

J. Prasad Polymers Vs. Commissioner of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Apr-30-2003

Reported in : (2003)(88)ECC643

Judge : S Kang, a T V.K.

Appellant : J. Prasad Polymers

Respondent : Commissioner of Central Excise

Judgement :

1. The issue involved in these two appeals arising out of a common Order-in-Appeal Nos. 225-226/2001 passed by the Commissioner (Appeals) is about availment of benefit of exemption as small-scale industry using the trade mark of other person.

2. Shri B.L. Narasimhan, learned Advocate, submitted that M/s. J.Prasad Polymers, Appellant No. 1, is a partnership firm, engaged in the manufacture of PVC shoes and sports shoes; that they came into existence in the year 1990; that as they are a small-scale unit, they are availing the benefit of Notification No. 1/93-Central Excise, dated 1-3-93 and its successor notifications; that they sell their products affixed with the brand names, Sundar Climbers, Sundar Dewana, Sundar Mastana, Sundar Raja, Sundar Naresh, Sunder Don, etc.; that the Additional Commissioner, under Order-in-Original No. 14/2000 dated 30-3-2000, disallowed the benefits of small-scale exemption notification, confirmed the demand of duty and imposed penalty on both the Appellants besides confiscating seized goods

plant and machinery holding that the goods were sold bearing the brand memo 'Sundar' belonging to M/s. Sada Ram & Sons (In short SRS); that on Appeal, the Commissioner (Appeals) has also, under the impugned Order, rejected their appeals.

3. The learned Advocate, further, submitted that the name 'Sundar' is not registered brand name of SRS; that it is only registered for its artistic work under the Copyright Act; that the Department has proceeded on the erroneous premise that 'Sundar' is a registered brand name of SRS for foot wear; that registration under the Copyright Act does not imply that a particular copyright in the artistic manner written 'Sundar' would ipso facto confer registration under the Trade Marks Act; that 'Sundar' used by the Appellants is different from the literary work titled 'Sundar' which has been copyrighted and therefore, it cannot be said that the Appellants have used the registered copyright of SRS. He also mentioned that the Appellants have been using the name 'Sundar' on the footwear in question ever since they commenced the production in March, 1990 in combination with other names like 'Kishore', 'Mastana', 'Climber', etc. without any objection; that, further, after 22-3-1990, SRS have been using the brand name 'Sony' on the Hawaii Chappals manufactured by them and have ceased to use the word "Sundar" on any of their product; that, on the contrary, the Appellants have been the continuous and honest users of the name "Sundar". He emphasized that the brand names for their products are climbers, Kishore, etc. and the name "Sundar" is not a brand name; that when they have sold the impugned goods under their own brand name, the exemption under the notification cannot be denied. He relied upon the decision in the case of VI John Beauty Tech v. Commissioner of Central Excise, New Delhi(T) and Commissioner of Central Excise, New Delhi-11 v. ACE Auto Co. Pvt. Ltd. - 2003 (106) ECR 280 (T); that in ACE Auto Co. case, the Appellants goods bear the brand name 'Tata Ace' and the Tribunal has held that the benefit of small-scale exemption notification will be available to the Appellants as there is no material to prove that the brand name belongs to another person.

4. The learned Advocate also contended that the entire demand is barred by limitation as they had filed necessary intimation and declaration to the Central Excise Authorities; that they have also intimated about availing of the benefit of

exemption in terms of various notifications; that they have also furnished the relevant notification under which they are availing the exemption in each of the invoices; that in such circumstances, the question of suppression with intent to evade payment of duty does not arise. He also mentioned that the quantification of demand, if any, should be done in terms of provisions of Section 4(4)(d)(ii) of the Central Excise Act. Reliance has been placed on the decision of the Larger Bench of the Tribunal in the case of *Srichakra Tyres Ltd. v. Commissioner of Central Excise* - 1999 (108) E.L.T. 47 (T).

5. Countering the arguments, Shri D.N. Choudhary, learned Departmental Representative, submitted that the brand name "Sundar" was registered in the name of SRS under Registration No. A-40216/83; that Shiv Kumar, partner of SRS admitted the ownership of brand "Sundar" by SRS, that Shri Sajjan Garg, partner of the Appellant-Firm, has admitted, in his statement, use of brand name "Sundar" belonging to SRS; that the Assignment Deed is dated 21-7-99 which has been made effective from 22-3-1990, that the Assignment deed has to be registered as in *Convertech Equipment Pvt. Ltd. v Commissioner of Central Excise* - 2001 (137) E.L.T. 144 (T), the Tribunal upheld the non-availability of SSI exemption before the registration of trademark assigned to them; that this is nothing but a colourable device to save themselves from the demand of duty. He, further, submitted that as per definition of Brand name in Notification, any 'name' 'mark', 'symbol', 'monogram', 'label', 'signature' or 'invented word' or writing which provides a distinguishable identity to the goods will be the brand name; that thus the word 'Sundar' is a brand name as per the definition of brand name given in notification; that as the Appellants were using the brand name of another person on their goods, the benefit of SSI notification is not available to them.

6. We have considered the submissions of both the sides. The benefit of SSI notification is not available to a small-scale unit if the goods manufactured by it bear the brand name or trade name of another person.

The Revenue have disallowed the benefit of SSI Notification to the Appellants on the ground that the goods manufactured by them were bearing the brand name 'Sundar' registered in the name of M/s. Sada Ram and Sons. The Appellants, on

the other hand, have contended that 'Sundar' was not registered as brand name by M/s. SRS under Trade Marks Act and it was only registered for its artistic work under the Copyright Act. The Revenue has relied upon a letter dated 12-3-96 of the Calcutta Trade Mark Company (Patent and Trade Mark Attorney), New Delhi. A perusal of the said letter reveals that the said letter refers to "the certified copy of the above copyright under title SUNDAR at No.A-40216/83." The subject of the letter is also "Certified copy of artistic work under title SUNDAR at No. A-40216/83. On the basis of such a letter, it cannot be claimed by the Revenue that "Sundar" was a brand name registered in favour of M/s. SRS under the Trade and Merchandise Marks Act. The Revenue has also not brought on record any registration Certificate issued by the competent Authority registering 'Sundar' as a brand name in favour of M/s. SRS. It has also been contended by the Appellants that since March, 1990 when they commenced production they are using the name 'Sundar' on the footwear manufactured by them in combination with other names like "Kishore", "Mastana", "climber", etc. and M/s. SRS have been using the brand name "Sony" on Hawaii Chappals manufactured by them. Revenue has not rebutted the said contention of the Appellants. Thus the Revenue has not succeeded in establishing that the goods manufactured by the Appellants were bearing the brand name of another person during the relevant period.

7. The Appellants have also contended that they sell their shoes bearing their own brand names, Sundar Climbers, Sundar Dewana, Sundar Mastana, Sundar Naresh, etc. in the course of manufacture, the names like Sundar Dewana, etc. are put on the sole when it is moulded; the in-sole is affixed with the respective brand names like "Climbers", Kishore", "Mas-tana", etc.; on the upper of shoes, the respective brand names like "Climbers", etc. are prominently affixed and the cartons, in which the shoes are packed, are affixed with "climbers" Mastana, etc.

in big form with "Sundar" very much less prominently. This was also stated by Shri Sajjan Garg in his statement dated 9-9-98. This averment has also not been controverted by the Revenue by bringing on record any material or evidence. On the other hand the Appellants have brought on record some letters of their customers placing orders for "Sundar Naresh", "Sundar Kishore", "Sundar Parwana", "Sundar Mastana", "Sundar Raja", etc. Thus there is substantial force in

the contention of the Appellants that they were selling the impugned goods under their own brand name. The learned Advocate has relied upon the decision in the case of VI John Beauty Tech where the benefit of SSI notification was held to be available as the Appellants were selling the goods under their own brand names and printing of words "VI John" in bold letters in their name would not amount using of brand name of another person.

Similarly in the case of ACE Auto Co. supra, the Revenue wanted to deny SSI exemption to the assessee as their goods were bearing brand name "Tata ACE" on the ground that the goods would be associated with the products of Tata Group' in the course of trade. The Tribunal did not accept the contention of the Revenue by holding as under - "..... .The argument put forthwith by the Revenue seems attractive but it does not fall within the purview of Para 4 of the Notification No. 1/93 or 16/97. According to the notification, exemption shall not apply if the specified goods are bearing the brand name of another person. It is not the case of the Revenue that "Tata Ace" is the brand name of another person. The very fact that there is no material to prove that the brand name, which the excisable goods manufactured by the respondents bear, belongs to another person, the mischief of Para 4 of the Notification No. 1/93 will not be attracted." 8. In view of this, we hold that the Revenue has not succeeded in showing that the goods manufactured by the Appellants are bearing the brand name of another person. Thus the mischief of Para 4 of Notification No. 1/93-C.E. and successor notification is not attracted.

Accordingly, we set aside the impugned order and allow both the appeals.

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