-1978 and the third respondent without issuing fresh show cause notice could not direct the petitioner to submit its case as only after knowing the stand of the Department in a show cause notice, reply could be given. In the meantime, the petitioner's writ miscellaneous petitions W.M.P. Nos. 8448 and 8449 of 1985 in W.P. No. 5424/85 in which interim stay of the operation of the order C. No. V/18-E 15-2-1974, dated 3-5-1985 had been granted, came for enquiry. Ratnam, J. (As the learned Judge then was) by order, dated 24-4-1987 made the interim stay and the interim injunction granted in those petitions absolute, subject to the condition that the petitioner furnished before the third respondent a bank guarantee in a sum of Rs. 6,85,157/- within four weeks therefrom. There was also a further direction to renew the bank guarantee if and when furnished periodically and keep the same alive till the disposal of the writ petition. The inaction on the part of the third respondent can therefore be easily accounted for. On 9-8-1999 the third respondent once again directed the petitioner to offer its explanation to the show cause notice, dated 30-8-1989. The petitioner sent a reply, dated 21-8-1989 reiterating its objections once again, in particular maintaining that the show cause notice had been quashed and unless and until the Department narrated its reasonings for arriving at its conclusion, the assessee would not be in a position to reply to the same and that the action on the part of the third respondent amounted to wilful and wanton disobedience of the order of the High Court, dated 25-11-1985. The

burden of the song of the petitioner was that the proceedings had not been properly initiated as directed by the High Court. The third respondent wrote a letter on 12-10-1989 to the petitioner stating that it had been proposed to consider afresh the classification of cotton/nylon twist yarn with effect from 18-6-1977 and the duty liability thereof in the light of the observations contained in the order of the High Court in the writ petitions mentioned in the subject, that the observation of the High Court was well known to the petitioner and the Department alike and that the view point of the petitioner over the classification of the product in the light of the observation of the Court might be sent to the third respondent's office within ten days of the receipt of the said letter and in case no reply was received from the petitioner's end within the stipulated date, the case would be decided on merits. The petitioner again sent a letter on 27-10-1989 through Special Messenger calling upon the third respondent to initiate appropriate action in accordance with law and as per the High Court orders and given it a chance to defend its cause in person before orders were passed. On 6-12-1989 the third respondent sent a communication to the petitioner requesting it to appeal before him on 19-12-1989 at 11 hours for personal hearing with all the records in which it placed reliance in support of its defence. On 18-12-1989 the petitioner sent a letter by hand delivery to the third respondent stating that there was no show cause notice and without the show cause notice, the third respondent wanted to adjudicate the issue, that this was not permissible in law since the Department has not issued a formal show cause notice to enable Madurai Coats to submit their cause. Thereafter, on 23-1-1990 a lengthy formal show cause notice came to be issued by the third respondent setting out in detail how the matter had to be decided pursuant to the directions by the High Court and calling upon the petitioner to show cause within 30 days from the date of receipt of the letter as to why :

(i) the said yarn should not be held to be a manufactured product u/s 2(f) of the Central Excises and Salt Act, 1944.

(ii) the said yarn should not be classified under T.I. 18-A(ii) of the erstwhile Tariff under Rule 173B of the Central Excises and Salt Act, 1944.

(iii) The Tariff Advice 29/80, dated 24-5-1980 should not be held to be not applicable to the said yarn, and

(iv) the protest of the assessee for the payment of duty made under T.I. 18-A(ii) of the erstwhile Tariff should not be vacated.

15. To this the petitioner sent a reply and it would be worthwhile to reproduce the entire reply and it reads as follows:-

"MIF/Excise No. 769, 19th March, 1990

The Assistant Collector of Central Excise Madurai-I Division, Madurai-2

By R.P.A.D.

Dear Sir,

Sub : Show cause notice on 18-A(ii) Yarn

Ref : Your Show cause notice

C. No. V/18E/13/153/77-PF, dated 23-1-1990 and

Your letter C. No. V/18-E/13/153/77-PF

Adjn dated 26-2-1990.

With reference to the above show cause notice we wish to submit our reply as follows :

(1) The above show cause notice has been issued in pursuance of the order, dated 25-11-1985 by the Hon"ble High Court, Madras, in W.P. Nos. 2877/79, 11652/81 and 1090/82 after a protracted correspondence between the Department and starting from your office letter C. No. V/18E/3/153/77-PF, dated 24-9-1986 and ending with our letter MIF/Ex. 542 of 18th December, 1989.

(2) We request the learned Assistant Collector to judiciously consider the various points urged by us in our defence in the correspondence cited above. We also request the learned Assistant Collector to take into consideration the contentions raised by us in W.P. No. 2877/79 filed in the High Court, Madras, to the effect that the subject goods can not be classified under 18-A(ii) of the Old Tariff. We are not reproducing all these points in our defence in this reply since the same are already available in record with the Department.

(3) We also invite the Assistant Collector's attention to para 3 of the impugned show cause notice, dated 23-1-1990 wherein it has been admitted by the Department that your office order in original C. No. V. 18-E/3/153/87, dated 25-11-1978 classifying the said yarn under Tariff 18-A(ii) was quashed by the Hon"ble High Court of Madras in W.P. No. 2877/79, vide Court order, dated 25-11-985. We submit hat though the Court ordered the Department to consider afresh the liability of the said yarn for payment of duty under 18-A(ii) after having agreed to various aspects not earlier considered by the Department, the present notice also does not, in our view, explicitly answer the court's directions in proposing 18-A(ii) classification, particularly on points (c) and (d) of para 3 of the Notice.

(4) We also wish to state that for the cotton nylon twist yarn the issue of excisability prior to 18-6-1977 is subjudice in the High Court of Madras in W.P. No. 5424/85 the disposal of which is expected shortly. In the circumstances, we request the learned Assistant Collector to take the totality of the issue in adjudicating the impugned show cause notice and render justice.

We may also be heard in person.

Thanking you,

Yours faithfully, For Madura Coats Ltd., Sd/- N. Muruganantham Manager - Excise & Transport

16. There was a personal hearing given on 26-4-1990 and at the personal hearing the petitioner had raised the question of limitation stating that a formal show cause notice had been issued after a lapse of about 5 years from the date of the order of the High Court in November, 1985 and that once the High Court had quashed the Department's show cause notice impugned in the writ petition the Department ought to have initiated de novo proceedings by issuing formal show cause notice immediately after the receipt of the High Court Order, which in the present case has not been done.

17. The above narration should leave one with no doubt that the petitioner had been setting a trap by raising the bogey of non-issue of a fresh show cause notice and when once the third respondent issued a fresh show cause notice at the instance of the petitioner the petitioner came up with the plea of limitation. It was totally unnecessary to have issued a fresh show cause notice at all. The order of Ratnam J. (As the learned Judge then was) already extracted is absolutely clear on the point. The third respondent was directed to consider afresh the liability of the petitioner for excise duty in respect of the cotton/nylon yarn produced by it. The issuing of show cause notice was a totally unnecessary exercise. In any event, it cannot be said that it was a fresh show cause notice. The parties had been corresponding and the petitioner had been effectively blocking the course of the proceedings by raising unnecessary queries and objections. The proceedings had not come to a stop, but had only continued from where they were left. The point on limitation raised by the petitioner is wholly unsustainable and the same is rejected. The section relied on viz., 11A of the Act does not avail to the petitioner.

18. Now coming to the merits of the claim the third respondent has come to the conclusion that the classification already decided by him was the correct classification and that the Tariff Advice 29/80 would not apply to the facts of the present case. Ultimately, the third respondent classified the cotton/nylon yarn under dispute under T.I. 18-A (ii) of the first schedule to the Central Excises and Salt Act, 1944 under Rule 173B of the Central Excise Rules, 1944, that the protest made by the assessee for payment of duty under TI 18-A (ii) stood vacated and that the refunds claimed in W.P. Nos. 11652/87 and 1090/82 were rejected.

19. Incidentally, it should also be pointed out that against the order of the third respondent, an appeal lies to the Collector of Central Excise (Appeals), Trichy.

The petitioner has not availed the statutory remedy of appeal. The writ petition can be held to be not maintainable on this score. However, the position is now well settled that the question relating to alternative remedy has to be adjudicated at the threshold, namely, at the time of admission and not after the writ petition had been entertained and pending for nine years.

20. Let us therefore go into the merits of the case also. It has been held in *Aditya Mills Ltd. Vs. Union of India (UOI)*, that,

"Excise duty is a duty on the manufacture of goods and not on sale. Manufacture is complete as soon as by the application of one or more processes, the raw materials undergo some change. If a new substance is brought into existence or a new or different article having a distinct name, character or use results from a particular process or processes, such process would amount to manufacture. The moment there is transformation into a new commodity commercially known as a separate and distinct commodity having its own character and use manufacture takes place"

It has been further held by the Supreme Court that,

"If the tribunal having borne the correct legal principles in mind and in the light of the facts and without ignoring any relevant or material fact, comes to a conclusion on a question of classification of an item for tariff purposes that finding cannot and should not be interfered with in appeal before the higher court".

The Supreme Court has held in that case that,

"Doubling and twisting of two different type of yarns amount to manufacture of a new type of yarn known as PPRF yarn as envisaged by Section 2(f) of the Central Excises and Salt Act 1944."

This decision , according to Mr. Sivam, must be deemed to have been, impliedly over-ruled by the three Judges Bench of the Supreme Court in *Porritts and Spencer (Asia) Ltd. Vs. Collector of Central Excise, New Delhi*, . In the case before the Supreme Court the question that arose for consideration was whether the multifold yarn or doubled yarn prepared by the appellants out of duty paid cotton yarn and nylon filament yarn attracts duty under Item No. 18-/18-E of the Central Excise Tariff. In that case, the appellants purchased coarse cotton yarn and duty paid nylon filament yarn from others, then took a few strands of cotton yarn and nylon filament yarn (the numbers depending on the varieties of felts) and twisted them together on a doubling machine and thereafter used the multifold yarn having both the constituents for weaving of felts. That was the process through which cotton yarn and nylon filament yarn were put for the purposes of manufacturing the felts. There was also no dispute that the appellants were liable to pay excise duty on the end product, namely, the felts. The question was whether they were liable to pay duty for the intermediate product known as multifold yarn. The Tribunal in that cases considered the question from the point whether the multifold yarn could be said to be goods and whether it could commercially be described as a new product having a distinct identity brought into existence by a process of manufacturing. Relying on the decision of the Division Bench of the Allahabad High Court in *Union of India v. Union Carbide India Ltd.*, 1978 E.L.T. 1 the Tribunal held that the test of general marketability was not a sound test in the case of monopoly products since the

multifold yarn was prepared for weaving felts, which was monopoly product. The Tribunal concluded that notwithstanding the fact that the intermediary product did not have a market, still it was all the same goods which had a distinct identity and was therefore, liable to excise duty under the aforesaid Tariff Entries. Since the intermediary product was neither cotton yarn nor nylon yarn, but a mixed one, the Tribunal held that it was a distinct commodity having two constituents cotton and nylon and was therefore attracted by the aforesaid Tariff Entries. The decision relied on by the Tribunal in that case, namely, Union of India (UOI) and Others Vs. Union Carbide India Ltd., was reversed by the Supreme Court in Union Carbide India Limited Vs. Union of India (UOI) and Others, and it was pointed out by the Supreme Court while reversing the decision of the Allahabad High Court that in order to attract excise duty the article manufactured must be capable of sale to a consumer. It was further pointed out that the expression "goods manufactured or produced" must refer to article which were capable of being sold to a consumer.

21. In that case before the Supreme Court in Porritts and Spencer (Asia) Ltd. Vs. Collector of Central Excise, New Delhi, it was found that, except indicating the process of preparing multifold yarn needed for the manufacture of felts the Revenue had not placed any material on record to hold that the multifold was a distinct article having an identity of its own in the commercial world nor was any evidenced let in to show that it had marketability, however, limited it might be".

22. According to the petitioner, one of the several products manufactured by the petitioner company in its factory is cotton/nylon duck. After twisting the cotton and nylon yarns together, the cotton nylon duck is woven. To give further durability and strength to the duck fabrics, the cotton and nylon yarns are twisted together by a mechanical process and this twisted yarn is woven into duck fabrics. The cotton/nylon duck is an industrial fabric mainly used by rubber industries in the manufacture of conveyor belts, fan belts, V-belts and similar other industrial products. The cotton yarn is spun out of raw cotton and the nylon yarn made by process of extrusion out of chemicals purchased by the petitioner company from open market. Both these yarns suffer duty at the yarn stage. The twisting of cotton and nylon yarn according to the petitioner, is only an intermediary process in the manufacture of duck fabrics. If we apply the ratio of the Supreme Court in Porritts & Spencer (Asia) Ltd. case it is incumbent on the Department to show that the resultant product obtained by the twisting of cotton and nylon yarns is a distinct article having an identity of its own in the commercial world and that it should have marketability, however, limited it may be. It is not the case of the Department that the cotton and nylon yarns twisted together by a mechanical process had a marketability of its own. Only after the twisted yarn is woven into duck fabrics, it becomes marketable. Only this nylon duck is used by rubber industries in the manufacture of the conveyor belts, etc. No doubt, in Aditya Mills case the Supreme Court has held that,

"The moment there is transformation into a new commodity commercially known

as a separate and distinct commodity having its own character and use, manufacture takes place".

23. In the instant case, the twisted yarn is indeed, a new commodity. It also has its own character and use, but then it does not have a marketability. Only after it is woven into duck fabrics, it has marketability. Looking at the question from this angle, it would be clear that the authorities have indeed made a mistake in holding that the product would come under classification under TI 18-A (ii) of the First Schedule to the Central Excises and Salt Act, 1944 and Rule 173B of the Central Excise Rules, 1944. Indeed, as pointed out by the Supreme Court, the decision as to the nature of the product by the Tribunal cannot be assailed. However, having regard to the fact that the specific directions issued by this court in the writ petition and the writ appeal referred to already, this Court cannot close its eyes as to how the third respondent had gone about in arriving at a decision.

24. In these circumstances, the writ petitioner is entitled to succeed. The order of the third respondent will stand quashed and the matter will stand remitted to the third respondent for consideration afresh in the light of the discussion above and also the decision of the Supreme Court in *Porritts and Spencer (Asia) Ltd. Vs. Collector of Central Excise, New Delhi*, . At the same time the matter was decided by the authorities this decision had not come and in fact, even in the counter filed on behalf of the respondents on 9th September, 1992 only the *Aditya Mills Ltd.* case is referred to and relied on. The *Aditya Mills Ltd.* case had been decided by a Bench of two Judges while the subsequent decision is by a Bench of three Judges. There will, however, be no order as to costs. Consequently, the Stay Petition W.M.P. No. 24143/90 is closed.