(2003) 09 MAD CK 0136

In the Madras High Court

Case No : Writ Petition No. 354 of 1999 and W.M.P. No. 450 of 1999

Madura Coats Limited APPELLANT

Vs

Central Board of Excise and Customs and Commissioner of Central Excise RESPONDENT

Date of Decision : 30-09-2003

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2004) 163 ELT 164 : (2004) WritLR 662

Hon'ble Judges : P.K. Misra, J

Bench : Single Bench

Advocate : Arvind P. Datar, for the Appellant; K. Veeraraghavan, ACGSC, for the Respondent

Final Decision : Allowed

Judgement

P.K. Misra, J.—The present writ petition has been filed to declare the Circular No. 433/66/98-CX.6 dated 27.11.1998 issued by the first respondent, the Central Board of Excise and Customs, as ultra vires on the ground that such circular violates the provisions contained in Section 37B of the Central Excise Act (hereinafter called as "the Excise Act"), Note 2 of Chapter 59 of the Central Excise Tariff Act (hereinafter called as "the Tariff Act") and Article 14, 19 and 265 of the Constitution of India.

2. The petitioner manufactures various textile products including fusible interlining cloth, which is used inside the garments, for cuffs, collars, etc.. Such interlining cloth is partially coated with plastic. In 1989, the Central Board of Excise and Customs (hereinafter called as "the Board") issued a circular indicating that such interlining cloth would be classifiable under Chapters 52 to 55 of the HSN depending upon the textile material prior to use. Under the Finance Act, 1989, Chapter Note 2(c) of Chapter 59 was inserted indicating that such cloth would be classifiable under Clause 59.03. The position continued till 1995, when under the Finance Act, 1995, Note 2(c) of Chapter 59 was

withdrawn, thus, reverting the position to pre-1989 stage. However, thereafter the Board issued the impugned circular which is to the following effect :-

" Fusible interlining cloth - Classification of (Heading 59.03)

I am directed to say that certain doubts have arisen regarding the classification of fusible interlining cloth after the omission of Chapter Note 2(c) of Chapter 59 of the Central Excise Tariff with effect from 16-3-1995. Specifically, doubts have been raised as to whether fusible interlining cloth continues to be classifiable under Chapter Heading 59.03 of the Central Excise Tariff Act, 1985 after the omission of the above mentioned Chapter Note.

2. The matter has been examined by the Board. Chapter Note 2(c) was introduced as a new clause in Note 2 of Chapter 59 in the 1989 budget in order to clarify that fusible interlining cloth made by discrete coating of plastic by dot matrix process would be classified under Chapter Heading 59.03. Chapter Note 2(c) reads as follows: ''Textile fabrics, partially or discretely coated with plastic by dot printing process''. Chapter Note 2(c) was omitted with effect from 16-3-1995.

3. In the 1995 budged the Central Excise Tariff was broadly aligned with the Customs Tariff (based on HSN) and as such Chapter Note 2(c) of Chapter 59 of the Central Excise Tariff was omitted. The omission of Chapter Note 2(c) was neither intended to and nor resulted in changing the classification of fusible interlining cloth under Heading 59.03 of the Central Excise Tariff. This is so because as per the HSN Explanatory Notes (1996, 2nd edition, page 894) textile fabrics which are spattered by spraying with visible particles of thermoplastic material and are capable of providing a bond to other fabrics or materials on the application of heat and pressure are covered under Chapter Heading 59.03. Classification of such fabrics under Chapter Heading 59.03 may thus be considered as an exception to Chapter Note 2(a)(4) of Chapter 59 according to which fabrics partially coated or partially covered with plastics and bearing designs resulting from those treatments are excluded from the scope of Chapter Heading 59.03.

4. Board is of the view that fusible interlining cloth would be appropriately classified under Chapter Heading 59.03 of the Central Excise Tariff."

3. It is the contention of the petitioner that the aforesaid circular is beyond the power of the Board and it is not contemplated u/s 37B of the Excise Act and is also in violation of the provisions contained in Article 14, 19(1)(g) and 265 of the Constitution of India. It has been further submitted that such circular cannot have any impact in the adjudicatory process and should be declared as illegal and inoperative.

4. A counter affidavit has been filed justifying the issuance of the circular and it has been stated that the circular has only tried to clarify the position.

5. Chapter Note 2(c) of Chapter 59 is to the effect:-

" Heading No. 59.03 applies to :

. . . .

(c) Textile fabrics, partially or discretely coated with plastic (heading No. 59.03)"

As per Chapter Note 2, Heading No. 59.03 applies to:

(a) Textile fabrics, impregnated, coated, covered or laminated with plastics, whatever the weight per square metre and whatever the nature of the plastic material (compact or cellular), other than :

(1) Fabrics in which the impregnation, coating or covering cannot be seen with the naked eye (usually Chapters 50 to 55, 58 or 60); for the purposes of this provision, no account should be taken of any resulting change of colour;

(2) Products which cannot, without fracturing be bent manually around a cylinder of a diameter of 7 mm, at a temperature between 15 C and 30 C (usually Chapter 39);

(3) Products in which the textile fabric is either completely embedded in plastics or entirely coated or covered on both sides with such material, provided that such coating or covering can be seen with the naked eye with no account being taken of any resulting change of colour (Chapter 39);

(4) Fabrics partially coated or partially covered with plastics and bearing designs resulting from these treatments (usually Chapters 50 to 55, 58 or 60),

(5) Plates, sheets or strip of cellular plastics, combined with textile fabric, where the textile fabric is present merely for reinforcing purposes (Chapter 39); or

(6) textile products of heading No.58.11;

(b) Fabrics made from yarn, strip or the like, impregnated, coated, covered or sheathed with plastics, of heading No. 56.04."

6. Relevant portion of 59.03 is extracted hereunder:-

59.03 TEXTILE FABRICS IMPREGNATED, COATED, COVERED OR LAMINATED WITH PLASTICS, OTHER THAN THOSE OF HEADING No. 59.02 5903.10 - With polyvinyl chloride 5903.20 - With polyurethane 5903.90 - Other

This heading covers textile fabrics which have been impregnated, coated, covered or laminated with plastics (e.g., polyvinyl chloride).

Such products are classified here whatever their weight per m2 and whatever the nature of the plastic component (compact or cellular), provided :

(1) That, in the case of impregnated, coated or covered fabrics, the impregnation, coating or covering can be seen with the naked eye otherwise than by a resulting change in colour.

Textile fabrics in which the impregnation, coating or covering cannot be seen with the naked eye or can be seen only by reason of a resulting change in colour usually fall in Chapters 50 to 55, 58 or 60. Examples of such fabrics are those impregnated with substances designed solely to render them crease-proof, moth-proof, unshrinkable or waterproof (e.g., waterproof gabardines and poplins). Textile fabrics partially coated or partially covered with plastics and bearing designs resulting from these treatments are also classified in Chapters 50 to 55, 58 or 60.

. . . ."

7. A bare perusal of the aforesaid provisions makes it clear that but for the Chapter Note 2(c), which was introduced under the Finance Act, 1989, such fusible interlining would be coming within Chapters 50 to 55 and only by virtue of introduction of Chapter Note 2(c) of Chapter 59 such fusible interlining came within the scope of Chapter 59.03. Once such Chapter Note 2(c) was omitted under the Finance Act, 1995 it is obvious that the position which was available prior to introduction of such Chapter Note 2(c) revived. In such background, issuance of Circular would be clearly against the statutory provisions. In other words, the Chapter Note 2(c) had been omitted under a statutory provision. The Board by issuing such a circular is trying to reintroduce such Note by insisting that such item should come within Chapter 59.03.

8. It is well settled that by issuing circular u/s 37B of the Excise Act, the Board cannot shut down the quasi-judicial power of the authorities under the Excise Act and the Tariff Act. (see 1969 SC 48 (ORIENT PAPER MILLS LTD. v. UNION OF INDIA), Kerala Financial Corporation Vs. Commissioner of Income Tax, , and Indian Rayon and Industries Ltd. Vs. Union of India, . In such view of the matter, the Circular must be taken to be illegal and ultra vires and is hereby quashed.

9. In course of hearing it was also contended that since the writ petition has been filed at the stage of show cause, such writ petition is pre-mature. Since the notice itself was issued on the basis of the circular, it is obvious that such circular is likely to be followed by the concerned authorities, and therefore, filing of the writ petition cannot be said to be pre-mature and such circular, which is contrary to the provisions of the Finance Act, cannot be sustained. For the aforesaid purpose, the decision of this Court in Madras Bar Association and Others Vs. Central Board of Direct Taxes and Others, is applicable.

10. For the aforesaid reasons, the writ petition is allowed and the impugned circular is quashed as illegal and ultra vires. There would be no order as to costs. Consequently, WMP. No. 450 of 1999 is closed.

