SUPREME COURT OF INDIA

Commissioner of Central Excise, Chandigarh

Vs.

Shital International

C.A.Nos.1689-1690 of 2003

(D.K.Jain and C.K.Prasad JJ.)

22.10.2010

JUDGMENT

D.K.Jain, J.:

1. These appeals filed by the Revenue under Section 35- L(b) of the Central Excise Act, 1944 (for short "the Act") are directed against the order and judgment dated 21st August 2002 passed by the Customs, Excise and Gold (Control) Appellate Tribunal, (for short "CEGAT"), as it existed then, and the order and judgment dated 8th November 2004 passed by the Custom, Excise and Service Tax Appellate Tribunal (for short "CESTAT"), whereby both the CEGAT and CESTAT rejected the claim of the Revenue and held that the goods manufactured by the assessee were "unprocessed knitted pile fabrics" classifiable under chapter sub-heading 6001.12 of the Central Excise Tariff Act, 1985 (for short "the Tariff Act"), attracting Nil rate of duty.

2. Since the question of law arising for our consideration in all the appeals is similar, these are disposed of by this common judgment. However, for the purpose of appreciating the controversy, a brief reference to the facts in Civil Appeal Nos.1689-1690 of 2003, relating to the same assessee, would be necessary. These are: The assessee company is engaged in the manufacture of knitted pile fabrics as well as knitted hosiery fabrics of man-made fibres. Admittedly, till 30th September 2000, the assessee was declaring the processed goods as dutiable and was paying Excise duty on the same.

> "However, on 3rd October 2000, the assessee submitted a revised declaration claiming that the goods manufactured by it were subject to Nil rate of duty in terms of Notification No. 06/2000-CE dated 1st March 2000 which came into effect from 1st October 2000, forming part of General Exemption No. 66, prescribing Nil rate of duty on "unprocessed knitted or crocheted fabrics", as also under Notification Nos. 9/96 and 18/96.

> On receipt of the revised declaration, a show cause notice dated 12th December 2000 was issued to the assessee, questioning as to why its stand be not rejected and CENVAT @ 16% ad valorem with AED(ST) @ 8% and AED (TTA) @ 15% of the Excise duty on the goods should not be levied.
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> On 29th December 2000, the assessee replied to the above show cause notice, denying liability on the ground that the fabric was unprocessed. However, the claim of the assessee did not find favour with the Deputy Commissioner, Central Excise, Jalandhar who vide his Order-in-Original No. 222/20/Val/01 dated 29th June 2001, held: "knitted pile fabrics of sub-heading 6001.12 being manufactured by the noticee be treated as processed fabrics and chargeable to cenvat @ 8% Adv., AED(ST) @ 8% Adv. in terms of notification no. 17/2000 dated 01.03.2000."

3. Being aggrieved by the said orders, the assessee preferred an appeal before the Commissioner (Appeals), Customs & Central Excise, Chandigarh.

4. The Commissioner (Appeals), upon consideration of the processes undertaken by the assessee came to the conclusion that these were not covered under Chapter Note 4 to Chapter 60 of the Tariff Act as neither of the processes of carding, knitting and shearing find mention in the said Chapter Note nor these processes can be covered under "any other process" mentioned in the said Chapter Note. Placing reliance on the decisions of the CEGAT as well as on the decision of this Court in Mafatlal Fine Spinning And Manufacturing Co. Ltd. Vs. Collector of Central Excise, Bombay1, the Commissioner allowed the appeal of the assessee.

5. Aggrieved by the said order, the Revenue preferred an appeal before the CEGAT. As mentioned previously, the CEGAT, vide impugned order, dismissed the appeal. Relying on the decision of this Court in Mafatlal (supra), the CEGAT held that operations of shearing, cropping and back coating of the fabric undertaken by the assessee did not amount to processing of the fabric, as contemplated in the said Chapter Note.

6. It would be expedient to mention that in C.A. No. 4541 of 2005 relating to the same assessee, the Commissioner, vide Order-in-Original No. 69/CE/JAL/03 dated 30th July 2003, who had adjudicated on the show cause notice dated 22nd June 1 (1989) 2 SCC 446: 1989 (40) ELT 218 (SC) 2001, after examining the processes carried out by the respondents, had concluded that the knitted pile fabric manufactured by the assessee was unprocessed and therefore was exempt under Notifications No. 5/99 and 6/2000. In the ultimate analysis the Commissioner observed thus:

> “Thus, from the above discussion it is proved that the noticee has supplied knitted pile fabrics as well as knitted hosiery fabrics to the buyers sold by raising commercial invoices and most of the pile fabrics supplied by the noticee as knitted fabrics were not having back coating and even if process of back coating was conducted on some quantity, the noticee have claimed that the drying was done naturally. There is nothing on record to controvert the claim that back coated pile fabrics were not dried

naturally or cannot be dried naturally. Thus, I find that the show cause notice itself does not contain any of the ingredients required to substantiate the charge that the processes undertaken by the noticee amounts to manufacture in terms of Chapter Note 4 to Chapter 60 of Central Excise Tariff Act 1985 so as to attract Central Excise Duty.

In view of the above discussion, I hold that the processes undertaken by the noticee in the manufacture of pile fabrics sold as knitted fabrics do not amount to manufacture in view of Hon'ble Supreme Court judgment in *Maharashtra Fur Fabrics Ltd.*[1] and the definition of processes as defined above and therefore, the goods supplied by the noticee were not dutiable under notification no.5/99-CE dated 28.02.1999 and 6/2000-CE dated 01.03.2000 during the relevant period and Central Excise duty amounting to `1,20,93,135/- [BED `1,11,97,348 + `8,95,787] is not recoverable under Section 11A of the Act and interest under Section 11AB of the Act."

Aggrieved by this order, the Revenue preferred an appeal before the CESTAT, which was rejected vide the impugned order."

7. Being dissatisfied by the said orders, the Revenue is before us in these appeals. For the sake of convenience, hereinafter, both the CEGAT and the CESTAT will be referred to as "the Tribunal."

8. Mr. B. Bhattacharya, learned Additional Solicitor General, appearing for the revenue, contended that since in the instant case, the fabric had been subjected to processing in the form of shearing and electrifying polishing, these processes amounted to "manufacture" in terms of Chapter Note 4 to Chapter 60 of the Tariff Act and hence it was not exempted from Excise duty. Learned counsel argued that the decision of this Court in Mafatlal (supra) was not applicable to the present case, as initially the assessee was itself paying duty as and when knitted pile fabric was cleared under Excise invoices, treating the same as processed fabrics.

9. Per contra, Mr. V. Lakshmi Kumaran, learned counsel appearing for the assessee, while supporting the impugned order of the Tribunal, urged that Chapter Note 4 of Chapter 60 of the Tariff Act refers only to those processes which result in irreversible or lasting change in the character of the fabric and, therefore, since the processes of shearing and back-coating did not bring about any change in the grey fabric, the said processes do not fall within the ambit of the said Chapter so as to attract Excise duty. To buttress the argument that the processes carried out by the assessee, namely shearing, back coating etc. are integral processes for the manufacture of knitted pile fabric and did not amount to manufacture of "processed fabric" as contemplated under Chapter Note 4 and, therefore, the assessee was entitled to claim exemption under Notification No. 06/2000-CE, learned counsel relied on the decisions of the Tribunal in *Maharashtra Fur Fabrics Ltd. Vs. Collector of Central Excise, Bombay*[2] *and Versatile Enterprises Pvt. Ltd. Vs. Collector of Central Excise, Meerut*[3].

10. It was strenuously contended that so far as the process of shearing was concerned, the issue is no more res integra in the light of the decision of this Court in Mafatlal (supra)

wherein it had been held that shearing process did not have the effect of bringing about any change in the grey fabric. According to the learned counsel, in view of the concurrent findings of fact recorded by both the authorities below, the test enunciated in the said decision stands satisfied. It was, thus, asserted that there being no permanent change in the character of the fabric even when the grey fabric is back-coated or sheared, the ratio of the said decision is in all force to the facts in hand and, therefore, the appeals deserve to be dismissed. In so far as the question of process of electrifying polish was concerned, learned counsel submitted that such a plea was neither a part of the show cause notice nor was raised by the Revenue either before the Commissioner or Tribunal, the Revenue cannot be permitted to raise such a plea at this stage.

11. Before embarking on an examination of the rival submissions, it would be instructive to take note of the tests laid in Mafatlal (supra), to determine whether a process amounts to manufacture under the Excise Act. In the said case, this Court had observed thus:- "Any processing that can take a case out of Rule 49-A(1)(b) must be a process which renders cotton fabric ceases to be `grey fabric' as commercially known and understood. The question whether `calendering' and `shearing', as actually carried out by the appellant has had the effect of taking the cotton fabric out of Rule 49-A(1) should be decided in the light of this test.

> "20. In the present cases, the claim of the appellant before the authorities that the calendering process employed by them was such as to give temporary finish by pressing the fabric is not controverted. No lasting change is brought about. There is no finding to the contrary. Likewise the claim as to the "shearing" which was only to trim protruding, stray fibres from the fabric. If these are the nature of the operations, the `grey' fabric, in the facts of these cases, does not become new and commercially different commodity and cease to be `grey' cloth. There is thus no justification to take it out of Rule 49-A(1)(b)."

12. Therefore, the questions arising for consideration are: (i) whether the said processes undertaken by the assessee amounted to "manufacture" in terms of Note 4 to Chapter 60 and/or (ii) whether the processes in question introduce such a change in the nature of the fabric that it ceases to be a grey fabric?

13. The relevant portion of Chapter 60 of the Tariff Act along with the notes reads as follows:

> "CHAPTER 60
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> KNITTED OR CROCHETED FABRICS
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> Notes:
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> 1. This Chapter does not cover:

(a) crochet lace of heading No. 58.04; 11

(b) labels, badges or similar articles, knitted or crocheted, of heading No. 58.07; or

(c) knitted or crocheted fabrics, impregnated, coated, covered or laminated of Chapter 59. However, knitted or crocheted pile fabrics, impregnated, coated, covered or laminated, remain classified in heading No. 60.01

2. This Chapter also includes fabrics made of metal thread and of a kind used in apparel, as furnishing fabrics or for similar purposes.

3. Throughout this Schedule, any reference to "knitted" goods includes a reference to stitch-bonded goods in which the chain stitches are formed of textile yarn.

4. In relation to products referred to in this Chapter, bleaching, mercerising, dyeing, printing, water- proofing, shrink-proofing, tentering, heat-setting, crease-resistant, organdie processing or any other process or any one or more of these processes shall amount to `manufacture'.

Head- Sub- Description of goods Rate of dutying heading No. No. Basic Additional (1) (2) (3) (4) (5) 60.01 Pile fabrics, including `Long pile' fabrics and terry fabrics, knitted or crocheted - `Long pile' fabrics: 6001.11 - Of man-made fibres 16% 8% 6001.12 - Of other textile materials 16% 8% 6001.19 - Of other textile materials 16% 12

- Looped pile fabrics 6001.21 - Of cotton 16% 8% 6001.22 - Of man-made fibres 16% 8% 6001.29 - Of other textile materials 16% - Other:

6001.91 - Of cotton 16% 8% 6001.92 - Of man-made fibres 16% 8% 6001.99 - Of other textile materials 16%"

14. There is no dispute that knitted pile fabrics are to be classified under heading No. 60.01 of the Tariff Act. The issue is whether the processes of shearing and back-coating which do not figure in Chapter Note 4 to Chapter 60 of the Tariff Act, would fall within the ambit of "any other process" referred to in the said note. It is well settled that general terms following particular expressions take their colour and meaning as that of the preceding expressions, applying the principle of ejusdem generis rule, therefore, in construing the words "or any other process", the import of the specific expressions will have to be kept in mind. (See: *Collector of Central Excise, Bombay Vs. Maharashtra Fur Fabrics Ltd.*[4]). Therefore, the processes, with which we are concerned in the present appeals must take their colour from the process of bleaching, dyeing, printing, shrink- proofing, tentering, heat-setting, crease-resistant processing, specifically mentioned in the note. It is evident that when a grey fabric is subjected to any of these processes, a permanent or lasting change is brought about in the

fabric. Whereas, in the present case, both the appellate authorities below have found that neither shearing nor back-coating brings about any permanent or lasting change in the knitted pile fabric manufactured by the assessee by carding and knitting. In this regard, it would be useful to advert to the observations made by this Court in *Commissioner of Central Excise, Hyderabad-I Vs. Charminar Non-Wovens Limited*[5] wherein it was held that:-

> "Such concurrent findings by the lower authorities are interfered with by this Court in exercise of its jurisdiction under Section 35-L of the Central Excises and Salt Act, 1944 only when such findings are patently perverse or are based on manifest misreading of any legal provision. Here none of these situations is present. Reference in this connection may be made to the decision of *Sidharath Pharmaceuticals v. CCE*[6] . In that judgment, the learned Judges of this Court held that with the concurrent finding of facts reached by the lower authorities in classification on the basis of evidence and on analysis of relevant legal provision interference is not called for by this Court in exercise of its power under Section 35- L of the Central Excise Act, 1944."

15. In the declaration submitted by the assessee, the said processes are described as follows:-

> "a. Carding: Firstly, the fibre/synthetic waste/mixed fibre and waste is fed into the carding machine which opens the compressed material and after loosening the same, sliver is made.
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> b. Knitting: Thereafter, the carded sliver plus yarn is inserted into the loops of the circular knitting machines and the fabric is made.
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> c. Shearing: The next process is on the back- coating machine where the cloth is sheared, polished and the pile is kept to the required level. d. Back-coating: The final process is on the back coating machine where the back coating is done and fur is ready. Then, it is measured on semi- automatic measuring table and the rolls are made which are ready for show in the Excise Bond room and for sale."
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> In this background, we find it difficult to hold that the processes of shearing or back-coating are of the same nature as other processes mentioned in the said chapter Note and therefore, would fall within the scope and ambit of "any other process."

16. Adverting to the second issue, noted supra, the Revenue has not controverted the afore-stated factual position, nor has it adduced any evidence to suggest that the processes mentioned in the afore-extracted declaration induce some permanent change in the "grey fabric". A bare perusal of the nature of the processes, explained in the said declaration reveals that the processes mentioned therein do not have the effect of changing the "grey fabric" into another commodity or bring about a permanent or lasting change in the fabric so as to bring out a new product, tantamounting to manufacture in terms of Chapter Note 4 to

Chapter 60 of the Tariff Act. Support is also lent to this view by the decision of this Court in Mafatlal's case (supra).

17. As regards the process of electrifying polish, now pressed into service by the revenue, it is trite law that unless the foundation of the case is laid in the show cause notice, the revenue cannot be permitted to build up a new case against the assessee. (See: *Commissioner of Customs, Mumbai Vs. Toyo Engineering India Ltd.*[7]; *Commissioner of Central Excise, Nagpur Vs. Ballarpur Industries Ltd.*[8] *and Commissioner of Central Excise, Bhubaneshwar-I Vs. Champdany Industries Limited*[9]). Admittedly, in the instant case, no such objection was raised by the adjudicating authority in the show cause notice dated 22nd June 2001 relating to the assessment year 1988-89 to 2000-01. However, in the show cause notice dated 12th December 2000, the process of electrifying polish finds a brief mention. Therefore, in light of the settled legal position, the plea of the learned counsel for the revenue in that behalf cannot be entertained as the revenue cannot be allowed to raise a fresh plea, which has not been raised in the Show Cause notice nor can it be allowed to take contradictory stands in relation to the same assessee.

18. In light of the foregoing discussion, we are in agreement with the Tribunal that the said processes do not amount to "manufacture" in terms of Note 4 of Chapter 60 of the Tariff Act, and hence the fabric in question is "unprocessed knitted fabric" falling under Sr. No.165 of the exemption notification No. 06/2000 dated 1st March 2000, attracting Nil rate of duty as also under notification Nos. 5/99, 9/96 and 18/96. These appeals are bereft of any merit and are, therefore, dismissed accordingly, leaving the parties to bear their own costs.

[1]*2002 (145) ELT 287 (SC)*
[2]*1994 (71) E.L.T. 857 (Tri.-Del.)*
[3]*2001 (130) E.L.T. 770 (Tri.-Del.)*
[4]*(2002) 7 SCC 444*
[5]*(2009) 10 SCC 770*
[6]*(2009) 16 SCC 561*
[7]*(2006) 7 SCC 592*
[8]*(2007) 8 SCC 89*
[9]*(2009) 9 SCC 466*