A UGAM CHAND BHANDARI

v.

COMMISSIONER OF CENTRAL EXCISE, MADRAS

MAY 5, 2004

B [RAJENDRA BABU, CJ. AND G.P. MATHUR, J.]

Central Excise :

Central Excise Act, 1944—Section 11A, Proviso—Extended limitation
C *period—Invocation of—Water-proof fabrics—Wrong classification by assessee—Department officials had been regularly visiting the factory of assessee and were aware of the manufacturing process adopted by them—Held, no fraud was played on the Department—Consequently extended limitation period is not invocable.*

D *Central Excise Tariff Act, 1985—Tariff Heading 59.06—Water-proof fabrics—Nature of—Found on test by the chemical examiner to be an impregnated/coated fabric with the layer of coating visible to naked eye—Tribunal rightly classified the product under Tariff Heading 59.06.*

E **The questions that arose for consideration in the appeals are whether the water-proofed fabrics are classifiable under Heading 52.07 of the Central Excise Tariff Schedule as claimed by the appellant-manufacturer or under Heading 59.06 as held by the Tribunal, and whether the extended period of limitation under proviso to Section 11A**
F **of the Central Excise Act, 1944 is invokable.**

Partly allowing the appeals, the Court

HELD : 1.1. The finding recorded by the Tribunal as to the nature of the product is after examining relevant material with reference to
G **relevant entries. The Tribunal held that the fabric manufactured by the appellants is impregnated and, therefore, has to be considered as fabric impregnated with materials other than those mentioned under Tariff 59.02 and 59.05. Such impregnation clearly indicated that under the scheme of the Central Excise Tariff the impregnated fabrics with a**
H **coating and which is visible to the naked eye on the material on record**

being of the finding of fact, cannot be interfered with. [62-D-F] A

1.2. Apart from the fact that there was difference of opinion even in the Department, the fact remains that the department officials had been regularly visiting the factory of the appellants and were in the know of the process of manufacture adopted by the appellants and to state that the appellants had played fraud on the department is difficult to sustain. In the circumstances, the application of the extended period of limitation as provided under Section 11A of the Act is not correct. Therefore, that part of the order where the Tribunal has rejected the prayer of the appellants not to invoke Section 11A is set aside and in other respects the order made by the Tribunal is maintained. [63-A-B] B C

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 1751-1752 of 1997.

From the Judgment and Order dated 3.8.96 of the Central Excise, Customs and Gold (Control) Appellate Tribunal, South Zonal Bench at Madras in F.O. No. 1402/96 in A. Nos. E/R 783-784 of 1995. D

WITH

C.A. Nos. 1778, 1795-1796 of 1997. E

V. Lakshmikumaran, Alok Yadav and V. Balachandran for the Appellants.

Gourishankar Murthy, Siddhartha Chowdhury and B.K. Prasad for the Respondent. F

The Judgment of the Court was delivered by

RAJENDRA BABU, CJ. : These appeals arise out of an order made on 3.8.1996 by the Customs, Excise and Gold (Control) Appellate Tribunal (for short the Tribunal) in which questions that arise for consideration are (i) whether the water-proofed fabrics are classifiable under Heading 52.07 of the Central Excise Tariff Schedule as claimed by the appellant or under Heading 59.06 as held by the Tribunal, and (ii) whether the extended period of limitation under proviso to Section 11A of the Central Excise Act, 1944 G H

A is invokable in the present case and consequently whether penalty under rule 173Q of the Central Excise Rules, 1944 is imposable on the appellant.

The two competing entries are as under :-

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"*Heading 52.07.*

Cotton fabrics (including fabrics covered under Heading Nos. 52.09, 52.10 and 52.11), -

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(a) woven on looms other than handlooms, and

(b) subjected to the process of bleaching, mercerizing, dyeing, printing, water-proofing, shrink-proofing, organdie processing or any other process or any two or more of these processes without the aid of power of steam"

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"*Heading 59.06.*

Textile fabrics, otherwise impregnated, coated or covered (including fabrics covered partially or fully with textile flocks or with

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preparations containing textile flocks)."

The Tribunal took note of the prospectus issued by the appellants in which equity was sought to be raised from general public which described the process as under :-

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"Grey cotton canvas for CPT is processed through application of a common proofing mixture and dried in a drying range. The common proofing mixture is prepared with ingredients consisting mainly of wax of different grades, aluminium stearate and copper napthanate (and colouring agents, if required)."

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It was stated that the process carried out by the appellants is held out as of impregnation to make the fabric water proofed. Whereas the fabrics manufactured by the appellants were tested and it was found on test by the chemical examiner to be an impregnated/coated fabric with the layer

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of coating visible to the naked eye. They noticed that even rubber coated

or plastic coated fabrics will be water proof; that if the appellant's plea is accepted, then the scope of tariff items in Chapter 59 will become restricted to the extent that even if the cotton fabric is coated and impregnated so long as it was water proof, it will fall under tariff heading 52.07 or 52.06, as the case may be. After anaylsing various headings, the Tribunal took the view that fabric manufactured by the appellants is impregnated one and the same, therefore, has to be considered as fabric impregnated with materials other than those mentioned under tariff 59.02 and 59.05; that fabrics also passes the muster of note 4 of Chapter 59 which note was at serial No. 5 after coming into force of the new tariff subsequently during the relevant period as being coated with materials other than materials under Heading 59.01 to 59.05 with coating visible to the naked eye. On analysing Chapter 59, it was noticed that the Chapter covers impregnated cotton and textile fabrics among other things. The Tribunal, in particular, noticed that process as applicable to any textile and does not change the texture of the fabric nor add to its weight. After referring to some text books, the Tribunal noticed that interpretation has to be made on the basis of Chapter notes and, therefore, the Tribunal was of the view that the impregnated fabrics with a coating visible to the naked eye have been correctly held to be assessable under tariff heading 59.06.

Next, contention put forth on behalf of the appellants that their plea for re-testing their fabrics was not accepted by the Tribunal on the basis that nothing prevented the appellants from asking for re-test of the samples as provided for under the rules at an appropriate stage of the proceedings. This contention has been rightly dealt with by the Tribunal and calls for no interference.

The next contention advanced before us is that when the impregnation or coating could be seen with the naked eye, then only the product can merit classification under Heading 59.06 and on the other hand, if the impregnation or coating cannot be seen with the naked eye and the fabric could be seen with the naked eye, then Heading 59.06 would not cover than product. They rely upon a circular issued on 11th April 1991 to the effect that while determining whether the deposit on the surface is a visible layer or not, a layer should be distinguished from mere presence of residues in uneven patches. It is submitted that in the present cases, the test report of the samples of the product merely state that the impregnation and coating

A is visible to naked eye and there is no mention about visible layer formation of the coating or impregnation and hence, the product cannot be classified under Heading 59.06. It is also submitted that since the test report of the chemical examiner was not correct and was not clear, the appellants sought re-test of the samples drawn or in the alternative cross-examination of the B chemical examiner, but no re-testing as provided in Rule 56 was allowed by the Commissioner on the ground that the request was made beyond 90 days. In any case, it is submitted, the sealed samples are still available and the same can be got tested even now for the test of presence of visible layer formation.

C On behalf of the respondents it is contended that a finding recorded by the authorities being one on fact and that conclusion having become final by conclusions reached by the Tribunal, this matter should not be re-examined by us.

D As stated earlier, finding recorded by the Tribunal as to the nature of the product is after examining relevant material with reference to relevant entries. The denial of cross-examination was due to the lapse of the appellant and cannot take advantage of the same in these proceedings. The Tribunal held that the fabric manufactured by the appellants is E impregnated and, therefore, has to be considered as fabric impregnated with materials other than those mentioned under Tariff 59.02 and 59.05. Such impregnation clearly indicated that under the scheme of the Central Excise Tariff the impregnated fabrics with a coating and which is visible to the naked eye on the material on record being one of the finding of fact, F we cannot interfere with it. Hence, all the contentions of the appellants stand rejected.

In so far as the contention raised by the appellants whether the extended period of limitation under proviso to Section 11-A of the Central Excise Act could be invoked in the present cases is concerned, what is to G be seen is whether there was no deliberate intention on the part of the appellants to have suppressed any material information. The plea taken by them is that under *bona fide* belief that the fabrics are classifiable under heading 52.07 they classified the same and the authorities had been visiting the appellants from 1986 onwards and they were aware of the process H adopted in manufacturing the end product by them. The Tribunal rejected

this contention. Apart from the fact that there was difference of opinion even in the Department, the fact remains that the department officials had been regularly visiting the factory of the appellants and were in the know of the process of manufacture adopted by the appellants and to state that the appellants had played fraud on the department is difficult to sustain. In the circumstances, we think, the application of the extended period of limitation as provided under Section 11A of the Act is not correct. Therefore, that part of the order where the Tribunal has rejected the prayer of the appellants not to invoke Section 11A is set aside and in other respects the order made by the Tribunal is maintained.

We may state that the contention advanced on appellants that whether the Tribunal was correct in charging the excise duty on the price of the product without treating the same as cum-duty price need not be examined in these cases as these contentions had not been specifically raised before, or considered by the Tribunal.

The appeals stand partly allowed to the extent indicated above and in other respects the appeals stand dismissed.

B.B.B. Appeals partly allowed.