Super Delicacies Vs. Cce

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Aug-10-1999

Reported in : (2000)(89)LC538Tri(Delhi)

Judge : J Balasundaram, S T G.R., A T V.K.

Appellant : Super Delicacies

Respondent : Cce

Judgement :

1. The captioned three (3) Appeals, along with Miscellaneous Applications were heard together and are being disposed of by this common order.

2. The point for determination in the captioned 3 appeals is the same i.e. Whether an assessee using a brand name of another manufacturer, who is not manufacturing the same product, is entitled to the benefit of SSI exemption Notification No. 175/86.

3. The Id. Counsel was first asked to argue the Miscellaneous Applications. The Miscellaneous Applications are about urging an additional ground. The additional ground is to argue the case in the light of the decision of this Tribunal in the case of Taj Serpent Eggs Factory v. CCE Madurai 1998 (85) ELT 78, The Id. SDR has no objection.

4. We considered the submissions. We find that it is only a citation.

We, therefore, accept the reliance on the citation and allow the Miscellaneous Applications.

5. The facts of the case, shortly put, are that the Appellants are manufacturing Dant Manjan (Ayurvedic), classifiable under Central Excise Tariff Heading 3306,00. The Appellants were using the brand name of "MDH". Investigations revealed that the brand name "MDH" was owned by M/s. Mahashiyan Di Hatti Pvt. Limited. The Department alleged that since the Appellants were using the brand name "MDH" on their product, they were not eligible to the benefit of Notification No. 175/86 dt.

1.3.1986 as amended. It was also alleged that since this fact was suppressed, their demand period was extendable beyond six months under the proviso to Section 11A of the Central Excise Act, 1944.

Investigations also revealed that M/s. Mahashiyan Di Hatti Pvt. Ltd., the owner of the brand name "MDH" was not manufacturing Dant Manjan and had an agreement with the Appellants and the Applicant was paying Rs. 1,000 (as royalty per year to M/s. Mahashiyan Di Hatti Pvt. Ltd. and utilising the brand name. It was also found that they had no other relationship between them. The lower authorities held that since the Appellants were using the brand name and since the value of clearances of the brand name Holder was more than Rs. 7.5 Lakhs during the preceding financial year, therefore, in terms of Clause 4(a) of the Notification, the Appellants were not entitled to the benefit of Notification No. 175/86. Against this finding, the Appellants have filed the captioned 3 Appeals.

6. Arguing the Appeals, Shri Pradip Jain, the Id. Advocate appearing for the Appellants, submitted that the Appellants were entitled to the benefit of Notification No. 175/86 in as much as they were manufacturing Dant Manjan and using the brand name "MDH" on it; that Dant Manjan was not manufactured by M/s. Mahashiyan Di Hatti Pvt. Ltd. who were the owners of the Brand Name "MDH". He submitted that since there was no manufacture of Dant Manjan by M/s. Mahashiyan Di Hatti Pvt. Ltd., the question of clearances of this product by M/s.

Mahashiyan Di Hatti Pvt. Ltd. for computation of value thereof did not arise. He, therefore, submitted that the Appellants were entitled to the benefit of Notification No. 175/86. In support of this contention, he cited and relied upon the decision of this Tribunal in the case of Taj Serpent Eggs Factory v. CCE 1996 (85) 78. He submits that the issue is finally settled by this decision of the Tribunal and, therefore, applying the ratio of this decision, they were entitled to the benefit of Notification No. 175/86.

7. Countering the arguments of the Id. Counsel, Shri K. Srivastava, the Id. SDR submitted that the lower authorities examined the issue thread-bare and the provisions of relevant clauses of Notification No.175/86. He submits that in the decision cited and relied upon by the Appellants, there is no examination of the provisions of Clause 4(a) of Notification No. 175/86 and hence the facts are distinguishable. He reiterated the findings of the lower authorities and prayed that the Appeal may be rejected.

8. We have considered the rival submissions. We find that the CCE (Appeals) in para 4 of his Order, held as under: 4. I find that Notification No. 175/86 has used the expression "Aggregate value of clearance" in Para 1, Para 2 and Para 3. In a clear contrast to this expression, the phrase used in Para 4(a) is "Value of Clearances". The Explanation II under this Notification stipulates that for the purposes of computing the "aggregate value" of clearances under this Notification, the clearances of any excisable goods which are chargeable to nil rate of duty or which are exempted from the whole of the duty of excise leviable thereon by any other Notification etc., shall not be taken into account. It is very relevant to note in this context that this Explanation does not stipulate "value" of clearance but restricts itself to the computation of "aggregate value" of clearances. There is a clear distinction in the phraseology used and it cannot be just a co-incidence. It is a well settled law that the language of a Notification should be construed strictly. Since the term "Aggregate Value" has been specifically used in certain paragraphs of the Notification No. 175/86 and this is conspicuously not repeated in Para 4(a) where the expression is only "value of clearances", it will be reasonable to assume that the difference was consciously introduced. As per Explanation I of this Notification, the expression "Value" means either the value as determined in

accordance with the provisions of Section 4 of the Act or as the case may be according to the tariff values fixed or altered under Section 3 of the said Act. Therefore, it becomes logical to conclude that for computing value of clearances under Para 4(a) of the Notification, the Explanation-II will not be relevant since it applies only to the computation of "aggregate value" of clearances and not to "value of clearance". There may be also a reason behind making this distinction in the provision of Para 4(a) which is one of the two exemptions to the requirement of Para 4 main clause.

Being in the nature of relaxation from the mischief of Para 4, the provisions of Para 4(a) and Para 4(b) are to be read strictly as per the language used therein. The main clause of Para 4 requires that the factory should be an undertaking registered with the Director of Industries or the Development Commissioner (SSI) as a small scale industry in order to enable it to enjoy the benefit of this Notification. The reason for incorporating this requirement is to be assured of the fact that the unit is a genuine SSI unit. Therefore, when the question of relaxation from this important requirement arises, any provision granting such relaxation should aim at ensuring that the unit, even though not registered as an SSI, is nevertheless an SSI unit and for this purpose, a rigid limit for its value of clearance has been fixed under Para 4(a) or the requirement that a manufacturer had availed of the same benefit in the preceding financial year has been prescribed in Para 4(b). When viewed in this context, it can be reasonably accepted that the legislature had deliberately avoided using the expression "aggregate value" of clearances in Para 4(a) so that the total value of clearances of all the goods whether dutiable or not is taken into consideration for the purpose of judging the capacity of the unit as an SSI unit before granting it the relaxation from the requirement of Para 4. I, therefore, find that the view taken by the Assistant Collector in taking the total value of clearance of all the goods whether dutiable or exempted for the purposes of computing the value of clearances under Para 4(a) of the Notification is sustainable in law and on facts. The impugned order is, therefore, confirmed and the appeal is rejected accordingly.

9. We note that in this paragraph, the Id. Collector (Appeals) has examined the various words used in the Notification No. 175/86 and came to the categorical

conclusion that the Appellants were not entitled to the benefit of Notification No. 175/86. We have also perused the judgement in the case of Taj Serpent Eggs Factory. For coming to this conclusion in this case, the Tribunal had relied upon the decision in the case of Precision Electronics v. CCE . We have perused the decision in this case also. We find that in this case, the Tribunal had observed that the brand name of another person has to be understood to mean that a particular brand name is such as it belongs to the other person and the right of ownership to that can be established by record notwithstanding the fact that the brand name is registered or not and that the said brand name by right belongs to the other person for use on the goods of the type manufactured by the manufacturer claiming the benefit of the exemption notification. The Tribunal has observed that in the present case, the Appellants have been found to be using the brand name of another person who is using it on watches; that the lower authorities have not examined whether the other person, namely Doshi Electronics who used the brand name "Masterpiece" on the watches hold the legal right for using the same on other categories of watches and clocks; that unless it can be shown that the brand name "Masterpiece" belongs to Doshi Electronics for use on the wall clocks, the Appellants cannot be held to be within the mischief of para 7. Thus, we find that in the case relied upon by the Tribunal to come to the conclusion as indicated in the case relied by the Appellants, the facts in that case were different from those in the present case in as much as in the present case, there is a finding that the Appellants were paying Rs. 1,000/- per year as Royalty for use of the "MDH" brand name on their products. Thus, the ratio of the decisions cited by the Appellants are not applicable to the facts of the present case. On the contrary, we find that there is detailed examination of the language of the Notification by the Departmental authorities and we find force in what they have concluded as brought out in para 4 of the Order of the Id. Collector (Appeals) cited above.

In this view of the matter, we uphold the impugned orders and reject the Appeals.

Sd/- Separate Order (G.R. Sharma) (Jyoti Balasundaram) Member (T) Member (J) Dt. 19.11.1998 10. I have carefully perused the order recorded by my learned colleague but regret that I am unable to bring myself to agree with it. My reasons for differing therefrom are as under: 10.1. The learned Technical Member has

relied upon the payment of royalty by the appellants to M/s. Mahashiyan Di Hatti P. Ltd. for using of MDH brand name on the Dant Manjan (Ayurvedic) manufactured by them.

However, there is no dispute that the brand name MDH was being used by M/s. Mahashiyan Di Hatti on masalas manufactured by them, and Dant Manjan was not manufactured by Mahashiyan Di Hatti P. Ltd. What is relevant for the purpose of brand name is that the expression "brand name of another person" in Notification 175/86 has to be understood to mean that the particular brand name as such, as it belongs to the other person and the right of ownership to that can be established by record (notwithstanding the fact that it is registered or not) and that the said brand name by right belongs to the other persons for use on the goods of the type manufactured by the manufacturer claiming the benefit of exemption Notification as held by the Tribunal in the case of Precise Electronics v. CCE followed in the Taj Serpent Eggs Factory case . Applying the above criteria in the present context, M/s. Mahashiyan Di Hatti P. Ltd. (MDH) must belong to Mahashiyan Di Hatti P. Ltd. and it must also belong to them for use on the Dant Manjan (Ayurvedic) manufactured by M/s. Super Delicacies who are claiming the benefit of the Notification. In other words, the ownership of the brand name by another person is itself not sufficient and what is further required is that the brand name should belong to another person for use on goods of the type manufactured by the claimant to the benefit of the Notification. Since in this case, although MDH brand name admittedly belongs to Mahashiyan Di Hatti P. Ltd., it does not belong to them for use on the goods of the type Dant Manjan (Ayurvedic) manufactured by the appellants before us and, therefore, the appellants are not disentitled to the benefit of the Notification. I, therefore, propose setting aside of the impugned order and allowing the appeal.

11. The following difference of opinion is placed before the Hon'ble President for reference to a third Member Whether the appellants are not entitled to the benefit of Notification 175/86 and the appeals required to be rejected as proposed by Member (T) or the appellants are eligible to the benefit of Notification 175/86 and the appeals required to be allowed, as proposed by learned Member (Judicial).

Sd/- Sd/- (G.R. Sharma) (Jyoti Balasundaram) Member (T) Member (J) Whether the Appellants are not entitled to the benefit of Notification 175/86 and the appeals required to be rejected as proposed by Member (T) or the Appellants are eligible to the benefit of Notification No. 175/86 and the Appeals required to be allowed, as proposed by learned Member (Judicial).

13. Shri Pradeep Jain, Ld. Advocate, submitted that the Appellants manufacture Dant Manjan (Ayurvedic) which was affixed with the brand name "MDH"; that brand name "MDH" is used by M/s. Mahashiyan Di Hatti Pvt. Ltd. on spices manufactured by them; that M/s. Mahashiyan Di Hatti do not manufacture Dant Manjan at all and as such the products manufactured and affixed by brand name "MDH" by Mahashiyan DLHatti and the Appellants are totally different; that they have acquired the right to use the brand name as their own on payment of royalty to M/s.

Mahashiyan Di Hatti. He further submitted that the issue has been finally settled by the Appellate Tribunal in the case of Taj Serpent Eggs Factory v. CCE, Madurai . The Tribunal allowed the benefit of Notification No. 175/86 to the Appellants therein, though they were affixing their product 'serpent eggs' with the brand name "Cock" as the brand name was used by the owner in respect of the products different from the products made by the Appellants therein. He also relied upon the decision in the case of Precise Electronics v. CCE . Finally the Ld. Advocate submitted that M/s.

Mahashiyan Di Hatti were not liable to pay any excise duty as their product spices carry a nil rate.

14. Countering the arguments, Shri H.K. Jain, Ld. S.D.R., submitted that as per para 7 of Notification No. 175/86, the exemption shall not apply to the specified goods where a manufacturer affixes the specified goods with a brand name or trade name (registered or not) of another person who is not eligible for the grant of exemption under this Notification. He further, submitted that nowhere the para provides that such a manufacturer should only manufacture the same goods as are manufactured by the owner of the brand name. He relied upon the decision in the case of Intercity Cable Systems (P) Ltd. v. CCE in which it was held that

affixing brand name of other on an entirely different product would also be hit and the manufacturer will not be eligible for S.S.I. Concession. The Ld. S.D.R.mentioned that the Ld. Member (T) has clearly distinguished the present matters from the cases relied upon by the Appellants. He further mentioned that it is apparent from the facts of the matter and submissions made by the Appellants that the brand name "MDH" belongs to another person as the Appellants pay a royalty for its use and M/s.

Mahashiyan Di Hatti are not eligible for the benefit of Notification No. 175/86. Accordingly the mischief of para 7 of the Notification 175/86 is squarely applicable and the Appellants are not eligible to the exemption under the Notification. He also relied upon the decision in the case of CCE v. Arogya Pharma .

15. In reply, Shri Pradeep Jain, Ld. Advocate, submitted that the Central Board of Excise and Customs has also clarified in Circular No.213/41/88-CX6 dt. 30.12.1988 that a trade mark need not necessarily be in respect of all goods unless the registration has been so acquired; it is, therefore, quite possible and permissible to have the same trade mark/brand name for different classes of goods owned by different persons. He submitted that it is clear from this circular that the same brand name can be used by two manufacturers for different products.

16. I have considered the submissions of both the sides and perused the records. Para 7 of Notification No. 175/86 reads as under: The exemption contained in this Notification shall not apply to the specified goods where a manufacturer affixes the specified goods with a brand name or trade name (registered or not) of another person who is not eligible for grant of exemption under this Notification.

17. On a perusal of para 7 of the Notification it is apparent that it is the ownership of the brand name which determines whether the manufacturer becomes ineligible to the benefit of Notification No.175/86. This was also the view of the Tribunal in the case of Opus India v. CCE . In that case, the Tribunal allowed the benefit of Notification as the trade mark 'Hotline' was duly transferred in favour of the Appellants therein by assignment deed and same was duly registered under Trade and Merchandise Marks Act, 1958 and Tribunal gave the findings to the effect that

Trade Mark belonged to the Appellants. In the present matters, the brand name has been taken on payment of Royalty of Rs. 1000/- per month which, as contended by Ld. S.D.R., goes to show that the brand name is owned by someone else and the brand name does not belong to the Appellants. The Board's circular dated 30.12.1988 also speaks of the brand name owned by different persons for different classes of goods. The Board's circular nowhere provides that a small scale unit can affix the brand name of another person for a different product and can avail of the benefit of the Notification. This is evident from the circular where it is mentioned that "In the instant case, the Company "A" are the legal registered owners of the trade mark 'HOTLINE' in respect of gas stoves whereas the Company "B" are the registered owners of the same trade mark but for the commodity television.

18. The Ld. Advocate has relied upon the decision in Precise Electronics, supra, and that decision has been followed in Taj Serpent Eggs case, supra. The Appellate Tribunal in the case of Intercity Cable Systems, relied upon by the Ld. S.D.R., observed that Madras High Court has taken a contrary view in the case of Bell Products Co. v. U.O.I. and held that "even if the Appellants were using the trade mark or brand name "Shyam" which was owned and registered by M/s.

Shyam Antenna (P) Ltd. in respect of products which were different from the Appellants own products the benefit of the exemption under Notification No. 175/86 was not admissible to the Appellants since they were using on their products the brand name of Shyam Antenna Electronics (P) Ltd., who were not eligible for the exemption under the said notification." The Madras High Court in Bell Products case held as under: ...Can the Petitioner be held to be entitled to the exemption merely because the products of the units are different notwithstanding the common or identical brand name used for the products. For the purpose of excise duty and application of the rates, it is the totality of the clearances that have to be taken into account and not the clearances in respect of different products when exemption is sought to be claimed under the Notification in question. The Notification apart from stipulating the mere user of the brand or trade name of another person, does not carry any further limitation on the said use that it should be in respect of similar or identical goods also.

19. The Madras High Court in Kali Aerated Water Works v. UOI considered the question of allowing the use of brand name under a deed of mutual arrangement and held as under: In substance, the business activities and financial commitments and prospects of the various members of the family appear to be distinct and separate, while the trade or brand name has been held in proprietorship by K.P.R. Sakthival, the others using the same with his permission subject to the arrangement recorded in the deed of mutual agreement. The fact that a deed of mutual arrangement has been entered into between parties and the registered trade or brand name proprietor has permitted the others to use the same for their own business in their respective areas may be an effective answer or defence to any claim or charge of infringement of a trade or brand name, but in my opinion it cannot detract from the obvious and inescapable position that the other petitioners are really using the trade or brand name registered in the name of K.P.R. Sakthivel, who alone for all purpose is supposed to be the proprietor of the trade mark. This being the factual position, there can be no difficulty in coming to the conclusion that the petitioners manufacture the goods by affixing the goods so manufactured by them, with a brand name or trade name of another person and therefore they will not be eligible for the grant of exemption claimed by them.

20. It is, thus, apparent from the decisions of the Madras High Court, one of which was relied upon by the Tribunal in Intercity Cable System, that it is not necessary that the brand name should be used by another manufacturer only in respect of similar or identical goods. It has been held by Tribunal in Amritlal Lalubhai v. UOI that where there is a High Court judgement on a specific issue and there is no contrary judgement of any other High Court or the Supreme Court, the Bench would respectfully follow the High Court judgement on that issue.

Thus following the judgements of Madras High Court, I agree with the Ld. Member (Technical) that the Appellants are not entitled to the benefit of Notification No. 175/86 as they were affixing the goods with the brand name of another person which is not eligible for the grant of exemption under the Notification. I also would like to quote from the judgement in UOI v. Paliwal Electricals (P) Ltd. wherein the Supreme Court has dealt with the object underlying para 7 of Notification No. 175/86 as under: The object underlying para 7 is self evident. If a small

manufacturer who affixes the brand name or trade name of an ineligible manufacturer (a convenient expression to denote a manufacturer outside the purview of Notification No. 175/86 and who owns or entitled to use a brand name or Trade name), the very reason d'etre for granting the exemption disappears. The exemption is designed to enable the small manufacturer to survive in the market in competition with the ineligible manufacturer but if he joins, or identifies himself with, the ineligible manufacturer, his goods become one with the goods of such ineligible manufacturer. They become indistinguishable. In the market, they will all be understood as one and the same goods. They no longer need the benefit under the Notification.

21. The matter is referred back to the Bench concerned for pronouncing the majority order.

22. In the light of the majority view, the appellants are held ineligible to the benefit of Notification 175/86 and the appeals are rejected.

Sd/- Sd/- (G.R. Sharma) Jyoti Balasundaram) Member (T) Member (J)