COLLECTOR OF CENTRAL EXCISE, BOMBAY

v.

M/S KOHINOOR MILLS BOMBAY

APRIL 4, 1995

[R.M. SAHAI AND S.B. MAJMUDAR, JJ.]

Central Excises and Salt Act, 1944:

Item 18(III)(i), 18-A(i) and 19.

Central Excise Rules, 1944: Rules 18(1) and 19.

Excise—Exemption Notification—Applicability of—Composite Textile Mill—Yarn manufactured—Captive consumption of—Notification exemption levy of duty—Subsequent withdrawal of notification—Yarn manufactured and captively consumed prior to withdrawal of notification—Fabric manufactured out of such yarn removed from factory subsequent to withdrawal of exemption—Assessee held entitled to benefit of exemption notification.

The assessees in both these appeals are composite textile mills. The yarn manufactured by them in their weaving department was captively consumed in there spinning department. Under a notification No. 132/77 dated 18.6.1977 the yarn manufactured in the Composite Textile Mill from 18.6.1977 onwards was exempted from excise duty when such yarn was removed for captive consumption and used for that purpose by the same mill in its spinning department for manufacturing fabrics. However, this exemption was partially withdrawn with effect from 15.7.1977. The respondent assessee claimed benefit of the notification dated 18.6.1977 and the Tribunal held that when cotton yarn was manufactured prior to 15.7.1977 and was removed for captive consumption and used by the composite textile mill in manufacturing fabric prior to that date no excise duty was leviable thereon even if the fabric was manufactured out of it after 15.7.1977. In the other connected appeal the Tribunal took contrary view and held that it was not the date of manufacture but the date of clearance of the manufactured commodities that was relevant for deciding the tax liability and as cotton fabric was cleared after 15.7.1977, the input of yarn was liable to be taxed as per the notification holding the field after 15.7.1977. Against the orders of the Tribunals appeals were preferred before this Court.

A On behalf of the Revenue it was contended that even though the yarn might have been manufactured between 18.6.1977 and 14.7.1977 if such yarn was captively consumed and ultimately resulted into fabric and if such fabric was removed from the factory gate after 15.7.1977, the captively consumed yarn out of which such fabric was manufactured was liable to B excise duty as per notification dated 15.7.1977.

Dismissing the appeals preferred by Revenue and allowing the appeals of assessees, this Court

HELD : 1. The view taken by the Tribunal in the impugned judgment C against which Revenue has preferred appeals cannot be found fault with. The view taken by the Tribunal in the impugned judgment against which assessee has preferred appeal cannot be upheld. [167-H, 168-D]

2. The yarn manufactured by the appellant composite mills from 18.6.1977 upto 14.7.1977 and removed for captive consumption and used D as such during that time in the spinning department for manufacture of fabric will not be liable to bear any excise duty as per the latter notification dated 15.7.1977. [164-H, 165-A]

3. A conjoint reading of Rule 9(1) and Explanation to Rule 9(2) of E the Rules makes it clear that if a manufactured item covered by the charge of excise duty by the charging provisions of the Central Excise Act is captively consumed, it would amount to removal of such manufactured item . Consequently once the yarn is manufactured in the weaving department of the composite textile mill and is taken to the spinning department F for being captively utilised by way of consumption in spinning department, and gets consumed, it is deemed to have been removed within the meaning of Rule 9(1). Once that happens, the liability of such manufactured yarn to pay excise duty at the then prevalent rate of duty is crystalised. Thereafter, the question as to when subsequently the fabric is manufactured or emerges or is removed from factory gate becomes irrelevant for the pur- G pose of deciding the question of liability of excise duty on such captively consumed yarn. [167-C to E]

4. In the present case captively consumed yarn was manufactured on and from 18.6.1977 and removed to spinning department and was utilised H prior to 15.7.1977. Thus such yarn falls in first category under notification

dated 15.7.1977 viz. cotton yarn manufactured prior to 15.7.1977 and removed for captive consumption and utilised in production of fabrics. The liability to pay excise duty on such yarn, therefore, has to be decided prior to 15.7.1977 in the light of Rule 9(1) read with Explanation and subject to the relevant exemption notification then holding the field. As at the relevant time the earlier Notification No. 132/77 of 18.6.1977 was holding the field under which such yarn was wholly exempt from payment of excise duty, no excise duty was to be paid thereon. [167-F, G] A B

Sriram Mills Ltd. **v.** *Union of India,* **(1982) E.L.T. 457;** *Aryodaya Spinning and Weaving Company Ltd.* **v.** *Union of India,* **(1981) E.L.T. 274 and** *Union of India* **v.** *Hindustan Spinning and Weaving Mills Ltd.,* **(1992) 61 E.L.T. 531, approved.** C

Wallace Flour Mills Company Ltd. **v.** *Collector of Central Excise,* **(1989) 44 E.L.T. 598, held inapplicable.**

M/s. J.K. Cotton Spinning and Weaving Mills Ltd. and Anr. **v.** *Union of India and Ors.,* **[1987] Supp. SCC 350, referred to.** D

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 103-04/88.

Appeal under Section 35L(b) of the Central Excise and Salt Act, 1944 from the order dated 16.4.86 of the Customs Excise and Gold (Control) Appellate Tribunal, New Delhi in Appeal .No. 440 and 441 of 1981-D [Order Nos. 234 and 235 of 1986-D]. E

WITH

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C.A. No. 5408 of 1990.

A.K. Srivastava for the Appellants and Respondent in CA.No. 5408/90.

V.Laxmikumaran, Rajinder Narain, Ms. Amrita Mitra, Rajan Narain, Ms. Sonu Bhatnagar, A.R. Madav Rao for the Respondent and Petitioner in C.A.No. 5408 of 1990. G

The Judgment of the Court was delivered by

MAJMUDAR, J. These appeals involve a common question for our H

A consideration. It is to the effect 'when yarn was manufactured in the weaving department of a composite textile mill and was captively consumed in the spinning department for manufacturing fabrics therefrom, whether any excise duty was payable on the manufactured yarn prior to 15.7.1977 when an earlier notification dated 18.6.1977 exempting such yarn from payment of excise duty was in operation, only because the ultimate fabrics B got manufactured from such yarn on and from 15.7.1977 when the earlier notification stood rescinded'.

Civil Appeals 103 and 104 of 1988 are moved by the Collector of Central Excise of Bombay being aggrieved by the order passed by the C Customs and Excise and Gold (Control) Appellate Tribunal (hereinafter referred to as "the Tribunal") which has taken the view that such yarn would not be liable to pay any duty while Civil Appeal No. 5408 of 1990 is moved by the assessee against the order of the Tribunal which has taken a contrary view. In order to appreciate the contours of this controversy, it is necessary to note a few relevant facts. D

There is no dispute that the assessee textile mills in both the sets of appeals are composite textile mills. Composite textile mill is one which contains two departments amongst others, namely, spinning and weaving departments. In the weaving department yarn is manufactured. That yarn E is captively consumed in the spinning department of the same mill and ultimately cotton fabric emerges. It is also not in dispute that once yarn is manufactured even for capctive consumption in the weaving department, it has to bear excise duty as a commercial commodity is said to have emerged. When this yarn is utilised in the spining department of the F composite mill and fabric is manufactured out of it, on fabric excise duty has to be paid as per the tariff rate operating at the relevant time. The dispute in there present case arose because from 18.6.1977 there was in operation an exemption notification issued by the Central Government in exercise of its powers conferred under Rule 8 of the Central Excise Rules, 1944. The said Notification No. 132/77 reads as under : G

> "In exercise of the powers conferred by sub-rule (i) of rule 8 of the Central Excise Rules, 1944, the Central Government hereby exempts cellulosic spun yarn and cotton yarn falling under sub-item III (i) of Item No. 18 and Item No. 18A (i) respectively, of the H First Schedule to the Central Excise and Salt Act, 1944 (1 of 1944),

when used for weaving of cotton fabrics falling under Item No. 19 in a composite mill, free from whole of the duty of excise leviable thereon :

Provided that when such yarn is produced in a factory other than such composite mill, the procedure set out in Rule 96E of the Central Excise Rules, 1944 is followed.

Explanation - For the purposes of this notification "composite Mill" means a manufacturer who is engaged in spinning of cotton yarn or weaving of cotton fabrics or processing of cotton fabrics with the aid of power and has a proprietary interest in at least two of such manufacturing activities."

It may be mentioned at this stage that there was also in operation from the same date 18.6.1977 Notification No. 131/77 which first granted partial exemption from excise duty to cotton yarn. But because of Notification No. 132/77, such yarn when captively consumed in the composite textile mill got fully exempted.

Consequently the cotton yarn manufactured by the assessee composite textile mills from 18.6.1977 onwards had not to bear any excise duty when such yarn was removed for captive consumption and used for that purpose by the same mills in its spinning department for manufacturing fabrics. This exemption was partially withdrawn by a latter notification dated 15.7.1977. The said notification reads as under:-

"Cotton Fabrics [Tariff Item 19]

Notification No. 226/77-C.E., dated 15.7.1977.

In exercise of the powers conferred by sub-rule (1) of rule 8 of the Central Excise Rules, 1944, read with sub-section (3) of Section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957), and in supersession of the notification of the Government of India in the Department of Revenue and Banking, No. 135/77 - Central Excises, dated the 18th June, 1977, the Central Government hereby exempts cotton fabrics, falling under sub-item I of Item No. 19 of the First Schedule to the Central Excises and Salt Act, 1944 (I of 1944) and specified in column (2) of the Table hereto annexed (hereafter in this notification referred

to as the "Table") from so much of the duty of excise leviable thereon as is in excess of the duty specified in the corresponding entry in column (3) thereto.

TABLE

S. No.	Description	Rate of duty
(1)	(2)	(3)
1.	Cotton fabrics in which the average count of yarn is 41s or more.	fifteen per cent *ad valorem.*
2.	Cotton fabrics (other than those in which the average count of yarn is 41s or more), -	
	(i) does not exceed four rupees	two per cent *ad valorem.*
	(ii) exceeds four rupees but does not exceed six rupees	three per cent *ad valorem.*
	(iii) exceeds six rupees but does not exceed seven rupees	four per cent *ad valorem.*
	(iv) exceeds seven rupees but does not exceed eight rupees	six per cent *ad valorem.*
	(v) exceeds eight rupees but does not exceed nine rupees	eight per cent *ad valorem.*
	(vi) exceeds nine rupees but does not exceed ten rupees	ten per cent *ad valorem.*
	(vii) exceeds ten rupees but does not exceed eleven rupees	twelve per cent *ad valorem.*
	(viii) exceeds eleven rupees but does not exceed twelve rupees	fourteen per cent *ad valorem.*
	(ix) exceeds twelve rupees	fifteen per cent *ad valorem.*"

The excise authorities contended that even though the yarn might have been manufactured in the spinning department of the concerned composite mill between 18.6.1977 and 14.7.1977 if such yarn was captively consumed and ultimately resulted into fabric and if such fabric was removed from the factory gate after 15.7.1977, the captively consumed yarn out of which such fabric was manufactured must bear the duty of excise as

per notification dated 15.7.1977. That stand of the excise authorities was based on proviso (1) contained in the notification dated 15.7.1977. The said proviso reads as under :-

> "Provided further that in cases where cotton fabrics have been produced in a composite mill or are produced therein and in the production of such cotton fabrics cellulosic spun yarn falling under sub-item III(i) of Item No. 18 of the said First Schedule or Cotton yarn falling under Item no. 18A(i) of the said First Schedule, or both, on which no duty of excise was paid prior to the 15th day of July, 1977, was or is used, the duty payable on such fabrics shall be -
>
> (a) at the appropriate rate of duty as specified in this notification plus
>
> (b) the duty payable on such cellulosic spun yarn or cotton yarn or both, as the case may be, under the notification of the Government of India in the Department of Revenue and Banking, No. 131/77 - Central Excises, dated the 18th June, 1977."

A mere look at the said proviso shows that under the notification dated 15.7.1977 two types of cotton yarns manufactured by the composite textile mills, were sought to be taxed by way of excise duty as per Notification No. 131/77, namely, (1) cotton yarn manufactured prior to 15.7.1977 and removed for captive consumption and utilised in production of fabrics; and (2) cotton yarn already manufactured prior to 15.7.1977 but removed for captive consumption from and after 15.7.1977 for manufacturing of fabrics. This is clearly discernible from the words "where cotton fabrics have been produced in a composite mill or are produced therein and in the production of such cotton fabrics ..... cotton yarn.... on which no duty of excise was paid prior to the 15th day of July, 1977, *was or is used*..." The dispute centres around the cotton yarn in the first category. In Civil Appeals 103 and 104 of 1988, the Tribunal has taken the view following the decisions of the Bombay High Court in *Sriram Mills Ltd.* v. *Union of India,* (1982) E.L.T. 457 and the Gujarat High Court in *Aryodaya Spinning and Weaving Company Ltd.* v. *Union of India,* (1981) E.L.T. 274, that when cotton yarn is manufactured prior to 15.7.1977 and is removed for captive consumption and used by the composite textile mill in manufacturing fabric prior

A to that date no excise duty can be charged thereon even if the fabric is manufactured out of it after 15.7.1977. In Civil Appeal 5408 of 1990 on the other hand, another Bench of the Tribunal took the view placing reliance on the decision of this Court in *Wallace Flour Mills Company Ltd.* v. *Collector of Central Excise,* (1989) 44 ELT 598 that it is not the date of B manufacture but the date of clearance of the manufactured commodities that is relevant for deciding the tax liability and as cotton fabric was cleared after 15.7.1977, the input of yarn would be liable to be taxed as per the notification holding the field after 15.7.1977.

We have heard learned counsel for the parties in support of their C respective cases. In our view the contention canvassed on behalf of the revenue cannot be accepted. The reasons are obvious. It has to be kept in view that charge under the Central Excise Act fastened on a manufactured item once manufacture takes place. But the liability to pay the duty thereon will have to be decided in the light of the appropriate tariff applicable at the time when such manufactured commodity is cleared by the D manufacturer as per the provisions of the Excise Rules. In this connection, Rule 9(1) of the Central Excise Rules, 1944 becomes relevant. It reads as under:-

> "9. *Time and manner of payment of duty.*- (1) No excisable goods E shall be removed from any place where they are produced, cured or manufactured or any premises appurtenant thereto, which may be specified by the Collector in this behalf, whether for consumption, export or manufacture of any other commodity in or outside such place, until the excise duty leviable thereon has been paid at such place and in such manner as is prescribed in these Rules or F as the Collector may require and except on presentation of an application in the proper form and on obtaining the permission of the proper officer on the form."

It, therefore, becomes obvious that the duty becomes payable on a G manufactured item once it is removed from the place of manufacture for consumption, export or manufacture of any other commodity in or outside such place. There is an explanation of sub-rule (2) of Rule 9, which is relevant for the present purpose. It reads as under :-

> "Explanation. - For the purposes of this rule, excisable goods, H produced, cured or manufactured in any place and consumed or

utilised - A

(i) as such or after subjection to any process or processes; or

(ii) for the manufacture of any other commodity;

Whether in a continuous process or otherwise, in such place or any premises appurtenant thereto, specified by the Collector under sub-rule (1), shall be deemed to have been removed from such place or premises immediately before such consumption or utilisation." B

A conjoint reading of Rule 9(1) and Explanation makes it clear that if a manufactured item covered by the charge of excise duty by the charging provisions of the Central Excise Act is captively consumed, it would among to removal of such manufactured item. Consequently once the yarn is manufacture in the weaving department of the composite textile mill and is taken to the spinning department for being captively utilised by way of consumption in spinning department, and gets consumed, it is deemed to have been removed within the meaning of Rule 9(1). Once that happens, the liability of such manufactured yarn to pay excise duty at the then prevalent rate of duty is crystalised. Thereafter, the question as to when subsequently the fabric is manufactured or emerges or is removed from factory gate becomes irrelevant for the purpose of deciding the question of liability of excise duty on such captively consumed yarn. C D E

It is not in dispute between the parties that in the present case captively consumed yarn was manufactured on and from 18.6.1977 and removed to spinning department and was utilised in the spinning department prior to 15.7.1977. Thus such yarn falls in first category of yarn to which we have referred to earlier. The liability to pay excise duty on such yarn, therefore, has to be decided prior to 15.7.1977 in the light of Rule 9(1) read with Explanation and subject to the relevant exemption notification then holding the field. Once that happens, it has to be held that as at the relevant time the earlier Notification No. 132/77 of 18.6.1977 was holding the field under which such yarn was wholly exempt from payment of excise duty, no excise duty was to be paid thereon. The view taken by the Tribunal, therefore, in Civil Appeals 103 and 104 of 1988 cannot be found fault with. That was in confirmity with the view taken by the Gujarat and the Bombay High Courts in the earlier mentioned cases. We concur F G H

A with the same.

The latter view taken by the Tribunal in judgment under appeal in Civil Appeal 5408 of 1990 seeks to rely on the decision of this Court in *Wallace Flour Mill's* case (supra). In that case this Court was not concerned with the manufacture and utilisation of a commodity by way of captive B consumption. It was a case dealing with manufacture of food articles by an assessee company. After their manufacture but before they could be removed from the factory gate for home consumption, the rate of duty changed. It was, therefore, held that the said products had to bear the excise duty in the light of the prevailing tariff rate when such manufactured C items were removed from the factory gate for home consumption. The said view was obviously based on operation of Rule 9(1). Explanation to Rule 9(1) was not attracted on the facts of the case. Such is not the present situation where the manufactured yarn is not removed in its the then existing condition from the factory gate for home consumption. On the contrary, it was removed for being utilised for captive consumption prior D to 18.7.1977. It is, therefore, not possible to uphold the view taken by the Tribunal in Civil Appeal 5408 of 1990. At this stage it is also appropriate to note that the Explanation to Rule 9(1) and Section 49 inserted with retrospective effect by the rule making authorities were upheld by this Court in the case of *M/s. J.K. Cotton Spinning & Weaving Mills Ltd. & Anr.* E v. *Union of India & Ors.*, [1987] Supp. SCC 350. A latter Bench of the Bombay High Court in the case of *Union of India* v. *Hindustan Spinning & Weaving Mills Ltd.*, (1992) 61 E.L.T. 531 at 535, has taken the same view which has appealed to us. According to us no other view is possible on the scheme of the relevant provisions of the Act and the Rules. We respectfully concur with the view of the Division Bench of the Bombay High Court in F *Union of India* v. *Hindustan Spinning & Weaving Mills'* case (supra).

For all these reasons, Civil Appeals 103 and 104 are liable to fail and are dismissed. Civil Appeal 5408 of 1990 is allowed and it is held that the yarn manufactured by the appellant composite mills from 18.6.1977 upto G 14.7.1977 and removed for captive consumption and used as such during that time in the spining department for manufacture of fabric will not be liable to bear any excise duty as per the latter notification dated 15.7.1977.

The appellant in Civil Appeal 5408 of 1990 had moved an application H for refund of the duty paid under protest as demanded by the excise

authorities in the light of notification dated 15.7.1977. The question whether the appellant is entitled to any refund will have to be re-examined by the Assistant Collector of Central Excise before whom application was moved in the present case in the light of Section 11B of the Central Excise Act and the said application will have to be considered on merits in accordance with law and in the light of the present judgment after hearing the parties. The orders passed by the Tribunal as well as the Collector, Central Excise (Appeals) stand quashed and set aside and the application is remanded to the Assistant Collector for the re-adjudication of the refund claim of the appellant as aforesaid. Civil Appeal 5408 of 1990 will stand allowed accordingly. In the facts and circumstances of the case, there will be no order as to costs.

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T.N.A. Appeals dismissed.