(1991) 01 GUJ CK 0016

In the Gujarat High Court

Case No : Spl. Civil Application No. 3100 of 1979

Aflon Engineering Corporation APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 17-01-1991

Acts Referred:

Central Excise Rules, 1944 — Rule 8, 8(1)

Citation : (1991) 33 ECC 220 : (1991) ECR 314 : (1992) 61 ELT 246

Hon'ble Judges : J.M. Panchal, J;G.T. Nanavati, J

Bench : Division Bench

Advocate : G.N. Shah, for the Appellant; P.M. Raval, for the Respondent

Judgement

G.T. Nanavati, J.—The Petitioner is a manufacture of what are known as "PTFE sheets". There is no dispute that they are articles made of plastic and are covered by Tariff Item 15A(2) of the First Schedule to the Central Excises & Salt Act, 1944. On 29-5-1971, the Central Government, in exercise of the powers conferred on it by Rule 8 of the Central Excise Rules, 1944, issued Notification No. 68/71 exempting articles made of plastics, all sorts, falling under sub-item (2) of Tariff Item 15A, except rigid plastic boards, sheeting, sheets and films, whether laminated or not and flexible polyvinyl chloride sheeting, sheets, films and lay-flat tubings not containing any textile material from the whole of the duty of excise leviable thereon. The case of the petitioner is that PTFE sheets produced by it are not rigid plastic sheets and, therefore, it is entitled to the benefit of the said notification. Even though this position was made clear to the respondents, they called upon the petitioner by their letters dated 18th July, 1972 and 28-10-1972 to immediately apply for licence in form AL-4 and to furnish particulars of clearances of articles of plastic manufactured by it. They thereafter on 17th August, 1973 issued a show cause notice requiring the petitioner to show cause why action should not be taken against it for contravention of the rules. The respondents issued another show cause notice dated 26th November, 1975 to the petitioner calling upon it to show cause why

PTFE sheets manufactured by it should not be treated as excisable and assessed to duty at an appropriate rate. By an order dated 14th June, 1976, respondent No. 1 held that PTFE sheets manufactured by the petitioner are liable to excise duty as they are not eligible for exemption under the aforesaid Government notification. Against this order, the petitioner filed an appeal before the Central Board of Excise and Customs. Before that appeal was decided, the first respondent by his order dated 7th December, 1978 by way of penalty, ordered confiscation of 21 PTFE sheets and imposed a penalty of Rs. 22,000/- on the petitioner. That order has been challenged by the petitioner by filing a separate petition being Special Civil Application No. 45/79. Some time before that, i.e., on 23rd/25th November, 1978, the Central Government, in exercise of its powers under Rule 8(1) of the Rules, issued a notification amending its earlier Notifications No. 68/71 dated 29th May, 1971 and No. 39/73 dated 1st March, 1973 by inserting therein an Explanation whereby the terms, "flexible" and "rigid" came to be defined. A trade notice was also issued thereafter by the Central Excise Collectorate on 6th February, 1979 explaining the said notification. Feeling aggrieved by the said notification and the trade notice, the petitioner has filed this petition. The petitioner has challenged by validity of the said notification and the trade notice and it wants this Court to restrain the respondents from applying the same to the petitioner.

2. The contention of the petitioner is that the effect of the impugned notification of 1978 and the trade notice of 1979 is that what was held to be not rigid would now have to be regarded as rigid and by giving an artificial definition in this manner, the Central Government has either usurped the power of the Legislature to classify the goods or acted in contravention of Tariff Entry 15A. In either case, the impugned notification and the trade notice should be regarded as invalid. As pointed out earlier, there is no dispute that PTFE sheets manufactured by the petitioner are articles of plastic. Now it is no longer in dispute that the sheets manufactured by the petitioner are semi-rigid and enjoy the benefit of exemption granted by Notification dated May 29, 1971. Though the claim of the petitioner for exemption was resisted by the respondents, now, in view of the decision of the Central Board, the said controversy has come to an end.

3. The question which now arises is whether after amendment of 1971 notification by the notification issued on November 25, 1978, the position has so changed as to deprive the petitioner of the benefit of 1971 notification. What the Central Government has done by issuing the impugned notification is to add an Explanation to the 1971 notification. The said Explanation reads as under :

"Explanation. - For the purposes of this notification

(i) the expression "flexible", in relation to an article made of plastics, means the article which has modulus of elasticity either in flexture or in tension of not over 700 kilograms per square centimeter at 23 degrees centigrade and 50 per cent relative humidity when tested in accordance with the method of test stiffness of plastics (ASTM Designation D-474-73), the flextural properties of plastics (ASTM

Designation D-790-53), for tensile properties of plastics (ASTM Designation D-638-64T), or for tensile properties of this plastic sheeting (ASTM Designation D-822-64T);

(ii) the expression ''rigid'' in relation to an article made of plastic, means all articles other than ''flexible'' articles as defined in clause (i)".

The trade notice which came to be issued thereafter is as follows :

(i) Notification No. 197/78-C.E. : An explanation has been inserted at the end of Notification No. 68/71-C.E., dated 29-5-1971 and No. 39/73-C.E., dated 1-3-1973, which lays down norms for determining the ''flexible'' and ''rigid'' articles made of plastics falling under T.I. 15A(2) of C.E.T."

4. Thus, by the Explanation the two terms "flexible" and "rigid" have now been defined. The expression "flexible" is defined in such a manner as to include only those articles made or plastics which have a modulus of elasticity either in flexture or in tension of not over 700 kilograms per square centimeter at 23 degrees centigrade and 50 per cent relative humidity. The expression "rigid" is now defined in relation to an article made of plastic as an article other than flexible article as defined in clause (i) of the Explanation. The PTFE sheets manufactured by the petitioner are semi-rigid and by virtue of the Explanation now added, they will have to be regarded as rigid articles made of plastics. The submission of Mr. Shah is that it was not open to the Central Government to define the two expressions "rigid" and "flexible" in an artificial and arbitrary manner and doing so, it has gone beyond the power available to it under Rule 8(1) of the Rules. By defining the said two expressions contrary to their ordinary or dictionary meaning, the Central Government has exercised its rule making power in such a manner as to create an inconsistency between the relevant tariff entry and the notification and for that reason the impugned notification and the trade notice should be regarded as invalid. In support of his contention, Mr. Shah relied upon the decision of the Bombay High Court in Mechanical Packing Industries Pvt. Limited Vs. C.L. Nangia and Others, . In that case, the question which was raised for its consideration was : Can an article which is capable of being bent be called rigid ? That question was raised in the context of Tariff Item 15A and the aforesaid 1971 notification. The Bombay High Court, accepting the contention that classification of plastic sheet was universally recognised to be (a) rigid, (b) semi-rigid, and (c) flexible, and considering the ordinary and dictionary meanings of the words "flexible" and "rigid", held that the articles which are capable of being bent must be regarded as flexible and not rigid. It was submitted that these two words, as used in Tariff Item 15A, having been correctly construed in this manner, it was not open to the Central Government to define them in an artificial and arbitrary manner so as to include within the meaning of the word "rigid" something which is really not rigid but semi-rigid and to exclude from the meaning of the word "flexible" that which can be regarded as flexible even though it may be semi-rigid. He submitted that in doing so, the Central Government has acted beyond its rule making power. In support of this

submission he relied upon another decision of the Bombay High Court in Mechanical Packing Industries Pvt. Ltd. Vs. Union of India and others, . In that case the Bombay High Court examined the validity of the impugned notification of 1978 and held it as invalid. We are also told by the learned Advocate appearing for the petitioner that this decision has been accepted by the Department as it has not challenged the same by approaching the Supreme Court. Even though time was granted to the learned Advocate for the respondents to verify this fact, he is not in a position to deny the correctness of this statement. Though we do not agree with all the reasons stated by the Bombay High Court in support of its conclusion, we agree with its conclusion that the impugned notification is not consistent with Tariff Item 15A inasmuch as the definitions of the two words given by the impugned notification are not consistent with the true meaning of the said words as used in the tariff item. In that sense, the Central Government by issuing the impugned notification has gone beyond its rule making power. Even though according to the correct interpretation of Tariff Item 15A the PTFE sheets manufactured by the petitioner will have to be regarded as not rigid and, therefore, flexible and thus entitled to the exemption under the 1971 notification, if the notification of 1978 is allowed of stand, its result will be that the said sheets will have to be now regarded as rigid articles made of plastics and, therefore, not entitled to the benefit of the exemption notification of 1971. The Central Government in exercise of its rule making power cannot act in this manner and, therefore, the impugned notification of 1978 will have to be held as invalid.

5. In the result, the petition is allowed. The impugned notification being Notification No. 198/78 dated November 25, 1978 is declared as invalid and the respondents are restrained from implementing the same and also the trade notice dated 6th February, 1979. The respondents are also directed to determine the amount refundable to the petitioner within three months from the date of receipt of an application that may be made by the petitioner in that behalf and grant refund in accordance with law. Rule is made absolute accordingly with no order as to costs.