

COMMISSIONER OF CENTRAL EXCISE, BANGALORE

v.

M/S. MYSORE ELECTRICALS INDUSTRIES LTD.

NOVEMBER 15, 2006

[DR. AR. LAKSHMANAN AND ALTAMAS KABIR, JJ.]

Customs Excise Tariff Act, 1985; Section 37B; CSH 8535, 8536 & 8537/Central Board of Excise & Customs Circular No. 32/8/94-CX and Notification No. 52/93 dated 28/2/93:

Classification—Single Panel Circuit Breakers—Levy of Excise duty under CSH 8535 or 8537—Circular re-classifying the product under CSH 8537—Effective date—Held: Re—classification of the product in question could take effect prospectively from the date of communication of the Show-cause Notice proposing re-classification—Hence, differential amount of Excise duty could be levied from that date.

The questions which arose for consideration by this Court in the appeal were as to whether Single Panel Circuit Breakers, an electrical appliance, manufactured by the respondent-assessee could be classifiable under Tariff Heading 8535.00 of the Customs Excise Tariff Act as claimed by the assessee or classifiable under Tariff Heading 8537.00 as classified by the Revenue for the purpose of levying excise duty and as to whether the Circular issued by the Central Board of Excise & Customs classifying the product under the Heading 8537.00 could be given retrospective effect.

Revenue contended that much prior to issuance of Circular dated 14.07.1994 classifying the product in question under CSH 8537, a show cause notice was issued by the Assistant Collector on 17.12.1993 on the basis of his interpretation of the two entries CSH 8535 and CSH 8537; that the said order is not based on the circular dated 14.07.1994 and, therefore, the circular had no application to the facts of this case; that under Section 37B of the Act, the Board is empowered to issue instructions to Central Excise Officers for the purpose of maintaining uniformity in the classification of eligible goods which instructions, are required to be followed by such officers; and that switches, fuses, relays, plugs, junction boxes etc. have been given the status of separate/individual items. Without these items main equipments/machinery

A cannot function, therefore, though they may be parts of certain machinery, yet they have to be classified under those headings where they are specifically mentioned. Thus, the panels manufactured by the assessee contain more than two apparatus falling under heading 85.35 and 85.37 of the Act.

B The respondent-assessee submitted that when there is a concurrent finding of fact in his favour, the appeal filed by the Revenue has no merits; that the issues involved in the present appeal is a question of fact which has been decided in his favour both by the Commissioner (Appeals) and by the Tribunal and thus there is a concurrent finding of fact in his favour; that the circular being oppressive and has to be applied only prospectively and cannot be applied retrospectively; and that for the period in question, trade notices
C had been issued classifying the circuit breakers under Heading No. 85.35 or 85.36 depending upon the voltage, such notices are binding upon the Revenue. Thus, the circuit breaker is classifiable under Heading 85.35.

Dismissing the appeal, the Court

D HELD: The assessee had filed a classification list effective from 01.03.1993, classifying the Single Panel Circuit Breakers under Heading No. 85.35 and claiming concessional rate of duty at 5% under Notification No. 52/93 dated 28.02.1993. The said classification list was approved by the jurisdictional Assistant Commissioner. Thereafter, the assessee cleared the
E said goods in accordance with the approved classification list. When the approved classification was proposed to be revised to reclassify the Single Panel Circuit Breakers under Heading No. 85.37 of the Tariff Act, such re-classification can take effect only prospectively from the date of communication of the show cause notice proposing re-classification. Accordingly, the differential amount of duty can be demanded from that date.

F [24-C-D-E-F]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4488 of 2005.

From the Final Order No. 1943/2004 dated 6-12-2004 of the CESTAT, at Bangalore in Appeal No. E/339/2001.

G Mohan K. Parasaran, A.S.G., T.S. Dhobia, Chinmoy Pradip Sharma and B. Krishna Prasad for the Appellant.

A.R. Madhav Rao, Alok Yadav and M.P. Devanath for the Respondent.

H The Judgment of the Court was delivered by

DR. AR. LAKSHMANAN, J. Delay condoned.

This appeal is directed against the final order No. 1943 of 2004 dated 06.12.2004 passed by the Customs, Excise and Service Tax Appellate Tribunal, Bangalore in Appeal No. E/399/2001. The appellant before us is the Commissioner of Central Excise, Bangalore.

We have heard Mr. T.S. Doabia, learned senior counsel for the appellant and Mr. A.R. Madhav Rao, learned counsel for the respondent.

The issue involved in the present appeal is whether the Single Panel Circuit Breakers are classifiable under CSH 8535.00 (rate of duty 5%) as claimed by the assessee or under CSH 8537.00 (rate of duty 20%) as per the revenue and whether the Board's Circular F.No. 32/8/94-CX (Section 37B Order) dated 14.7.2004, which has clarified that the Single Panel Circuit Breakers are classifiable under Chapter 85.37, has retrospective effect.

The assessee is engaged in the manufacture of electrical appliances falling under Chapter 85 of the CETA, 1985. The assessee had filed the classification list classifying the products under chapter 8535.00 CETA 1985 and availing the benefit of notification No. 52/93 dated 28.02.1993 attracting duty @ 5% *ad valorem*.

A show cause notice was served on the assessee to classify the goods in question under CSH 8537.00 attracting duty at the rate of 20%, as single control panel manufactured by the assessee consists of a panel equipped with more than two apparatus of Heading Nos.8535 and 8536 (like circuit breaker/fuses/switches/plugs/socket/relays). The relevant tariff entries are quoted herein below :-

“Heading 85.35 :- electrical apparatus for switching of protecting electrical circuits, or for making connection or in electrical circuits (for example -switches, fuses, lightning arrest voltage limiters, surges suppressors, plugs, junction boxes).

Heading 85.37 :- ‘Boards, panels, consoles, des-cabinets and other bases, equipped with two or more apparatus of heading No. 85.35 or 85.36, for electric control or the distribution electricity.”

The Assistant Commissioner decided the classification of the products in question, under CSH 8537.00 and confirmed the duty demand of Rs.22,13,129.

A Aggrieved by the aforesaid order, the assessee preferred an appeal to the Commissioner (Appeal) who by his order dt.28.11.1995, set aside the impugned order dated 31.10.1994 and remanded the same for denovo, for the reasons that the order was passed without hearing the assessee in respect of the first show cause notice dated 31.12.1993.

B The case was again taken up and the Adjudicating Authority relying mainly on the two entries in the tariff decided that the Single Panel Circuit Breaker manufactured by the assessee has to be classified under CSH 8537.00 and confirmed the duty demand of Rs.22,13,129/-.

C Aggrieved by the said order, the assessee preferred an appeal to the Commissioner (Appeals) who observed that to merit classification of the panel under CSH 8537.00, it should contain two or more apparatus of Heading No. 8535.00 or 8536.00 and in the instant case, the single panel contains only the circuit breaker falling under Chapter 85.35 and hence the subject panel is not classifiable under Chapter 85.37 and accordingly the Single Panel Circuit

D merits classification under Chapter 85.35, and accordingly set aside the order and allowed the appeal. The department preferred an appeal against the said order in the Customs, Excise and Service Tax Appellate Tribunal, Bangalore which relied on a ruling of the Tribunal in the case of *Eswaran & Sons Engineers Ltd. v. CCE, Madras*, reported in (1991) 112 ELT 1011, which upheld the classification under Heading 85.35 and has noted that the Board's

E Circular (Section 37B Order) issued on 14.07.1994, does not have a retrospective effect but only a prospective effect to classify the item under Chapter 85.37. Since the period under dispute is 24.06.1993 to 22.11.1993 and 01.12.1993 to 27.02.1994 to 22.11.1993 and 01.12.1993 to 27.02.1994, which is prior to the issuance of CBEC Circular No. 32/8/94-CX dated 14.07.1994 which does not

F have retrospective effect and has only prospective effect to classify the goods in question under Chapter 85.37, the departmental appeal has been rejected. Aggrieved against the rejection of their appeal, the Commissioner of Central Excise, Bangalore filed the above appeal before this Court.

G Mr. T.S. Doabia, learned senior counsel for the appellant took us through the orders passed by the authorities below and also other relevant records. He submitted much prior to 14.07.1994, a show cause notice was issued by the Assistant Collector on 17.12.1993 on the basis of his interpretation of the above two entries and the order passed by the Assistant Collector dated 19.12.1994 is also on the basis of his interpretation of the above two entries and that the said order is not based on the circular dated 14.07.1994 and,

H

therefore, the circular had no application to the facts of this case. He would further submit that under Section 37B of the Act, the Board is empowered to issue instructions to Central Excise Officers for the purpose of uniformity in the classification of eligible goods which instructions, are required to be followed by such officers. However, under proviso A to Section 37B, an exception is made. The said proviso states that the said instructions, orders or directions cannot make any Central Excise Officer to dispose off a particular case in a particular manner. Similarly, under proviso B, such instructions shall not in the discretion of the Commissioner of Central Excise (Appeals), discharging appellate functions. In view of the proviso to Section 37B, the said circular dated 14.07.1994 issued by the Board was not applicable to the facts of the said case. Therefore, he would submit the circular dated 14.07.1994 had no application to the facts of the present case. It is further submitted that switches, fuses, relays, plugs, junction boxes etc. have been given the status of separate/individual items. Without these items also main equipments/machinery cannot function. Therefore, though they may be parts of certain machinery, they have to be classified under those headings where they are specifically mentioned/classified. Thus, the panels manufactured by the assessee contain more than two apparatus falling under heading 85.35 vide relays, circuit breakers, switches, position indicators etc. Therefore, the goods manufactured by the assessee are correctly classifiable under heading 85.37.

Concluding his argument, Mr. Doabia submitted that the matter requires investigation and, therefore, be remitted to the authorities concerned for fresh consideration.

Mr. A.R. Madhav Rao, learned counsel for the respondent submitted that when there is a concurrent finding of fact in favour of the respondent, the appeal filed by the Department has no merits. It is submitted that the issues involved in the present appeal is a question of fact which has been decided in favour of the respondents both by the Commissioner (Appeals) and by the Tribunal and thus there is a concurrent finding of fact in favour of the respondent and department's appeal ought to be dismissed in view of the same. Learned counsel has also invited our attention to the counter affidavit filed on behalf of the respondent and the detailed reply made thereunder to the civil appeal filed by the Revenue. Learned counsel further submitted the circular being oppressive and against the respondent has to apply only prospectively and cannot be applied retrospectively. In other words, a beneficial circular has to be applied retrospectively while an oppressive circular has to be applied prospectively. Thus, when the circular is against the

- A respondents they have a right to claim the enforcement of the same prospectively. It is further submitted that for the period in question, trade notices had been issued classifying the circuit breakers under Heading No. 85.35 or 85.36 depending upon the voltage, which are binding upon the Department. Thus, he submitted that the circuit breaker is classifiable under Heading 85.35. He would further submit that the Tribunal has allowed the appeal filed by the respondents by following its own order in the case of *Eswaran and Sons* (supra) and has not given any finding on the merits of the matter.

- C We have perused the order impugned in this appeal, other connected records, and considered the rival submissions.

- D In the instant case, the assessee had filed a classification list effective from 01.03.1993, classifying the Single Panel Circuit Breakers under Heading No. 85.35 and claiming concessional rate of duty at 5% under Notification No. 52/93 dated 28.02.1993. The said classification list was approved by the jurisdictional Assistant Commissioner, on 10.06.1993. Thereafter, the assessee cleared the said goods in accordance with the approved classification list. When this approved classification was proposed to be revised to reclassify the Single Panel Circuit Breakers under Heading No. 85.37 of the tariff, such re-classification can take effect only prospectively from the date of communication of the show cause notice proposing re-classification. In the instant case, the show cause notice was communicated to the assessee only on 31.12.1993. Therefore, as rightly urged by the learned counsel for the respondent, the reclassification can take effect only from 27.04.1994 and accordingly the differential duty can be demanded only from that date.

- F In view of the above, we see no reason to interfere with the order passed by the Commissioner (Appeals) and as confirmed by the Tribunal. The appeal is accordingly dismissed.

However, there shall be no order as to costs.

S.K.S.

Appeal dismissed.