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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Mar-09-2001

Appellant : M/S Wavetronics

Respondent : Cce New Delhi I

Judgement :

1. In this appeal filed by M/s Wavetronics, the issue, involved is whether the benefit of SSI exemption under Notification No. 175/86-CE dt. 1-3-86, as amended was available to their product sold under brand name "National RXC4OF".

2. Shri Rjaesh jain, Id Advocate, submitted that the Appellant manufacture two in one bearing the brand name "National RXC4OF;" that the Assistant Commissioner denied the exemption under Notification No.175/86, holding that the brand National is of a foreign concern which is not entitled for SSI benefit and interms of Para-7 of the Notification, the goods will not be eligible for exemption under the Notification; that their appeal was also rejected by the Commissioner (Appeals), holding that brand name 'National' is an acknowledged and well known name and affixing the goods with such brand name, attracts the mis-chief of para 7 of the Notification. The Id. Advocate, further, submitted that the onus to prove that the ownership of the brand name belongs to other person is always on the Department as held by the Tribunal in many cases such as Eco-Products India (Pvt.) Ltd Vs. CCE Meerut, 2000(120) ELT 356 and Kalinga Cable Co. Vs. CCE Delhi, 1999 (33) RLT 12: that there is no mention in the show-cause-notice as to whom this brand 'National' belongs to; that they have not affixed the brand name

of any other person in India or even of any country outside India/ that National may be an acknowledged and well known name in respect of two-in-one but the brand name used by them is "National RXC4OF" and not 'National'; that even otherwise the brand National cannot be attributed to be a brand owned by a foreign company because the goods when sold under their brand always carries a logo alongwith name; that the style in which the word "National" appears on their goods is different and moreover the logo appearing with their name is neither used by the appellant on their products nor alleged to have been used in the show-cause notice. The Id. Advocate relied upon the decision in the case of Rukmani Pakkwell Traders Vs. CCE Trichy 1999(109) ELT 204 wherein it was held that the use of word "Such brand Name" shows that it is the very brand name which are used by brand name owner should be used by the manufacturer. In this case the Appellants were only using part of the brand name i.e., ARR and the photograph of A.R. Ramasami, and the Tribunal held that the benefit of Notification No. 1/93 is available because the brand name may at best be treated as 'deceptively similar'. He also placed reliance on the decision in the case of A.G.I. Switches (p) Ltd VS. CCE New Delhi, 1999 (III) ELT 440(T) and Continental Power System Vs. CCE Banglore, 2000(69) E.C.C.553. The Id. Advocate also mentioned unless and until connection between the trade name and the person with whom that brand name is identified can be established, the requirements of brand name in the notification will not be satisfied. He referred to Board's Circular No.52/52-94-Cx dt. 1-9-94. Finally, be submitted that the affidavit of the Appellants stating that the brand name belongs to them has not been rebutted by the Department.

3. Countering the arguments Shri M.P.Singh, Id. DR, submitted that what is being mentioned by the Appellant is the brand name "National" and the remaining words are nothing but Model Number; that as held by the Commissioner (Appeals), the brand name "national" is an acknowledged and wellknown name in respect of the specified goods manufactured by the Appellants; that in such cases no further proof is required to prove who is not eligible for the benefit under Notification; that in these type of cases the onus to prove shifts to the assesee which has not been discharged by them. He further, submitted that the Appellant's main plea before the Adjudicating Authority was that in India, the brand name belongs to them and they were marketing the impugned goods on their own and had never supplied the

goods to the brand name owner.

He, further, submitted that the Appellate Tribunal in the case of Kumar Products Pvt. Ltd. Vs. CCE, Final Order No. 2397/97 dt. 2-9-97, held that it is not necessary that the entire label is to be taken into account and that it will not make any difference that wires made by the parties are of different sizes; that the Supreme Court has dismissed the review petition filed by M/s Kumar Power Products as reported in 1999(III) ELT A198. He also placed reliance on the decision in the case of ELymer Havells Electrics VS. CCE New Delhi, 1999(35) RLT 793(t) wherein it was held that the pictorial representation of the mark on the product gives an idea that there is a close connection with the product marked by the brand name owner and the use of brand name "Havell's" by the Appellants clearly indicated a connection in the course of trade between the goods of the Appellants and brand name owner. The Id. DR emphasised that the brand name "National itself make the connection between the brand name and the person; that mere use of 'National' is enough to link the impugned goods with the brand name owner. He relied upon the decision of the Supreme Court in the case of M/s Parle Products Ltd. Vs U.O.I. AIR 1972 (SC) 1359 wherein it was held that "in order to come to the conclusion whether one mark is deceptively similar to another the brand and essential features are to be considered. They should not be placed side by side to find out it there are any differences in the design, and if so whether they are of such characatrer as to prevent one design from being mistaken for the other. It would be enough if Trade Mark bears such an over all similarity to the registered mark as would be likely to mislead a person ususally dealing with one to accept the other if offered to him." 5. In reply the Id. Advocate submitted that in the case of Elymer Havells, there was pictoral representation which is not in their case; that, further, the Department itself has extended the benefit of small scale exemption to their goods sold under the brand name "Wave National".

6. We have considered the submission of both the sides. Para 7 of the Notification No. 175/86 provides that nothing contained in this Notification shall apply to the specified goods where a manufacturer affixes the specified goods with a brand name or trade name (whether registered or not) of another person who is not eligible for the grant of exemption under this Notification. The Appellants in this

case admittedly are affixing the impugned goods with the brand name 'National' followed by the words "RXC4OF" which according to Ld. DR indicate Model No. only. We find substance in the submissions of the Id. DR and the findings of the Ld. Commissioner (Appeal) that the brand name 'National' is well recognised brand in respect of Electronic goods owned by a company abroad. When the Appellants clear impugned goods by affixing the brand name alongwith word RXC4OF a connection in the course of trade between the specified goods and the brand name owner is established. Explanation VIII of Notification No. 175/86 provides that brand name owner is established. Explanation VIII of Notification No.175/86 provides that brand name shall mean a brand name that is to say a name or mark which is used in relation to specified goods for the purpose of indicating in the course of trade between the specified gods and some person using such name or mark with or without any indication of the identity of that person. Similar views were held by the Tribunal in the case of Elymer Havells Electrics, supra, wherein the Appellants were afixing their goods with the brand name "Elymer Havell's" and the Tribunal held that use of brand name Havell's clearly indicated a connection in the course of trade between the goods of the Appellants and brand name owner. The decision in the case of Rukmani Packwell Traders is not applicable to the facts of the present matter as the Appellants were found to be not using the trade name of another person.

Similarly in the case of A.G.I. Switches supra, the brand name used by the Appellants was not found to indicate the connection in the course of trads. Further, the test laid down by the Supreme court in the case of Parle Products is satisfied in the present matter before us in as much as impugned goods manufactured by the Appellants are sold under the brand name 'National' which can be related to the owner of the brand name. Accordingly, the benefit of Notification No. 175/86 will not be available to the impugned goods.

7. The Id. Advocate has also contended that as their classification lists stands duly approved by the Department, duty under Section 11A of the Central Excise Act cannot be demanded in view of the decision in the case of CCE Vs. Cotspun Ltd. 2000 (113) ELT 353 SC and the Supreme Court in the case of Eas Land Combines, in Civil Appeal No. 2693/2000 has issued notice for stay and pending

further orders has stayed the order. The decision in view of the provisions of Section 110 of the Finance Act 2000 which provides that any notice issued under Section 11A of the Central Excise Act demanding duty on account of non payment, short payment etc, shall be DEEMED to be vaildly and effectively issued notwithstanding any approval or acceptance of the classification. The Id. Advocate has not brought on record any decision of the Supreme Court affecting validity of section 110 of the Finance Act.