SUPREME COURT OF INDIA

Kohinoor Elastics Private

Vs.

Commissioner of Central Excise, Indore

C.A.No.3197 of 2000

(S. N. Variava and Tarun Chatterjee JJ.)

04.08.2005

JUDGMENT

S. N. VARIAVA, J:-

1. Civil Appeal Nc. 3197 of 2000 is by the manufacturer against the Judgment of the Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi ("CEGAT") dated 24th December, 1999 wherein it has been held that the manufacturer is not entitled to the benefit of Notification No. 1/93-C.E., dated 28th February, 1993. Civil Appeal No. 1469 of 2002 is by the Commissioner of Central Excise against the judgment dated 5th September, 2001 wherein for a subsequent assessment year CEGAT followed the Judgment of the Full Bench of the Tribunal in the case of Prakash Industries v. Commissioner of Central Excise, Bhubaneswar, reported in 2000 Indlaw CEGAT 380 (overruled) and held that the manufacturer (same Assessee) is entitled to the benefit of Notification No. 1/93-C.E., dated 28th February, 1993. As parties are same and the point for consideration is the same both the Appeals are being dealt with by this common order. Hereinafter parties will be referred to in their capacity in Civil Appeal No. 3197 of 2000.

2. The question for consideration, in both these Appeals, is whether or not the Appellants i.e. M/s. Kohinoor Elastics Private Limited are entitled to the benefit of the aforementioned Notification. The Appellants manufacture elastics as per specific orders of customers, who are manufacturers of undergarments. As per the orders of the customers the Appellants affix brand/trade names belonging to the respective customers, on the elastic manufactured for that customer.

3. The Appellants claimed exemption of Notification No. 1/93-C.E., dated 28th February, 1993 on the basis that it is a small scale industry. Subsequently it was found out that they were using brand/trade names of other parties and thus the benefit of the Notification was denied to them. For one Assessment Year the Tribunal has, on an analysis of the Notification, concluded that they are not entitled to the benefit of the Notification. However, for another Assessment Year, following a Full Bench Judgment of the Tribunal it has been held that they are entitled to the benefit of the Notification.

4. The relevant portion of the Notification reads as follows : -

"4. The exemption contained in this notification shall not apply to the specified goods, bearing a brand name or trade name (registered or not) of another person :

Provided that nothing contained in this paragraph shall be applicable to the specified goods which are component parts of any machinery or equipment or appliances and cleared from a factory for use as original equipment in the manufacture of the said machinery or equipment or appliances and the procedure set out in Chapter X of the said Rules is followed :

Explanation IX. - "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, [Code number, design number, drawing number, 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." *

5. Clause 4 of the Notification is unambiguous and clear. It specifically states that the exemption contained in the Notification shall not apply to specific goods which bear a brand name or trade name (registered or not) of another person. It is settled law that to claim exemption under a Notification one must strictly comply with the terms of the Notification. It is not permissible to imply words into the Notification which the Legislature has purposely not used. The framers were aware that use of a brand/trade name is generally to show to a consumer a connection between the goods and a person. # The framers were aware that goods may be manufactured on order for captive consumption by that customer and bear the brand/trade name of that customer. The framers were aware that such goods may not reach the market in the form in which they were supplied to the customer. The framers were aware that the customer may merely use such goods as an input for the goods manufactured by him. Yet Clause 4 provides in catagoric terms that the exemption is lost if the goods bear the brand/trade name of another. Clause 4 does not state that the exception is lost only in respect of such goods as reach the market. It does not carve out an exception for goods manufactured for captive consumption. The framers meant what they provided. The exemption was to be available only to goods which did not bear a brand/trade name of another. The reason for this is obvious. If use of brand/trade names were to permitted on goods manufactured as per orders of customers or which are to be captively consumed then manufacturers, who are otherwise not entitled to exemption, would get their goods or some inputs manufactured on job work basis or through some small party, freely use their brand/trade name on the goods and avail of the

exemption. It is to foreclose such a thing that Clause 4 provides, in unambiguous terms, that the exemption is lost if the "goods" bear a brand/trade name of another.

6. Mr. V. Sridharan, learned Counsel for the Appellants placed strong reliance upon Explanation IX set out hereinabove. He submitted that the words "that is to say" qualify the words "Brand name" or "Trade name". He submitted that Explanation IX thus makes it clear that the brand name or the trade name must have been used so as to indicate a connection in the course of trade between such specified goods and some person using such name or mark. He submitted that a brand/trade name has significance only because it conveys to the customer in the market a connection between the product and some person. It was strenuously submitted that the words "so as to indicate a connection in the course of trade" make it clear that the brand/trade name must be used on goods which ultimately reach a customer. He submitted that a brand/trade name has relevance only because the customer associates the product bearing the brand/trade name with a person. He submitted that in this case the customers associated the brand/trade names (used by the Appellants) not with the elastics (which never reached the market) but with undergarments manufactured by the Appellants customer. He submitted that the elastic manufactured by the Appellants was never sold in the market and was only supplied to the customer who so ordered it. He submitted that thus the use by the Appellants of the brand/ trade name could never be considered to be for purposes of indicating a connection in the course of trade between the goods and the person/s using the brand/ trade name. He submitted that the use of brand/trade names on elastics, which are not sold in the open market, does not convey to the ultimate customer that the elastics have any connection with the owner of the brand/trade name. He submitted that the customer only gets the final product i.e. the undergarments and thus the customer only associates the brand/trade name with the undergarment and not with the elastics. He submitted that in such cases the exemption is not lost.

7. It is on just such a reasoning that the Full Bench of the Tribunal has held that the exemption is not lost. We are afraid that there is complete misreading and a misunderstanding of the Notification. As set out hereinabove, Clause 4 of the Notification is clear and unambiguous. It says that the exemption is lost if the "goods" bear the brand/trade name of another. There are no other qualifying words. The term "goods" admittedly refers to "goods" which are otherwise excisable except for the exemption granted by the Notification. In this case admittedly "goods" are the elastic manufactured by the Appellants. As stated above Clause 4 does not provide that exemption is lost only for "goods (elastic)" which are sold in the market or on those "goods (elastic)" which reach customers without any change in form. Clause 4 does not provide that the exemption will not be lost if the "goods (elastic)" are only used as inputs in the manufacture of other goods. Most importantly Clause 4 does not provide that exemption is not lost if the "goods (elastic)" are manufactured as per orders of a customer and for use only by that customer. Explanation IX nowhere detracts from this position. It is correct that the words "that is to say" qualify the words "Brand name" or "Trade name". However the words "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" cannot be read de hots Clause 4. They have to be read in the context of Clause 4. The words "used" indicates use by the manufacturer. It is the manufacturer, in this case the Appellant, who is applying/affixing the brand/trade name on the goods. Thus the words "for the purpose of indicating" refers to the purpose of the manufacturer (Appellant). The "course of trade" is of that manufacturer and not the general course of trade. Even if a manufacturer only manufactures as per orders of customer and delivers only to that customer, the course of trade, for him is such manufacture and sale. In such cases it can hardly be argued that he has no trade. In fairness it must

be stated that it was not argued that there was no trade. Such a manufacturer may, as per the order of his customer, affix the brand/trade name of the customer on the "goods" manufactured by him. This will be for the purpose of indicating a connection between the "goods" manufactured by him and his customer. In such cases it makes no difference that the "goods" as manufactured did not reach the market. The "use" of the brand/trade name was "in the course of trade" of the manufacturer for the "purpose of indicating a connection between the goods and the customer who used the brand/trade name". Clearly in such a case the exemption is lost. Now in this case there is no dispute on facts. The "course of trade" of the Appellant is making elastics for specified customers. It is an admitted position that the Appellants are affixing the brand/trade name of their customers on the elastics. They are being so affixed because the Appellants and/or the customer wants to indicate that the "goods (elastic)" have a connection with that customer. This is clear from the fact that the elastics on which brand/trade name of "A" is affixed will not and cannot be used by any person other than the person using that brand/trade name. As set out hereinabove once a brand/trade name is used in the course of trade of the manufacturer, who is indicating a connection between the "goods" manufactured by him and the person using the brand/trade name, the exemption is lost. In any case it cannot be forgotten that the customer wants his brand/trade name affixed on the product not for his own knowledge or interest. The elastic supplied by the Appellants is becoming part and parcel of the undergarment. The customer is getting the brand/trade name affixed because he wants the ultimate customer to know that there is a connection between the product and him. Of course the intention of the customer is not relevant for the purposes of this Notification. This is being mentioned only to indicate that interpretation sought to be placed by Mr. Sridharan would enable manufacturers, who are otherwise not eligible, to get manufactured from small scale industries like the Appellants their "goods" or some inputs, affix their brand/trade name and still avail of exemption. When the wording of the Notification are clear and unambiguous, they must be given effect to. By a strained reasoning benefit cannot be given when it is clearly not available.

8. It must be mentioned that reliance was sought to be placed on the meaning of the terms "brand name" and "trade name" as well as the words "indicating a connection in the course of trade" in the context of Trade Marks. In our view, the Notification has to be interpreted in the context in which the words are used in the Notification. Context in which such words are used under the Trade Marks Act or under principle governing trade marks have no relevance for purposes of interpreting such a Notification.

9. Under these circumstances, we would have dismissed Civil Appeal No. 3197 of 2000 and allowed Civil Appeal No. 1469 of 2002. However, we are shown a Circular of the Board dated 27th October, 1994 which clearly gives an interpretation as canvassed before us by Mr. Sridharan. Before this Court there is a divergence of opinion whether such Circulars prevail over Judgments of this Court. This question has been referred to a Constitution Bench by a Judgment in the case of Commissioner of C. Ex., Bolpur v. Ratan Melting & Wire Industries reported in (S.C.) (referred). We, therefore, after giving the above finding, tag these matters with the cases before the Constitution Bench. We clarify that this is only for the purpose of ascertaining whether the Circular would prevail or the Judgment of this Court would prevail. If, ultimately it is held by the Constitution Bench that Judgments of this Court prevail, then Civil Appeal No. 3197 of 2000 will stand dismissed and Civil Appeal No. 1469 of 2002 will stand allowed without any further Orders. If, however, the Constitution Bench takes a contrary opinion, then of course, the reverse will follow. In either case there will be no order as to costs.

10. Before parting we clarify that the Full Bench Judgment of the Tribunal stands overruled.