

Collector of Central Excise Vs. Maruthi Foam (P) Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Sep-13-1995

Reported in : (1996)(85)ELT157TriDel

Appellant : Collector of Central Excise

Respondent : Maruthi Foam (P) Ltd.

Judgement :

1.1 Appellants herein are manufacturers of articles of flexible polyurethane foam. They bring duty paid polyol and isocyanide and manufacture polyurethane (pu) foam block. It is stated by the appellants that the foam block as it comes out of the plant has top-skin, bottom skin and side-skins which is not fully foamed. These various aforesaid skins have to be cut from the block before the flexible polyurethane foam block comes into existence. From the said flexible block, the respondents herein manufacture articles of polyurethane foam (cellular/flexible) which are cleared on payment of duty.

1.2 P.U. block as it comes out of the plant, being liable to duty under Tariff sub-heading 3909.69 pertaining, inter alia, to "polyurethanes in primary form" is cleared without payment of duty in the factory itself for consumption in the manufacture of p.u. articles as aforesaid under exemption notification 217/86 since the final products - articles of cellular p.u. - are dutiable under Tariff sub-heading 3912.11 read with Notification 54/88-C.E., dated 1-3-1988 (as amended).

1.3 Prior to January 1990, the respondents were paying duty on the aforesaid 'skins' and other waste, parings and scrap (WPS) arising during the course of manufacture of articles of cellular p.u. foam under Sl. 6 of the table to Notification 54/88. For better appreciation the extracts from Notification 54/88 are reproduced below : In exercise of the powers conferred by Sub-rule (1) of Rule 8 of the Central Excise Rules, 1944, the Central Government hereby exempts goods of the description specified in column (3) of the table hereto annexed and falling under heading Nos. or sub-headings of the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), as are specified in the corresponding entry in column (2) of the said Table from so much of the duty of excise leviable thereon which is specified in the corresponding entry in column (4) of the said Table, subject to the condition, if any, laid down in the corresponding entry in column (5) of the said table

TABLE_____

No.	Heading	Description	Rate	Condition	of
goods					
(1)		(2)	(3)		(4)
(5)					

39.15 Waste, parings, 40% ad The aggregate quantity of scrap of flexible valorem such goods outside the...

polyurethane from, any factory for foam consumption, in any year, by or on behalf of one or 1.4 A Trade Notice 59/89, dated 5-1989 was issued by Meerut Collectorate regarding classification of top-skin, bottom skins and side skins cut from p.u. block. Although this trade notice was not placed on record by either side, we reproduce below a Trade Notice of Bombay Collectorate available at 1989 (41) E.L.T. - T51 : " Attention of the trade is invited to this Collectorate Trade Notice No. 2/(CH-39) dl/CE/CAL-II/88, dated 6-1-1988 of the classification of polyurethane foam product commonly known as 'top skin', bottom skin' and 'shreadings'.

2. A doubt had been raised as to whether the goods in question should be classified under Heading No. 39.15 as 'Waste, parings and scrap of plastics'.

3. The matter has been examined and it is clarified that polyurethane foam products commonly known as ' top skin', 'bottom skin' and 'shreadings' would be

appropriately classifiable under Heading No. 39.15 of the CET as 'waste, parings and scraps' of plastic. This Collectorate trade notice mentioned above may be treated as withdrawn".

1.5 According to the appellants, in pursuance of the said clarification, they submitted a classification list seeking exemption from payment of duty in terms of Notification 53/88 on the aforesaid 'cut off skins' as distinct from, WPS of flexible p.u. foam arising in the course of manufacture of articles from flexible/cellular p.u.foam block left after cutting off the top, bottom and side skins. The latter 'waste', they submit, is liable to discharge the duty in terms of Notification 54/88 which is not indispute. Dispute is whether the 'WPS' arising in the form of top, bottom and side skins of p.u. foam block is liable to nil rate of duty in terms of Notification 53/88-C.E.1.6 Collector C.E.(Judicial) has allowed the contention of the respondents herein. Hence, the present application under Section 35E of the Central Excises & Salt Act, 1944, as on the direction of the Central Board of Excise & Customs to be treated as appeal before us.

1.7 For appreciation of the controversy, we reproduce relevant extracts of Notification No. 53/88 :- In exercise of the powers conferred by Sub-rule (1) of Rule 8 of the Central Excise Rules, 1944, and in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 132/86-Central Excises, dated the 1st March, 1986, the Central Government hereby exempts goods of the description specified in column (3) of the Table hereto annexed, and falling under Heading Nos. or Sub-heading Nos. of the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), as are specified in the corresponding entry in column (2) of the said Table, from so much of the duty of excise leviable thereon which is specified in the said Schedule, as is in excess of the amount calculated at the rate specified in the corresponding entry in column (4) of the said Table, subject to the condition, if any, laid down in the corresponding entry in column (5) of the said table.

No.	Heading	No./	Description	of	Rate	Condition	Sub-heading	No.
(2)					(3)			(4)

...

...

...

...24 39.15 Waste, parings Nil If such waste, parings and scrap of and scrap of plastics, 2.1 Learned JCDR, Shri. S. Kak has urged that Notification 53/88 is applicable to WPS of plastics (in general) subject to the condition that such WPS of plastic arise from goods falling under Chapter 39 or any other of Chapter of the Schedule to CETA, 1985 on which duty of excise under the CESA or Customs countervailing duty has already been paid. Admittedly, p.u. foam block from which the WPS in the form of top, bottom and side-skins arise is not duty paid inasmuch as it is cleared for captive consumption in the manufacture of articles under Notification 217/86 without payment of duty. He relies for this proposition on Tribunal's Final Order No. 174/93-C and 174-A/93-C, dated 25-5-1993 [reported in 1994 (72) E.L.T. 770 (Tri.)] in the case of Tirupati Foam.

2.2 He also submits that Notification 53/88-C.E. gives, inter alia, exemption to WPS of plastics in general whereas Notification 54/88-C.E. speaks of part exemption to WPS of p.u. foam. On the principle of specific provisions of law prevail over the general provisions, Notification 54/88 should be treated as the notification governing durability of WPS of p.u. Foam rather than the Notification 53/88.

2.3 He further submits that trade notice is mainly about clarification of 'WPS' under consideration. In fact both the Notifications 53/88 and 54/88 classify 'WPS' as under Heading 39.15. Trade Notice 51/89 is not relevant for deciding the controversy in question-whether Notification 53/88 or Notification 54/88 governs the rate of duty on WPS, 3.1 On the other hand, learned advocate Sh. Vinay Garg for the respondents has urged that the two Notifications 53/88 and 54/88 are different in character and operate for different products. Notification 53/88 speaks of WPS of all plastics whereas Notification 54/88 speaks only of WPS of flexible

p.u. foam. Top, Bottom and side skins of a p.

u. foam block are either not foamed at all or are only partially foamed. These are hard in character and by no means can be treated as WPS of flexible p.u. foam. Therefore, the WPS under consideration fall outside the scope of Notification 54/88.

3.2 On the other hand, the WPS in the form of top, bottom and side-skins satisfy the term of Notification 53/88 fully. There is no reason whatsoever to deny the benefit of the said notification. It is admittedly WPS of plastic, p.u. being a plastic. It arises from duty paid polyol and isocyanide. Therefore condition of the Notification 53/88 is fully satisfied.

3.3 On the other hand, he submits that the Revenue's contention is self-contradictory. Top, bottom and side-skins are part and parcel of the p.u. foam block as it comes out of the machine. These skins arise earlier than the flexible p.u. foam block from which further articles of flexible (cellular) p.u. foam are made. In the very nature of things and the process of manufacture, adopted by the respondents WPS in the form of top, bottom and side-skins cannot arise from the p.u. foam block.

4.1 We have carefully considered the pleas advanced from both sides. We observe, as rightly contended by the learned advocate that Notification 54/88 applies to WPS of flexible p.u. foam whereas Notification 53/88 applies to WPS of all plastics. If the Revenue contends that Notification 54/88 applies it must adduce satisfactory and cogent evidence that the waste skins under consideration are flexible p.u.

foam. There is no evidence whatsoever on record from the Revenue in support of this averment. Accordingly, applicability of Notification 54/88 is ruled out.

4.2 Even, if we assume that both Notifications 53/88 and 54/88 apply to the WPS, there is no rule of law that the notification which is specific to a product should be applied to that product to the exclusion of the more general notification which is otherwise applicable. This is so because each notification is independent of one

another, and they cannot be treated as part of a one whole scheme like that of a single enactment containing various provisions. It is the policy of public interest in each case that impels the Central Government to issue an exemption notification. It is well settled that an assessee is entitled to even two notifications unless one notification debars the application of the other notification by specific words to that effect. In this connection, we rely upon Tribunal's judgment in 1991 (53) E.L.T. 347 in the case of Indian Oil Corporation v. Collector of Central Excise wherein it was held, in para 8 of the report as follows : - "When there are 'two notifications which are in force simultaneously then that notification which is beneficial to the assessee should be applied." In the said case, a similar situation arose where HVI Spindle in a notification specifically applicable to HVI Spindle oil carried a higher rate of duty whereas a 'mineral oil (HVI Spindle oil) was leviable to lower rate of duty. Conditions of both the notifications were satisfied by the product of the I.O.C. Tribunal allowed the contention of the I.O.C. for allowing the benefit of notification imposing lower burden of duty.

4.3 We, however, observe that there is no sufficient force in the appellant's plea that removal of p.u. foam block under Notification 217/86 for captive consumption would mean that the p.u. foam block has not already paid the duty leviable thereon. This position is now well settled in Patna High Court's judgment in the case of Tata Yodogawa Ltd. and Anr. v. UOI and Ors. [1987 (32) E.L.T. 521 (Patna)]. This judgment has been followed by the Tribunal in a series of judgments e.g. 1990 (49) E.L.T. 284 & 1988 (35) E.L.T. 142. A question in Tata Yodogawa arose whether ingots, which were exempted from payment of duty if melting scrap (from which such ingots were manufactured) had already paid duty, would still be entitled to exemption if the scrap used in manufacture of such ingots was fully exempted. It was held that ingots would still be entitled to exemption because the scrap had already paid the duty which 'was contracted to be paid or which 'ought to have been paid ' in view of the exemption on scraps.

4.4 In view of the above discussion we hold that benefit of Sl. No. 24 of the table to Notification 53/88 would be available to the top skin, bottom skin and side skins of a p.u. foam block used captively in manufacture of articles of cellular p.u. foam.

4.5 Before parting with this matter, we would like to deal with the Tribunal's order in the case of Tirupati Foam (supra) relied upon by the learned JCDR. We observe that the said judgment of the Tribunal, in upholding applicability of Notification 54/88 did not notice that Sl.

No. 6 of the table to the said notification speaks of WPS of flexible p.u. foam. It is also to be observed that the Tribunal did not examine the meaning of the expression 'duty... has already been paid'. Nor any judgments on the meaning of that expression were cited by the Revenue or were noticed by the Tribunal. The Bench examined the question from the angle of discrimination which would be caused to a person who purchased p.u. foam blocks after payment of duty thereon vis-a-vis the manufacturer, as in the present case who captively utilised the p.u.

foam blocks in manufacture of further articles. We may say with respect, that to go into the question of discrimination would be entering into the realm of intendments, conjectures and surmises.

Supreme Court in Hemraj Gordhandas [1978 (2) E.L.T. (J 350)] has ruled against such an approach while construing an exemption notification.

5. There is one more question in this appeal of the Revenue. It alleges that the respondent has inflated the production of waste skins during the months of January, 1990 onwards as compared to their production during the preceding twelve months. Contention of the respondents, on the other hand, is that there was a lean period in the p.u. flexible articles and as such the stocks accumulated in the form of semi-finished goods. When these were processed from January, 1990 onwards, production of waste skins was bound to be more the average production of the immediately preceding period. We have examined the rival contentions with reference to the available facts and figures. We do not find much force in the Revenue's allegation. In any case, allegation is not that the respondent cleared the bound goods in the garb of waste skins, but the allegation is that there was deliberate excess production of waste skins from January, 1990 with the intention of clearing them without payment of duty under Notification 53/88 instead of clearing them on payment of duty under Notification 54/88 as was being hitherto done by the respondents. It is also alleged that this tendency on the part of the

respondents started after filing revised classification list claiming exemption under Notification 53/88. We do not see any offence in this scheme or intention of the respondents, even if it be true, particularly after upholding respondents' contention of applicability of Notification 53/88 to top skin, bottom skin and side skins.

7. The respondents M/s. Maruti Foam (P) Ltd. are engaged in the manufacture of articles of Cellular/Flexible Polyurethane Foam which are cleared on payment of duty. For this purpose they imported plastics in primary form that is to say Polyol and isocyanide and cleared the same on payment of customs duty and the additional duty at appropriate rate. The first product which comes out in their plant is blocks of Polyurethane Foam of irregular shape in primary form which are not fully foamed and have an uneven surface and stiff and hard side skins which are classifiable under Pleading 3909.60 attracting Central Excise Duty @ 60% ad valorem Plus Rs. 40/- per Kg. But these blocks of Polyurethane Foam of irregular shape in primary form were cleared at nil rate of duty for captive consumption for manufacture of articles of P.U. Foam under Notification No. 2.17/86, dated 1-3-1986. During the manufacture of the final product, namely, articles of Cellular/Flexible Polyurethane Foam out of the inputs, (i.e., blocks of Polyurethane Foam of irregular shape in primary form) some waste and scrap arises at two stages that is to say at the stage when uneven surface and stiff and hard side skins are removed from these blocks of Polyurethane Foam of irregular shape in primary form commonly known as top skin, bottom skin and side skins for making them regular blocks/sheets of waste flexible Polyurethane Foam. The other stage at which waste arises is when these fully foamed and regular flexible polyurethane blocks (which are obtained after removal of top skins, bottom skins and shredding as aforesaid) are cut to size for manufacturing the article of Polyurethane Foam (Cellular/Flexible. Prior to January, 1990 there was a doubt as to whether the said waste and parings and scrap is to be classified under Heading 3915.90 as waste parings and scrap of plastic, though, the respondents are classifying the said top skins, bottom skin and shredding under Heading 39.90 and paying duty @ 40% BED and 5% SED under Notification No. 54/88, as amended by Notification No. [37/89], dated 1-3-1989 which speaks of waste, parings and scrap of Flexible Polyurethane Foam. However, the said doubt was removed by the Department by issuing parallel Trade Notices [as mentioned in paragraph 1.4 of the Order

proposed by my Id. Brother Shri PC. Jain, Member (Technical)] clarifying that the said top skin, bottom skin and shredding would be appropriately classified under Heading 39.15 of CET as waste parings and scrap of plastic. With the issuance of these Trade Notices the respondents filed their additional classification list No.2/90 effective from 11-1-1990 claiming that since the said top skin, bottom skin and shredding falls under Chapter Heading 3915.90 as articles of plastics they were entitled for the benefit under Notification No. 53/88, dated 1-3-1988 as amended. However, a Show Cause Notice was issued to the respondents inter alia on the ground that as per [the] condition of the Notification No. 53/88 (Sl. No...) nil rate of duty on waste, parings and scrap of plastics falling under Tariff Heading 39.15 is applicable only if such waste paring and scrap of plastics arise from goods on which the duty of excise leviable thereon or the additional duty as the case may be has already been paid and since in the instant case blocks of Polyurethane Foam of irregular shape in primary form falling under 3909.60 were removed for captive consumption under Notification No. 217/86, dated 1-3-1986 without payment of duty on the condition that final product shall be cleared on payment of duty, the benefit of the said Notification No. 53/88 cannot be extended. However, the Collector of Customs and Central Excise, Meerut dropped the said demand holding that the waste and scrap of plastics enjoys the benefit of exemption Notification No. 53/88. Hence the present appeal by the Revenue.

8. Arguing on behalf of the Revenue Shri Siddarth Kak, Jt. CDR submitted that admittedly the blocks of Polyurethane Foam of irregular shape in primary form falling under Tariff Item 3909.60 and attracting duty at the specified rate as aforesaid from which the waste parings and scrap in the form of top, bottom and side skins arises were cleared for captive consumption as input in the manufacture of articles of cellular/Flexible Polyurethane Foam under Notification No. 217/86 without payment of duty it cannot be said that the duty of excise has already been paid on such waste parings and scrap of plastics. For this proposition he relied upon the Final Order No. 174/93-C and 174A/93-Q dated 25-5-1993 [reported in 1994 (72) E.L.T. 770 (Tri.)] passed in the case of M/s. Tirupati Foams Pvt. Ltd. He also submitted that Notification No. 53/88 is of a general nature which exempts waste, parings and scrap of plastics in general whereas Notification No.53/88-C.E. speaks of part exemption to waste, parings and scrap of Polyurethane Foam. He

further added that the Trade Notice No. 51/89 and the other Public Notices issued by different Collectorates is not relevant for deciding the controversy in hand.

9. In reply, the learned counsel for the respondents, Shri Vinay Garg, submitted that the said two Notification Nos. 53/88 and 54/88 deal with different WPS that is to say, Notification No. 53/88 deals with waste, parings and scrap of plastics (Sl. No. 24 Column No. 3), whereas Notification No. 54/88 deals with waste, parings and scrap of flexible Polyurethane Foam. He highlighted that top, bottom and side skins of Polyurethane Foam block of irregular shape in primary form are either not foamed at all or are only partially foamed and these are hard in character and cannot be treated as waste, parings and scrap of flexible Polyurethane Foam by any stretch of imagination and therefore, Trade Notices were issued, as aforesaid, clarifying that the same are to be classified as waste, parings and scrap of plastics. He further vehemently contended that the decision rendered in the case of M/s.

Tirupati Foams (P) Ltd., supra, is per incuriam as much as Rule 57D of the Central Excises & Salt Act, 1944 has not brought to the notice of the Bench and the distinction appearing in the description of the goods given in the said two Notification Nos. 53/88 and 54/88 was not either brought to the notice of the Bench or not noticed by the Bench itself.

He also submitted that the final products referred to in the Proviso to Notification No. [217/86] refer to the finished final product only and not to the by-products, waste or residue emerging at intermediate stage and known as intermediate product. But it appears that this was also not brought to the notice of the Bench in the case of M/s. Tirupati Foams Pvt. Ltd., supra.

10. I have considered the submissions. The following facts stand established from the record in the instant case : (i) that the respondents imported plastic material on payment of duty for manufacture of articles of cellular/flexible polyurethane foam: (ii) that the first product which came out of their plant was blocks of Polyurethane Foam of irregular shape in primary form which were not fully foamed and have an uneven surface and stiff and hard sides skins classifiable under Heading 3909.60 and attracting Central Excise duty at the rate specified therein, but the same were

cleared for captive consumption as inputs for manufacturing the articles of cellular/flexible Polyurethane Foam as exempted goods under Notification No. 217/86, dated 1-3-1986; (iii) that in the course of manufacture of final product i.e.

articles of cellular/flexible Polyurethane Foam some waste and scrap is generated. First at the stage, when uneven surface and stiff and hard side skins known as top skin, bottom skin and side skin is removed for making them regular blocks/sheets of Polyurethane Foam (which is the only subject matter of dispute before us); (iv) that the other waste which occurs when these regular sheets of Polyurethane Foam are cut to size in the course of manufacture of Final products i.e. articles of cellular/flexible Polyurethane Foam.

This later waste is liable to discharge the duty in terms of Notification No. 54/88 as waste, parings and scrap of flexible polyurethane Foam (Sl. No. 06) which was not disputed before us.

(v) that the appellants are paying duty on the final product, namely, articles of cellular flexible polyurethane Foam.

11. The Central Excise Rules, 1944 contain the Modvat Scheme in Rules 53A to 57]. This Scheme enables the manufacturers of excisable goods to take credit of duty on excisable goods used as inputs in the manufacture of finished excisable goods, that is to say, final products. However, the credit of duty under the Modvat Scheme is not allowable when the final product produced out of notified inputs is exempted from the whole of the duty of excise or is chargeable to nil rate of duty, but such restriction is inapplicable if part of the inputs is contained in any waste, refuse or by-products arising during the manufacture of the final product, whether or not such waste, refuse or by-product is exempt from the whole of the duty of excise leviable thereon or is chargeable to nil rate of duty or is not specified as a final product under Rule 57A, as per Rub-rule (1) of Rule 57D of the Central Excise Rules, 1944. The Notification No. 217/86 has been issued under The Modvat Scheme and exempts the specified inputs used in or in relation to the manufacture of final products specified therein from the whole of the duty on the condition that the final product is not exempt from the whole of the duty of excise leviable thereon or is chargeable to the nil rate of duty. In the case of Swadeshi

Polytex Ltd. v. Collector of Central Excise, 1989 (44) E.L.T. 794 (SC), the Apex Court was concerned with the interpretation of Proviso to Notification No. 201/79 which was identical to the Proviso to Notification No. 217/86 which provided that the notification shall not apply when such final product was wholly exempted from the duty of excise or chargeable to nil rate of duty and after analysing the case law and the Notification it was held that, the condition that the goods should not be fully exempted was with reference to the final product only and not to the by-products, waste or residue emerging at intermediate stage and, therefore, set off of duty paid on the input could not be denied or reduced even on that part which was contained in the waste or by-product generated during the manufacture of final product. In the case of Detergents India Ltd. v. Collector of Central Excise, 1992 (61) E.L.T. 310 it was held by this Tribunal that there is nothing in the Rules to suggest that Modvat Credit could be taken only for that portion of the inputs which got consumed in the manufacturing process. Under the Rules the inputs may be used in or in relation to the manufacture of the final product. For the purpose of Modvat Rules, it makes no difference if the whole of the material put in the manufacturing stream has not got consumed and that in the nature of the manufacturing process part of it has emerged as a product which is described as spent acid. In fact, Sub-rule (1) 57D of Central Excise Rules itself states that credit of specified duty allowed in respect of any inputs shall not be denied or varied on the ground that part of the inputs is contained in any waste, refuse, or by-product arising during the manufacture of the final product, whether or not such waste, refuse or by-product is exempt from the whole of the duty of excise leviable thereon or is chargeable to nil rate of duty.

12. In the instant case it is an admitted fact that blocks of Polyurethane Foam of irregular shape in primary form falling under T.I.3909.60 were removed for captive consumption as exempted goods under Notification No. 217/86 dated 1-3-1986 for manufacturing the final product, namely articles of cellular/flexible polyurethane Foam and the respondents are paying duty on this end product (final product), namely, articles of Flexible Polyurethane Foam Falling under sub-headings 39.25, 39.23, 39.24 and 39.26 as specified in the tariff.

Therefore, in my view Proviso to Notification No. 217/86 would not effect the claim of the respondents under Notification No. 53/88, if otherwise admissible.

13. Now coming to the claim of the respondents for the benefit of exemption Notification No. 53/88, it may be stated at the outset that there appears to be no dispute that the waste parings and scrap that is to say top, bottom and side skin fall under Tariff Heading 39.15 and the respondents were clearing the same as waste parings and scrap under Tariff Heading No. 39.15 availing exemption under Notification No.54/88 prior to January, 1990. But after issuance of the Trade Notices as aforeside the respondents are claiming that they are entitled for the benefit of exemption Notification No. 53/88 as waste, parings and scrap that is to say top skin, bottom skin and side skin are articles of plastics whereas it was contended by Revenue that Notification No.54/88-C.E. being special must prevail upon Notification No. 53/88 since it grants exemption in general. From a reading of the said Notification as reproduced by my Ld. Brother in paragraph 1.3 and 1.7 it would be clear that waste, parings and scrap of plastics as well as waste parings and scrap of Polyurethane Foam fall under the sub-heading that is to say 39.15 but the scope of both these Notifications is different inasmuch as they applies to different WPS namely, Notification No.53/88 applies to waste, parings and scrap of plastics (see Col. No. 3 of the Table attached to Notification wherein the description of the goods is given). Whereas Notification No. 54/88 applies to waste, parings scrap of Flexible Polyurethane Foam. (See Col. No. 3 of Table attached to it wherein the description of the goods has been given). In the instant case it is not in dispute that after the issuance of Trade Notices as aforesaid in 1989 the waste, that is to say top, bottom and side skins is classifiable as waste, parings and scrap of plastics. In this view of the matter the arguments of the Id. Jt. CDR that the Notification No. 54/88 is special since it speaks of part exemption and Notification No. 53/88 is general and, therefore, Notification No.54/88-C.E. should prevail upon Notification No. 53/88-C.E. cannot be accepted.

14. Now coming to the question of fulfilling the condition of the Notification No. 53/88, it was contended by the Ld. Jt. CDR that the removal of blocks of Polyurethane Foam of irregular shape in primary form for captive consumption at nil rate of duty under Notification No.217/86 would mean that the said irregular

Polyurethane Foam blocks in primary form have not already paid the duty leviable thereon. I am afraid this argument cannot be accepted, since this position is now well settled by a series of judgments delivered by the Apex Court and High Courts and followed by this Tribunal. In the case of Tata Yodogawa Limited v. Union of India, 1987 (32) E.L.T. 521 (Patna), the question arose as to whether ingots which were exempted from payment of duty if melting scrap (now from which such ingots were manufactured) had already paid duty, would still be entitled for exemption if the scrap used in manufacture of such ingots were fully exempted. It was held that ingots would still be entitled for exemption because the scrap has already paid the duty which 'was contracted to be paid' or which 'ought to have been paid' in view of exemption of scrap. For ready reference the relevant paragraphs [16 to 21] of the said judgment may be extracted as follows : I.E.L. Ltd. v. Collector of Central Excise, Bombay, 1988 (35) E.L.T. 142 this Tribunal has observed as under [paras 7 to 8] : * * * * *

N.B. Sanjana. v. The Elphinstone Spinning and Weaving Mills Co. Ltd., AIR 1971 SC 2039 the Hon'ble Supreme Court had an occasion to consider the meaning of the expression 'paid' occurring in Rule 10 of the Central Excise Rules. One contention was that it means "actually paid". As against this it was contended that it means "ought to have been paid". The Hon'ble Supreme Court held that the proper interpretation to be placed on the expression 'paid' is "ought to have been paid". Following it the Hon'ble Supreme Court reiterated the same view in the case of Assistant Collector of Central Excise, Calcutta v. National Tobacco Co. of India Ltd., AIR 1972 SC 2563 and D.R. Kohli v. Atul Products Ltd., AIR 1985 SC 537. In fact the Government of India also interpreted the said expression in the same way and issued Circular No. M.F. (D.R.) TRU F. No. 339/6/80-TRU, dated 6-12-1980, to that effect. The relevant portion of the said order is reproduced as under : "...Notification 180/61 allows the exemption to the specified secondary dyes only when the primary dyes are such "on which excise duty or countervailing customs duty has already been paid". The matter was referred to the Ministry of Law who have opined that the specified secondary dyes manufactured from primary dyes in this case are entitled to exemption under Notification No. 180/61 even though the primary dyes had availed full exemption of duty under Notification, No. 71/78 or 80/80. An extract of the opinion of the Ministry of Law is enclosed. The Board has accepted the opinion of the Ministry of

Law".

"Exemption under Notification 180/61 will be available "if and only if such dyes are manufactured from any other dye on which Excise duty or countervailing customs duty has already been paid". The crucial words in the exemption notification are 'duty has already been paid'.

The two interpretations possible are that it might mean duty which has actually been paid or which ought to have been paid.

We are dealing with a case where no duty is payable in respect of certain goods by virtue of exemption notifications. If these goods are assessed to duty, the duty payable would be nil. In this context, reference may be made to the definition of 'assessment' in Rule 2(l)(a) of the Central Excise Rules, 1944 which means assessment of duty by the proper officer and includes reassessment, provisional assessment under Rule 9B, summary assessment under Rule 37A and post-judgment assessment under Rule 173Q and any order of assessment in which the duty assessed is nil. In *N.B. Sanjana v. The Elphinstone Spinning and Weaving Mills* 1973 July Cen-Cus (vi) - AIR 1971 SC 2039], the Supreme Court had also occasion to consider the meaning of the expression "paid" occurring in Rule 10 of the Central Excise Rules. One contention was that it means "actually paid". As against this it was contended that it means "ought to have been paid". The Supreme Court held that the proper interpretation to be placed on the expression "paid" is "ought to have been paid". The Court also referred to certain other enactments where also such an interpretation has been placed on the said expression.

In the light of the above, it would appear that the necessary dye manufacturers would be entitled to the exemption under Notification No.180/61 even after the advent of the exemption Notifications 71/78 and 80/80" Thus, I hold that the appellants fulfil the conditions provided under Notification No. 53/88 and, therefore, were rightly held to be entitled for the benefit of the same.

16. As regards the Final Order passed in the case of M/s. Maruti Foam (P) Limited, it may be stated that in that case the issue was whether top skin, bottom

skin, side skin and shreddings are leviable to nil rate of duty under Notification No. 53/88 as claimed by the appellants or chargeable to duty at the rates prescribed under Notification No.53/88 as held by the Appellate Authority. The assessee therein claimed the benefit of Notification No. 53/88 mainly on the ground that the said top skin, bottom skin, side skin and shreddings results from inputs on which appropriate duty has been paid at the time of importation. However, before the Tribunal an additional ground was raised that the expression 'the duty of [excise] leviable thereon used in Notification No. 53/88 also includes nil rate of duty Further, alternative view was also taken that if their plea for the benefit of Notification No. 53/88 was to be rejected, they would be entitled to the benefit of Notification No. 54/88. The Tribunal rejected the main plea of the appellants that the WPS results from inputs on which appropriate duty has been paid at the time of importation, which is not the case here as the present appellants are not claiming the benefit of Notification No. 53/88 on the ground that the impugned goods that is to say WPS results from inputs on which appropriate duty has been paid at the time of importation. As regards the additional ground raised by M/s. Maruti Foam (P) Ltd. in that case the expression 'the duty of excise leviable thereon' used in Notification No. 53/88 also includes 'nil rate of duty', the Tribunal rejected the same by observing as follows : "Considered. It is not disputed that no duty is paid on the uncut polyurethane foam block from which the impugned waste material has arisen. If the plea of the appellant were to be accepted, Notification 54/88 will become redundant and hence such an interpretation is to be avoided.

4. This view is supported by the provisions of Notification No. 217/86 which exempts inputs captively consumed for further manufacture by including a proviso that "provided that nothing contained in this notification shall apply to inputs used in or in relation to the manufacture of final products which are exempt from whole of the duty of excise leviable thereon or is chargeable to nil rate of duty. Hence, the waste material under reference were to be held as covered under Notification No. 53/88 it gets excluded from Notification 217/86. On this view of the matter the plea taken in the Misc. petition is untenable".

17. Regarding this finding it was submitted by the Ld. Counsel Shri Garg that it appears from the said order passed by the Tribunal in the case of M/s. Tirupati

Foam (P) Ltd. that the following facts were not brought to the notice of the Bench nor the Bench noticed the same :- (i) that Sl. No. 24 of Notification No. 53/88 specifically deals with the waste parings and scrap of plastics waste. Whereas Sl. No. 6 of Notification No. 54/88 speaks of waste, parings, scrap of flexible polyurethane Foam. Both has a different fields to operate and one does not overlap the other; (ii) that therein applicability of Notification No. 217/86 was not in issue and, therefore, neither side therein argued on it. However, in that case the Tribunal while passing the said order cited it only to lend assurance to its view that if the plea of the appellants were to be accepted, Notification No. 53/88 will become redundant and hence, such an interpretation is to be avoided. He highlighted that while taking support for the said view by proviso to the Notification No. 217/86 the Tribunal did not notice that the said Proviso speaks of "final products" and not of intermediate products.

That is to say, in the instant case "cut of skins" (as distinct from WPS of flexiable PU foam arising in the course of manufacture of articles from flexible/cellular PU foam block after cutting of the top bottom and side skins) is an intermediate product which has arisen before the final product that is to say articles of plastic is manufactured. And, therefore, its emergence as intermediate product does not preclude the appellants from claiming the benefit of exemption under Notification No. 217/86 ; (iii) that from the case of M/s. Tirupati Foam (P) Ltd. it is clear that in that case the assessee therein was claiming the benefit of Notification No. 53/88 on the total waste paring and scraps, that is to say, top skin, bottom skin, side skin and shreddings which arise during the entire manufacturing process of the final products, namely, articles of plastics on the ground that the said WPS results from the inputs on which appropriate duty has been paid at the time of importation and the case was argued in the wholesale manner for the entire WPS without bringing to the notice of the Bench that there are two types of waste which occurs at two different stages, i.e. at the first stage when uneven surface and stiff & hard skin known as top skin, bottom skin and side skin are removed from the semi foamed PU foam block of irregular shape and size in primary form. And later waste occurs when these flexible PU foamed blocks of regular shape and size are shredded and cut to size for manufacturing the final products, namely, articles of flexible PU foam. In the instant case, the said distinction has been brought to the notice of the

Bench stating that 'cut of skins' is distinct from WPS of Flexible P.U. Foam arising in the course of manufacture of articles from flexible/cellular P.U. Foam left after cutting of the top, bottom and side skins and in the instant case the assessee is admitting that the later waste is liable to discharge duty in terms of Notification No. 54/88 and in fact they are paying it whereas in the case of M/s Tirupati Foam (P) Ltd. the assessee therein was claiming the benefit of Notification No. 53/88 for this later waste also; and (iv) that the Bench while passing the order did not examine the expression 'the duty of excise levied thereon...has already been paid and not recorded its findings regarding the meaning of duty of excise levied thereon or nil rate of duty appearing in Notification No. 53/88.

18. In the aforesaid premises it was his contention that the order passed in that case is only an authority for its own case and is not a precedent since it was based without arguments, without reference to the crucial words of the notification, without any citation etc.

19. From a reading of the said order passed in the case of M/s.

Tirupati Foam (P) Ltd., I find that the submissions made by the Ld.

counsel is correct. In the said case of M/s. Tirupati Foam (P) Ltd. the attention of the Bench was not drawn to the judgment delivered by the Apex Court in the case of 'Swadeshi Polytex v. Collector of Central Excise, supra, or to the Annexure to the Government of India contained in Circular No. M.F. (D.R.) TRU F. No. 339/6/80-TRU, dated 6-12-1980 (extracted above). Provisions of Rule 57D were also not brought to the notice of the Bench. During the hearing samples of WPS were produced before the Bench and it was pointed out that the same had arisen as intermediate product during the manufacture of final product that is to say articles of plastic. Proviso to Notification No. 217/86 speaks of "final product" and not of intermediate product. In the instant case WPS is an intermediate product and is liable to duty not because it is a 'final product' but it becomes liable to duty because such an intermediate product by itself is an excisable goods since a distinct and different product known to the commercial world comes into existence even, though, used for captive consumption. There is no principle of res judicata operating on subsequent matters nor Rule of estoppel arises in fiscal matters if

fresh facts comes to the light (see CIT v. Brij Lal Lohia, 1972 (84) ITR 273 (SC); Seth Mathura Dass v. CIT, 1962 (44) ITR 517 (SC); Seth Ram Nath Daga v. CIT, 1971 (82) ITR 287 at page 291 (Bom.) and Punjab National Fertilizers & Chemicals Ltd. v. Collector of Central Excise, 1991 (54) E.L.T. 115. In 'Salmond on Jurisprudence' Twelfth Edition Section 27 page 153 it was opined that: "A decision passed sub silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind. The Court may consciously decide in favour of one party because of point A, which it considers and pronounces upon. It may be shown, however that logically the court should not have decided in favour of the particular party unless it also decided point B in his favour; but point B was not argued or considered by the Court.

In such circumstances, although point B was logically involved in the facts and although the case had a specific outcome, the decision is not an authority on point B. Point B is said to pass sub silentio".

"A good illustration is Gerard v. Worth of Paries, Ltd. (K). There a discharged employee of a company, who had obtained damages against the company for wrongful dismissal, applied for a garnishee order on a bank account standing in the name of the liquidator of the company. The only point argued was on the question of the priority of the claimant's debt, and, on this argument being heard, the Court of appeal granted the order. No consideration was given to the question whether a garnishee order could properly be made on an account standing in the name of the liquidator. When, therefore, this very point was argued in the subsequent case before the Court of Appeal (I), the court held itself not bound by its previous decision. Sir Wilfrid Greene, MR. said that he could not help thinking that the point now raised had been deliberately passed sub silentio by counsel in order that the point of substance might be decided. We went on to say that the point had to be decided by the earlier court before it could make the order which it did nevertheless, since it was decided "without argument, without reference to the crucial words of the rule, and without any citation of authority", it was not binding and would not be followed.

The rule that a precedent sub silentio is not authoritative goes back to least to 1661 (m), when counsel said:" An hundreded [sic] precedent sub silentio are not material"; and Twisden, J., agreed;" Precedents sub silentio and without argument are of no moment". Quoted with approval by this Tribunal in the case of [Collector of Central Excise, Rajkot v. Surgichem, 1987 (27) E.L.T. 548] while not following the earlier decision rendered in the case of J.L. Morison, Son & Jones India Ltd., Bombay, 1984 (15) E.L.T. 251.] In view of the above, the case of M/s. Maruti Foam (P) Ltd., is only an authority for its own case and when fresh facts and provisions of law are brought to the notice of the Tribunal in a subsequent case, the Tribunal has to record its own findings, though, it may be at variance with the earlier decision as, to rely on the judgment of the Apex Court rendered in the case of The Regional Manager and Ors. v. Pawan Kumar Dubey, AIR 1976 SC 1766 a judgment based on limited facts cannot be cited as a precedent in another case, where more evidence was available to reach a contrary conclusion since "one additional or different fact can make a world of difference between conclusions in two cases even when the same principles are applied in each case to similar facts".

20. As regards, the charge of inflated production of waste skin during the month of January, 1990 onwards as compared to their production during the preceding 12 months I agree with my Ld. Brother Technical Shri P.C. Jain for the reasons mentioned by him in paragraph 5 above.

22. I have gone through the orders recorded by the learned brothers S/Shri P.C. Jain and Shri G.P. Agarwal. I am unable to agree with the finding arrived at by the learned members that the disputed "Waste Paring and Scrap" arising from the top, bottom, and side skin of polyurethane foam block is eligible for the exemption under Notification No. 53/88-C.E. I am, therefore, recording the following order :

23. From the facts outlined in the order recorded by the learned brother Shri P.C. Jain, it is seen that polyurethane block as it comes out of plant is liable to duty under Tariff sub-heading 3909.60 pertaining inter alia to "polyurethane in primary form". Notification No. 53/88-C.E. reproduced in para 1.7 of the order recorded by the learned Member (Technical) covers Waste, Paring, and Scrap of plastic falling under sub-heading 39.15 which under the said notification attracted 'nil' duty

subject to the condition specified in column 5 of the notification. As recorded by the learned Member (Technical) in para 3.1 of his order the main ground on which the learned advocate on behalf of the respondents has claimed that the disputed "Waste, Paring, and Scrap" cannot be treated as covered by Notification No. 54/88-C.E. is that Notification No. 54/88-C.E. covers only "Waste, Paring and Scrap" of flexible Polyurethane Foam whereas the disputed products comprises of only the top, bottom, and side skin of polyurethane blocks which are either not foam at all or are partially foam and being hard in character they can by no means be treated as waste, paring and scrap of flexible polyurethane foam. Another argument advanced by the learned counsel for the respondents in support of his claim is that the waste, paring and scrap in question arising out of top, bottom and side skins of such unfoamed or partially foamed polyurethane blocks is nothing but waste, paring and scrap of plastic falling under Tariff sub-heading 39.15, and therefore, it would be eligible for exemption under Notification No. 53/88-C.E. subject to the conditions specified therein being satisfied.

24. On a plain reading of Notification No. 53/88-C.E. it follows that waste, paring and scrap consisting of the top, bottom and side skin of unfoamed or partially foamed polyurethane blocks would be eligible for exemption under the said notification only if it can be deemed as waste, paring and scrap of plastic covered by Heading 39.15.

25. As seen from the order recorded by the learned Member (Technical) and the submissions made by the learned counsel, waste, paring and scrap in question is in the nature of "Hard irregular cut of skin" which is removed from polyurethane blocks as they come out of the plant and which being irregular in shape are classifiable under sub-heading 3909.60 as polyurethane in primary form. The classification of blocks of irregular shape as polyurethane in primary form is supported by Note 6(II) of Chapter 39 of the Tariff which is reproduced below : 6. (a) In Heading Nos. 39.01 to 39.14, the expression "primary forms" applies only to the following : (ii) Blocks of irregular shape, lumps, powders (including moulding powder), granules, flakes and similar bulk forms.

(b) Notwithstanding anything contained in Note 3 to this Chapter, Heading Nos. 39.01 to 39.14 shall also include primary forms obtained from conversion of another primary form, falling under the same heading, and such conversion shall amount to "manufacture".

In terms of Note 7 to Chapter 39 of the Central Excise Tariff, which is reproduced below it is seen that Heading 39.15 does not apply to Waste, Paring and Scrap of single thermoplastic material which is transformed into primary form : "7. Heading No. 39.15 does not apply to waste, parings and scrap of a single thermoplastic material, transformed into primary forms (Heading Nos. 39.01 to 39.14)" On a combined reading of Notes 6 and 7 to Chapter 39 it follows that the disputed Waste, Paring and Scrap arising as a result of the removal of the hard outer top skin, bottom skin and side skin of polyurethane block of irregular shape which arises at the first stage in the course of manufacture of polyurethane foam article and which is treated as "polyurethane in primary form" would be classifiable under Tariff sub-heading 3909.60 and not under sub-heading 39.15 which was specified in column 2 of Notification No. 53/88. and it would also not be covered by the description of goods in the said notification, namely 'Waste, Paring or Scrap of plastics' occurring in column 2 of the said notification. In view of the foregoing, I am inclined to agree with the stand taken by the Revenue in grounds (a)(i) to (3) of their appeal memo which is reproduced below :- "(a) (1) The blocks of P.U. Foam are fully and classifiable under sub-heading No. 3909-60 and chargeable to duty at the same rate as other articles of flexible P.U. Foam if cleared as blocks i.e. @ 42/- per kg. vide Serial No. 2 of the table to Notification No. 54/88. Therefore, the duty at this rate is payable on the blocks themselves. However, vide the same Serial No. 2 of the table to Notification No. 54/88, waste and scrap of flexible P.U. Foam is also chargeable to duty at the same rate Rs. 42/- per Kg. This means that waste and scrap of P.U. Foam is definitely dutiable and Notification No. 53/88 is not relevant for waste and scrap of P.U. Foam. Even if it is conceded for arguments sake that it is relevant, even then it is a conditional exemption which provides that the parent material i.e. blocks or sheets or articles from which scrap is generated, have already paid duty. In the present case the blocks have not paid duty and, therefore, party is not entitled to clear waste and scrap at nil rate of duty.

(2) The distinction drawn by Collector (Jud.) between waste and scrap of P.U. Foam (declared as dutiable under the old classification) and waste and scrap of plastic (declared as subject to nil rate of duty under revised C/L) does not appear to be correct. Firstly the Heading No. 39.15 contains four sub-headings.

The first three headings refer to polymerised products such as P.V.C. and the fourth heading refer to Polymers of other plastics such as P.U. Foam. This last sub-heading does not distinguish between foamed waste as against unfoamed waste. Party has argued that the parent material for the waste and scrap are polyol and isocyanate which are already duty paid. However, this contention is not correct because a finished intermediate product namely P.U. Foam block has arisen which is subject to duty. Further, it is a well-known chemistry that polyol and Isocyanate react to produce only P.U. Foam (Whether Rigid/Flexible) and not any other plastics.

(3) Assessee's contention that top skin, bottom skin etc. should be considered as waste and scrap of other plastics i.e. other than waste and scrap of P.U. Foam is incorrect in view of the fact that Polyol and Isocyanate (Chemicals) produce only P.U. Foam and that waste and scrap of flexible P.U. Foam is separately and specifically indicated at Serial No. 2 of the table to Notification No. 54/88 rather than effective rate of duty on such waste and scrap would be governed by Notification No. 54/88 rather than Serial No. 24 to Notification No. 53/88 which is more applicable to the scrap arising during the manufacture of other plastic materials other than foamed materials".

26. For the reasons outlined above I hold that the disputed Waste, Paring and Scrap comprising of top skin, bottom skin and side skin of polyurethane block in primary form was not eligible for exemption under Notification No. 53/88-C.E. I, therefore, allow the appeal.

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