

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
EXCISE APPEAL BRANCH

Appeal No. E/1140/2006 - EX[DB]

Date 22/07/2010

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
C.C.E. JALLANDHAR(HQ. AT CHANDIGARH)
C.R.BUILDING, PLOT NO. 19, SECTOR 17-C,
CHANDIGARH.
C.C.E. JALLANDHAR(HQ. AT CHANDIGARH)

M/S ASIAN POLYMERS.

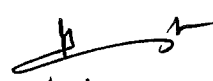
Appellant

Vs

Respondent

I am directed to transmit herewith a certified copy of Final order No. 516/
passed by the Tribunal under Section 35-C(1) of Central Excises Act, 1944

2010 EX[DB] dated 07-7-10


Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent

M/S ASIAN POLYMERS.

D-37, FOCAL POINT, JALANDHAR

2. Adv. / Consult

SH. RAVI CHOPRA, ADV.,
CONNAUGHT CIRCUS, JALANDHAR CITY

3 C.D.R

~~4 J.C.D.R.~~

5 Bar association, CESTAT, New Delhi

6 Director Publications, Customs, Excise. I.P. Estate, New Delhi

7 M/s Centax Publications Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi - 3

8 Company Law Institute of India Pvt Ltd., No.2(Old No. 36), Vaithyaram Street, T. Nagar, Chennai -17

9 M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017

10 Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005

11 Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,Ahmedabad-15

12 LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Harvana)

13 TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070

14 Office Copy

15 Guard file

16. HON'BLE PRESIDENT.


Assistant Registrar
(Excise Appeal Branch)

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE
TRIBUNAL, NEW DELHI, PRINCIPAL BENCH NEW DELH

Date of Hearing/ Decision: 07.07.2010

For approval and signature:

Hon'ble Mr. Justice R.M. S. Khandeparkar, President
Hon'ble Mr. Rakesh Kumar, Member (Technical)

1. Whether Press Reporters may be allowed to see
CESTAT (Procedure) Rules, 1982.

Yes

2. Whether it should be released under Rule 27 of the
CESTAT (Procedure) Rules, 1982 for publication
in any authoritative report or not?

Yes

3. Whether Their Lordships wish to see the fair copy
of the Order?

: See

4. Whether Order is to be circulated to the Departmental
authorities?

Yes

Excise Appeal No.1140 of 2006-Excise Branch

(Arising out of Order-in-Appeal No.454/CE/CHD/2005 dated
28.12.2005 passed by the Commissioner of Central Excise
(Appeals), Chandigarh).

CCE, Jalandhar

Appellant

Vs.

M/s. Asian Polymers

...Respondent

Appearance: Shri V. Choudhary, DR appeared for the appellants.
Shri Ravi Chopra, DR appeared for the
respondent/Deptt.

CORAM: Hon'ble Mr. Justice R.M.S. Khandeparkar, President
Hon'ble Mr. Rakesh Kumar, Member (Technical)

FINAL Order No. *516/10-EG* Dated: 07.07.2010

Per Justice Shri R.M.S. Khandeparkar:

This appeal arises from order dated 28.12.2005 passed by the
Commissioner (Appeals), Chandigarh. By the impugned order, the

Commissioner (Appeals) has allowed the appeal which was filed by the respondents herein against the order dated 4.6.2003 of the Joint Commissioner, Jalandhar. By the said order, the Joint Commissioner while rejecting the benefit of Notification No.1/93-CE dated 28.02.93 to the respondents had confirmed the demand of duty to the tune of Rs.3,00,246/- with penalty of Rs.50,000/-. Consequent to setting aside of the said order in appeal, the respondents have been declared to be entitled to the said benefit under the said notification.

2. The respondents herein were the manufacturers of Tyres, Tubes, Tyre flaps and Rice Rubber Rolls classifiable under Chapter 40 of the Central Excise Tariff Act, 1985. The respondents were availing the benefit of SSI exemption under Notification No.1/93-CE dated 28.02.1993. The respondents had filed the declaration in terms of Rule 73 (B) of the Central Excise Rules, 1944, w.e.f. 1st May, 1995, wherein they declared the description of their goods including the brand name to be "ASIAN" for Rice Rubber Rolls and Polishers. Subsequently, they filed another declaration under Rule 173 B w.e.f. 23rd July, 1996, declaring their brand name for the said product to be "RHINO", "SONA", "FIELD MARSHAL", "ASIAN", "S.CHAMPION" and "ANIL SPECIAL". The records with the Department disclosed that another industry by name M/s. Lyallpur Rubber Mills, Jalandhar was also engaged in the manufacture of Rice Rubber Rolls and were clearing their products under brand names, "RHINO", "SONA", "FIELD MARSHAL", "ASIAN" and

"S.CHAMPION" since prior to the commencement of the respondent-firm and same was specified in their declarations and classifications filed by them from time to time. On investigation being carried out a show cause notice dated 3.2.1997 came to be issued to the respondents requiring them to show cause as to why the benefit under the said notification should not be denied and an amount of Rs.3,00,246/- in relation to the period from 1st July, 1996 to 31st December, 1996 and should not be recovered being excise duty on the branded goods cleared during the said period valued at Rs.61,19,476.72 by charging duty @ 20% Adv. and why penal action should not be taken.

3. The notice was contested by the respondents on the ground that there was no material to prove the ownership of those brand names in favour of the M/s. Lyallpur Rubber Mills, besides that those names were common brand names, which were being used by different manufacturers. It was also the contention of the respondent that in order to deny the benefit under the said notification, it is necessary for the Department to establish that the brand name is owned by someone else and is being used in relation to specified goods for the purpose of indicating or so as to indicate a connection in the course of trade between such specified goods and the person using such brand name and there is no material in this regard placed by the Department.

4. The Adjudicating Authority after hearing the parties, while rejecting the benefit under the said notification, confirmed the demand and imposed the penalty as stated above.

5. In appeal against the said order, the respondent in addition to the points raised in reply to the show cause notice also contended that the adjudicating authority had failed to appreciate that the price charged by the respondent was cum duty price and for working out the assessable value, the element of duty was required to be excluded and secondly that, as there was no case of evasion of duty to establish against the respondents, no penalty was warranted.

6. Ld. DR while drawing our attention to the provisions of Rule 173B of the said Rules along with the said notification and placing reliance in the decision of the Apex Court in the matter of **Commissioner of Central Excise, Trichy Vs. Rukmani Pakkwell Traders reported in 2004 (165) ELT 481 (SC)**, **Commissioner of Central Excise & Customs, Indore Vs. Parenteral Drugs (I) Ltd. reported in 2009 (236) ELT 625 (SC)**, **Unison Electronics Pvt. Ltd. Vs. CCE, Noida reported in 2009 (235) ELT 206 (SC)**, **Commissioner of Central Excise, Chandigarh-I Vs. Mahaan Dairies reported in 2004 (166) ELT 23 (SC)**, **Meghraj Biscuits Industries Ltd. Vs. Commissioner of Central Excise, U.P. reported in 2007 (210) ELT 161 (S.C.)**, **Mysore Metal Industries Vs. CC, Bombay reported in 1988 (36) ELT 369 (SC)** and **BOC India Ltd. Vs. State of Jharkhand reported in 2009 (237) ELT 7**

(SC) submitted that the provisions of the notification clearly require the manufacturer to establish that they are using the brand name, which does not belong to any other person and in the absence of any material in that regard, in the face of the records placed by the Department relating to the declaration, prior in time, by M/s. Lyallpur Rubber Mills reveal similar brand name for their products and further their classification list filed from time to time disclosed that the respondent had been using the brand name belonging to another person and this aspect was totally overlooked by the Commissioner (Appeals). As against this, Id. Advocate for the respondent placing reliance in the decision of the Tribunal in the matter of **Commissioner of Central Excise, Visakhapatnam Vs. Balaji Electrodes (P) Ltd. reported in 2005 (191) ELT 204 (Tribunal-Bangalore)** and **Minimax Industries Vs. CCE, Delhi-II reported in 2010-TIOL-882-CESTAT-Delhi** submitted that in the absence of any material being placed on record of actual user of the brand name by other person, the adjudicating authority had erred in denying the benefit of the notification to the respondents and which has been rightly corrected by the Commissioner (Appeals). Without prejudice to this contention, he further submitted, in case the Tribunal arrives at any contrary decision, then it should also consider other grounds, which were raised by the respondents before the Commissioner (Appeals) viz. in relation to the cum duty price and the penalty. He has also drawn our attention to the Circular issued

by the Board being Circular No.52/52/94-CX dated 1.9.94 while contending that in accordance with the said circular, which was issued on the basis of the opinion given by the Law Ministry, mere use of the brand name which is also used by other manufacturers cannot be a justification to deny the benefit under the said notification unless the brand name is established to be belonging to a particular person.

7. The notification in question in order to avail benefit thereunder clearly requires compliance of Condition No.4 stated thereunder. The relevant portion of Condition No.4 reads thus:-

Condition No.4: "The exemption contained in this notification shall not apply to the specified goods, bearing a brand name or trade name (registered or not) or another person."

8. The Explanation IX to the said notification provides thus:-

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. The Apex Court in **Rukmani Pakkwell Traders'** case while referring to the Condition No.4 and Explanation No.IX, held thus:-

“Clause 4 of this Notification and the explanation (set out hereinabove) make it clear that the exemption will not apply if the specified goods (i.e. scented supari) bears a brand or trade name of another person. Neither in Clause 4 of the Notification nor in Explanation IX is it provided that the specified goods must be the same or similar to the goods for which the brand name or trade name is registered. The Tribunal has in adopting the above reasoning effectively added to the Notification words to the effect “brand name or trade name in respect of the same goods”. This is clearly impermissible. It is to be seen that there may be an unregistered brand name or an unregistered trade name. These might not be in respect of any particular goods. Even if an unregistered brand name or trade name is used the exemption is lost. This makes it every clear that the exemption would be lost so long as the brand name or trade name is used irrespective of whether the use is on same goods as those for which the mark is registered.”

10. In **Mahaan Dairies's** case while reiterating the decision in **Rukmani Pakkwell Traders's** case, it was held thus:-

“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.”

11. In **Meghraj Biscuits Industries Ltd.**'s case, the Apex Court has held thus:-

“21. Applying the principle of deemed equivalence we may clarify that if the SSI unit wrongly affixes a trade mark of another person, be it registered or not, or if it uses the trade mark of an ineligible person then such default would not be eliminated by the above principle of deemed equivalence embodied in Section 28 of the Trade Marks Act, 1999 as that principle is based on a deeming fiction which fiction is confined only to the provisions of the Trade Marks Act.”

12. The findings arrived at by the Adjudicating Authority clearly shows that the brand names, which are being used by the respondents, were already declared as a brand names of another manufacturer viz. M/s. Lyallpur Rubber Mills and that too in relation to the similar products. It is also pertinent to note that the respondents, being shareholder of M/s. Lyallpur Rubber Mills, belong to the same family. The finding also discloses that the materials placed before the authorities included the classification list filed by M/s. Lyallpur Rubber Mills from time to time which revealed clearance of goods with the brand names. As against this, it was the specific plea of the respondents that the said names were not the brand names of M/s. Lyallpur Rubber Mills but they were the common brand names, which were being used by different

manufacturers. As rightly pointed out by the Id. DR, it is settled law that the assessee claiming an exemption under an exemption notification has to establish that he has complied with all the conditions, which are required to be complied with to avail the benefit under the notification. The decisions of the Apex Court in **Mahaan Dairies, BOC India Ltd.,** as well as **Mysore Metal Industries** are very clear on this aspect. In spite of the fact that it was for the respondents to establish that they were justified in claiming the exemption under the said notification and that they were not using the brand name of another person, no material was placed on record in support of the contention that the brand name used by them for their product was a common brand name used by different manufacturers. Ld. Advocate for the respondents fairly conceded that materials on record do not disclose any evidence having been placed on record in that regard by the respondents. His contention, however, was that it was for the Department to prove that the brand name belongs to another person. As far as the onus in that regard is concerned, the Department had already discharged the same by producing the declaration under classification list filed by M/s. Lyallpur Rubber Mills, disclosing the fact that the said company had been clearing their product with the said brand name in accordance with their declaration and classification list. Being so, it was necessary for the respondents to discharge the burden upon

them in terms of the said notification, which records disclose that they have failed to discharge the burden.

13. The findings by the Commissioner (Appeals) that mere declaration by another company would not ipso facto prove that the same brand names were used by any other company has ~~not~~ been arrived without referring to the materials on record in that respect. Besides, as already observed above, the burden was essentially upon the respondents, which they failed to discharge.

14. The reliance in the decision of the Tribunal in the matter of **Minimax Industries Vs. CCE, Delhi-II**, to which both of us were parties, is totally mis-placed. It is true that in the said decision, it was observed that it was necessary to establish that the person was manufacturing the product using the brand name which was being used by another person. The said observation was made in the facts and circumstances, which disclosed total absence of materials about use of the band name, which was used by the appellant therein or by any another person. That is not the case in the matter in hand. The declaration filed by M/s. Lyallpur Rubber Mills and their classification list and clearance of goods from time to time disclosed that the brand name used by the respondents was in fact being used by the said M/s. Layallpur Rubber Mills since prior to even formation of the company by the respondents.

15. The decision in **Balaji Electrodes (P) Ltd.** is also of no help to the respondents as the same is clearly contrary to the established

principles of law, which has been reiterated by the Apex Court time and again, including in the decisions referred to above on the point of burden of proof on the assessee regarding the claim of exemption under exemption notification. As regards the Circular issued by the Board, the same states that, "the field formations may be advised accordingly and the trade may be informed suitably, that even after deletion of the third proviso referred to above, the lock manufacturers cannot be denied the benefit of exemption under Notification No.1/93-CE merely on the ground that they are using marks, labels, etc. used by other manufacturers, so long as such marks, etc. do not belong to a particular person." Obviously, the Circular merely advises that in case of brand name used by different manufacturers, which constitute common brand name, would not disentitle the manufacturer from claiming benefit under the said notification on use of such brand name. As already seen above, the respondents have failed to establish that the brand names used by them were common brand names.

16. The claim pertaining to the cum-duty price and the penalty is concerned, undisputedly was not considered by the Commissioner (Appeals). We have no benefit of the finding of the lower authority on this aspect of the matter before considering the matter at the appellate stage. Being so, it would be appropriate to remand the matter in that regard to the adjudicating authority to deal with those

issues in accordance with the provisions of law on the basis of the materials available on record.

17. In the result, therefore, the appeal succeeds and the impugned order is hereby set aside while holding that the respondents are not entitled for the benefit of the said notification for the period in question. However, as regards the issue of claim regarding cum-duty price and the penalty, the matter is remanded to the adjudicating authority to deal with the same in accordance with the provisions of law after hearing the parties and to decide the same as expeditiously as possible, in any case, prior to **31st December, 2010**. The appeal is accordingly disposed of.

[Justice R.M.S. Khandeparkar]
President

[Rakesh Kumar]
Member [Technical]

Ckp.