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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Aug-08-1997

Reported in : (1997)(95)ELT316TriDel

Appellant : Collector of C. Ex.

Respondent : C.R. Auluck and Sons (P) Ltd.

Judgement :

1. This is an appeal filed by the Department against the order of Collector (Appeals) dated 6-11-1986.

2. Learned Departmental Representative stated that the respondents are engaged in the manufacture of Luxmi Brand Fans falling under Chapter 84.14. They had also leased out their brand name to another unit, M/s.

Luxmi Engg. Works, Ludhiana. Since the brand name of both the units was 'Luxmi' as such while regulating the exemption for M/s. C.R. Auluck and Sons (P) Ltd., the quantum of clearances of Luxmi Brand Fans effected by M/s. Luxmi Engg. Works will be includible towards the value of clearances of M/s. C.R. Auluck and Sons. Accordingly, they were not entitled for exemption under Notification No. 85/85, dated 17-3-1985 and they were required to make the payment of Central Excise duty from the very beginning.

3. The party had effected the clearances of the said product consequent upon the Budget for the year 1986-87 by virtue of Explanation IV of the Notification No.

175/86, dated 1-3-1986 but the implementation of this notification was inoperative (due to issuance of Notification No.202/86-C.E., dated 25-3-1986) during the period 25-3-1986 to 31-3-1986.

4. Accordingly, the Supdt. of Central Excise issued show cause notice to the party for recovery of central excise duty amounting to Rs. 20,933.10 which was confirmed by the A.C. However, Collector (Appeals) has set aside the impugned order on the grounds that the judgments of Hon'ble Supreme Court in the cases relating to Cibatul Ltd. reported in 1985 (22) E.L.T. 302 and Food Specialities Ltd. reported in 1985 (22) E.L.T. 324 are applicable to the respondent's case. Hence, this appeal.

5. He further stated that the respondents are the prop, of trade mark 'Luxmi' in respect of electric fans registered under the Trade and Merchandise Marks Act, 1958 By an agreement dated 1-3-1984, they had permitted M/s. Luxmi Engg. Works to use the trade mark 'Luxmi' in respect of electric fans and parts thereof. The use of trade mark was only by way of permitted use and the property of the said registered trade mark remained with the respondents. This agreement was a specific type of agreement which imposes a number of conditions and restrictions on the one of the trade mark such as :- (a) Clause (iv) requires the users to maintain the quality of electric fans manufactured by them and marketed under that trade mark 'Luxmi' as per specifications and quality control approved by the party.

(b) Clause (vii) provides that the owner shall neither manufacture nor market electric fans for sale in India or abroad with the exception of the quantity required for the supplies in respect of execution of orders received or to be received for the Government department.

(c) Clause (viii) stipulates that in case of infringement of passing of relating to the said trade mark 'Luxmi' the legal action will be taken on the third parties on the cost and responsibilities of the users M/s. Luxmi Engg. Works.

(d) Property in the goodwill and reputation relating to the said trade mark is to remain with the owner M/s. C.R. Auluck and Sons (P) Ltd., Ludhiana.

6. From the clauses of the agreement, it is evident that the various conditions and restrictions imposed by the respondents are indicative of the fact that M/s. Luxmi Engg. Works was manufacturing electric fans for or on behalf of the principals namely M/s. C.R. Auluck and Sons and in this view of the matter, the clearances of electric fans under the brand name 'Luxmi' effected by both the units merited to be clubbed for regulating the exemption available to the party because M/s. Luxmi Engg. Works was acting for or on behalf of the party and under their directions and control in the manufacture of electric fans under the owners trade mark.

7. The party, through the mechanism of the agreement, gets its own trade mark or labelling done on the electric fans and the said labelling and use of trade mark is to be treated as manufacture within the meaning of Section 2(f) of the Central Excises and Salt Act, 1944.

The above view finds support from the judgment of Hon'ble Gujarat High Court in the case of Jamnadas v. Nangia (AIR 1965 Gujarat 225) and the observations of the Hon'ble Supreme Court in the case of Shree Agencies v. S.K. Bhattacharjee reported in AIR 1972 SC 780.

8. Learned counsel stated that the respondents are a totally independent unit and the value of clearances of lease holders of their brand name cannot be added to the value of their clearances for the purpose of exemption notification. It is on record that the value of their clearances during 1985-86 (including the clearances during the period 25-3-1986 to 31-3-1986) has been well below the exemption limit of Rs. 7.5 lakhs. The noticee party submits that they had been paying duty with effect from 1-4-1985 on the insistence of the Department. The duty was being paid 'under protest'. They have already applied for the refund of the duty paid up to June, 1985. Since the value of their clearances did not cross the exemption limit of Rs. 7.5 lakhs, there is absolutely no basis for the proposed demand.

9. There are score of decisions of various Hon'ble High Courts, wherein it has been held that brand name owner cannot be deemed to be the manufacturer of the goods. The Hon'ble Supreme Court of India has finally settled the issue in their recent judgments on this point which are as follows :-Union of India and Ors. v. Cibatul Ltd. reported in 1985 (22) E.L.T. 302 (S.C.)Govt. of India v. Food

Specialities Ltd. - 1985 (22) E.L.T. 324 (S.C.).

10. In these judgments, it has been held that brand name owner cannot be treated to be a manufacturer of goods which have been manufactured by another person. Mere affixing of brand name on goods manufactured by other manufacturer cannot make the brand name owner, the manufacturer of those goods. The judgments of Hon'ble Supreme Court have the force of law as per Article 141 of the Constitution of India. In view of this position, no liability can be created as a consequence of suspension of the operation of Notification No. 175/86-CE. having Explanation No. IV during the period 25-3-1986 to 31-3-1986. The explanation has been incorporated to make the intention abundantly clear. Even without the incorporation of Explanation, the value of clearances of one manufacturer cannot be added to the value of clearances of another manufacturer. That being so, there is absolutely no basis for the proposed demand.

12. We notice that the learned Collector (Appeals) has relied upon the judgment of Hon'ble Supreme Court in the case of Cibatul Ltd. reported in 1985 (22) E.L.T. 302 and Food Specialities Ltd. reported in 1985 (22) E.L.T. 324.

13. We notice in this connection that in the case of Cibatul Ltd. (referred to shortly as the seller) entered into an agreement with Ciba Geigy of India Limited. The buyer was entitled to test a sample of each batch of these goods, and it was only after it had given its approval that the goods were to be released for sale to the buyer. It was understood that the products manufactured under the two agreements would bear certain trade marks which were the property of the foreign company, Ciba Geigy of Basle. The respondents filed a declaration for the purposes of the levy of excise under the Central Excises and Salt Act, 1944 showing the wholesale prices of different classes of goods sold by it during the period May, 1972 to May, 1975. The declaration included the wholesale prices of the different resins manufactured under the two aforesaid agreements. The Assistant Collector of Customs revised those prices upwards on the basis that the wholesale price should be the price for which the buyer sold the product in the market.

The entire question before them was whether the goods were manufactured by the seller or are manufactured by the seller on behalf of the buyer.

It is apparent that the seller cannot be said to manufacture the goods on behalf of the buyer. The seller owns the plant and machinery, the raw material and the labour and manufactures the goods and under the agreements, affixes the trademarks on the goods. The goods are manufactured by the seller on its own account and the seller sells the goods with the trade marks affixed on them to the buyer.

14. In the case of Food Specialities Ltd. (supra), the Hon'ble Supreme Court had held as under :- "The respondent Food Specialities Ltd. entered into a number of agreements with Messrs Nestle's Products (India) Limited, to manufacture for and on its behalf sweetened condensed milk soluble coffee, baby milk food, milk powders and infant cereal foods for sale in India by Nestle's under certain trade marks in respect of which the latter was registered as the sole registered user in India. The products were manufactured by the respondent in accordance with detailed quality specifications supplied by Nestle's and the price of the products was determined under the agreements free on rail at Moga or free on lorry at factory.

We are satisfied upon the particular facts of this case that the value of Nestle's trade marks cannot be added to the wholesale price charged by the respondent to Nestle's for the purpose of computing the value of the goods manufactured by the respondent in the assessment to excise duty." It can, therefore, be seen that whereas the judgment of M/s. Food Specialities Ltd. was in the context of the particular facts of that case, it is the judgment in the case of Cibatul Ltd. from which ratio could be drawn and applied to similar cases.

15. While the A.C. is correct in holding and the learned DR is right in pointing out that the Hon'ble Supreme Court judgment in the aforesaid cases basically related to valuation and determination of wholesale price in the light of the agreements in question in those cases, in the case of Cibatul Ltd., the Hon'ble Supreme Court had also occasion to discuss the case in the light of Section 2(f) and definition of word 'manufacture' given therein. Therefore, the ratio of the observations of

Hon'ble Supreme Court in the aforesaid case can be utilised for dealing with the Department's argument with reference to Section 2(f) in the present case.

16. It is true that in the present case, the basic question related to applicability or otherwise of Notification No. 175/86 (as amended) and that in view of the agreement between the two parties whether the value of the clearances under the brand name 'Luxmi' could be clubbed for the purpose of determining eligibility.

17. Since the brand name owner cannot be treated as the manufacturer of the goods and it is the actual manufacturer who alone could be treated as such under Section 2(f) of the Central Excise Act and the Department has given no other reasons for clubbing such clearances, the Department's case remains unsubstantiated for the purpose of denying the benefit of Notification 175/86 (as amended). The appeal is, therefore, rejected as already announced in the Open Court.

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