COMMISSIONER OF CENTRAL EXCISE, MADURAI

v.

AYYAPPAN TEXTILES LTD.

(Civil Appeal No. 6766 of 2003)

JULY 23, 2013.

[SUDHANSU JYOTI MUKHOPADHAYA AND J. CHELAMESWAR, JJ.]

Central Excise Tariff Act, 1985:

Heading 52.03 - Cotton yarn of various counts - Demand raised against assessee for manufacturing cotton of higher counts than the declared ones - Held: If on inspection of a manufacturing premises on a particular day it is detected that goods of a particular specification are being manufactured, the department is entitled in law to presume that (until the manufacturer proves the contra) goods of the same specification are continued to be manufactured - However, in the instant case, no samples were drawn for Revenue to draw an initial presumption - Further, having regard to the paltry amount involved in the matter and the first appellate authority found substance in the defence of assessee, judgment of first appellate authority as affirmed by Appellate Tribunal, not interfered with - Evidence Act, 1872 - s.114,Ill.(d).

The respondent-assessee was issued a show cause notice dated 24.6.1994 stating that on the inspection of its factory premises, entries in two registers indicated that the assessee was manufacturing cotton yarn of higher counts than the declared ones. Revenue came to the prima facie conclusion that the assessee was liable to pay a further sum of Rs.4,98,034/- towards duty of goods allegedly manufactured between 1.2.1989 to 14.8.1993, and was also liable to penalty. The Collector, Central

A **Excise confirmed the demand to the extent of Rs.1,33,573/-. On appeal by the Revenue, the matter was remitted by the first appellate authority and the Deputy Commissioner upheld the demand raised in the show cause notice. But on appeal by the assessee, the**
B **Commissioner (Appeals) restricted the demand to Rs.1,32,573/- as was initially held by the Collector, Central Excise. Revenue's appeal was dismissed by the Tribunal.**

Dismissing the appeal, the Court

C **HELD: 1.1 If the department on inspection of a manufacturing premises on a particular day detects that goods of a particular specification are being manufactured, the department, in view of the principle enunciated in s.114, Illustration (d) of the Evidence Act,**
D **1872, is entitled in law to presume that (until the manufacturer proves the contra) goods of the same specification are continued to be manufactured. However, the case on hand is not a case where the said principle can be applied as no samples were drawn at all**
E **for the department to draw an initial presumption. The content of the recovered FILE and the statements of the employees of the respondent must be examined to ascertain the fact whether the respondent manufactured during the period covered by the FILE - yarn of a higher**
F **count than the declared one. Only after establishing such fact the department would be entitled to draw a presumption. There is no clear finding on record from any one of the authorities below that the materials gathered by the department would establish that basic fact. [para**
G **14-15] [778-G-H; 779-A-C]**

Ramalinga Choodambikai Mills Ltd. v. Government of India & Others **1984 (15) E.L.T. 407 (Mad.) - approved.**

Bojaraj Textiles Mills Ltd. v. Assistant Collector of Central

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Excise **1990 (45) E.L.T. 559 (Mad.) and** *The Government of India represented by its Secretary, Ministry of Finance, Department of Revenue & Insurance, New Delhi and Others v. The Chirala Co-operative Spinning Mills Ltd., Chirala* **1980 E.L.T. 174 (A.P.) - referred to.**

Collector of Central Excise, Coimbatore v. Cambodia Mills Ltd., **2001 (128) E.L.T. 373 (Mad.) - disapproved.**

Superfil Products Ltd. v. CCE, Chennai **2002 (48) R.L.T. 319 (CEGAT - Chennai) - cited.**

1.2 On the other hand, the 1st appellate authority found that the defence of the assessee - that the test reports obtained by it for a different purpose but not to ascertain the count of a day are not representative of the count of the production of the entire week - is a tenable defence. The Tribunal instead of deciding the correctness of such a conclusion went into the questions of law unwarranted by the facts of the case. Further, having regard to the paltry amount involved in the matter, the long and chequered history of the litigation and the resultant wastage of time of the various fora, coupled with the fact that the 1st appellate authority found some substance in the defence of the assessee, judgment under appeal is not interfered with. [para 16-17] [779-C-F]

Case Law Reference:

2001 (128) E.L.T. 373 (Mad.)	**disapproved**	**para 10**
2002 (48) R.L.T. 319 (CEGAT - Chennai)	**cited**	**para 10**
1984 (15) E.L.T. 407 (Mad.)	**approved**	**para 10**
1990 (45) E.L.T. 559 (Mad.)	**referred to**	**para 10**
1980 E.L.T. 174 (A.P.)	**referred to**	**para 10**

A CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6766 of 2003.

From the Judgment and Order dated 07.01.2003 of the Customs, Excise and Gold (control) Appellate Tribunal, South Zonal bench at Chennai final Order No. 4 of 2003 in Appeal No. E/252/02.

K. Radhakrishnan, Binu Tamta, Shalini Kumar, B. Krishna Prasad for the Appellant.

C The Judgment of the Court was delivered by

CHELAMESWAR, J. 1. This is a statutory appeal under section 35L (b) of the Central Excise Act, 1944 against the Final Order No.4/2003 of the Customs Excise & Gold (Control) Appellate Tribunal, South Zonal Bench at Chennai passed in D Appeal No.E/252/02 on dated 7.01.2003.

2. This is a typical case where at every stage of the litigation irrelevant legal principles were pressed into service resulting in colossal waste of time of adjudicators including time E of this Court.

3. Briefly stated the facts are as follows:

4. The respondent company is engaged at least from 1985 in the business of manufacturing of various counts of cotton yarn F falling under heading 52.03 of the Central Excise Tariff Act, 1985 at the relevant point of time. It appears that at the relevant point of time the rate of tax on the yarn manufactured depended on the count/finesse of the yarn. Higher the count higher the duty. On 30.08.1993, the officers of the Central Excise G Department inspected the factory premises of the respondent company and recovered two registers and a file. In the show-cause notice dated 24.06.1994 issued by the department which resulted in the present litigation, the contents of the seized documents are described as under:

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"The officers found TWO REGISTERS showing the datewise details on count, strength and the Court Strength Product of various counts of yarn manufactured by them pertaining to the period 14.12.1985 to 31.12.1990 and A FILE containing the yarn test reports of various counts manufactured by M/s. Ayyappan Textiles Limited and tested at Sitalakshmi Mills Group Central laboratory, Madurai on a weekly basis. The said two Registers and file were recovered from the party.

Perusal of the two registers and the files revealed that the assessee was manufacturing higher counts over and above the tolerance limit in respect of the following counts declared to the department and cleared the same without payment of appropriate duty on the higher counts, (1) 40s (ii) 43s (iii) 60s (iv) 82s.

(emphasis supplied)

5. Subsequently, the statements of Spinning Manager of respondent company and Technical Manager from M/s. Sitalakshmi Group of Mills, were recorded, (the details of which may not be necessary for the present purpose,) and on the basis of the abovementioned material, the department came to the prima facie conclusion that the respondent company is liable to pay a further sum of Rs.4,98,034/- towards the duty on the goods allegedly manufactured between 1.2.1989 to 14.8.1993 and also liable to penalty. Therefore, the show cause notice was issued.

6. Upon receipt of the explanation, the Collector of Central Excise vide order dated 4.10.1994 confirmed the demand to the extent of Rs.1,33,573/- holding that the assessee did not dispute his liability to pay higher tax on the basis of the material contained in the two registers recovered with respect to the balance of the demand based on the material contained in the FILE:-

A "...I find that the assessee's contention has considerable force as the count determined on the basis of test conducted on the basis of sample drawn on a particular day's production during a week cannot be the representative of the whole weeks production."

B 7. Aggrieved by the same, the department carried the matter in appeal before the tribunal. The tribunal vide order dated 25.06.1997 allowed the appeal and remitted the matter for afresh adjudication.

C 8. On such remand, the Deputy Commissioner who heard the matter passed order dated 31.8.1998 concluding that the respondent is liable to pay the entire amount of Rs.4,98,034/- as demanded by the show-cause notice. Aggrieved by the same, the respondent carried the matter once again before the D Commissioner (Appeals) who by his order dated 22.03.2002 allowed the appeal partially and restricted the demand to Rs.1,33,573/- incidentally relying upon the findings recorded on 4.10.1994 (already extracted). Once again, the department carried the matter in appeal before the tribunal. The tribunal by E the impugned order dated 07.1.2003 dismissed the appeal. Hence the instant appeal.

9. The operative portion of the impugned order reads as under:

F "I have carefully considered the submissions made by both sides and perused the records. This Bench also in the case of Superfil Products Ltd. Vs. CCE, Chennai has followed the judgment rendered by the Hon'ble High Court of Judicature at Madras in the case of Cambodia Mills Ltd. G (supra), the ratio of the above decision has a binding force on this Bench. By respectfully following the judgment rendered by the Hon'ble High Court at Madras in the case of CCE, Coimbatore Vs. Cambodia Mills Ltd. (supra) and the judgment rendered by this Bench in the case of Superfil H Products Ltd. Vs. CCE, Chennai (supra), I reject the

appeal filed by the revenue and sustain the impugned order passed by the Commissioner (Appeals). Ordered accordingly." A

10. In substance, following the earlier judgment of the Madras High Court rendered in *Collector of Central Excise, Coimbatore v. Cambodia Mills Ltd.*, 2001 (128) E.L.T. 373 (Mad.) and *Superfil Products Ltd. v. CCE, Chennai.* 2002 (48) R.L.T. 319 (CEGAT - Chennai), the appeal was dismissed. Whereas the decisions relied upon by the department in *Ramalinga Choodambikai Mills Ltd. v. Government of India & Others* 1984 (15) E.L.T. 407 (Mad.), *Bojaraj Textiles Mills Ltd. v. Assistant Collector of Central Excise* 1990 (45) E.L.T. 559 (Mad.) and *The Government of India represented by its Secretary, Ministry of Finance, Department of Revenue & Insurance, New Delhi and Others v. The Chirala Co-operative Spinning Mills Ltd., Chirala* 1980 E.L.T. 174 (A.P.) were simply ignored. B C D

11. In *Cambodia Mills Ltd.* (supra), the division bench of the Madras High Court was considering a case where samples of yarn were drawn from the mill. It was found that the samples were of higher counts than what was being declared by the manufacturer. The department demanded a higher rate of tax on the entire production made subsequent to the date of inspection in view of the fact that the yarn produced on the date of inspection was found to be of higher counts. Eventually the matter reached the High Court. It appears that the question before the High Court in the aforementioned case was "whether the differential duty on the differential count of yarn which is in excess of the declared counts shall be demanded for the entire production from the period of drawal of the sample till the next sample....." (para 7). The High Court opined that there was no material on record to support the conclusion drawn by the department and directed the demand be restricted only to the yarn manufactured on the date of the drawal of the sample. E F G H

A 12. On the other hand, the department relied upon the decision in *Ramalinga Choodambikai Mills Ltd.* (supra), which is also a case of cotton yarn. Samples were drawn on 14.9.1966. On that day, 69 bales of cotton yarn manufactured prior to that date were lying in a packed condition in the factory B premises. Finding that the samples were of higher count than the declared count by the manufacturer, the department demanded a higher tax not only on the 69 bales of yarn existing in the factory premises on the date of the drawal of the samples but also further material manufactured between the date of C inspection (14.09.1966) and 20.10.1966 on which date fresh samples had again been drawn. The question was whether the demand in so far as it pertained to the yarn manufactured between the two dates of inspection solely on the basis of the test report of the samples drawn on the first date of inspection D is legally tenable. The High Court held that such a demand was tenable.[1]

13. The said decision was followed in *Bojaraj Textiles Mills Ltd.* (supra) and *The Chirala Co-operative Spinning Mills Ltd.* (supra). Unfortunately, none of the above-mentioned three E judgments appear to have been brought to the notice of the division bench of the Madras High Court when it considered the case of Cambodia Mills Ltd. (supra).

14. In our opinion the view taken in *Ramalinga* F *Choodambikai Mills Ltd.* (supra) appears to be a sound view in law and obviously based on the principle enunciated under Section 114 of the Evidence Act in illustration (d) "that a thing or state of thins which has been shown to be in existence within a period shorter than that within which such things or states of G things usually cease to exist is still in existence." If the department on inspection of a manufacturing premises on a particular day detects that goods of a particular specification are being manufactured, the department is entitled in law to presume that (until the manufacturer proves the contra) goods of the same specification are continued to be manufactured.

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15. However, the case on hand is not a case where the above principle can be applied as no samples were drawn at all for the department to draw an initial presumption. The content of the recovered FILE and the statements of the employees of the respondent must be examined to ascertain the fact whether the respondent manufactured during the period covered by the FILE - yarn of a higher count than the declared count. Only after establishing such fact the department would be entitled to draw a presumption. We do not find any clear finding on record from any one of the authorities below that the materials gathered by the department would establish that basic fact.

16. On the other hand the 1st appellant authority found that the defence of the respondent - that the test reports obtained by the respondent for a different purpose but not to ascertain the count of a day are not representative of the count of the production of the entire week - is a tenable defence.

17. The Tribunal instead of deciding the correctness of such a conclusion went into the questions of law unwarranted by the facts of the case. Having regard to the paltry amount involved in the matter, the long and chequered history of the litigation and the resultant wastage of time of the various fora, coupled with the fact, the 1st appellate authority found some substance in the defence of the respondent, we are not inclined to interfere with the judgment under appeal. The appeal is dismissed.

R.P. Appeal dismissed.