(1992) 03 BOM CK 0003

In the Bombay High Court

Case No : Writ Petition No. 1808 of 1983

Reliance Textile Industries Ltd. APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 11-03-1992

Acts Referred:
Central Excise Rules, 1944 — Rule 56B, 8, 9B

Citation : (1993) 63 ELT 67

Hon'ble Judges : M.L. Pendse, J;M.G. Chaudhari, J

Bench : Division Bench

Advocate : Shri Rafiq Dada, for the Appellant; Shri M.M. Varma and M. R. Asokan, for the Respondent

Judgement

M.L. Pendse, J.—We informed the Counsel for the Respondents as soon as the petition was called out for hearing that one of us (Pendse J.) is a share-holder of Petitioner No. 1-Company. The Counsel for the respondents, after taking instructions from the officers, stated that the respondents have no objection to this Bench hearing the petition. We proceeded to hear the petition only after the assurance was given.

2. The question which falls for determination in this petition filed under Articles 226 and 227 of the Constitution is the rate of duty leviable on partially oriented yarn of 132 denier age at the time of clearance from the factory gate. The facts giving rise to the filing of the petition are not in dispute and are required to be briefly stated to appreciate the grievance of the petitioners.

3. Petitioner No. 1 is a public limited company and its factory unit is situated at Patalganga where polyester filament yarn of the type known as partially oriented yarn (POY) is manufactured. The Company has also another factory situated at Naroda, Ahmedabad in the State of Gujarat, where the work of text rising is carried out. The POY manufactured by the Patalganga unit are basically of the types of 132, 215 and 245 deniers. The POY are cleared directly from the manufacturing unit at Patalganga on payment of central excise duty. The

manufacturing unit in respect of such clearance is provisionally assessed under Rule 9B of the Central Excise Rules, 1944, and duty is assessed at the rate of Rs. 61.25 per kg. on the POY manufactured which is within the range of 100 to 750 deniers in respect of clearance made prior to March 1, 1983.

4. On April 15, 1983, the Superintendent, Central Excise, passed order finalising the provisional assessment under Rule 9B and directing payment of Rs. 13,19,235.75 for the period commencing from December 31, 1982 and ending with February 27, 1983. This provisional assessment was in respect of 52% of the manufactured POY sold in the market by the petitioner-Company. The balance manufactured POY of 48% was cleared under Rule 56B. The petitioners filed the present petition to challenge the finalisation of the provisional assessment on various grounds, one of them being that the order was passed without any notice to the petitioners.

5. Subsequently, the petitioners were served with show cause notices for the clearance of POY for the subsequent periods and those show cause notices are also challenged by amendment of the petition.

6. Mr. Dada, learned Counsel appearing on behalf on the petitioners, submitted that the finalisation of assessment by the impugned order dated April 15, 1983 proceeds on an erroneous basis and the base yarn which was cleared from the factory gate is tried to be levied with excise duty prescribed for base yarn which undergoes text rising process. To appreciate the submission of the learned Counsel, it is necessary to refer to Tariff Item No. 18(II) which deals with the item of man-made filament yarn. The sub-item indicates that non-cellulosic yarn other than textile is liable to pay duty at Rs. 85/- per kg. while textured yarn is liable to pay duty at the rate of Rs. 95/- per kg. The explanation to the entry sets out that textured yarn means yarn that has been processed to introduce crimps, coils, loops or curls along the length of the filaments and shall include bulked yarn and stretch yarn. The Central Government in exercise of powers conferred by sub-rule 1 of Rule 8 of the Central Excise Rules published an exemption notification dated March 1, 1978 exempting so much of the duty of excise leviable as in excess of duty specified in the corresponding entry in column (3) of the table annexed to the notification. The first item in the table is textured yarn produced out of base yarn and rate of duty in column 3 is the duty for the time being leviable on the base yarn, if not already paid plus Rs. 5/- per kg. Another exemption notification dated May 11, 1982 provides the rates for polyester yarn of 100 deniers and above but not above 750 deniers at Rs. 61.25, while in respect of 75 deniers and above but below 100 deniers at Rs. 78.75. A perusal of the tariff entry and the two exemption notifications leaves no manner of doubt that while working out the duty payable, the Government has clearly made a distinction between textured yarn and non-textured yarn. The rate of duty for the non-textured yarn or base yarn is different than that of other textured yarn. The base yarn undergoes certain processes of text rising to bring into existence the textured yarn which is a distinct and different commodity than the base yarn

7. Mr. Dada submitted, and in our judgment with considerable merit, that as soon as the petitioners manufacture base yarn in their factory at Patalganga, an excisable item comes into existence and when such excisable item is cleared from the factory gate, the excise duty payable is at the rate of Rs. 61.25 and it is not permissible for the department to claim that a higher excise duty which is payable in respect of textures yarn will be levied and recovered. It is not in dispute that 52% of the base yarn manufactured at Patalganga factory is cleared at the factory gate. Mr. Varma, learned Counsel appearing on behalf of the department, submitted that the clearance by the petitioners from Patalganga factory is only to forward to the text rising unit of the petitioners at Naroda in the State of Gujarat. Mr. Verma submitted that even though the base yarn is a new product liable to excise duty when the petitioners remove such new product for undertaking text rising process at their own factory at Naroda, the excise duty payable while removing base yarn at the factory gate from Patalganga factory is a duty leviable in respect of textures yarn. It is impossible to find any merit in the submission of the learned Counsel. It is futile to suggest that base yarn is an intermediate product used by the petitioners for bringing into existence the final product of textures yarn. The tariff entry clearly establishes that base yarn is a product which comes into existence on manufacture and is liable to excise duty. The liability of the petitioners to pay duty arises as soon as base yarn comes into existence and the same is cleared from the factory gate. The excise duty payable is on the basis that the manufactured product is base yarn and at that juncture is not permissible for the department to levy excise duty on the basis that the manufactured product is textured yarn. It is not in dispute that when base yarn undergoes text rising process to bring into existence textures yarn, then separate excise duty is leviable for the process of manufacture. In these circumstances, it is impossible to accede to the submission urged on behalf of the department that at the time of clearance of base yarn, the petitioners are liable to pay excise duty which is required to be paid after the textures yarn comes into existence. The provisional assessment made by the department, therefore, is unsustainable.

8. Mr. Dada invited our attention to a circular issued by the Government which suggests that the duty can be levied on base yarn on the basis that it will be used subsequently for manufacturing textures yarn. We do not read the circular in a manner as understood by the department and in any way the circular cannot confer right upon the department to levy excise duty on the basis of textures yarn when what is cleared from the factory gate is only base yarn. Mr. Dada also invited our attention to a decision of CEGAT where the Tribunal examined the dispute between the petitioners and the department. The petitioners were claiming that the liability to pay excise duty on the base yarn stands postponed till the textures yarn comes into existence. The department resisted the claim by pointing out that the liability to pay excise duty arises as soon as base yarn comes into existence. The contention of the department was upheld. Mr. Dada, is therefore, right in submitting that it is not open to the department now to turn

round and claim that the excise duty at the time of clearance of base yarn from the factory gate would be recovered on the basis of duty payable for manufacture of textures yarn. In our judgment, the action of the department is clearly erroneous and the petitioners are entitled to the relief.

9. Accordingly, rule is made absolute in terms of prayers (a) to (d) as amended. In the circumstances of the case, there will be no order as to costs.

