

Commissioner of C. Ex. Vs. Joseph Engineering Works

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Dec-18-2002

Reported in : (2003)(152)ELT89Tri(Mum.)bai

Judge : J Balasundaram, J T J.H.

Appellant : Commissioner of C. Ex.

Respondent : Joseph Engineering Works

Judgement :

1. The brief facts of the case are that the respondents herein who are manufacturers of packing/sealing machines, weighing scales, etc., falling under Chapter 84 of the Schedule to the CETA, 1985, filed classification lists effective from 1-3-1994 and 1-4-1994 claiming exemption under Notification 1/93, dated 28-2-1993. Show cause notice dated 11-1-1995 was issued proposing denial of the exemption on the ground that the goods were being cleared under the brand name 'Philips' belonging to another person. The Assistant Commissioner confirmed the charges raised in the show cause notice and confirmed the duty demand of Rs. 1,88,381.40 covering the period August to November, 1994. He also imposed a penalty of Rs. 1,000/- upon the respondents. The Commissioner (Appeals), Mumbai set aside the order of the Assistant Commissioner's order holding that, for denying the benefit of the exemption it has to be established that the word 'Philips' used by the respondents in respect of the products manufactured by them belongs to another person, and that it is also necessary that the usage of the product is for purpose of indicating connection in the course of trade between such specified

goods and some person using such trademark. The Commissioner (Appeals) also accepted the contention of the respondents that the name "Philips" belong to them. Hence this appeal by the Revenue.

2. On hearing both sides, we note that issue in dispute, namely, whether the bar contained in paragraph 4 of Notification 1/93-CE is applicable only when the brand name of another person used by the SSI unit is used on goods identical to those manufactured by the brand name owner or whether the bar is applicable if the brand name of another person is used on any goods by an SSI unit, has been settled by the decision of the Larger Bench in the case of CCE, Chandigarh v. Fine Industries and Ors. 2002 (146) E.L.T. 53 (Tri.- LB). The bench has held that in order to attract the mischief of para 4 of Notification 1/93 specified goods manufactured by a SSI unit must have been cleared under the brand name of another person who used the same brand name on identical goods. In doing so the Tribunal relied upon the Apex Court decision in the case of UOI v. Paliwal Electricals (P) Ltd. 1996 (83) E.L.T. 241 (S.C.). The relevant extract from the Larger Bench Judgment is reproduced below : "13. The question before us is whether, in terms of para 4 *ibid*, the benefit of exemption under Notification 1/93-C.E. (as amended) could be denied to specified goods manufactured and cleared by a SSI unit after affixing the goods with the brand name or trade name of another person who used the brand name/trade name on goods different from the specified goods of the SSI unit, in order to resolve this issue, we think, we have to read together Explanation IX and Explanation X to the notification. Explanation IX defines brand name/trade name as under :- "Brand name" or "trade name" shall mean a brand name or trade name, whether registered or not, that is to say a name or a mark (xxx) 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." According to the above Explanation, either of the terms 'brand name' and 'trade name' used in para 4 of the Notification should be one used in relation to the specified goods of the SSI unit for the purpose of indicating a connection in the course of trade between such specified goods and some person using such name or mark. It is not in dispute that the

words "some person using such name or mark " ..stand for "another person" in para 4. Explanation IX, of course, does not read "some person using such name or mark on like goods (or identical goods) ..." It is obviously the absence of these italicized words or equivalent expressions in Explanation IX that has prompted the learned SDR to argue that the 'connection' envisaged under Explanation IX is one in the course of trade between the specified goods manufactured by the SSI unit and the brand name owner without reference to the nature of the goods of the latter.

The learned SDR has endeavoured to press the point that the identity or the nature of the goods manufactured by the brand name owner and cleared under his brand name is immaterial to the 'connection in the course of trade' to be established between the goods of the SSI unit and the brand name owner, for attracting para 4 of the Notification. The learned Counsel has, on the other hand, maintained that the learned SDR's interpretation does not subserve the intended purpose of para 4. It has been argued that the "connection in the course of trade' can only be a connection through the specified goods referred to in para 4 and goods identical therewith in the market. We are of the view that this argument has great force as it appears to be well supported not only by the Hon'ble Supreme Court's judgement in Paliwal Electricals (supra) but also by Explanation X to Notification 1/93-CE., which reads thus :- "For the purpose of this notification, where the specified goods manufactured by a manufacturer, bear a brand name or trade name (registered or not) of another manufacturer or trader, such specified goods shall not, merely by reason of that fact, be deemed to have been manufactured by such other manufacturer or trader." Explanation X says that, where the specified goods manufactured by a SSI unit bear a brand name or trade name of another manufacturer/trader, such specified goods shall not, merely by reason of that fact, be deemed to have been manufactured by such other manufacturer/trader. In our view, Explanation X casts a burden of proof on the Revenue. As held by the Apex Court [vide CC v. K. Mohan & Co. Exports (Supra)], the burden is on the Revenue to show that an assessee's claim for exemption from payment of duty under any notification is hit by any exclusionary clause in the notification. In the instant case, the burden of the Revenue was to show that the small scale manufacturer's branded goods fell within the net of para 4 ibid which

contained the exclusionary clause. The Revenue had to show that the said goods were bearing the brand name of another person, which burden was discharged by it. The Revenue had a further burden to discharge in terms of Explanation X which said that the mere fact that a small scale manufacturer's goods bore the brand name/trade name of another manufacturer/trader shall not be a reason for the Revenue (whose burden it was to bring such goods within the net of para 4 so as to deny the benefit of exemption to the small scale manufacturer) to deem that such other manufacturer/trader was also manufacturing the specified goods. The Revenue had to show that the brand name/trade name owner was also manufacturing the specified goods and clearing the same under his brand name/trade name.

14. The above position appears to be well supported by the Apex Court's decision in the case of Paliwal Electricals wherein their Lordships explained the object of para 7 of Notification No. 175/86 as under:- "Now what does para 7 provide and why? It provides that the benefit of Notification No. 175 shall not be available to a small manufacturer, who affixes the brand-name or trade-name (registered or not) of another person who is not eligible for the grant of exemption under the said notification. Explanation VIII defines the expressions "brand name or trade name". The Explanatory Note appended to the notification states that "(T) his amendment seeks to deny small scale exemption in respect of specified goods affixed with the brand name/trade name of a person who is not eligible for the exemption under Notification No. 175/86-C.E., dated 1-9-1986." The object underlying para I 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 of 1986 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. It must be remembered that by extending the benefit of exemption, the State is forgoing public revenue to which it is entitled under the Act. The loss to public revenue is supposed to be compensated by helping along the small manufacturers to survive in the market and continue to produce. Once he becomes one with his competitor, the need for supporting crutches disappears. There is no reason why in such a case the State should forego the revenue due to it under the Act.

The highlighted observations of the Apex Court clearly lay down that, to attract the mischief of para 7, the goods manufactured by the SSI unit and cleared under the brand name of another person should be identical to that manufactured by the brand name owner, in which event only the goods could become indistinguishable in the market from those manufactured by the brand name owner. We have already noted that para 7 of Notification No. 175/86-C.E. considered by the Apex Court is *pari materia* to para 4 of Notification No. 1/93-C.E., which is not disputed also. The reasoning of the Apex Court will, therefore, be equally applicable to para 4 *ibid*. We have no doubt in our mind that, to attract the mischief of para 4, the specified goods manufactured by SSI unit should have been cleared under the brand name of another person who used the same brand name on identical goods." 3. Following the ratio of the above decision we hold that the respondents herein are entitled to the benefit of SSI exemption under Notification 1/93, uphold the impugned order and reject the appeals.

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