

SUPREME COURT OF INDIA

Commissioner of Central Excise, Chennai-II Commissionerate, Chennai

Vs.

Australian Foods India Ltd. Chennai

C.A.No.2826 of 2006

(D.K.Jain and Jagdish Singh Khehar JJ.)

14.01.2013

JUDGMENT

D.K. JAIN, J.

1. The short question of law which arises for consideration in this appeal is, whether the manufacture and sale of specified goods that do not physically bear a brand name, from branded sale outlets, would disentitle an assessee from the benefit of S.S.I. Notification No. 1/93-C.E., dated 28th February, 1993, as amended from time to time.

2. Briefly stated, the material facts giving rise to the appeal, are as follows:

Pursuant to an inspection by the officials of the enforcement Commissionerate, Chennai-II at the sales outlet of the respondent (hereinafter referred as “the assessee”), revealed that the assessee was engaged in the manufacture and sale of cookies from branded retail outlets of “Cookie Man”. The assessee had acquired this brand name from M/s Cookie Man Pvt. Ltd, Australia (which in turn acquired it from M/s Auto-bake Pvt. Ltd., Australia). The brand name used the words “Cookie Man” accompanied with a logo depicting the smiling face of a mustachioed chef. The assessee was selling some of these cookies in plastic pouches/containers on which the brand name described above was printed. No brand name was affixed or inscribed on the cookies. Excise duty was duly paid, on the cookies sold in the said pouches/containers. However, on the cookies sold loosely from the counter of the same retail outlet, with plain plates and tissue paper, duty was not paid.

3. The retail outlets did not receive any loose cookies nor did they manufacture them. They received all cookies in sealed pouches/containers. Those sold loosely were taken out of the containers and displayed for sale separately. Even though no separate register was maintained to account for the sale of the cookies sold loosely, their numbers were calculated from the number of empty pouches/containers left behind at the end of day.

4. On scrutiny of the documents recovered from the said outlet and on the basis of the statement of the Executive Director, a notice dated 20th December, 2012 was issued to the assessee by the Commissioner to show cause as to why (i) the cookies sold by the assessee at its outlets be not classified under Chapter sub-heading 1905.11 as biscuits and (ii) in view of their use of brand name “Cookie Man” on sale of cookies in plastic pouches/containers, S.S.I. exemption should not be disallowed.

5. Upon consideration of the explanation furnished by the assessee, the Commissioner inter-alia came to the conclusion (relevant for the controversy at hand) that unless the specified goods or the packaging in which these are sold, bear the brand name or the logo, prescribed S.S.I. exemption cannot be denied. Thus, the Commissioner held that since there was neither any material evidence nor averment to prove that the brand name was embossed on the cookies, the assessee was eligible to avail of the benefit of small scale exemption in respect of cookies sold loosely from the counter of the retail outlet. Being aggrieved by the order, both the Department and the assessee filed cross appeals before the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench at Chennai (hereinafter referred to as “the Tribunal”).

6. The decision of the Commissioner having been affirmed by the Tribunal, the revenue is before us in this appeal under Section 35L(b) of the Central Excise Act, 1944 (for short “the Act”).

7. There is no dispute that the specified good is to be classified under sub-heading 1905.11 as Biscuits, manufactured with the aid of power. The controversy revolves around para 4 of S.S.I. notification No. 1/93-C.E. dated 28th February, 1993, which, in its erstwhile form, read as follows: -

“4. The exemption contained in this notification shall not apply to the specified goods where a manufacturer affixes the specified goods with a

brand name or trade name (registered or not) of another person who is not eligible for the grant of exemption under this notification...”

8. The meaning of a “brand name” or “trade name” is enunciated in Explanation IX of the said notification which says: -

“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, 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.”

9. Para 4 of the said notification that deals with exemption for certain goods “affixed” with a brand name was amended vide notification No. 59/94- C.E. dated 1st March, 1994, to read:-

“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...”

10. Part (iii) of para J of the Budget Changes-1994-95 dealt with “Changes in the SSI schemes” explains the purpose of the amendment in the following words:

“(iii) Brand name provision has been amended so as to provide that SSI concession shall not apply to the goods bearing the brand name or trade name of another person. The effect of this amendment is that if an SSI unit manufactures the branded goods for another person irrespective of whether the brand name owner himself is SSI unit or not, such goods shall not be eligible for the concession. Another implication of this amendment is that the requirement of affixation or brand name by the SSI unit has been changed and now the only condition is that the goods cleared by SSI unit bearing a brand name of another person shall not be eligible for the concession irrespective of the fact whether the brand name was affixed by the SSI unit or that, the input material used by the SSI unit was already affixed with brand name.”

11. Mr. N.Venkataraman, learned senior counsel appearing on behalf of the assessee argued that a combined reading of Para 4 and Explanation IX of the

notification, along with Para J of the Budget Changes, would lead to the conclusion that only specified goods bearing an affixed brand name, or in other words, those goods that physically display the brand name, are not covered by the exemption. Learned counsel relied on the decision of this Court in the case of Commissioner of Central Excise, Jamshedpur Vs. Superex Industries, Bihar[1] for the proposition that a physical manifestation of a brand name on a good is a necessary requirement for disqualification from the exemption granted by the concerned notification. Learned counsel also relied on the same decision to urge that this Court cannot look into the surrounding circumstances of a good, especially the specific outlet from which it is sold, to construe if it is branded or not; scrutiny, in his opinion, must be limited to the specified good itself. The relevant paragraph of the order on which emphasis was laid, reads as follows:

“3.CEGAT has held that the benefit of the notification would be lost only if the manufacturer affixes the specified goods with a brand name or trade name of the another who is not eligible to the exemption under the notification. It could not be denied that the name Kirloskar is not affixed to the generating sets. CEGAT has held that merely because, in the invoices, the set is passed off as a Kirloskar generating set, the benefit of the notification would not be lost. We see no infirmity in this reasoning. We, therefore, see no reason to interfere.”

12. We are unable to appreciate as to how a compulsory requirement of physical manifestation of a brand name on the specified good, for it to be construed as a branded good, can be derived from the above passage. The decision in the above case simply recognizes that the benefit would be lost only if a manufacturer affixes the specified goods with a brand or trade name of another who is not eligible for the exemption under the notification. It does not state that the specified good must itself bear or be physically affixed with the brand or trade name. Such an interpretation would lead to absurd results in case of goods, which are incapable of physically bearing brand names. For instance, the goods, which, due to their very nature and structure, are incapable of bearing brand names, would always be deemed unbranded. Liquids, soft drinks, milk, dairy products, powders, edible products, salt, pepper, sweets, gaseous products, perfumes, deodorants etc., to name a few, are either liquids, gases or amorphous/brittle solids, making it impossible for the good to be affixed with a brand name. In some situations, such an affixation may be impossible, in which case, it would be permissible for the specified good to continue being a branded good, as long as its environment conveys that it is branded. By environment we mean packaging and wrapping of the good, accessories it is served with, uniform of vendors, invoices, menu cards,

hoardings and display boards of outlet, furniture and props used, the specific outlet itself in its entirety and other such factors, all of which together or individually or in parts, may convey that a good is a branded one, notwithstanding that there is no physical inscription of the brand or trade name on the good itself. Further, a specific, dedicated and exclusive outlet from which a good is sold is often the most crucial and conclusive factor to hold a good as branded. The decision referred to above only made a limited point that invoices alone cannot be the sole basis of construing whether a good is a branded good or not; it does not hold that a specified good itself must be stamped with a brand name. It is therefore, permissible to look into the environment of the good. However, like in the case of Kirloskar generators [Superex Industries (supra)], invoices bearing brand name could not be the sole basis of construing whether goods are branded or not. That decision would depend on the facts and circumstances of the case. There can be no precise formula for such a determination; in some cases certain factors may carry more weight than in other situations. However, in most circumstances, an exclusive branded outlet from which the good is sold, would be a crucial factor in determining the question.

13. Learned counsel strongly relied on another decision of this Court in Kohinoor Elastics (P) Ltd. Vs. Commissioner of Central Excise, Indore[2], for the proposition that only the “specified good” in question must be scrutinized and the expression cannot be expanded to mean “specified outlets” or other surrounding circumstances. To bring home his point, reliance was placed on the following paragraphs from the said decision:

“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 categorical terms that the exemption is lost if the goods bear the brand/trade name of another.

Clause 4 does not state that the exemption 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 be permitted on goods manufactured as per the 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.”

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“7.....Now in this case there is no dispute on facts. The “course of trade” of the appellants 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...”

14. We feel that to hold from the above passages that every good must be physically stamped with a brand or trade name to be considered a branded good in terms of the notification, and that, one is forbidden to look beyond the specified good into the surrounding environment of the good in construing if it is a branded good or not, would be a complete misunderstanding of the above judgment and a

distortion of the concept of a brand or trade name. The above judgment makes no such observation and was delivered on a completely different set of facts and circumstances. It involved a case of undergarments manufactured by a producer P2, which used branded elastics produced by P1, and retained the brand name of P1 in the final product. P2 was denied exemption under the same notification involved in the present case because of the appearance of brand name of another i.e. P1, not covered by the same notice. P2 argued that the presence of P1's brand name should not be taken as a basis for disqualification from the benefits of the exemption since the customer buying the good would continue to associate the good with P2 and not P1, thus making it a branded good of only P2. This Court rejected the contention and held that P1 is providing a stamped input for captive consumption to P2 "because he wants the ultimate customer to know that there is a connection between the product and him". The Court further observed that the term "specified goods" is used without any caveats and hence rejected the contention that some consideration should be given to the fact that P1 was used only as an input in the making of the final product of P2. It is in this background that this Court observed that the requirement of the notifications must be adhered to strictly and cannot be diluted by substituting the term "specified goods" with the nature of goods or the manner of disposal. In case the specified good clearly exhibits a brand name of another not covered by the notification, it would squarely fall within the confines of Para 4 of the notification; looking beyond the specified good to consider whether it is an input or not is not necessary in case of a conspicuous brand name. However, to apply this principle to the scenario of a specified good that does not contain a brand name at all would be equivalent to fitting a square peg in a round hole. If a final product is marked or stamped with a brand name, it is clearly a branded good; to stretch this principle to imply that one not marked by any brand is an unbranded good, is untenable. In case a scrutiny of the good itself fails to reveal a brand name then the search must not end there; one ought to look into the surrounding circumstances of the good to decipher, if it is in fact branded or not.

15. We are of the opinion that such an approach is necessary to maintain the essence of the concept of a brand name. A brand/ trade name must not be reduced to a label or sticker that is affixed on a good. The test of whether the good is branded or unbranded, must not be the physical presence of the brand name on the good, but whether it, as Explanation IX reads, "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 the person." Therefore, whether the brand name appears in entirety or in parts or does not appear at all cannot be

the chief criterion; primary focus has to be on whether an indication of a connection is conveyed in the course of trade between such specified goods and some person using the mark. Highlighting this principle, this Court in Commissioner of Central Excise, Trichy Vs. Rukmani Pakkwell Traders[3] observed thus: -

“6. The Tribunal had also held that under the notification the use must be of “such brand name”. The Tribunal has held that the words “such brand name” show that the very same brand name or trade name must be used. The Tribunal has held that if there are any differences then the exemption would not be lost. 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 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 would be sufficient to disentitle the person from getting exemption under the notification. In this case, admittedly, the brand name or trade name is the word “ARR” with the photograph of the founder of the group. Merely because the registered trade mark is not entirely reproduced does not take the respondents out of clause 4 and make them eligible to the benefit of the notification.”

16. Similarly, in Commissioner of Central Excise, Chandigarh-I, Vs. Mahaan Dairies[4], it was noted as follows:

“6. We have today delivered a judgment in CCEv. Rukmani Pakkwell Traders, (2004) 11 SCC 801 wherein we have held in respect of another notification containing identical words that it makes no difference whether the goods on which the trade name or mark is used are the same in respect of which the trade mark is registered. Even if the goods are different, so long as the trade name or brand name of some other company is used the benefit of the notification would not be available. Further, in our view, once a trade name or brand name is used then mere use of additional words would not enable the party to claim the benefit of the notification.”

“8. It is settled law that in order to claim benefit of a notification, a party must strictly comply with the terms of the notification. If on wording of the notification the benefit is not available then by stretching the words of the

notification or by adding words to the notification benefit cannot be conferred. The Tribunal has based its decision on a decision delivered by it in *Rukmani Pakkwell Traders v. CCE(1999) 109 ELT 204(CEGAT)*. We have already overruled the decision in that case. In this case also we hold that the decision of the Tribunal is unsustainable. It is accordingly set aside.”

17. As aforesaid, once it is established that a specified good is a branded good, whether it is sold without any trade name on it, or by another manufacturer, it does not cease to be a branded good of the first manufacturer. Therefore, soft drinks of a certain company do not cease to be manufactured branded goods of that company simply because they are served in plain glasses, without any indication of the company, in a private restaurant. The good will continue to be a branded good of the company that manufactured it. The same principle would apply in the case of potato chips, chocolates, biscuits, wafers, powders and other such goods often sold from various locations.

18. In case of goods sold from exclusive single brand retail outlets or restaurants or stores, the fact that a good is sold from such a store ought to be a relevant fact in construing if the good is its branded good or not. In the case of such goods, perhaps a rebuttable presumption arises in favour of such goods being branded goods of the specified store. Such a presumption can be rebutted if it is shown that the specified good being sold is in fact a branded good of another manufacturer. Thus, branded potato chips, soft drinks, chocolates etc. though sold from such outlets, will not be considered to be goods of such outlets. However, all other goods, sold without any appearance of a brand or trade name on them, would not be deemed unbranded goods; to the contrary, they may be deemed to be branded goods of that outlet unless a different brand or trade name appears.

19. Hence, we hold that it is not necessary for goods to be stamped with a trade or brand name to be considered as branded goods under the SSI notification, discussed above. A scrutiny of the surrounding circumstances is not only permissible, but necessary to decipher the same; the most important of these factors being the specific outlet from which the good is sold. However, such factors would carry different hues in different scenarios. There can be no single formula to determine if a good is branded or not; such determination would vary from case to case. Also, our observations must be limited to this notification and not supplanted to other laws with similar subject matter pertaining to trade names and brand names.

20. Applying the said principles on the facts at hand, we fail to see how the same branded cookies, sold in containers, can transform to become unbranded ones, when sold from the same counter, or even from an adjoining counter, without packaging carrying the brand name. Admittedly, on the same cookies, physically bearing brand “Cookie Man” sold in containers carrying brand name duty is paid. It is interesting to note that learned counsel appearing on behalf of the assessee first argued that to determine if the cookies sold from the counter are branded or not, scrutiny must be limited to the case of the cookies themselves without looking at the surrounding circumstances; yet went on to argue that the tissues and plates they were served on did not bear the brand of the specified good. Either the environment of the goods can be looked into, or cannot be taken into consideration at all. Once it is established, as in the instant case, that the environment of the goods can be gone into to construe if it is branded or not, we do not see why the environment of the goods should be limited to the plates and tissues, on which they are served. As aforesaid, in the instant case, the cookies were sold from a dedicated outlet of “Cookie Man” where no other products but those of the assessee were sold. The invoices carry the name of the company and the cookies were sold from a counter of the store. In our opinion, the store’s decision to sell some cookies without containers that are stamped with its brand or trade name does not change the brand of the cookies. We are convinced that the cookies sold even without inscription of the brand name, indicate a clear connection with the brand name, in the course of assessee’s business of manufacture and sale of cookies under the brand name “Cookie Man”. They continue to be branded cookies of “Cookie Man” and hence cannot claim exemption under the SSI Notification.

21. In view of the foregoing discussion, we are of the opinion that the impugned decision of the Tribunal is erroneous and unsustainable. Consequently, the appeal is allowed and the impugned order is set aside, leaving the parties to bear their own costs.

[1] (2005) 4 SCC 207

[2] (2005) 7 SCC 528

[3] (2004) 11 SCC 801

[4] (2004) 11 SCC 798
