(2004) 01 SC CK 0043

In the Supreme Court Of India

Case No : Civil Appeals No. 9924 Of 1996 With Nos. 1267, 6805-06 Of 1999, 3010-11 Of 2000, 3113-14 Of 2002 And 70-71 Of 2001

Collector of Central Excise, Meerut — APPELLANT

Vs

Maruti Foam (P) Ltd. — RESPONDENT

Date of Decision : 22-01-2004

Acts Referred:
Central Excise Rules, 1944 — Rule 8(1)

Citation : (2004) 92 ECC 498 : (2004) 164 ELT 394 : (2004) 6 SCC 722 : (2006) 144 STC 161

Hon'ble Judges : Ruma Pal, J;B. P. Singh, J

Bench : Division Bench

Advocate : N.K. Bajpai, Binu Tampta, Nisha Bagchi and B. Krishna Prasad, for the Appellant; Praveen Sharma, Rajesh Kumar, A.R. Madhav Rao, Alok Yadav, Vishwanath Shukla, Madhav Rao, Vinay Garg and V. Balachandran, for the Respondent

Final Decision : Allowed

Judgement

1. The question involved in these appeals is whether waste, parings and scrap (WPS) arising in the course of manufacture of polyurethane foam blocks were entitled to the benefit of the exemption Notification 53/88 or 54/88 for the period in question. It is the contention of the appellant that WPS of polyurethane foam were covered by Notification 54/88 and not 53/88. The submission is that the WPS of flexible polyurethane foam (PUF) had been specifically excluded from Notification 53/88 (serial No. 42) and has been dealt with expressly in exemption Notification 54/88.

2. The Tribunal was of the opinion that both the Execution Notifications applied to the WPS of PUF and that since a greater benefit was conferred on the assessee by Notification 53/88, the Revenue was bound to grant such greater benefit to it.

3. The appellant has submitted that the Tribunal has erred in holding that the notifications overlapped. Detailed arguments were addressed to us on this basis

and there appears to be substance in the submission of the appellant on this point. However, learned Counsel appearing on behalf of two of the assesses, namely, Dura foam and U. Foam, has submitted that even on the basis that Notification 54/88 applied, the assessee was entitled to the benefit of the exemption to the extent that it provided for payment of nil rate of duty. In view of this argument we do not propose to decide the issue whether Notifications 53/88 and 54/88 overlapped and, if so, what would be the outcome thereof. Notification No. 54/88, as it stood prior to 1989 read as follows :

"Notification No. 53/88-C.E., dated 1-3-1988.

Effective rates of duty on flexible and rigid P.U. foam and articles thereof. - In exercise of the powers conferred by Sub-rule (1) of Rule 8 of the Central Excise Rules, 1944, the Central Government hereby exempts goods of the description, specified in column (3) of the Table hereto annexed, and falling under heading Nos. of sub-heading Nos. of the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as are specified in the corresponding entry in column (2) of the said Table, from so much of the duty of excise leviable thereon which is specified in the said Schedule, as is in excess of the amount calculated at the rate specified in the corresponding entry in column (4) of the said Table, subject to the conditions, if any, laid down in the corresponding entry in column (5) of the said Table.

NOTIFICATIONS TABLE

Sl. No. Heading No. Description of goods Rate Conditions

(1) (2) (3) (4) (5)

01 39.09 Polyurethane's in primary form, other than polyurethane foam, in any primary form. 40% ad valorem

02 39.09, 39.15 39.21, 39.23, 39.24, 39.25 or 39.26 Flexible polyurethane foam, all goods of flexible polyurethane foam, waste, parings and scrap of flexible polyurethane foam. Rs. 40 per kilogram

03 39.15, 39.21, 39.23, 39.24, 39.25 or 39.26 All goods of flexible polyurethane foam, waste, parings and scrap of flexible polyurethane foam. Nil If,--(1) the said goods are manufactured from flexible polyurethane foam on which duty of excise leviable there on under the Central Excises and Salt Act, 1944 (1 of 1944) has already been paid; and

(ii) no credit of duty paid on flexible polyurethane foam has been taken under Rule 57A of the said rules.

04 39.23, 39.24, 39.25, 39.26, 94.01 or 94.01 All articles of polyurethane foam. Nil If manufactured from wastes of scraps of polyurethane foam or foam wastes or scrap of articles of polyurethane foam.

05 39.09, 39.21, 39.23, 39.24, 39.25 or 39.26 Rigid polyurethane foam and

goods thereof. 15% ad valorem"

4. In 1989 Notification No. 54/88 was further amended by substituting Sl. No. 2 of the Notification and by adding Sl. No. 6. The 1989 amendment reads as follows :

"No. 54/88-Central -in the Table annexed to the said notification. Excises dated the 1st (P.11) March, 1988. 1. for S. No. 02 and the entries relating thereto, the following S. No. and entries shall be substituted, namely :-

1 2 3 4 5

02 39.09, 39.21, 39.23, 39.24, 39.25, or 39.26 Flexible polyurethane foam and articles thereof Rs. 42 per 1

(ii) after S. No. 05 and the entries relating thereto, the following S. No. and entries shall be inserted, namely :-

1 2 3 4 5

06 39.15 Waste, paring and scrap of flexible polyure-thane foam 40% ad valorem The aggregate quantity of clearances of such goods outside the factory, from any factory for home consumption, in any month, by or on behalf of one or more manufacturers, at the rate specified in column (4), shall not exceed 10% of the total production of flexible polyure-thane foam and articles thereof falling under heading No. 39.09, 39.20 or 39.21 of the said Schedule during the immediately preceding month".

5. According to the assesses/respondents the WPS in question would be covered by Sl. No. 3. It is further submitted that the latter portion of Sl. No. 2 as it originally stood as well as Sl. No. 3 and Sl. No. 6 as introduced in 1989 were identical. The difference was in the rate of duty based on the fulfilment of conditions under Sl. No. 3.

6. Learned Counsel appearing for the appellant does not dispute that the WPS in question would be covered under Sl. Nos. 2, as it originally stood, Sl. No. 3 and Sl. No. 6 subsequent to the 1989 amendment. However, it is contended that the condition prescribed in respect of Sl. No. 3 had not been fulfilled by the respondent inasmuch as the flexible PUF out of which the WPS had resulted, not been subjected to any duty and had been exempted from payment of duty by Notification 217/86. Reliance has been placed on the decision of this Court in Collector of Central Excise, Vadodra Vs. Dhiren Chemical Industries, in support of this contention.

7. It is not in dispute that during the period in question in all these appeals there were circulars in operation issued by the Central Board of Excise and Customs (CBEC) which had specifically construed the phrase "already been paid," as occurring in condition 1 against Sl. No. 3, to include cases where nil rate of duty had been prescribed. No doubt this was done on the basis of the decision of this Court in Collector of Central Excise, Patna Vs. Usha Martin Industries, etc., . It is

also true that the decision in Usha Martin was over-ruled by this Court in the decision of Dhiren Chemical Industries (Supra). However in paragraph 9 of Dhiren Chemical Industries (supra) the Constitution Bench of this Court has made it clear that regardless of the interpretation placed on the aforesaid phrase by the Court, if there were circulars which had been issued by the CBEC which placed a different interpretation upon the phrase, that interpretation would be binding on the Revenue. This view has been reaffirmed in Collector of Central Excise, Vadodara Vs. Dhiren Chemical Industries, . Therefore the circulars in question issued by the CBEC construing the phrase "duty already paid" must be held to bind the Revenue as long as they were not withdrawn which they were but only in 2002. For the period in question the circulars were operative. The appeals are, accordingly, dismissed albeit for reasons which are different from those expressed by the Tribunal. We make it clear that this decision will not operate to reopen any assessment order nor will any duty already paid become refundable by reason of this judgment. There will be no order as to costs.