

**Commissioner of Central Excise Vs. Metal Pack**

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**Court :** Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

**Decided On :** Aug-10-2000

**Reported in :** (2000)(122)ELT161Tri(Mum.)bai

**Appellant :** Commissioner of Central Excise

**Respondent :** Metal Pack

**Judgement :**

1. The question for consideration in these appeals filed by the department is whether the respondent could avail total exemption benefit of Notification 175/86 with regard to some of the products manufactured by it and choose not to avail of the exemption on some others. In the common order impugned in the appeal the Commissioner has held that the assessee had the right to do so because Trade Notice 121/88 dated 30-8-1988 issued by Bombay-I Collectorate permitted this.

2. The ground in the appeal that this trade notice referred, not to exemption under notification 175/86 but exemption under notification 180/88 and 69/86 and therefore does not apply to the facts of the present case, is not disputed by the representative of the respondent.

He, however, relies on the decision in Faridabad Tools Pvt. Ltd. v. Collector - 1993 (63) E.L.T. 759, while he says must be followed because the appeal against that decision has been dismissed by the Supreme Court.

3. The larger Bench of the Tribunal which was constituted to resolve the difference in the view taken by the benches of the Tribunal which passed orders in Faridabad Tools Pvt. Ltd. v. Collector and the benches of the Tribunal which took a contrary view in Kharia Cement Works v.CCE - 1989 (42) E.L.T. 696, confirmed the ratio of the latter decision noting that this decision had not been brought to the notice of the bench which decided the Faridabad Tools Pvt. Ltd. The appeal filed by the department against Faridabad Tools Pvt. Ltd. has been dismissed by the Supreme Court in 1996 (82) E.L.T. A149.

4. The dismissal by the Supreme Court in limine or not on merits of an appeal against a particular order does not amount to affirmation of the ratio of that order. It would then follow that notwithstanding the dismissal of the appeal the law that is to be applied is the law settled by the decision of the larger bench in Kamani Foods v.Collector [1995 (75) E.L.T. 202 (Tribunal)]. The conclusion therefore is that the respondent was not entitled to the simultaneous benefit of the notification for some of the goods and Modvat benefit for others.

5. We therefore allow these appeals, set aside the order of the Collector (Appeals) and restore the order of the Assistant Collector.

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