

itc Ltd. Vs. Cc

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Tamil Nadu

Decided On : Apr-16-1998

Reported in : (1998)(77)LC411Tri(Chennai)

Judge : V Gulati, Vice-, T Nambiar, S T K., A T V.K., S Peeran

Appellant : itc Ltd.

Respondent : Cc

Advocate for Pet/Ap. : Shri. R. Sashidharan

Judgement :

1. This is an appeal filed by the appellant against the orders passed by the Commissioner (Appeals) in Order No. 421/97 dt. 31.3.1997. In terms of that order, he upheld the orders passed by the Asstt.

Commissioner, holding that the writings, marks etc. on the cartons show that this unmanufactured Tobacco is a preparation of M/s. BAT (UK and Export) Ltd., specifically made for M/s. ITC Ltd. and they are classifiable under 2401.90 as "branded unmanufactured Tobacco".

2. The brief facts of the case as mentioned in the order-in-original are that the appellant M/s. ITC Ltd., Bangalore have imported 13248 Kgs. of unmanufactured tobacco for C & F value of 65,768/- from BAT (UK and Export) Ltd., England. The CHA of the importer, namely M/s.

Royal Agencies have filed the Bill of Entry No. 5783 dt. 21.1.1997 for the clearance of the imported goods. Goods were examined on first appraisement. The assessing officer also inspected the goods.

2.1. The imported goods namely unmanufactured tobacco are packed in 288 thick cardboard cartons. Three distinctive writings are available on the outside of the cartons. One such writing is "BATUKE" which is printed in bold letters. Another writing is of "DBIT 00460". The other writing is "MND3". These writings on the cartons are apart from the regular marks and numbers available on the cartons, and these marks and numbers are given so that the importer may identify his goods.

2.2. M/s. ITC have been importing unmanufactured tobacco regularly.

They have been classifying the goods under Customs Chapter heading 2401.20 and paying the relevant Customs Duty. They have been classifying the goods under Central Excise Tariff heading 2401.10 which attracts "NIL" rate of Central Excise duty and thus paying no Central Excise duty on import. In the instant case also, they had classified the goods under Customs Chapter heading 2401.20 and Central Excise Chapter heading 2401.10, the duty according to them being 50% + 2% + NIL (CVD).

3. The adjudicating authority in the impugned order held that the word or the writing "BATUKE" printed on the cartons containing tobacco is a brand name as per chapter note 1/24 of the schedule to the Central Excise Tariff Act 1985. He, therefore, classified the same under tariff sub-heading 2401.90. Accordingly, he assessed the same to duty of 40% basic + 10% additional duty. This decision was taken in appeal and the learned Commissioner (Appeals) dismissed the appeal. Against this decision, the present appeal is filed.

4. The learned advocate Shri R. Sashidharan appearing for the appellants contended before us that the Commissioner (Appeals) has failed to appreciate that the Judgment of the Hon'ble Supreme Court in the case of Astra Pharmaceuticals (P) Ltd., applies all force to the present case. In this connection, he relied upon the above said decision reported in 1995 (75) ELT 214 (SC) : 1995 (56) ECR 638

(SC).

Relying on the above said decision, it was contended that the distinction between the House mark and Product mark has been brought out. Similarly, he pointed out that in this case 'BATUKE" on the packing has been used to project the image of the manufacturer generally and does not establish any relationship between the mark and the tobacco. It was contended that the wording on the packing was only to identify the manufacturer. He, therefore, pointed out that the attempt made by the Commissioner (Appeals) to bring out a distinction between the facts of the present case with the facts in the case of Astra Pharmaceuticals which was dealt with by the Supreme Court is not correct. He, therefore, pointed out that the impugned order is based on an erroneous conclusion that the above case will not apply to the facts of this case. He pointed out that in the case before the Supreme Court, their lordships were concerned with the interpretation of identical expression and by applying the ratio of the above said judgment, the impugned order is contrary to law.

5. Reliance was also placed on the decision of the Hon'ble High Court in the case of BHEL Ancillary Association v. CCE. Relying on the above said decision, it was stated that the markings and inscriptions on components manufactured by the Ancillary units of BHEL would not constitute trade or brand name and therefore the definition of "brand name" given in the Notification No. 175/86 being similar to the definition given in chapter note No. 1 to Chapter 24 of the Central Excise Tariff Act, the principles of that description squarely applies to the facts of this case. He, therefore, pointed out that on the above said principles, the case of the appellant is established and prayed that the appeal may be allowed.

6. The learned JDR for the department Shri Rama Rao on the other hand pointed out that the principles enunciated in the decision of the Hon'ble Supreme Court do not apply to the facts of this case. He pointed out that in the above said decision of the Hon'ble Supreme Court, the expression House Mark, Product Mark and distinction thereof applicable to the pharmaceuticals products has been discussed. He, therefore, pointed out that a distinction has been made between a house mark which is different from a product mark. He pointed out that in that particular case,

their lordships were dealing with medicinal preparation. It was also pointed out that under the Drug Rules, it was compulsory to have a house mark. He also pointed out that in pharmaceutical business, a distinction is made between a house mark and a product mark. The house mark is used on all the products of the manufacturer. It is usually a device in the form of an emblem, word or both. For each product a separate mark known as a product mark or a brand name is used which is invariably a word or a combination of a word and letter or numeral by which the product is identified and asked for. It was in this background their lordships held that the ASTRA on the container of packing in that case was used to project the image of a manufacturer generally. He, therefore, pointed out that the above cited decision is not applicable to the facts of this case. He also distinguished the decision of the Madras High Court which was relied on by the learned advocate on the same reasoning 7. The learned advocate in a rejoinder stated that under the law relating to the Weights and Measures, it was stated under Section 4 that specific commodities should be packed and sold only in standard packages and under Section 6 every package shall bear thereon or on a label securely affixed mentioning the name and the address of the manufacturer and other particulars. He, therefore, stated that in view of standards of Weights and Measures Act, 1976, there is no such obligation. He, further, relied on the fax message given by the Foreign supplier dated 10.7.1997 wherein it is mentioned as follows: Please find below details as requested for the Appellate Tribunal in India: 1) BAT (UK and Export Limited) does not own any cigarette brands in its own name.

Cigarettes are produced by BAT (UK and Export) Limited but the designation on the finished product will be that of the brand owner.

2) The brands manufactured under license from the brand owner by BAT (UK and Export) Limited are: If you require any additional information then please do not hesitate to contact me.

The learned advocate also relied on the fax message of the foreign supplier dated 11.7.1997 wherein it is mentioned as follows: BAT (UK & Export) Ltd. does not market any brands in its own name whether these are finished cigarettes or

unmanufactured tobacco.

If you require any additional information then please do not hesitate to contact me.

Relying on the above said replies, the learned advocate contended that there is no brand name like 'BATUKE'. He, therefore, pointed out that the decision of the learned lower authority is not in accordance with the law.

8. We have considered the submissions made by both the sides. It is seen that during the hearing, we got certain samples and examined the same. After examining the same in the presence of both the sides, we noted the facts in the following terms: The sample packet is produced before us by the department. We have perused the same in the Open Court in the presence of learned Advocate Shri R. Sashidharan, as well as Shri R. Victor Thyagaraj, Ld SDR. After having perused the packet, the description as mentioned in the packet is noticed by us as well as both the learned Advocate and the learned SDR. The size of the packet is large and its dimensions as reflected in the packing list is 120 x 79 x 71 cms. On One side of the packet, there is a White paper in which marking BATUKE is mentioned and below the same, some letters and numbers are mentioned which are: A little above, on the left side, there is another White sheet on which the following mark is found: A little above that there is another small white paper with some other numerals. On the other side, there is another marking BATUKE partially covered by another sheet carrying the cardboard.

We have asked the learned Counsel to produce the copies of the orders placed by the Appellants with the suppliers. They have today produced an order which is marked Fax No. 0703793501 which is dated 31.12.1996 and carries the order No. LD/IMP/ORD/26. The proforma invoice of the supplies produced is dated 11.12.1996 and in this Purchase Invoice following is mentioned: Your ref: December order". The learned advocate is not having a copy of this December order. He, further, states that this was an oral order over phone and there is no written order as such. We have adjourned the matter to this date to have a look at the order as was placed by the Appellants since there is a reference to a December order in the Proforma Invoice dt. 11.12.1996 and the same has not been produced. We are anxious to see as to what that order was to appreciate the

position as was urged by the Appellant at the previous hearing. The learned Advocate seeks a short adjournment to get the fax in regard to the same. The matter is hereby adjourned till tomorrow.

It is thus seen that the markings as mentioned by us in the above recording are the letters 'BATUKE', 'MND3' etc. which are found on the above said packages. The question for determination is whether that can be held to be a brand name within the meaning of chapter 1/24 of the schedule to the Central Excise Tariff Act 1985. The brand name is defined therein as follows: Brand Name means a brand name, whether registered or not, that is to say a name or a mark, such as a symbol, monogram, label, signature, or invented words or any writing which is used in relation to a product for the purpose of indicating, or so as to indicate a connection in the course of trade between the product and some person using such name or mark with or without any indication of the identity of that person.

It is now seen that there is a mark or a invented word "BATUKE" on the packages in question. There is also the word "MND3" on the above said packages. It is now seen that the decision of the Hon'ble Supreme Court in the case of Astra Pharmaceuticals (P) Ltd., reported in 1995 (75) ELT 214 (SC) : 1995 (56) ECR 638 (SC) is not applicable to the facts of this case. In that particular case, their lordships were dealing with the Patent or proprietary medicines of the Medicines. The question decided in that particular case was with reference to Pharmacopoeial preparation sold under its Pharmacopoeial name. In that judgment, their lordships at para 4 held as follows: That is, the writing or monogram on the medicine must establish that it was the producer or the manufacturer who was proprietor of the medicine.

6. As has been explained earlier the first part of the Explanation widens the ambit of the entry by extending it to any drug or medicinal preparation for use in internal or external administration for prevention of ailments in human beings or animals. But then it narrows it by restricting the applicability of the Tariff item to only such medicines which bear either on itself or on its container or both a name which is not specified in a monograph in a Pharmacopoeia. This obviously is not applicable to the appellant as the injections manufactured by the appellant are specified in a

Pharmacopoeia. The other class of medicines to which this Explanation applies are those which have a brand name that is a name or a registered trade mark under a Trade & Merchandise Marks Act.

The medicine manufactured by the appellants is not registered under the Trade and Merchandise Marks Act. Therefore, it would attract levy only if its container or packing carried any distinctive marks so as to establish the relation between the medicine and the manufacturer. But the identification of a medicine should not be equated with the produce mark. Identification is compulsory under the Drug Rules. Technically, it is known as 'house mark'. In Narayan's Book on Trade Marks and Passing-Off, the distinction between 'house mark' and product mark (brand name) is brought out thus: In the pharmaceutical business a distinction is made between a house mark and a product mark. The former is used on all the products of the manufacturer. It is usually a device in the form of an emblem, word or both. For each product a separate mark known as a product mark or a brand name is used which is invariably a word or a combination of a word and letter or numeral by which the product is identified and asked for. In respect of all products both the product mark and house mark will appear side by side on all the labels, cartons etc. Goods are ordered only by the product mark or brand name. The house mark serves as an emblem of the manufacturer projecting the image of the manufacturer generally.

The 'AP' or 'Astra' on the container or packing was used to project the image of manufacturer generally. It did not establish any relationship between the mark and the medicine. For instance, if the appellant instead of using Dextrose injections would have described it as Astra injections or Astra Dextrose injections then it could be said that a relationship between the monograph and the medicine was established. In the case of appellant it was only a monograph to identify the manufacturer.

In *M/s. Indo French Pharmaceutical Co., Madras v. Union of India and Ors.* a learned Single Judge of the Madras High A close reading of the Explanation however in my view indicates that the marks, symbols, monogram, label, signature or other words which are used in the medicinal preparation or its container should

be such as to indicate that the medicine is a special preparation made by the manufacturer. The connection between the medicine and the manufacturer contemplated under the explanation should be such as to indicate that the manufacturer has a proprietary interest in the medicine.

This was approved by Division Bench of the same High Court in *Union of India v. Indo French Pharmaceutical Company*--.

Reliance was placed on *Ramsey Pharma Private Ltd. v. Superintendent, Central Excise Allahabad and Ors.*-- for the Revenue and it was claimed that this decision was followed by the Tribunal and since it was based on correct interpretation of Explanation I the appellant was not entitled to any relief. It would be seen that in the decision rendered by the Allahabad High Court it is not clear if the container bore the name of the medicine as well. What has been extracted in the judgment is that the medicine has been manufactured by M/s Ramsey Pharma Pvt. Ltd. As stated earlier if the container of the appellant would have stated that these were Astra Dextrose injections then it could be said that a relationship between the medicine and the manufacturer was established. The ratio laid down by the Madras High Court is approved as correctly enunciating the scope of Explanation I. Since the appeal is being allowed on merits the question whether the Revenue was justified in reopening the case under proviso to Section 11A of the Act is rendered academic and is not necessary to be decided.

A perusal of this Judgment goes to show that their lordships held that duty will be attracted only if its container or packing carried any distinctive marks so as to establish the relation between the medicine and the manufacturer. But the identification of a medicine should not be equated with the produce mark. Identification is compulsory under the Drug Rules. It was in that context, their lordships held that the marking found on the medicine was only to project the image of the manufacturer and it is only a house mark. It is thus seen that under the Drug Rules, identification is compulsory. So also in the case of the Madras High Court, which is relied upon by the learned advocate, their lordships were dealing with Patent or Proprietary medicines. In that decision reported in 1978 (2) ELT 478 which was approved by the Division Bench reported in 1983 (12) ELT

725 : 1983 ECR 41D (Mad), their lordships considered the same in the background of patent or proprietary medicines. But those decisions do not apply to the facts of this case in view of the fact that marks of identification of a medicine was compulsory under the Drug Rules.

9. But, in this particular case, the learned advocate stated that under the Law relating to Weights and Measures under Section 6, every package shall bear thereon a label securely affixed with the name and address of the manufacturer. But that law is applicable only in India and when the products in question are being sold by the Indian manufacturer. It is only compulsory for the Indian manufacturer to put such name and address of the manufacturer on every package. This provision is chapter II of the above said Act and in Section 3 of chapter II it is clearly said that the provisions of this Chapter was applied to packages intended for retail sale and the.....Therefore, this provision is applicable to the packages made by an Indian manufacturer of commodities, and sold in standard packages. But the same is not a pre-requisite for a foreign supplier. There is no such corresponding provision for a foreign supplier to mark their name on the packages.

Therefore, the ratio of the above cited decisions are not applicable to the facts of this case. It is therefore seen that the mark "BATUKE" is found on the packages. It is stated by the learned advocate that the manufacturer has stated in the telex message dated 11.7.1997 that this word "BATUKE" is not the brand name. But, we observe we have to decide the case in terms of the definition mentioned in note 1 of chapter 24 of the schedule to the Central Excise Tariff Act 1985. The same cannot be decided on the understanding of the foreign supplier wherein they stated that they do not have any brand name in its own of "Unmanufactured Tobacco", which they have supplied to the appellants.

9.1. As per Chapter Note 1 of chapter 24, it is very clear that 'brand name' means a brand whether registered or not, that is to say a name or a mark, such as a symbol, monogram, label, signature, or invented words or any writing which is used in relation to a product for the purpose of indicating or so as to indicate a connection in the course of trade between the product and some person using such name or mark. It is therefore clear that the word "BATUKE" clearly indicates

the relation to the unmanufactured tobacco which is a product supplied by the foreign supplier and these words indicate a connection in the course of trade between that product and the foreign supplier. Therefore they do constitute a brand name within the meaning of chapter note 1 of chapter 24 of the Schedule to the Central Excise Tariff Act, 1985. The learned Commissioner (Appeals) has taken note of these factors into consideration; in para 11 to 14 of the impugned order he held as follows: 11. It is common knowledge that in case of medicines, the name of the company manufacturing is printed/inscribed or marked not only on the outer packing but also in the containers. In certain cases of tablets, such brand names are marked even in the individual tablets.

Therefore, the Brand name interpreted in the context of Patent or Proprietary medicines, as explained in the said entry, cannot be made applicable in this case and in fact, has no relevance to the present case at all.

'We are here dealing with unmanufactured tobacco. It can be sold without any name, in bulk packings. It can also be sold in a packing with markings, as noticed in the instant case. The markings in this case have to be interpreted in the context of Chapter Note appearing in chapter 24 of Central Excise Tariff 12. If the marks are only for identification of goods and manufacturer, container numbers and serial number of the cartons are sufficient enough. The word 'BATUKE' is not required. The word 'BATUKE' is not mentioned in the Bill of Lading also. It is only mentioned in the carton. Two other expression on the cartons have not been explained by the Appellant. The Adjudicating Authority has also not enquired into it. Hence, no conclusion could be drawn on these writings.

13. As per the Chapter note even if the identity of the person is not established, it can still come within the mischief of the definition 'brand name'. In this case, the identity is also established, as held by the Adjudicating authority. Moreover, the Chapter note makes it clear that it is not necessary that the brand name should be registered. Going by this definition, the same is wide enough to cover the present consignment as branded unmanufactured tobacco.

14. It may further be stated that in the case of branded unmanufactured tobacco, a brand name cannot be affixed on individual product. It is impossible to make

markings on individual tobacco leaf. Such markings can be made only on manufactured tobacco such as cigarette, beedi, chewing tobacco or loose tobacco in packet for pipe making. Such a marking in unmanufactured tobacco is inconceivable. Therefore, the Appellant's argument that the markings are not on the goods themselves is untenable and hence has to be rejected. The Assistant Commissioner's findings are correct and maintainable.

10. We agree with the above said findings of the learned Commissioner (Appeals) in view of reasonings, we have stated above. In this view of the matter, we find no merit in the appeal and accordingly same is dismissed. Sd/- Separate Order (T.P. Nambiar) (V.P. Gulati) Member (J) Vice-President

11. I have given a careful thought to the order recorded by learned Brother. I am not able to persuade myself to agree with him that in the facts of this case the goods can be considered as branded goods for the purpose of assessment under Tariff Heading 2401.90 as branded unmanufactured tobacco.

12. The learned lower authority has taken note of the fact that on the packages of the goods, following word figured i.e. "BATUKE". It has been held that this word establishes the connection between the tobacco inside the cartons and the supplier of the goods viz., 'BAT (UK and Export)' Ltd. England. The learned lower authority has held for that reason, therefore, this word tantamounts to the use of the brand name in the context of Chapter Note 1 of Chapter 24 of the Schedule to the Customs Tariff. The issue, therefore, is required to be in the context of this Chapter Note, which reads as under: In this Chapter, 'Brand Name' means a brand name, whether registered or not, that is to say, a name or a mark, such as a symbol, monogram, label, signature or invented words or any writing which is used in relation to a product, for the purpose of indicating, or so as to indicate, a connection in the course of trade between the product and some person using such name or mark with or without any indication of the identity of that person.

13. An analysis of the definition of brand name as set out shows that before a product can be considered as a branded product, it has to be shown that the brand name used is such that it establishes a connection in the course of the trade, linking the product and some person using that name. What follows from this is

that the product in question should be marketed in the trade with a particular brand name. If a product as such is not marketed with a particular brand name, the question of invoking this definition would not arise, notwithstanding that some artificial words have been used on the package in which the goods are packed.

14. In this connection, the Board had clarified the position that the scope of the use of the brand name in the context of Central Excise Notification 1/93 precludes the benefit of this exemption notification in case of goods which are manufactured with the brand name of another person. The definition of brand name as set out under this notification is as under: Explanation IX.--"Brand name" or "trade name" shall mean a brand name or trade name, whether registered or not, that is to say a name or mark x x x such as symbol, monogram, label, signature or invented word or writing which is used in relation to such specified goods for the purpose of indicating, or so as to indicate a connection in the course of trade between such specified goods and some person using such name or mark with or without any indication of the identity of that person.

15. It is seen that in this notification also the operative words are that the brand name has to be such so as to indicate a connection in the course of trade between such specified goods and some person using such name or mark.

16. The Hoard in this context in their Circular No. 71/71/94-CE dated 27.10.1994, has clarified the position as under: 5. As explained in paragraph 3 of the letter, to attract the mischief of the provisions relating to brand name, two conditions have to be satisfied.

(1) Such brand name must indicate a connection between the branded goods and some person using such brand name.

6. Consequently, if there is no "trade" of such goods, the brand name provision would not apply.

8. As regards the second illustration, the Collectors' Conference held at Chandigarh on 17th June, 1994 had already taken a view that in such cases the use of names of the user like electricity boards etc. are embossed on the goods to

guard against theft or misuse of public property and are not meant for sale by State Electricity Boards. Use of the brand name in such cases will not attract the mischief of para 4 of Notification 1/93, and the benefit of Notification No. 1/93 cannot be denied under such circumstances. The Board agrees with the view taken in the Conference as here also the element "in the course of trade" is absent.

17. We had, therefore, during the course of the hearing, tried to ascertain the position as to whether the tobacco which has been reported was marketed either abroad or in India under the brand name 'BATUKE'. The appellants have clarified that this was not done and information was also obtained by them from their suppliers abroad in this regard and which has been set out in the order recorded by the learned brother above.

18. We have called for the information as to how the orders were placed to ascertain whether the tobacco of particular brand has been ordered for and it has been clarified by an affidavit filed on behalf of ITC that what had been ordered for by them was Diet Blend Mnd3 unmanufactured tobacco by an order which was orally placed on M/s. BAT (UK and Exports) Ltd., and on the basis of which proforma invoice was issued and the confirmation dated 31st November, 1996 of the appellant shows that the grade of Diet Blend Mnd3 and there is no mention of the brand name in it. The other shipping instructions which were given by the appellant as reflected in the documents filed before us regarding proforma invoice No. 52432 dated 11.12.1996, nowhere indicate that the tobacco of brand name was ordered for or it was asked to be endorsed by putting the word 'BATUKE' on the packages.

19. The various labels and the words used in the packages have been indicated in the sheet filed here before us, a photocopy of which is annexed to the order as Annexure 'A'.

20. We had also examined the packages, the word "BATUKE' has figured along with other numerals and letters and the manner in which it is placed, prima facie indicates that this is for the purpose of identification of the packages to reflect the suppliers' identity. The appellants also obtained clarification from the suppliers and

the fax received by them clarified the position as under: Please find below details as requested for the Appellate Tribunal in India.

1) BAT (UK and Export Limited) does not own any cigarette brands in its own name.

Cigarettes are produced by BAT (UK and Export) Limited but the designation on the finished product will be that of the brand owner.

2) The brands manufactured under license from the brand owner by BAT (UK and Export) Limited are: TO MR R ROY-CHOUDHURY COMPANY ITC INDIA
OO9I8O547 525O
From: Melane Watson
Date: 11/07/87 14:00
Pages including this
1
Cover page: BAT (UK & Export) Ltd. does not market any brand in its own name whether these are finished cigarettes or unmanufactured tobacco.

If you require any additional information then please do not hesitate to contact me.

21. The department had not led in any evidence to show that tobacco was marketed in the trade under the brand name 'BATUKE'.

22.1 observe that the burden is on the department to establish that the tobacco in question was marketed in the trade under this brand name, before holding that the goods as branded tobacco for assessment under 2401.90 of CTA. This not having been done and in the absence of any evidence that tobacco as such was marketed in the trade under the brand name 'BATUKE', and taking into consideration the instructions of the Board in this regard, as cited above, I am of the view that the goods cannot be held as branded tobacco as claimed by the appellants. I, therefore, allow the appeal of the appellants in this regard.

Sd/- I) Whether in the facts and circumstances of the case the goods can be considered as branded tobacco, for assessment under 2401.90 as held by the learned Member (J), for the reasons recorded by him.

II) Whether the goods cannot be considered as branded tobacco for assessment under Tariff Heading 2401.90, as held by the learned Vice-President, for the reasons recorded by him. Sd/- sd/-(T.P. Nambiar) (V.P. Gulati) Member (J) Vice-

PresidentDt. 24.12.1997 Dt. 24.12.1997 23. This matter came up for hearing before me in view of the difference of opinion between the Members who had originally heard this appeal.

The difference relates to the question whether the mark BAT UK E affixed on the cases in which the unmanufactured tobacco was imported by the appellant M/s. ITC Ltd., constituted a brand name within the meaning of Tariff Sub-heading 2401.10 read with Note 1 under Chapter 24 of the Central Excise Tariff. The Ld. Member (Judicial) held that this will constitute a brand name and the unmanufactured tobacco in question would attract classification under the sub-heading 2401.90 under the entry "Other" as against the specific alternative entry 2401.10 which covers unmanufactured tobacco not bearing a brand name. The Ld.

Vice-President held the contrary view that the goods in question cannot be considered as branded tobacco.

24. Arguing the case of the appellant, Shri R. Sashidharan, the Ld.

Counsel, submitted that the marking in question did not constitute a brand name within the meaning of the relevant Tariff Sub-heading read with the Chapter Note in question. It was only an indication of the supplier's name which is implied to be indicated in the imported consignment. He referred to the decision of the Supreme Court in Astra Pharmaceuticals (P) Ltd. v. CCE, Chandigarh , wherein, the mark or description AP or Astra appearing on the container or packing was held to be not a brand name for holding the product contained in such containers bearing such marking as patent or proprietary medicines falling under Item 14E of the erstwhile Central Excise Tariff and Sub-heading 3003.10 of the present Tariff. The Ld. Counsel submitted that this case which was cited before the original Bench was taken note of by both the Ld.

members, but the Ld. Judicial Member distinguished this case and held it to be not applicable to the facts of the present case as the Supreme Court in the said case was concerned with the classification of a pharmaceutical item as to whether it could be considered as patent or proprietary medicine. It is the submission of the

Ld. Counsel that such a distinction could not be envisaged on account of the difference in the product as what the Supreme Court had laid down was a principle regarding the scope of the term brand name which will apply equally to the present dispute also, even though the product with which we are concerned now is not a pharmaceutical item. This will be so because the definition of the term brand name as given in Chapter 24 is substantially the same as what had been provided in respect of patent or proprietary medicines. He added that the same description also appeared in the context of exemption notifications for Small Scale Industries where such exemptions have been kept out of bounds for products bearing brand name of a person not otherwise entitled to such a benefit. If the view taken by the authorities below which has been upheld by the learned Judicial Member were to prevail, it will render the small scale exemption redundant. Such a view cannot be permitted to prevail, he contended.

25. It was then urged that the unmanufactured tobacco in question has been imported by the appellant for the purpose of manufacture of Cigarettes and the tobacco itself is not sold by them. The significance of brand name qua the material imported would become irrelevant in view of the fact that the same is not marketed by the appellant. In this connection, he relied upon two decisions of the East Regional Bench reported in 1998 (24) RLT pages 626 and 628 and pointed out that in the latter decision the Circular issued by CBEC No. 71/71/94-CE dated 27.10.1994 had been referred to, where the subject product covered therein was not being marketed by the purchaser or customer of the manufacturer but used for own purposes.

26. The arguments were resisted by Shri Rama Rao, the Ld. DR. He pointed out that the definition of brand name in Note 1 of Chapter 24 is not the same as what is provided in the relevant Chapter Note under Chapter 30 relating to. Patent or proprietary medicine which was the subject matter of decision in the Astra Pharmaceuticals case. The trading pattern in the case of pharmaceutical products is different and peculiar, which is not the case in most of the other commodities. There is a system of franchise or loan licence system and brand name may belong to one company while the product may be manufactured by another company. In order to protect the interest of the consumer, it is necessary to refer to the

manufacturer's name in the package or container in which the medicines are supplied. The terminology house name as against the term brand name has got specific significance in the case of pharmaceutical products with which the Supreme Court was concerned in the aforesaid case which does not apply to the present dispute involving the import of tobacco. The Ld. DR contested the submission made in support of the appeal that the term BAT UK E marked on the cases containing the imported goods was only a device to refer to the suppliers name and that it was only a shipping mark to facilitate identification to the supplier. He pointed out that this aspect has been covered in the impugned orders and in the impugned order-in-appeal where the Commissioner (Appeals) had referred to the shipping documents which do not contain this particular term at all which appears only in the cases. In the tobacco trade, the exporter of the subject goods is a renowned name and any person in that trade will be able to identify and think of a link between the product imported and the supplier BAT UK and Exports Ltd. In that view of the matter, the term employed for marking the containers of the imported goods would definitely constitute a brand name and accordingly the classification adopted by the department and upheld by the Ld. Judicial Member should hold the field.²⁷ I have taken note of the rival submissions. I have perused the record. The issue for decision centres on the scope of the term brand name as described in Chapter Note 1 under Chapter 24 to decide whether the unmanufactured tobacco imported can be said to be not bearing a brand name for classifying it under 2401.10 or it should be treated as falling under the residuary item "others" meaning thereby unmanufactured tobacco bearing brand name to merit classification under 2401.90. I have taken note of the pertinent submission in this regard made by the Ld. DR with regard to the difference in the language of Chapter Note 1 under Chapter 24 and Chapter Note 2(ii) of Chapter 30 relating to pharmaceutical products. Though there is some difference in these two notes covering different products, the essential thrust of the definitions regarding brand name is that it should be a name or mark or symbol, monogram, label, signature or invented words or in writing which is used in relation to the product in question to indicate a connection in the course of trade between the product and the person using that mark. Of course, in the case of the pharmaceutical products, the person using that mark has been referred to as having the right either as the proprietor or

otherwise to use the name or mark. This appears to be the only difference between the two notes. I do not consider this difference to constitute a serious departure as far as tobacco is concerned from the ordinary scheme of marketing of any branded product. It was submitted that obviously a branded product would carry a higher price and that is why branded unmanufactured tobacco has been classified under a different Tariff item carrying a higher rate of duty. The question in the present case, as already stated, is whether the marks BAT UK E would constitute the brand name for the purpose of classification under 2401.90 read with Chapter Note 1 of Chapter 24. It was contended that the use of the word BAT UKE established a link between the product imported and the supplier in UK who was entitled to the said brand name and accordingly the appropriate classification for branded tobacco would be attracted.

No doubt the mark BAT UKE which is the obvious abbreviation for BAT UK and Exports Ltd., would serve the purpose of indicating a connection between the product and the supplier, but the question is whether it is brand name. In the Astra Pharmaceuticals case the Supreme Court held that mere use of the letters or word AP or Astra on the containers or packing did not constitute brand name but were only house mark.

28. It was contended by the Ld. DR that such a system or practice of brand name on the one hand and the house mark on the other was relevant for pharmaceutical product, which is not the case in the case of tobacco. Moreover, in the case of pharmaceutical products, the manufacturers were bound to indicate their name on the products to meet statutory requirements. There is no such requirement in the case of imported goods of the present type and hence, the indication of the name BAT UK E in the cases containing the unmanufactured tobacco cannot be said to be in pursuance of any statutory requirement but it serves only as a brand name.

29. I have given careful consideration to this submission in the light of the findings of the Hon'ble Supreme Court in the Astra Pharmaceuticals case and I am of the view that notwithstanding the difference in the labelling requirements of pharmaceutical products on the one hand and the remaining products on the other, the question whether the mark or description BAT UK E would constitute a

brand name has to be answered as done by the learned Vice-President in his Order.

30. I accordingly, agree with his view and hold that the product in question attracts classification as other than branded tobacco.

31. The matter may be referred to the Regular Bench for decision according to the majority view.

In terms of the majority Order, it is held that the goods cannot be considered as branded tobacco for assessment under Tariff heading 2401.90 and hence the appeal is allowed. Sd/ Sd/- (V.K. Ashtana) (S.L. Peeran)

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