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M/S. JAI FIBRES LTD.

v.

COMMISSIONER OF CENTRAL EXCISE, MUMBAI-III

NOVEMBER 15, 2007

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[S.B. SINHA AND DALVEER BHANDARI, JJ.]

Central Excises and Salt Act, 1944—ss.37B and 11A—Different High Courts had been taking different views with regard to appropriate C *classification of HDPE bags under the Tariff Act—Circular issued by CBEC u/s.37B for ensuring uniformity—Use of word "henceforth" in the circular—Held: Circular was expressly directed to have prospective application—Differential duty could not be recovered on basis of said circular for period prior to date of its publication—Central Excise* D *Tariff Act, 1985—Chapter Heading Nos. 39 and 63.*

Different High Courts had been taking different views as to whether excise duty in respect of HDPE bags was payable under Chapter Heading 63 or Chapter Heading 39 of the Central Excise E **Tariff Act, 1985. The Madhya Pradesh High Court in the** *Raj Pack Well Ltd. case** **held that HDPE bags should be classified under Chapter Heading 39 and not Chapter Heading 63. While appeal against the aforesaid decision of the said High Court was pending before this Court, the Central Board of Excise and Customs in order** F **to bring about an uniformity in classification, issued a circular dated 24-09-1992 in exercise of powers conferred under Section 37-B of the Central Excises and Salt Act, 1944, in terms of which HDPE strips and tapes of width not exceeding 5 mm were to be "henceforth" classified under sub-heading 3920.32 and sacks made therefrom** G **under sub-heading 3923.90 of the Tariff. The circular was published on 15-10-1992.**

Appellant-assessee classified HDPE bags manufactured by it under Chapter 63 of the Tariff Act for the period 1-4-1992 to 15-10-1992. Relying on the said circular, Respondents issued a show cause

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notice upon the Appellants to pay differential duty under Chapter 39 for the period 1-4-1992 to 15-10-1992. The cause having been shown, the Assistant Commissioner dropped the proceedings. Appeal filed by Revenue before the Commissioner was dismissed. Revenue filed appeal before the Tribunal. Tribunal relying upon a three-Judge Bench decision of this Court in *ITW Signode case* held that in view of the amendment of Section 11A of the Central Excise Act, the validity whereof had been upheld, the Revenue was within its jurisdiction to get the differential duty which had not been recovered.**

In appeal to this Court, Appellant submitted that the Tribunal failed to take into consideration a decision of this Court in *H.M. Bags Manufacturer**, in its correct perspective, wherein it was held that the word "henceforth" used by the Board must lead to the conclusion that only prospective effect thereto could be given and not a retrospective effect.**

Allowing the appeal, the Court

HELD: 1.1. Section 11A of the Central Excise Act was amended having regard to the Constitution Bench decision of this Court in *Cotspun Limited.* Amendment of Section 11A was found in *ITW Signode* as a validating legislation, retrospective operation whereof, therefore, was held to be permissible. [Para 11] [87-H; 88-A]

1.2. However, this Court is concerned with a different situation herein. Whereas there cannot be any doubt that the Revenue is entitled to rectify a mistake but implementation thereof would depend upon the statutory provisions. Section 37B of the Central Excise Act confers powers upon the Central Board of Excise and Customs to issue such orders, instructions and directions as the Central Excise Officers may deem fit, if it considers necessary or expedient to do so for the purpose of uniformity of classification of goods in a case or with levies of duty of excise on such goods. It was, therefore, necessary for the Tribunal to construe the said circular dated 24.9.1992 in its proper perspective. [Para 12] [89-C-D]

1.3. The circular refers to the fact that there had been lack of uniform classification of the said goods as a result whereof disparity

A existed in the matter of pricing of commodity by the manufacturer. It is on the aforementioned premise that the decision of the High Court of Madhya Pradesh was referred to and sought to be acted upon. But the Court was not unmindful of the fact that only by reason of the said judgment, the law cannot be said to have been settled as B an appeal had been preferred thereagainst which had been pending decision. It was in the aforementioned fact situation that the Board thought it fit and expedient in the interest of administration of taxing statute to bring out uniformity in the assessment practice.

[Para 13] [89-E-F]

C 1.4. By reason of the said circular, proper classification was made for the first time. It was done with the purpose of ensuring uniformity therein. It was expressly directed to have prospective application. Although the decision of the Madhya Pradesh High Court was the basis for issuance of the said circular, it was to operate D independent thereof as it was clearly noticed that the same had not attained finality. The said circular, so far as the Revenue is concerned, was, therefore, to operate irrespective of the decision of the Madhya Pradesh High Court. The Board was not unmindful of the consequences which may flow therefrom. It in exercise of its E statutory power, therefore, directed its application from a future date. *H.M. Bags Manufacturer* becomes relevant in view of the terminology used by the Board in issuing the aforementioned circular. Therein this Court clearly held that such a circular will have prospective effect, particularly when the word "henceforth" has F been used by the Board. *H.M. Bags Manufacturer,* therefore, is a binding precedent. If the Board itself did not intend to classify HDPE bags with retrospective effect no demand for duty prior to issuance of the said notice could be made.

[Paras 14, 15 and 16] [89-G-H; 90-A-C]

G ** *ITW Signode India Ltd.* v. *Collector of Central Excise,* (2003) 158 E.L.T. 403 SC, distinguished.

*** *H.M. Bags Manufacturer* v. *Collector of Central Excise*, (1997) 94 E.L.T. 3 SC, relied on.

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Collector of Central Excise, Baroda **v.** *Cotspun Limited,* **(1999) 113 E.L.T. 353 SC, referred to.** A

* *Raj Pack Well Ltd.* **v.** *Union of India*, **(1990) 50 ELT 201, referred to.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1950 of 2006. B

From the Impugned Order No. A/48-49/WZB/2005/C-II/EB dated 09.08.2005 passed by the Customs Excise and Service Tax Appellate Tribunal, Mumbai in Appeal No. E/3137/1999-Mum.

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A.P. Madhav Rao, Monish Panda and M.P. Devanath for the Appellant.

R.G. Padia, Neera Gupta and B. Krishna Prasad for the Respondents.

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The Judgment of the Court was delivered by

S.B. SINHA, J. 1. Delay condoned.

2. Interpretation of a Circular dated 24.09.1992, which was published on 15.10.1992 in the Trade Circular by the Central Board of Excise and Customs, is in question in this appeal which arises out of a judgment and order dated 9.8.2005 passed by the Central Excise and Service Tax Appellate Tribunal in Appeal No. E/3137/99 (Mumbai) and E/CO/389/99 (Mumbai), whereby and whereunder an appeal preferred by the respondent herein from a judgment and order dated 30th June, 1999 passed by the Commissioner of Central Excise (Appeals), Mumbai, was allowed. E F

3. The basic fact of the matter is not in dispute. The appellant herein manufacture HDPE bags. They used to classify the said bags for the purpose of payment of excise duty under Chapter 63 of the Central Excise Tariff Act (hereinafter referred as 'the Act'). The period for which the excise duty was payable is 1.4.1992 to 15.10.1992. Excise duty was paid accordingly. It is also not in dispute that different High Courts took different views as to whether the duty is payable under Chapter Heading 63.54 G

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A or Chapter heading 39 of the Act.

4. It is furthermore not in dispute that a Division Bench of the High Court of Madhya Pradesh in *Raj Pack Well Ltd.* v. *Union of India*, (1990) 50 ELT 201, took the view that the HDPE bags should be classified under Chapter heading 39 of the Central Excise Tariff Act, 1985 B and not under Chapter heading 63 thereof. Indisputably, again the Central Board of Excise and Customs upon noticing that the appeal against the aforesaid decision of the Division Bench of the High Court is pending before this Court for final decision, issued a circular on 24.9.1992, the relevant portion whereof is as under:

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> "Now, therefore, in exercise of the powers conferred under Section 37-B of the Central Excises and Salt Act, 1944 (1 of 1944) (henceforth referred to as the Act) *and for the purpose of ensuring uniformity in the classification of the said goods*, the D Central Board of Excise and Customs hereby orders that HDPE strips and tapes of a width not exceeding 5 mm *shall be henceforth classified under sub-heading 3920.32* and sacks made therefrom under sub-heading 3923.90 of the Tariff."

(Emphasis supplied)

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5. Relying on or on the basis of the said circular letter, a show cause notice was issued upon the appellants herein by the respondents to pay the differential duty under Chapter 39 for the period 1.4.1992 to 15.10.1992.

F 6. The cause having been shown, the Assistant Commissioner of Central Excise by an order dated 21.10.1997 dropped the proceedings. Revenue being not satisfied therewith preferred an appeal thereagainst before the Commissioner of Central Excise under Section 35E(4) of the Central Excise and Salt Act, 1944. By a judgment and order dated 30th G June, 1999 the said appeal was dismissed. Feeling aggrieved, Revenue preferred an appeal before the Tribunal which, as noticed hereinbefore, has been allowed by reason of the impugned judgment.

7. The Tribunal in its judgment relied upon a three-Judge Bench H decision of this Court in *ITW Signode India Ltd.* v. *Collector of Central*

Excise, (2003) 158 E.L.T. 403 SC for arriving at its decision that in view of the amendment of Section 11A of the Central Excise Act, the validity whereof had been upheld, the revenue was within its jurisdiction to get the differential duty which has not been recovered.

8. Mr. Madhav Rao, learned counsel appearing on behalf of the appellant would, in support of its appeal, submit that the Tribunal went wrong in passing the impugned judgment in so far as it failed to take into consideration a decision of this Court in *H.M. Bags Manufacturer* v. *Collector of Central Excise,* (1997) 94 E.L.T. 3 SC, in its correct perspective, wherein it has clearly been opined that the word "henceforth" used by the Board must lead to the conclusion that only prospective effect thereto could be given and not a retrospective effect.

9. Dr. Padia, learned senior counsel appearing on behalf of the revenue, on the other hand, placed strong reliance on the judgment of this Court in *ITW Signode India Ltd.* (supra). It was submitted by Dr. Padia that although at one point of time, classification of excisable items might have been approved but if such approval was based on a wrong premise, which was sought to be corrected, Section 11A which has been amended with retrospective effect from 17.11.1980, could be brought into service for the purpose of recovery of the differential amount of duty. It was urged that for the said purpose, neither penalty is leviable nor the period for which the duty can be demanded exceeded six months and in view of the fact that the notice issued by the appellant herein was for a period of six months, the decision of this Court *ITW Signode* (supra) is squarely applicable.

10. Drawing our attention to the decision of the Madhya Pradesh High Court; relying on or on the basis whereof, the Circular letter dated 24.10.1992 has been issued, it was contended that the validity of the said circular letter having not been challenged by reason thereof, the mistake committed by the revenue in classifying HDPE bags under Chapter heading 63 came to be known to them in terms of the said judgment.

11. It is beyond any pale of doubt that Section 11A of the Central Excise Act was amended having regard to the Constitution Bench decision of this Court in *Collector of Central Excise, Baroda* v. *Cotspun*

A *Limited*, (1999) 113 E.L.T. 353 SC. Amendment of Section 11A was found in *ITW Signode* (supra) as a validating legislation, retrospective operation whereof, therefore, was held to be permissible. In arriving at the said decision, this Court noticed a large number of binding precedents operating in the field to hold that as the basis for the decision rendered in B *Cotspun Limited* (supra) has been taken away by reason thereof, the Parliament was entitled to give the same retrospective effect and retroactive operation. While applying the said law, this Court in *ITW Signode* (supra) opined:

C "Section 11A deals with a case when *inter alia* excise duty has been levied or has been, short-levied or short-paid. The word 'such' occurring after the words 'whether or not' refers to non-levy, non-payment, short-levy or short-payment or erroneous refund. It is, therefore, not correct to contend that the word 'such' indicates only such short levy which has been held to be non-existent in D Cotspun having regard to Rule 173B. Such short-levy or non-levy may be on the basis of any approval, acceptance or assessment relating to the rate of duty on or valuation of excisable goods. Thus, any approval made in terms of Rule 10, in the event, any mistake therein is detected, would also come within the purview of the E expression 'such short-levy or short-payment'. Such notice is to be served on the person chargeable with the duty which *inter alia* has been short-levy or short-paid."

It was further held:

F "*Cotspun* (supra) was decided when the matters relating to classification, approval thereof as also short-levy or upon detection of a mistake were governed by the rules. Rule 10 and Rule 173B were to be read in conjunction with each other and the Constitution bench merely followed the said principle of interpretation of statute. G A different situation has arisen now having regard to the fact hat not only the substantive provision dealing with the consequence of non-levy, non-payment of short levy or short-payment or erroneous refund but also has laid down the procedure therefor."

H "A statute, it is trite, must be read as a whole. The plenary power

of legislation of the Parliament or the State Legislature in relation to the legislative fields specified under Seventh Schedule of the Constitution of India is not disputed. A statutory act may be enacted prospectively or retrospectively. A retrospective effect indisputably can be given in case of curative and validating statute. In fact curative statutes by their very nature are intended to operate upon and affect past transaction having regard to the fact that they operate on conditions already existing. However, the scope of the Validating Act may vary from case to case."

12. However, we are concerned with a different situation herein. Whereas there cannot be any doubt that the revenue is entitled to rectify a mistake but implementation thereof would depend upon the statutory provisions. Section 37B of the Central Excise Act confers powers upon the Central Board of Excise and Customs to issue such orders, instructions and directions as the Central Excise Officers may deem fit, if it considers necessary or expedient to do so for the purpose of uniformity of classification of goods in a case or with levies of duty of excise on such goods. It was, therefore, necessary for the Tribunal to construe the said circular dated 24.9.1992 in its proper perspective.

13. The circular refers to the fact that there had been lack of uniform classification of the said goods as a result whereof disparity existed in the matter of pricing of commodity by the manufacturer. It is on the aforementioned premise that the decision of the High Court of Madhya Pradesh was referred to and sought to be acted upon. But the Court was not unmindful of the fact that only by reason of the said judgment, the law cannot be said to have been settled as an appeal preferred against the judgment of the Madhya Pradesh High Court had been pending decision. It was in the aforementioned fact situation that the Board thought it fit and expedient in the interest of administration of taxing statute to bring out uniformity in the assessment practice.

14. By reason of the said circular, proper classification was made for the first time. It was done with the purpose of ensuring uniformity therein. It was expressly directed to have prospective application. Although the decision of the Madhya Pradesh High Court was the basis for issuance of the said circular, it was to operate independent thereof as

A it was clearly noticed that the same had not attained finality. The said circular, so far as the Revenue is concerned, was, therefore, to operate irrespective of the decision of the Madhya Pradesh High Court.

15. Having said so, the Board was not unmindful of the consequences which may flow therefrom. It in exercise of its statutory B power, therefore, directed its application from a future date.

16. *H.M. Bags Manufacturer* (supra) becomes relevant in view of the terminology used by the Board in issuing the aforementioned circular. Therein this Court clearly held that such a circular will have prospective C effect, particularly when the word "henceforth" has been used by the Board. H.M. Bags Manufacturer, therefore, is a binding precedent. If the Board itself did not intend to classify HDPE bags with retrospective effect, in our opinion, no demand for duty prior to issuance of the said notice could be made.

D 17. ITW Signode which was rendered in a different fact situation and dod not deal with the proposition of law with which we are concerned herein, in our considered view, could not have been applied by the Tribunal for the purpose of determining the issue in question.

E 18. For the reasons aforementioned, we are of the opinion that the impugned judgment cannot be sustained which is set aside accordingly. The appeal is allowed. However, in the facts and circumstances of this case, there shall be no order as to costs.

B.B.B. Appeal allowed.