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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Oct-20-2000

Reported in : (2000)(72)ECC765

Judge : K Sreedharan, G B Deva, N T C.N.B.

Appellant : Dossa Harjee and Co. and ors

Respondent : Collector of Central Excise

Judgement :

1. A Division Bench of this Tribunal vide its Miscellaneous Order No.M/57-607 2000-D dated 16.8.2000 has referred the following issue for consideration by Larger Bench: Whether the product of M/s. Simplex Mills Private Limited (Appellants in E/4413/93-D) viz. "filter cloth/grey coarse canvas" is classifiable under Chapter Heading 52.05 of the Schedule to the Central Excise Tariff Act, 1985 as claimed by the assessee or under Chapter Heading 59.09 of the said Schedule as claimed by the Revenue in relation to the period of dispute (1.9.89 to 30.11.91).

2. The issue has arisen in view of conflicting decisions of the Tribunal with regard to the classification of filter cloth/grey coarse canvas. The Tribunal held in the case of M/s. Simplex Mills Co. (one of the appellants in the present proceedings) in its order reported in 1993 (49) ECR 147 (Tribunal) that the goods in question are classifiable under Chapter heading 5909 of the Central Excise Tariff and not under Chapter 52 or Chapter 54. However, in a later decision in the case of Madura

Coats Ltd. v. Collector of Central Excise, Madras the Tribunal classifiable under heading 5205 of the Central Excise Tariff and not under heading 5905. Following this decision, another Division Bench of the Tribunal decided in the case of Simplex Mills Co. Ltd. v. Collector of Central Excise, Bombay, 1998 (103) ELT 568 (Tribunal) that the goods would be classifiable under heading 5205 of the Central Excise Tariff Act, 1985. Thus, there are conflicting decisions regarding classification by the Division Benches of this Tribunal, in the appellants' own case itself.

3. When the matter was heard on 9.10.2000, the learned Counsel representing the appellants submitted that the demand in the present case is for the period 1st September, 1989 to 30th November, 1991. The demand has been raised invoking the proviso to Section 11A(1) of the Central Excise Act for the extended period. The learned Counsel submitted that the questions of time bar of the demand as well as classification are required to be decided in the appeals.

4. With regard to difference of opinion on the classification question mentioned in the referral order, the learned Counsel for the appellants submitted that even though the referring bench has taken note of the decision reported in 1993 (49) ECR 147 (Tribunal), that decision is not in force as the same is pending in a writ petition before the High Court of Bombay (Nagpur Bench). Therefore, only the other two decisions are in force and both the decisions are in agreement that the goods in question have to be classified under tariff item 5205. The learned Counsel, therefore, submitted that the referral Bench should have confirmed the classification of the goods under Chapter Heading 5205.

He also submitted that the Central Board of Excise & Customs had clarified several times that the correct classification of the goods is under tariff item 5205 and Revenue cannot be contending against that classification. The learned Counsel also submitted that in view of the pendency of the issue before the Bombay High Court, the Tribunal should consider disposing of the appeal based on the question of time bar itself.

5. With regard to the time bar, the learned Counsel submitted that a demand for the extended period under proviso to Section 11A(1) of the Act could be raised

only if it satisfies the requirement under that proviso that non-payment of duty has taken place by reason of fraud, collusion or any wilful mis-statement or suppression of facts or contravention of any of the provisions of the Central Excise Act or of the Rules with intent to evade payment of duty. The learned Counsel submitted that, in the instant case, the assessee has been manufacturing the same goods for several years and the goods were being removed by the assessee on payment of duty in accordance with approved classification lists. The appellants had not suppressed any facts or mis-declared any facts with intent to evade payment of duty or committed any fraud. There was considerable difference of opinion with regard to the classification of the goods. Therefore, different orders were being passed regarding the classification of the goods. This was the position prior to the period for which duty demand has been made in the impugned order. The learned Counsel submitted that classification list dated 5.6.89 and 9.6.89 for the impugned goods were initially approved provisionally and subsequently finally approved under Heading 5205. Collector (Appeals) held vide his Order No. SKM-671 /89-BI dated 23.3.89 that the correct classification was under heading 5205. This order was accepted by the Department and no appeal was filed. The learned Counsel also submitted that Central Board of Excise & Customs did not accept the Tribunal's Final Order No. E/150 to 161/92-D dated 28.2.92 (reported in 1993 (49) ECR 147 (T) classifying the goods under Tariff Heading 5909. Instead, the Board issued Order No. 10/93 under Section 37B of the Central Excise Act directing that the goods are classifiable under heading 5205. This order specifically took note of the CEGAT's order classifying the goods under heading 5909 and the fact that the said order was pending before the Bombay High Court. Still, the Board re-affirmed its earlier Circular No. 22/88-CX.I dated 10.8.98 which clarified that goods will be classifiable under heading 5205. The learned Counsel submitted that in these circumstances, when the goods were being removed after payment of duty against approved classifications, the classification order of the Collector (Appeals) had been accepted by the department, and from time to time, the Central Board had re-affirmed the correct classification of goods under heading 5205, it is not open at all to allege that the assessee had committed say fraud or suppressed or misrepresented any facts with intent to evade payment of duty. The learned Counsel, therefore, submitted that the appeals may be disposed of on the ground of time

bar alone.

6. We have heard the learned Departmental Representative who, while reiterating the findings in the impugned order, stressed that the impugned order has been passed after considering the Chemical Examiner's report on the goods. He also submitted that as the appellants were differently describing the goods as filter cloth/grey coarse canvas in the classification lists, it could not be said that they were submitting full particulars in every classification lists.

7. The present reference has been made on account of the fact that conflicting orders of the Tribunal are in existence. We, however, find that the final Order No. E/150 to 161/92-D classifying the goods under tariff item 59.09 is pending before the Bombay High Court (Nagpur Bench). The other orders referred to by the Division Bench in the case of Madura Coats Ltd. (*supra*) and Simplex Mills Co. Ltd., 1998 (103) ELT 568 (T) are in agreement that the correct classification of the goods is under tariff item 5205. We further feel that in the facts of the present case, the appeals could be disposed of based on the ground of time bar alone. The goods were being cleared for a long period against approved classification lists. Prior to the period of dispute itself, a provisional assessment had been finalised after due verification holding the goods to be classifiable under Heading 5205. Collector (Appeals) had passed an order prior to the period involved in the present notice holding the classification to be under Heading 5205.

This order was not further taken up in appeal by the Revenue. It is clear from Section 35B order dated 5.11.93 of the Board that even after the first order was passed by the Tribunal classifying the goods under Heading 5909, the Revenue authorities considered their earlier circular of 1988 to be valid and had instructed all field formations to continue classifying the goods under Heading 5205. In these circumstances, we are in agreement with the appellants that this is not a case where allegation of fraud or suppression or mis-representation of facts could be validity raised. Therefore, the demand which has been issued invoking the extended period under proviso to Section 11A has to be held to be done without warrant. The appeals, therefore, have to be allowed on the ground of time bar. The appeals are accordingly allowed and the impugned order is set aside in its entirety

with consequential relief to the appellants.

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