Ripples of SC Verdict in Westinghouse Saxby Farmer – An Analysis

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R Parthasarathy
Advocate-on-record, Supreme Court

FACTS AND THE DECISION

1. By a judgment and order dated 8-3-2021, the Hon'ble Supreme Court [SC] of India decided the classification of a relay – which is an electrical equipment for making or breaking connections to or in electrical circuits. The relay in this case was specifically meant for use in railway signalling equipment.
2. The issue was whether the relay is classifiable under 8536.90 of the then Central Excise tariff or under 8608, as part of railway equipment.
3. The SC decided that the relay specifically meant for use in signalling equipment will be classified under 8608 as parts of railway signalling equipment and not under 8536.90.
4. The following extracts from the judgment are relevant:

*"16. Chapter Heading 8536 covers "Electrical apparatus for switching or protecting electrical circuits, or for making connections to or in electrical circuits (for example, switches, **relays**, fuses, surge suppressors, plugs sockets, lamp-holders and other connectors, junction boxes), for a voltage not exceeding 1,000 volts; connectors for optical fibres, optical fibre bundles or cables." [emphasis by me]*

*19. Chapter Heading 8608 covers "Railway or tramway track fixtures and fittings; mechanical (including electromechanical) signaling safety or traffic control equipment for railway, tramways, roads, inland waterways, parking facilities, port installation or airfields; **parts of the foregoing**". [emphasis by me]*

5. It is clear from the above that Heading 8536 covered relays, by name. Now, let us turn to the Rules for the interpretation of the tariff which govern the classification of any goods. The following is the extract from the said judgement:

"25. Section 2 of the Central Excise Tariff Act, 1985 provides that the rates at which duties of excise shall be levied under the Central Excise Act, 1944 are specified in the First Schedule and the Second Schedule. The First Schedule contains a set of Rules known as *"General Rules for the Interpretation of this Schedule".* These Rules begin with a mandate that the *"classification of goods in this Schedule shall be governed by the principles laid thereunder."*

"26. Rule 1 of these Rules makes it clear that *"the titles of Sections, Chapters and Sub-Chapters are provided for ease of reference only and that **for legal purposes, classification shall be determined according to the terms of the Headings and any relative Section or Chapter Notes** and provided such headings or Notes do not otherwise require, according to the provisions of the rules that follow".* [emphasis by me]

6. Thus, Rule 1 takes precedence in deciding the classification. All other Rules, from Rule 2 onwards, can be resorted to if and only if the classification cannot be determined by application of Rule 1. In the case on hand, relays are specifically covered under 8536 by the terms of the Heading, as extracted at para 16 of the judgment. So, effectively the exercise of determining the classification of the Relays should have stopped there.

7. However, since it was claimed by the assessee that the relays are specific to railway signalling equipment and therefore have to be classified as parts of the equipment falling under 8608, it was necessary to examine that claim. The following extracts – Paragraphs 32 to 37] from the judgment are relevant for this purpose:

"32. Coming to Section XVII, which precedes Chapter 86, the same contains a few notes, one of which is Note 2, which lists out certain articles to which the expressions "parts" and "parts and accessories" mentioned in Chapter 86 do not apply. Note 2 (f) reads as follows:" [emphasis by me]

1. xxxx

2. xxx

(a) xxxx

(b) xxxx

(c) xxxx

(d) xxxx

(e xxxx

(f) electrical machinery or equipment (Chapter 85)"

33. Note 2(f) is relied upon by the Revenue, in view of the fact that Chapter Heading 8608 uses the words "parts of the foregoing" after the words "Railway or tramway track fixtures and fittings" etc. Chapter Heading 8608 does not specifically mention "electrical relays". The assessee's contention is that *"it is part of the railway signaling safety or traffic control equipment"* and that, therefore, Relays manufactured by them would fall under Chapter Heading 8608 due to the usage of the word "parts". It is this contention that is sought to be repelled by the Authorities by relying upon Note 2(f) of Section XVII.

34. Though at first blush, Note 2(f) seems to apply to the case on hand, it may not, upon a deeper scrutiny.

35. Note 3 of Section XVII reads as follows:

"References in Chapters 86 to 88 to "parts" or "accessories" do not apply to parts or accessories which are not suitable for use solely or principally with the articles of those Chapters. A part or accessory which answers to a description in two or more of the headings of those Chapters is to be classified under that heading which corresponds to the principal use of that part or accessory."

36. What is recognized in Note 3 can be called the "suitability for use test" or 'the user test'. While **the exclusion under Note 2(f) may be of goods which are capable of being marketed independently as electrical machinery or equipment,** for use otherwise than in or as Railway signaling equipment, **those parts which are suitable for use solely or principally with an article in Chapter 86** cannot be taken to a different Chapter as the same would negate the very object of group classification. This is made clear by Note 3.

37. It is conceded by the Revenue that the relays manufactured by the appellant are used solely as part of the railway signaling/ traffic control equipment. Therefore, the invocation of Note 2(f) in Section XVII, overlooking the **"sole or principal user test"** indicated in Note 3, is not justified."

8. Based on the above, the Hon'ble SC decided the classification of relays meant for use with railway signalling equipment under 8608, by concluding that Note 2 will apply to those relays that are capable of being marketed independently and Note 3 of Section XVII will apply to those relays that are solely or principally for use with equipment of Chapter 86.

WHAT THE SC FAILED TO TAKE NOTE

9. The above conclusion, with utmost respect, is erroneous because it had failed to consider the preamble to Note 2 to Section XVII in its entirety, which reads as follows:

"2. The expressions "parts" and "parts and accessories" do not apply to the following articles,**whether or not they are identifiable** as for the goods of this section:

10. Thus, a relay, falling under heading 8536, even if it is identifiable as a 'part' meant exclusively for use with the signalling equipment of Chapter 86, by application of this Note, will be classified only under 8536. The distinction that general relays will fall under 8536 and specific relays will fall under 8608 is clearly erroneous. The omission to bring to the notice of the SC or the omission of the SC to note the words "**whether or not they are identifiable**" in Note 2 has probably led to the conclusion.
11. This following extract from the HSN Explanatory Note [EN] under Section XVII, supports the above view:

(III) PARTS AND ACCESSORIES

It should, however, be noted that these headings apply only to those parts or accessories which comply with all three of the following conditions:

(a) They must not be excluded by the terms of Note 2 to this Section (see paragraph (A) below).

and (b) They must be suitable for use solely or principally with the articles of Chapters 86 to 88 (see paragraph (B) below).

and (c) They must not be more specifically included elsewhere in the Nomenclature (see paragraph (C) below).

12. Thus, any article excluded by Note 2 to section XVII cannot be classified as parts or as accessories of the goods of Section XVII, which covers Chapters 86 [Railway items]. 87 [vehicles, other than railway], 88 [aircrafts] and 89 [ships etc].
13. Even if an item is not specified in Note 2 to section XVII but the item is more specifically included elsewhere in the nomenclature, the said item cannot be classified as parts of the goods of section XVII [vide para (c) above].
14. It appears that the above HSN EN was not brought to the notice of the court, as the judgment makes no reference to it.

SOME ILLUSTRATIONS:

15. Note 2 to section XVII does not include articles of Chapter 70 dealing with Glass and glassware. Does that mean laminated safety glass so shaped as to be capable of being used only with motor vehicle of a particular model can be treated as parts of motor vehicles and classified under 8708? The answer is "NO".
16. First, by application of Rule 1 of the Rules for the interpretation of the tariff, such safety glasses will be classified under 7007.21 which provides for ***Laminated glass, Of size and shape suitable for incorporation in vehicles, aircraft, spacecraft or vessels.*** The classification exercise will stop there.
17. Secondly, Note (c) extracted above also acts as a guide to classification under 7007.21 and not under 8708 – being more specifically included elsewhere in the nomenclature.
18. The same result will follow for Catalysts that are used in the manufacture of catalytic converters for motor vehicles. Catalysts are classified under 3815, by application of Rule 1 ibid. The end use of the catalysts is not relevant for classification. Goods of Chapter 38 are also not covered under Note 2 of Section XVII.
19. Let us take the example of AC machines for use in motor cars. Heading 8415 covers AC machines. Chapter 84 articles are mentioned in Note 2 (e), meaning AC machines of 8415 cannot be treated as parts or as parts and accessories of motor vehicles. In this case, the heading 8415.20 is specifically for AC machines of a kind used for persons in motor vehicles and the classification will be decided by application of Rule 1. So, in addition to exclusion by Note 2(e) to Section XVII,

8415.20 incorporates the end use also as part of the tariff description and hence car ACs can never be classified as parts of motor vehicles under 8708.

20. Let us take one more example. Catalytic converters and intake air filters find a specific mention in tariff, being 8421.32 and 8421.31 respectively. Tariff item 8421.32 applies to – ***Catalytic converters or particulate filters, whether or not combined, for purifying or filtering exhaust gases from internal combustion engines.*** Note 2(e) of section XVII excludes all goods of Chapter 84 from being classified as parts of goods of Chapters 86 to 89. Therefore, catalytic converters for motor vehicles [all of which are based on internal combustion engine, leaving electrical vehicles] will be classified under 8421.32 by application of Rule 1. Note 2 to Section XVII also points to the same classification. Thus, catalytic converters can never be classified under 8708.

WHY THIS ANALYIS OF A 2021 JUDGMENT IN 2024?

21. This judgment was rendered on 8-3-2021. Why this analysis in 2024? This analysis is necessitated because of the way in which the ratio of this judgment is applied in GST. The CBIC had rightly clarified vide its circular of 5-1-2022 and 3-10-22 that despite the Westinghouse judgement, the classification of 'parts' should be undertaken considering all relevant aspects including HSN EN, the relevant section and chapter notes and a few other SC judgments cited in the said circular.
22. The ratio of the judgment in Westinghouse case is not that all items covered under Section Note 2 of Section XVII but are capable of being used as parts of goods of Chapter 86 to 89 will be classified as parts by application of Note 3. The court had only dealt with "relays". The court did not deal with items that are not under Note 2 [for example, catalysts under 3815 or car seats covered under 9401 or laminated glass for use in motor vehicles under 7007] nor with other items that fall under Note 2 but which have end use inbuilt into the tariff [for example, catalytic converters for IC engines or AC apparatus for motor vehicles]. That was why the CBIC had correctly clarified that the classification of 'parts' should be undertaken considering all relevant aspects including HSN EN, the relevant section and chapter notes and a few other SC judgments cited in the said circular.
23. However, in actual practice the Westinghouse judgment is applied as if its ratio is that all items that ultimately go into a motor vehicle should only be classified under 8708. Show cause notices are being issued by GST officers invoking the said judgment to classify all and any item with ultimate end use in a motor vehicle under 8708, obviously because 8708 carries the highest GST rate of 28%. In many cases, this judgment delivered on 8-3-21 is cited for issuing notice invoking section 74, which applies only to cases involving fraud, suppression and wilful mis-statement with intent to evade payment of duty. Such section 74 notices have been issued even for periods from 2017-18 onwards.

WHETHER WETSINGHOUSE SAXBY CASE IS A BINDING PRECEDENT UNDER ARTICLE 141 OF THE CONSTITUTION OF INDIA?

24. The Westinghouse judgment was rendered by Three Hon'ble judges of the SC. As elaborated above, the judgment does not reflect the correct legal position as it had failed to notice of Note 2 to Section XVII in its entirety. What is the precedential value of this judgment? Can it be considered to have no precedential value because it is per incuriam or sub-silentio.
25. I will refer to the following passage from the judgment of the SC in State of UP & another Vs Synthetics and Chemicals Ltd & another reported in 1991 (4) SCC 139.

"This gives rise to an important question if the conclusion is law declared under Article 141 of the Constitution or it is per incurium and is liable to be ignored:

40. 'Incuria' literally means 'carelessness'. In practice *per incuriam* appears to mean *per ignoratium*. English courts have developed this principle in relaxation of the rule of stare decisis. The 'quotable in law' is avoided and ignored if it is rendered, '*in ignoratium* of a statute or other binding authority'. (*Young* v. *Bristol Aeroplane Co. Ltd.*[11]). Same has been

accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law. In *Jaisri Sahu* v. *Rajdewan Dubey*[12] this Court while pointing out the procedure to be followed when conflicting decisions are placed before a bench extracted a passage from *Halsbury's Laws of England* incorporating one of the exceptions when the decision of an appellate court is not binding.

41. Does this principle extend and apply to a conclusion of law, which was neither raised nor preceded by any consideration. In other words can such conclusions be considered as declaration of law? Here again the English courts and jurists have carved out an exception to the rule of precedents. It has been explained as rule of sub-silentio. "A decision passes 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." (*Salmond on Jurisprudence* 12th Edn., p. 153). In *Lancaster Motor Company (London) Ltd.* v. *Bremith Ltd.*[13] the Court did not feel bound by earlier decision as it was rendered 'without any argument, without reference to the crucial words of the rule and without any citation of the authority'. It was approved by this Court in *Municipal Corporation of Delhi* v. *Gurnam Kaur.*[14] The bench held that, 'precedents sub-silentio and without argument are of no moment'. The courts thus have taken recourse to this principle for relieving from injustice perpetrated by unjust precedents. A decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. Uniformity and consistency are core of judicial discipline. But that which escapes in the judgment without any occasion is not *ratio decidendi*. In *B. Shama Rao* v. *Union Territory of Pondicherry*[15] it was observed, 'it is trite to say that a decision is binding not because of its conclusions but in regard to its ratio and the principles, laid down therein'. Any declaration or conclusion arrived without application of mind or preceded without any reason cannot be deemed to be declaration of law or authority of a general nature binding as a precedent. Restraint in dissenting or overruling is for sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth of law.

26. The above passage, particularly the lines ***"A decision passed sub-silentio**, ..., **when the particular' point of law involved in the decision is not perceived by the Court or present to its mind' (Salmond 12th Edition). In Lancaster Motor Company (London) Ltd. v. Bremith Ltd., [1941] IKB 675 the Court did not feel bound by earlier decision as it was rendered 'without any argument, without reference to the crucial words of the rule....."*** clearly show that the decision in Westinghouse is not a binding precedent as it had not referred to the crucial words in Note 2 to Section XVII – "whether or not they are identifiable" and hence the point of law involved therein was neither perceived nor present in the mind of the court.

CONCLUSION

27. Thus, in my humble opinion, the judgment in Westinghouse case is not a binding precedent under Article 141 of the Constitution, even though the review petition filed by the Department has been rejected. Hence, it is imperative that the ratio of this judgment and its precedential value are clarified to the field formations – especially to the State GST formations - as soon as possible. This will bring welcome relief to assessees who are facing huge demands on the GST side.