

CASE NO.:
Appeal (civil) 5403-5406 of 1999

PETITIONER:
Commissioner of Central Excise

RESPONDENT:
M/s Eswaran & Sons Engineers Ltd.

DATE OF JUDGMENT: 05/01/2005

BENCH:
S.N. VARIAVA, Dr. AR. LAKSHMANAN & S.H. KAPADIA

JUDGMENT:
J U D G M E N T

KAPADIA, J.

These appeals under section 35L of Central Excise Act, 1944, (hereinafter referred to for the sake of brevity as "the said 1944 Act") are filed by the Department seeking to challenge the order dated 26.4.1999 passed by the Customs Excise and Gold (Control) Appellate Tribunal (for short 'the tribunal') in appeal No. E/689-692 of 1995.

The facts giving rise to these civil appeals, briefly stated, are as follows:

On 17th December, 1993 M/s. Eswaran & Sons Engineers Limited (hereafter referred to as 'the assessee') was engaged in the manufacture of Minimum Oil Circuit Breakers. The assessee paid duty by classifying the same under Tariff sub heading 8535 of Central Excise Tariff Act, 1985. According to the Department the item was classifiable under sub heading 8537. Accordingly, four show cause notices were issued on; 17.12.1993 for the period 30.6.1993 to 31.8.1993; show cause notice dated 4.4.1994 for the period 13.9.1993 to 30.9.1993; show cause notice dated 31.5.1994 for the period 1.11.1993 to 28.2.1994 and show cause notice dated August 1994 for the period March 1994 to August 1994. By the aforesaid four shows cause notices, the Department called upon the assessee to pay differential duty of Rs.9,69,638/- covering a period from 30.6.1993 to 31.8.1994. By the said four show cause notices, the Department proposed to revise the classification from sub heading 8535 to sub heading 8537.

By reply dated 4.2.1994 the assessee submitted that they were manufacturers of electrical goods falling under Chapter 85. They were manufacturing Switchgear Products coming under sub heading 8535.00, 8536.90, 8537.00 and 8538.00. They submitted that Minimum Oil Circuit Breaker was classified, right from inception, under tariff sub heading 8535.00 as it is an apparatus used for switching and protecting the electrical circuit in cases where the voltage exceeded 1000V. The assessee contended that the demand for duty was not maintainable because the said Minimum Oil Circuit Breaker was one single apparatus having function of breaking the current under abnormal conditions such as short circuit.

On the other hand, it was the case of the Department that the components of Minimum Oil Circuit Breaker

performed individual functions within the said Circuit Breaker and, therefore, cannot be termed as a separate apparatus. According to the Department Minimum Oil Circuit Breaker (outdoor) was put on a control panel for controlling the electricity current. Therefore, according to the Department the item in question came within sub-heading 8537.

By order dated 19.12.1994, the Assistant Collector of Central Excise came to the conclusion that Minimum Oil Circuit Breakers were classifiable under sub heading 8537.00 and not under sub heading 8535.00. Reliance was placed on the Explanatory Note to Chapter 85 as well as HSN for coming to the conclusion that Circuit Breakers were classifiable under sub heading 8537.00.

Being aggrieved by the order of the Assistant Collector, the assessee went in appeal to the Collector of Central Excise (Appeals). Before the appellate authority the assessee placed reliance on a Circular dated 14.7.1994 issued under Section 37B clarifying that the item in question would fall under tariff sub heading 8537.00 prospectively. It was urged by the assessee before the appellate authority that in view of the said Circular dated 14.7.1994 the reclassification ordered should be given prospective effect and to that extent alone demand should be made from the assessee. On merits, the assessee contended that there were two types of Minimum Oil Circuit Breakers, namely indoor and outdoor, which consists of electrical components such as fuse, terminals, socket outlet etc. The assessee, therefore, contended that the product came under sub heading 8535.00. By Order dated 31.5.1995 the appeal was dismissed.

Being aggrieved by the aforestated two orders, the assessee preferred appeal to the Tribunal. By the impugned judgment, the tribunal held that Minimum Oil Circuit Breaker was classifiable under sub heading 8537 and not under sub heading 8535. However, by the impugned judgment, the tribunal held that in view of the Circular dated 14.7.1994 issued by the Board under Section 37B the quantum of duty leviable needed recalculation as the said Circular dated 14.7.1994 operated prospectively. The tribunal noted that the assessee had pre-deposited Rs.4,00,000/- whereas the amount payable on the basis of the Circular dated 14.7.1994 fell within the amount of Rs.4,00,000/-. Accordingly, the tribunal remitted the matter to the Assistant Commissioner concerned to recalculate the duty payable by the assessee and refund the balance. Hence, these civil appeals by the Department.

Shri A. Subba Rao, learned advocate for the Department, submitted that in the present case the first show cause notice was issued on 17.12.1993, much prior to the Board's Circular dated 14.7.1994. It was submitted that the said show cause notice was not based on the Circular dated 14.7.1994, but, it was on the basis of the interpretation placed on the aforestated two entries by the Assistant Collector. Therefore, it was urged that the tribunal had erred in restricting the demand raised by the Department to the period on and after 14.7 1994.

Despite notice none appeared for the assessee.

Before dealing with the above arguments, for the sake of convenience, we reproduce hereinbelow the relevant heading, sub heading and description of the goods, along with

the rate of duty under Chapter 85 which dealt with electrical machinery and equipment and parts thereof.

CHAPTER-85

ELECTRICAL MACHINERY AND
EQUIPMENT AND PARTS THEREOF.

Heading

No.

Sub-

heading

No.

Description of goods

Rate

of

duty

(1)

(2)

(3)

(4)

85.35

8535.00

Electrical apparatus for switching or protecting electrical circuits, or for making connections to or in electrical circuits (for example, switches, fuses, lightning arresters, voltage limiters, surge suppressors, plugs, junction boxes), for a voltage exceeding 1,000 volts.

20%

85.37

8537.00

Boards, panels (including numerical control panels), consoles, desks, cabinets and other bases, equipped with two or more apparatus of heading No.85.35 or 85.36, for electric control or the distribution of electricity, including those incorporating instruments or apparatus of Chapter 90, other than switching apparatus of heading No.85.17

20%

On merits, the tribunal in the present case following its judgment in the case of Crompton Greaves Limited v. C.C.E., Aurangabad, reported in [1996 (87) ELT 414], has held that Circuit Breakers are panels equipped with circuit breakers classifiable under sub-heading 8535 and are also equipped with one or more apparatus under sub heading 8535.00 or under sub-heading 8536.00 and consequently such panels were classifiable under sub heading 8537.00 of Central Excise Tariff. Against the said decision, the assessee has not filed any appeal to this Court.

Now coming to the question of interpretation of Section 37B of the Act, as stated above, the tribunal has held that Circular dated 14.7.1994 issued by the Board

was prospective and consequently the Department was not entitled to demand duty on the basis of reclassification for the period prior to that date. In this connection, reliance was placed on the judgment of this Court in the case of H.M. Bags Manufacturer v. Collector of Central Excise, reported in [1997 (94) ELT 3]. In our view, the judgment of this Court in the case of H.M. Bags Manufacturer (supra) has no application to the facts of the present case. As can be seen from the facts enumerated hereinabove, much prior to 14.7.1994 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. The order passed by the Assistant Collector dated 19.12.1994 is also on the basis of his interpretation of the above two entries. The said order is not based on the Circular dated 14.7.1994. Therefore, the Circular had no application to the facts of this case.

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 excisable 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 of a particular case in a particular manner. Similarly, under proviso (b) such Instructions, shall not bind the discretion of Commissioner of Central Excise (Appeals), discharging appellate functions. In view of the proviso to Section 37B, the said Circular dated 14.7.1994 issued by the Board was not applicable to the facts of the present case. As stated above, in the present case, the Assistant Collector had taken a prima facie view for purposes of reclassification as far back as 17.12.1993. Therefore, the Circular dated 14.7.1994 had no application to the facts of the present case. The judgment of the Supreme Court in the case of H.M. Bags Manufacturer (supra) did not deal with the case where the department had issued show cause notice purporting to reclassify the product prior to the issuance of Instructions by the Board. Therefore, the said judgment has no application to the facts of the present case.

The extent and scope of Section 37B came up for consideration before the Calcutta High Court in the case of Birla Jute And Industries Ltd. v. Assistant Collector of Central Excise, reported in [1992 (57) ELT 674]. Ruma Pal, J. (as she then was) has succinctly analysed the provisions of Section 37B by laying down the following principles:-

"(1) There is a distinction between a decision in a particular assessment by a quasi-judicial authority and a decision on principle by the Board. While an instruction issued under Section 37B cannot be binding upon a quasi-judicial authority under the Act, the departmental officers conducting the lis before such quasi-judicial authority cannot take a stand contrary to the directive/instruction issued.

(2) The instructions which may be binding on the Central Excise Officers are not binding on the Assessee who may question the

correctness of the same before a quasi-judicial authority and before a Court. Both the quasi-judicial authority and a fortiori, the Court, can question the correctness of the instructions.

(3) An assessee has on the other hand the right to claim and the court may compel compliance with such instructions as are for the benefit of the assessee by the Central Excise Officers."

Applying the tests enunciated hereinabove, to the facts and circumstances of this case, we hold that Circular dated 14.7.1994 had no application.

For the reasons stated above, these civil appeals are allowed, the impugned judgment of the tribunal dated 26.4.1999 in Appeal Nos.E/689-692 of 1995 is set aside with no order as to costs.