

(2013) 02 MAD CK 0003

In the Madras High Court

Case No : C.M.A. No. 3554 of 2012 and M.P. No's. 1 and 2 of 2012

S and S Power Switch Gear Ltd.

APPELLANT

Vs

Commissioner of Central Excise and Another

RESPONDENT

Date of Decision : 13-02-2013

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A, 11A(1), 37B

Citation : (2013) 294 ELT 18 : (2013) 19 GSTR 349

Hon'ble Judges : R. Banumathi, J;K. Ravichandrabaabu, J

Bench : Division Bench

Advocate : K.S. Venkatagiri for Lakshmikumaran, for the Appellant; P. Mahadevan, for the Respondent

Judgement

K. Ravichandrabaabu, J.—This appeal is filed by the assessee aggrieved by the final order passed by the CESTAT in Final Order No.

444/2012 in Appeal No. E/354/2004, dated May 2, 2012 2012 (192) ECR 1 65 In this appeal, the assessee has raised the following substantial

questions of law for consideration of this court:

(1) Whether the Hon''ble Tribunal is right in holding that the duty demand on circuit breakers with control panels is liable to be confirmed for the period prior to the issuance of the CBEC circular dated July 14, 1994?

(2) Whether the hon''ble Tribunal was right in not following the ratio laid down by the hon''ble Supreme Court in the case of H.M. Bags

Manufacturer Vs. Collector of Central Excise,) and followed by the hon''ble Tribunal in the case of 2003 (88) ECC 354 wherein it held that the

CBEC circular dated July 14, 1994 is applicable prospectively from the date of the issue of the circular, i.e., from July 14, 1994?

The assessee is engaged in the manufacture of H.T. circuit breakers of various

types. During the relevant period, they were discharging duty on the said goods at five per cent. in terms of Notification No. 53/1993-CE, dated February 28, 1993 by classifying the same under Heading 8535.00.

The Revenue took a view that the circuit breakers with control panels manufactured and cleared by the assessee are classifiable under Heading 8537 and not under Heading 8535. Consequently, three show-cause notices were issued by the Revenue raising demand of duty to the tune of Rs. 3,09,62,619. The assessee gave explanations for the said show-cause notices and contended that the classification of the circuit breakers under Heading 8537 was not sustainable. An order-in-original came to be passed on November 17, 2000 by the Commissioner, confirming the demand of Rs. 3,09,62,619. He also imposed penalty of Rs. 75,00,000. The assessee challenged the said order before the Tribunal. By an order dated May 31, 2002, the Tribunal, by following the judgment of the hon''ble Supreme Court in the case of H.M. Bags Manufacturer Vs. Collector of Central Excise, held that the CBEC Circular No. 32/8/94-CX-4, dated July 14, 1994 issued u/s 37B of the Central Excise Act, 1944 is applicable from the date of its publication, viz., July 14, 1994. The Tribunal also held that there was no deliberate suppression or misstatement of facts with intent to evade payment of duty and consequently, the extended period of limitation under the proviso to section 11A(1) was not inviolable in the case of the assessee. Accordingly, the Tribunal remanded the matter to the Commissioner for redetermination of the classification issue and with a further direction to make the demand of duty by restricting it for six months'' period only. The Commissioner, thereafter, passed the final order on May 31, 2002 by holding that the circuit breakers with control panels are to be classified under Heading 8537 of the Central Excise Tariff Act, 1985 in terms of the CBEC Circular No. 32/8/94-CX-4, dated July 14, 1994 u/s 37B of the Act. Accordingly, by relying on the judgment of the Hon''ble Supreme Court in the case of H.M. Bags Manufacturer Vs. Collector of Central Excise, , the Commissioner held that the circular of the Board dated July 14, 1994 is applicable prospectively and therefore, confirmed the demand of duty of Rs. 37,611 for the period from July 14, 1994 to July 31, 1994. The Revenue challenged the said order of the Commissioner before the CESTAT. The Tribunal, vide its final

order dated May 2, 2012 (192) ECR 1 65), held that the Revenue's prayer for confirmation of entire duties by invoking the extended

period cannot be accepted. However, the Tribunal remitted the matter to the Commissioner for quantification of duty for a period of six months on

the reason that in the earlier order, the Tribunal had categorically held that the demand should be restricted to six months' period only. Aggrieved

against the said order of the Tribunal, the present appeal is preferred by the assessee raising the above substantial questions of law.

2. The learned counsel appearing for the assessee by relying on the decision of the apex court in H.M. Bags Manufacturer Vs. Collector of Central

Excise, in the matter of H.M. Bags Manufacturer v. Collector of Central Excise, contended that the Revenue has got no power to invoke the

extended period u/s 11A of the Central Excise Act to demand the duty retrospectively for the period prior to the date of the circular issued u/s

37B of the Central Excise Act, whereby the classification of goods was made. He thus contended that the Tribunal equally cannot direct the

demand to be made for six months' period prior to the date of the circular.

3. Per contra, the learned counsel appearing for the Revenue submitted that the said decision of the Hon'ble Supreme Court cannot be applied to

the case of the assessee in view of the fact that earlier appeals decided by the Commissioner as well as the Tribunal, confirming the demand of duty

for six months, were not appealed against by the assessee and therefore, when those orders have become final, the assessee cannot be permitted

to rely on the decision of the Hon'ble Supreme Court to contend that the demand can be made prospectively from the date of such notification.

4. We have heard the learned counsel appearing for the assessee as well as the Revenue.

5. The issue involved in this case is as to whether the Revenue is entitled to make demand u/s 11A of the Central Excise Act retrospectively for a

period prior to the date of the classification made in respect of a particular item u/s 37B of the Act. Similar issue was considered by the Hon'ble

Supreme Court in the decision relied on by the assessee H.M. Bags Manufacturer Vs. Collector of Central Excise,) in the matter of H.M. Bags

Manufacturer v. Collector of Central Excise. Paragraph 2 of the said decision is useful to be reproduced hereunder for proper appreciation of the

issue involved in this case:

2. The only contention of learned counsel for the appellant is that a trade notice No. 29 was issued by the Board on November 5, 1992 notifying

the reclassification and it is this date, i.e., November 5, 1992 which is material and the demand in the present case could not be from any prior

date. It is urged that it is the power u/s 37B of the Central Excises and Salt Act which was exercised in the present case and, therefore, any

argument based on section 11A is not available to the Revenue. It is submitted that according to the existing practice, any action taken u/s 37B is

duly notified or published and it takes effect from the date of notification or publication in view of the fact that the notification or publication of the

classification made pursuant to the Board's order dated September 24, 1992 was only on November 5, 1992, the date of issuance of the trade

notice, it must be held that the effective date for raising the demand by the Revenue cannot be any date prior to November 5, 1992. This

conclusion is reinforced by use of the word "henceforth" by the Board. The Board's order excluded the intention of making the same effective

from any earlier date. This submission of learned counsel for the appellant has, therefore, to be accepted.

Thus, from the reading of the decision rendered by the Hon'ble Supreme Court, it is seen that a demand u/s 11A of the Act cannot be raised for

any date prior to the date of the Board circular and the time limit as provided u/s 11A of the Act is not available to the Department. Thus it is

manifestly clear from the above decision rendered by the Hon'ble apex court that once reclassification notification is issued, the Revenue cannot

invoke section 11A of the Act to make demand for a period prior to the date of the said classification notification also. Accordingly, in our

considered view, the issue involved in this case is directly covered by the decision of the apex court reported in H.M. Bags Manufacturer Vs.

Collector of Central Excise, in the matter of H.M. Bags Manufacturer v. Collector of Central Excise and consequently, the order passed by the

Tribunal without considering the said decision of the apex court is not correct. The reasoning assigned for not following the judgment of the

Supreme Court is not acceptable in view of the fact that merely because the assessee has not challenged the earlier order of the Tribunal or the

Commissioner, the same cannot be taken as a precedent when already, on the very same issue, the Hon"ble Supreme Court decided in favour of the assessee. Therefore, the Tribunal is bound to follow the decision of the Hon"ble Supreme Court in preference to the decision of the Tribunal, though such decision has become final, in so far as the assessee is concerned. Accordingly, the appeal is allowed and the questions of law raised by the assessee are answered in favour of the assessee. No costs. Consequently, the connected miscellaneous petitions are closed.