(1991) 08 BOM CK 0009

In the Bombay High Court

Case No : Writ Petition No. 2432 of 1991

Kusum Engineering Works and Another APPELLANT

Vs

Union of India (UOI) and Others RESPONDENT

Date of Decision : 13-08-1991

Acts Referred:

Citation : (1991) 37 ECR 16

Hon'ble Judges : M.L. Pendse, J;A.V. Savant, J

Bench : Division Bench

Judgement

M.L. Pendse, J.—Rule returnable forthwith. Shri Deodhar waives service on behalf of the respondents. Heard counsel.

2. The petitioners No. 1?M/s. Kusum Engineering Works?is a registered partnership firm carrying on business of manufacturing various electrical items including switch and fuse units. The manufactured articles are liable to payment of excise duty. The petitioners filed revised classification list on April 1, 1989 seeking approval under Heading 8537 of the Schedule to the Central Excise Tariff Act as amended in the year 1986. The petitioners also informed that till the date of approval of the revised classification list duty would be paid at higher rate under protest, in terms of earlier approved classification list. The earlier approved list required the petitioners to pay duty under Heading 8536.90 and the duty leviable being 20% ad valorem. Under Heading 8537, duty payable in only 15% ad valorem. The claim of the petitioners that duty is payable under 1 leading 8537 was accepted and revised classification list was approved with effect from May 23, 1089.

3. Alter approval of the revised classification list, the petitioners filed refund claim of Rs. 98,177.75 in respect of excess duty paid under protest. The Assistant Collector of Central Excise, Division-VI, Bombay, by the impugned show cause notice dated October 17, 1989 called upon the petitioners to show cause why the claim for refund should not be turned down in view of the decision of this Court in the case of M/s. Roplas (India) Ltd. v. Union of India and Ors. (Writ

Petition No. 2204 of 1988) 1989 ECR 449 (Bom). The Department claimed that in view of the decision, the refund of the excess duty paid by the petitioners would amount to unjust enrichment and consequently, the petitioners are not entitled to refund. The petitioners filed detailed reply on December 14, 1989 and pointed out that the decision in Roplas case is no longer good law. The petitioners invited attention of the Assistant Collector to the fact that subsequent to the Roplas decision, this Court has delivered several judgments pointing out that the defence of unjust enrichment is not open to the Department when excess duty is paid under protest. In spite of the production of the subsequent judgments, the Department insisted on proceeding with the show cause notice and thereupon the present petition is filed to challenge the legality of show cause notice.

4. The earned Counsel appearing on behalf of the petitioners submitted that in face of the decisions recorded by this Court, it is improper for the Assistant Collector to serve show cause notice and attempt to deny the refund solely on the ground of the decision in Roplas case. The submission is correct and deserves acceptance. It has been repeatedly pointed out by this Court that the decision in Roplas case is not a good law. Apart from this consideration, the doctrine of unjust enrichment has no application whatsoever in cases where the duty is paid under protest. The recovery of duty by Department in such cases is subject to the right of the petitioners to seek refund and the petitioners having succeeded in establishing that the levy of duty can be only under Heading 8537, the department cannot deprive the petitioners of excess duly paid by reference to Roplas decision. In our judgment, the issuance of show cause notice is wholly without jurisdiction and is required to be quashed.

5. Accordingly, rule is made absolute and the impugned show cause notice is struck down and the respondents are directed to refund the amount after verification, within a period of two weeks. In case, the amount is not paid within two weeks, then the Department is liable to refund the amount along with interest at 15% per annum from today till the dale of repayment. The respondents shall pay the costs to the petitioners.