(1990) 10 KAR CK 0023

In the Karnataka High Court

Case No : Writ Petition No''s. 8702 and 8703/87

Polyflex (India) Pvt. Ltd. APPELLANT

Vs

Assistant Collr. of C. Ex., Bangalore RESPONDENT

Date of Decision : 18-10-1990

Acts Referred:

Citation : (1991) 31 ECC 237 : (1996) 87 ELT 40

Hon'ble Judges : S.R. Rajasekhara Murthy, J

Bench : Single Bench

Advocate : Shri G. Chandrakumar, for the Appellant; Shri Ashok Harnahally, Central Government Standing Counsel, for the Respondent

Judgement

1. Though two writ petitions are filed for issue of a writ of mandamus to refund a total sum of Rs. 52,92,933.25 as per refund claims made by the Petitioner on 25-3-1987 (Annexure E) and 23-3-1987 (Annexure F), we are not concerned with the claim made as per Annexure E. The Writ Petition No. 8703/87 which relates to the claim made as per Annexure F for a sum of Rs. 12,67,273.37 is considered on merits. This amount represents the sum which become due to the Petitioner as a result to the Appellate Collector''s order dated 30-1-1987 (Annexure D).

2. The Petitioner made a claim for refund before the Department, as per Annexure H, By an endorsement dated 21-4-1987, the Assistant Collector said that the refund application will be considered only after the appeal filed by the Department was disposed of by the Central Excise Gold (Control) Appellate Tribunal (CEGAT). The Appellate Tribunal dismissed the Appeal by its order dated 14-1-1988.

3. After the dismissal of the Department''s appeal by the Tribunal on 14-1-1988, a show cause notice was issued by the Assistant Collector on 31-8-1988 (Annexure K) stating that the Petitioner was eligible for refund of amount of Rs. 9,60,243.80 only and he was not eligible for refund of Rs. 3,78,502.06. This

show cause notice was followed by an order made by the Assistant Collector on 9-9-1988 as per Annexure L under which he ordered refund of Rs. 9,64,205.80P, and rejected the claim for refund of Rs. 3,78,502.06P. This order of the Assistant Collector is the subject matter of the Writ Petition No. 8703/87 as per the additional grounds urged in I.A.I. filed on 11-10-1988.

4. The reason for rejecting a part of the refund is that the amount of refund shall be included in the assessable value and on so doing the amount of refund gets reduced to that extent. It is on the basis of this reasoning that the Assistant Collector has rejected to refund part of the claim.

5. This Court had occasion to consider similar grounds on which the refund was rejected in the case of Mangalore Chemicals and Fertilizers Ltd. and Others Vs. Assistant Collector of Central Excise, Mangalore and Others, The decision of this Court in the said case squarely applies to the facts of the present case. Though this Court quashed Trade Notice No. 56/87, the scope of Explanation to Section 4(4)(d)(ii) was also considered by the Division Bench. It was held that only the effective duty or the actual duty chargeable under the Act should be excluded in determining the value u/s 4 and not the hypothetical duty leviable on any notional assessable value. This Court held that the question of adding back any duty that is not passed on to the (consumer) or paying any additional duty on the same on the ground that the same had not been passed on to consumers as if that was a requirement of the explanation was wholly misconceived and not sound.

6. There does not appear to be any appeal filed by the Department against the said Division Bench judgment. The view has consistently been followed by this Court. In one of the recent cases decided in the case of Alembic Glass Industries Ltd. v. Union of India and Others - 1986 (24) ELT 232 (Kar) similar contention of the Department was rejected.

7. Therefore, in view of the Division Bench decision in the case of Mangalore Chemicals, the petitioner in this writ petition has to succeed.

8. In the result, the Writ Petition No. 8703/87 which relates to refund of Rs. 12,67,273.37P as per Annexure H is disposed of by the following order :

The Writ petition is allowed and the order of the Assistant Collector dated 31-8-1988 rejecting the refund of Rs. 3,78,502.06P is quashed. As a consequence I direct issue of a writ of mandamus to the Respondents to refund the said sum within 8 weeks from the date of the receipt of this order along with interest at 12% on the said amount from 9-9-1988 upto the date of payment.

9. The W.P. No. 8702/87 which relates to Annexure H is dismissed.

