Cce Vs. Hira Cement

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Apr-03-2006

Reported in : (2006)(109)ECC669

Judge : S Kang, Vice, M T K.C.

Appellant : Cce

Respondent : Hira Cement

Judgement :

1. The Hon'ble Supreme Court under Civil Appeal No. 4424 of 2004 filed by Commissioner of Central Excise, Raipur has remanded this case to the Tribunal for consideration of the matter afresh in the light of the observations made in the order of the Hon'ble Supreme Court.

2. The facts in brief are that M/s Hira Cement, Raipur are manufacturer of cement and are registered with the Central Excise department and have claimed exemption under SSI exemption notifications issued from time to time. They filed classification list/declaration claiming SSI exemption from time to time. Show-cause notices were issued to them on the ground that they are not eligible for the benefit of Notification No. 1/93-CE dated 28.2.93 as amended and Notification No. 16/97-CE dated 1.4.97 and 38/97-CE dated 26.7.97 as claimed in their declaration filed under Rule 1738. The ground for denying the SSI exemption was that M/s Hira Cement were selling most of their goods through the premises of M/s Hira Industries Ltd. Raipur which is depot office of Hira Industries Ltd. Jagdalpur and

they are using brand name/trade name with the style and other accompanying designs of M/s Hira Industries Ltd. Jagdalpur who are also a manufacturer of cement, The show-cause notices were decided by the Commissioner under his Order No.813-822/Ch.25/COMMR/01 dated 28.12.01. He dropped the proceedings against M/s Hira Cement.

3. The order of the Commissioner was reviewed by the Central Board of Excise & Customs and the Commissioner was directed to file appeal, accordingly, the appeal was filed before the Tribunal. The appeal filed by the Revenue against the order of Commissioner was rejected vide Final Order No. 145/2004-B dated 22.1.04.

4. The Revenue filed appeal against the order of rejection of their appeal by the Tribunal before the Hon'ble Supreme Court and Supreme Court has now remanded the case back to the Tribunal for considering the matter afresh in the light of the observations made by them in the said order.

5. It was argued for the Revenue that the respondent M/s Hira Cement are using brand name which is similar to the brand name used by Hira Industries Ltd. and both these brand names are deceptive in nature since the cement manufactured by Hira Cement is also cleared from the depot of Hira Industries Ltd. therefore, the customers can get impression in their mind that Hira cement are manufacturer of cement of Hira Industries Ltd. It was also argued that both the brand names are having semi circle with a diamond in between and below the name BBC or Hira is written. The diamond in the semi-circle is the actual brand name which is common in both the concerns. The attention was drawn to para-7 of Supreme Court's decision in the case of Milmet of the Industries v. Alegran Inc.Cadila Health Care Ltd. v. Cadila Pharmaceuticals Ltd. reported in 2001 PTC 300 (SC) are reproduced. The guidelines are as under : in a passing off action for deciding the question of deceptive similarity the following facts had to be taken into consideration: (a) The nature of the marks, i.e. whether the marks are word marks or label marks or composite marks, i.e. both words and label works.

(b) The degree of resembleness between the marks, phonetically similar and hence similar in idea.

(c) The nature or the goods in respect of which they are used as trade marks.

(d) The similarity in the nature, character and performance of the goods of the rival traders.

(e) The class of purchasers who are likely to buy the goods bearing the marks they require, on their education and intelligence and a degree of care they are likely to exercise in purchasing and/or using the goods.

(f) The mode of purchasing the goods or placing orders for the goods, and (g) Any other surrounding circumstances which may be relevant in the extent of dissimilarity between the competing marks.

6. Reliance was also placed on the following decisions of the Supreme Court:Commissioner of Central Excise v. Grasim Industries Ltd. - Relying on para 15 of the said decision, it was stated that the brand name or trade name is qualified by the words "that is to say". Thus even though under normal circumstances a brand name or a trade name may have the meaning as suggested by the Tribunal, for the purposes of such a Notification the terms "brand name or trade name" get qualified by the words which follow. The words, which follow, are "a name or a mark". Thus even an ordinary name or an ordinary mark is sufficient.

It is then elaborated that the "name or mark" such as a "symbol" or a "monogram" or a "label" or even a "signature of invented word" is a brand name or a trade name.... No hard and fast rule can be laid down, however it is possible that words which merely indicate the party who is marketing the product may not be sufficient.Commissioner of Central Excise, Trichy v. Rukmani Pakkwell Traders - relying on para 7 of decision, it was stated that "we are afraid that in coming to this conclusion the tribunal has ignored Explanation IX. Explanation IX makes it clear that the brand name or trade name shall mean a brand name or a trade name (Whether registered or not) that is to say a name or a mark, code number, design number, drawing number, symbol, monogram, label, signature or invented word or writing. This makes it very clear that even a use of part of a brand name or trade name, so long as it indicates a connection in the course of trade could be sufficient to disentitle the person from getting exemption under the notification.

7. On behalf of the respondent, it was argued that the Commissioner has given a finding in para VII & VIII under the heading discussion and finding that on comparing the two bags submitted by the noticee which were submitted by them during the course of personal hearing on 27.12.2001 it is clear that brand name BBC was more prominent on their bags whereas in case of M/s Hira Industries Ltd. Jagadalpur brand "HIRA" with a logo of diamond on top is more prominent. This fact may be further corroborated with samples and drawings of HDPE bags submitted by the noticee to the Assistant Commissioner, Central Excise & Custom, Raipur. Hence M/s Hira Cement, Raipur have brand name BBC on their products. They have not used Hira Cement as their brand name, therefore, he held that both firms are not using common brand name on the packings of their products which will disentitle the noticee from benefit of exemption under Notification No. 1/93 as amended and 38/97.

In their cross-objections, they had taken the plea that in an earlier order-in-original No. 432/Ch.25/C/2001 dated 21.9.2001 demand based on the allegation relating to brand name were dropped. The Revenue has not filed any appeal against the said order. Since this order has decided the issue, the cement packed in two different brand name/logo one of Hira Industries and other of Hira Cement could not have been taken in review to agitate the matter in further appeal, when earlier no appeal was filed for the same cement and packed in the same type of bags with the same logos.

8. The Hon'ble Supreme Court remanded the case for afresh decision on the ground that in case of Commissioner of Central Excise, Chandigarh v. Mahaan DairiesCommissioner of Central Excise, Calcutta v. Emkay Investments (P) Ltd.Commissioner of Central Excise, Trichy v. Rukmani Packwell Traders if the manufacturer uses some brand of its own, it would be entitled to, but it would not be, for one reason or the other, it had been using the brand name of another, In the case of Emkay Investment (supra), which was the basis for the decision of the Commissioner has expressly been overruled by this Court. The cross-objections filed before the Tribunal also had not specifically been adverted to therefore, the

case was remanded back for fresh consideration.

9. We find that in this case the logo which is being used as brand name or trade name by Hira Cement is semi-circle with Diamond below this logo BBC cement is written whereas in the logo for Hira Industries semi circle with diamond in the middle and below its Hira Cement" and, further below "we cast your dreams" is written (samples and logos of the samples are enclosed with this order).

10. The factory address in case of Hira Cement and registered office in case and Hira Industries is the same with same phone numbers and fax number and telegraphic address mentioned in the bags below brand name for both the units. From the logo which is brand name, it is clear that the word BBC and Hira are clearly different and written in bold letters; therefore, this cannot create confusion in the mind of any person that they are deceptive in nature and one can confuse with the other. In the circumstances, we find that both the brand names are different and not deceptive in nature. Similarility should be such that one can confuse with the other products, if one do not carefully looks into it. But in the present case the word BBC and Hira are boldly and clearly written which makes the distinction very clear. Therefore, the decisions of the Supreme Court on which reliance has been placed by Revenue do not support their case, difference is in the brand. The brand names are with diamond in semi-circle and then the names broadly written as BBC and Hira, which are totally different and cannot be deceptive.