SUPREME COURT OF INDIA

Mathania Fabrics

Vs.

Commnr. of Central Excise Jaipur

C.A.No.1856 of 2005

(Dr.Arijit Pasayat and D.K.Jain, JJ.)

04.01.2008

JUDGMENT

Dr.Arijit Pasayat,J.

1. These two appeals involve identical questions and are, therefore, disposed of by this common judgment. Appeals are directed against the orders passed by the Customs, Excise and Service Tax Appellate Tribunal, New Delhi (in short the Cestat) and Customs, Excise & Gold Control Appellate Tribunal, New Delhi (in short the Cegat). The appeals filed by the appellants were dismissed by CESTAT holding that they were not entitled to benefit of concerned notifications. In case of appellant M/s Vimal Textile Mills, the concerned Notifications were Notification No.28/94-CE dated 1.3.1994 the Notification No.8/96-CE dated 23.7.1996 and its successor Notifications. CESTAT denied the benefit relying on a larger Benchs decision in the case of *M/s Mathania Fabrics v. Commissioner of Central Excise, Jaipur*[1] Same is the subject matter of challenge in C.A.No.5398 of 2002.

2. Background facts in a nutshell are as follows:

> "Appellants are engaged in the processing of cotton fabrics falling under Chapter 52. They claimed to be undertaking the processes of bleaching, mercerising, dyeing, printing, washing, drying and finishing before the fabrics were packed and cleared."

Note 3 to Chapter 52 reads as follows:

> "In relation to the manufacture of products of Heading Nos. 52.07, 52.08 and 52.09, bleaching, mercersing, dyeing, printing, water proofing, shrink-proofing, organdie process or any other process or any one or more of these processes shall amount to manufacture."

3. In Civil Appeal No.1856 of 2005 the stand taken by the appellants was that they were not using power in the processing of the fabrics and, therefore, the benefit which they were

earlier availing was available. They had not used any power while undertaking the activities of bleaching, mercersing, dyeing, printing, washing, drying and finishing before the fabrics were packed and cleared. It was further submitted that the Notification No.5/99 was amended by Notification No.35/99-CE dated 28.8.99 and the same was applicable retrospectively and the Explanation below serial No.102 of Notification No.5/99 was substituted as under:

> "Explanation- For the purposes of this exemption, cotton fabrics subjected to any one or more of the following processes with the aid of power, shall be deemed to have been processed without the aid of power or steam, namely:-
>
> (a) lifting to overhead tanks or emptying in underground tanks handling of chemicals such as acids, chlorine, caustic soda."

4. It was, therefore, submitted that there was doubt about the applicable provisions and, therefore, Section 11A of the Central Excise Act, 1944 (in short the Act) was not applicable.

5. Stand of the Revenue on the other hand was that the amendment to the Notification was not retrospective and in effect it substituted the explanation. Reference was also made to the Explanation by Notification No.35/99-CE dated 4th August, 1999 which reads as follows:

> "Explanation - For the purpose of this exemption, cotton fabrics subjected to any one or more of the following processes with the aid of power, shall be deemed to have been processed without the aid of power or steam namely: chemicals for lifting the water and for drying the fabrics does not amount to use of power in the processing of cotton fabrics."

6. CESTAT held that there was nothing in the Notification dated 4.8.99 to suggest that the amendment carried out was to be given retrospective effect. It was held that factually the adjudicating authority had found that power had been used.

7. Appellants took the stand that the processes undertaken amounted to manufacture but for the deemed definition of manufacture as noted above the processes undertaken by the appellants would not amount to manufacture. In respect of the above processes undertaken by the appellant and no power was used. Appellants claimed benefit of exemption granted to "cotton fabrics processed without the aid of power". Appellants took the stand that since they had not used the power in respect of the above processes, the benefit was available. They submitted that the use of power was only in certain ancillary and incidental areas such as mixing of chemicals etc. and therefore the benefit could not have been denied. Department denied the benefit on the ground that there was use of power and the view was found by the tribunal. In any event it was submitted that when the position in law was not clear and the authorities had to issue clarification, Section 11A of Act cannot be invoked. Tribunal after referring to the definition of manufacture underSection 2(f) of the Act and the decisions of this Court in *J.K. Cotton Spg.Wvg. Mills Co. Ltd. v. Sales Tax officer, Kanpur*[2] *and CCE, v. Rajasthan State Chemical Works*[3] held that the use of power in the operation of stirrer and

electric motor for lifting water and caustic soda would amount to manufacture with the aid of power. In view of the decision of this Court in Rajasthan State Chemicals Works case (supra) the stand about the applicability of Section 11A was held to be untenable. It held that the period involved was subsequent to the decision. Strong reliance is placed on a letter of Commissioner of Central Excise dated 10.1.1999, to contend that there was doubt about the nature of the process involved. Said letter is significant. In view of this Courts decision it is not known under what circumstances the letter was written. It is to be noted that the penalty amounts were equivalent to the extra demand raised but the Tribunal has reduced to it to Rs.25,00,000/-. Therefore, the appeal No. 1856 of 2005 is clearly without merit and we dismiss it.

8. So far as Civil Appeal No. 5398 of 2002 is concerned, the period involved is 14.12.1980 to 15.12.1985 when the first notice was issued on 9.12.1986. It appears that in the show cause notice reply there was no reference to this aspect. So far merit is concerned, the plea was that there is no aid of power used. It is to be noted that in paragraph 9 of the order, CEGAT observed as follows:

"If pumping of brine into salt pans and lifting of coke and lime stone to the platform with the aid of power can be treated as part of the continuous process of manufacture, there is no reason to hold otherwise when power is used for lifting water and pouring the same in the kier and bleaching vessel. It is not the case of the assessee that water is not an essential ingredient for the process of kiering and bleaching. The pouring of water into kier and bleaching vessel are steps integrally connected with the whole process. We, therefore, hold that the appellant is not entitled to claim the benefit of Notification No. 173/77 dated 18.6.77 as amended by Notification No. 130/82 CE dated 20.4.82 as part of the process was being carried out with the use of power."

9. Therefore, factually the stand that there was no use of power is unsustainable. Coming to the period of limitation the five years period has to be reckoned backward from 8.2.1989 when the show cause notice was issued. The Commissioner shall work out the liability and the penalty amount has to be equivalent to the amount of tax demand.

10. The appeal is allowed to the aforesaid extent. No costs.

Judgment Referred.

[1]*(2002) (142) ELT 49 LB*
[2]*(1997) 91 ELT 0034 SC*
[3]*(1999) 55 ELT 444 SC*