IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI
PRINCIPAL BENCH, COURT NO. I

Excise Appeal No. 1062 & 1721 of 2010

[Arising out of Order-in-Appeal No. 39 & 40/CE/DLH/2009 dated 09.02.2010 passed by the Commissioner of Central Excise (Appeals), New Delhi]

M/s. ALASKA Tyres Pvt. Ltd. **Appellants**
Shri Ravi Gupta

Vs.

Commissioner of Central Excise **Respondent**
Delhi II

Appearance:
Shri A K Prasad, Advocate for the Appellants
Shri H C Saini, DR for the Respondent

CORAM:
Hon'ble Mr. Justice (Dr.) Satish Chandra, President
Hon'ble Mr. Ashok K Arya, Member (Technical)

Date of Hearing : 29.03.2017
Date of Decision : 06.06.2017

FINAL ORDER NO. 53657-53658 /2017

Per: Ashok K Arya:

M/s. ALASKA Tyres Pvt. Ltd. is in appeal against order-in-appeal No. 39-40 /2009 dated 9.2.2010 wherein *inter alia* Central Excise duty of Rs. 16,90, 758/- along with interest and equivalent penalty has been confirmed against the appellant-assessee. There is other appellant, Shri Ravi Gupta, Managing Director in the assessee –

company, on whom also penalty of Rs. One lakh has been imposed under Rule 209 A of Central Excise Rules, 1944.

2. The Brief facts are that-

(i) The appellant-assessee is engaged in the manufacture of Rice Rubber Rolls and Rice polishers of various brands; on one brand – 'ALASKA' also, which was not owned by them, they were availing SSI benefit.

(ii) The Central Excise officers made a visit to their factory premises in New Delhi on 27.07.1998 and found out that 'ALASKA' brand was not owned by assessee-appellant but belonged to M/s. Vinko Auto Industries Ltd. Jalandhar.

(iii) The appellants were issued a show cause notice (SCN) dated 14.9.1998 which was adjudicated vide order in original dated 29.1.1999 confirming the demand of Central Excise duty along with equal penalty. The assessee went in appeal before Commissioner (Appeals) who vide order dated 6.8.01 upheld the confirmation of demand of duty and penalty.

(iv) Assessee came in appeal before CESTAT. CESTAT vide its order dated 13.62002 upheld the order of lower authorities. The assessee went in appeal before Hon'ble Supreme Court who remanded the case back to the Tribunal for re-appreciation of the evidence before deciding the issue raised.

(v) On remand from the Supreme Court, CESTAT took up the matter afresh and issued Final Order No. 677-678-CX dated 22.8.2005 setting aside the order of Commissioner (Appeals), sent the case back to the original adjudicating authority for fresh decision.

(vi) The original adjudicating authority vide order in original No. 62/2008-09 dated 9.1.2009 reconsidered the facts and inter alia confirmed the demand of duty of Rs. 16,90,758.19 along with interest and imposition of equivalent penalty.

(vii) The said second Order-in-Original No. 62/2008 dated 9.1.2009 was appealed before the Commissioner (Appeals) who sustained the Order-in-Original and additionally imposed penalty of Rs. One lakh on the other appellant Shri Ravi Gupta under Rule 209 A of Central Excise Rules, 1944. Hence, these two appeals before the Tribunal.

3. With above background, we have heard all the parties involved which were represented by learned Counsels Shri A K Prasad for the appellants and Shri H C Saini for the Revenue.

4. After hearing all the parties and on perusal of the facts on record, it appears that the main issue here is ownership of brand 'ALASKA', during the relevant period. If during the relevant period, 'ALASKA' brand is owned by entity other than the assessee appellant, the assessee appellant will not be entitled to the benefit of SSI exemption under notification No. 1/1993 dated 28.2.2003.

5. The main contention of the appellants is that this brand 'ALASKA' though initially belonged to M/s. Vinko Auto Industries Ltd., which is a family concern of brother of Shri Ravi Gupta, Managing Director of the assessee, it was assigned to the assessee appellant with effect from 1.7.1996 vide assignment deed dated 1.7.1996.

5.1 However, the ground facts do not support the plea of the appellant that transfer of the 'ALASKA' brand was made in assessee's favour effective form 1.7.1996. Revenue has all along taken a stand that during the period of investigation, no such document (assignment deed) existed and no one on behalf of the appellant disclosed about the fact that there has been transfer of brand name 'ALASKA' in favour of the assessee appellant by instrument of 'assignment deed' dated 1.7.1996. In this regard the impugned order observes as under:

> *"17. In this regard, I observe that leaving aside the fact that the statutory authority in this behalf namely, the Joint Registrar*

of the Trade Marks, Mumbai has held it as a valid transfer w.e.f. 01/07/96, in the name of the appellant by virtue of assignment deed executed in 1998 and permitted use of brand name retrospectively w.e.f. 1.7.96 but it is a matter of examination whether in such a circumstances they could be considered actual brand name owner of 'ALASKA". In the instant case, the Central Excise officers, paid a visit in the said Unit on 27.7.99 and found them engaged in the manufacture of rice rubber rolls and rice polishers in the brand name 'ALASKA' being the brand name not owned by them. The fact about ownership of the brand name by "ALASKA" by M/s. Vinko Auto Industries Ltd., Jalandhar was duly disclosed by them but the fact about signing of any agreement in between, by appellant and the brand name owner in the year 1998 was not disclosed by them to the Excise Officer. So, in the intervening period the situation remains that unless they do not get approval of the Trade Mark authority, the situation would have been that they were using the brand name ALASKA as of not owned by them and thus fall within the mischief of using brand name of other person. In such a situation, they would have been liable to duty at tariff rate and benefit of SSI would not have been available to them. ***Therefore, I find that during the period for which the demand has been raised, they were not in acquisition of brand name in their favour and therefore, the very order passed by the adjudicating authority in this context is proper and fair.*** *So far as issue connected to maintainability of the demand in view of Superintendent of Central Excise's letter dated 3.5.88 is concerned, I find that it was imperative on their part to file necessary declaration in each financial year with the Department and on account of non filing of their declarations*

> *during respective years the demand is liable to maintained by invoking extended period along with demand of interest and penalty under Section 11AC of the Act ibid, and therefore, the findings of the adjudicating officer in this regard are quite proper and fair."* [Emphasis supplied]

5.2 Further, in this regard we refer to the observations made by original adjudicating authority in his Order-in-Original No. 62/2008-09 dated 9.1.2009, which are as under:

> *16. As per the explanation of Notification No. 1/93 dated 01.03.1993, SSI exemption is not available on goods of brand name owned by another person. In the SCN, it is alleged that the brand name 'ALASKA' is now owned by the party. However, the party has declared that they were not manufacturing branded goods.*
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> *17. The party produced an assignment deed dated 01.7.96 between M/s. Vinko Auto Industries Ltd., Jalandhar and M/s. ALASKA Tyres Pvt. Ltd. (the party) which was later on registered in the name of the party on 16.11.99 and therefore claimed that since the brand name 'ALASKA' was owned by them by way of assignment deed dated 01.01.96, they were entitled for the concessional rate of duty under notification No. 1/93 dated 01.03.93.*
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> *18. The Hon'ble CESTAT vide order dated 22.08.05 has remanded the case to adjudicate case afresh after examination of the assignment deed dated 01.07.96. On going through the case records particularly the statements of Shri Ravi Gupta, Director*

of the Company and Shri Madhu Sudan, authorised signatory of M/s. Vinko Auto Industries Ltd., Jalandhar, there are contradictory evidence with respect the ownership of the 'ALASKA' brand. ***Shri Ravi Gupta in his statement dated 27.08.98 had stated that the 'ALASKA' brand was not owned by them and belongs to M/s. Vinko Auto Industries Ltd., Jalandhar****. He further stated that they are using the brand name 'ALASKA' belonging to M/s. Vinko Auto Industries Ltd., Jalandhar which is a company owned by his brother and being a family concern, they were using the same brand name.*

19. Shri Madhu Sudan, Authorised Signatory of M/s. Vinko Auto Industries Ltd., vide his statement dated 01.09.98 has stated that the brand name 'ALASKA' was being used by them for the last 30 years and is owned and registered in their name and further stated that they were claiming SSI benefit till 1996-97 on the branded goods 'ALASKA'. Both Shri Ravi Gupta and Shri Madhu Sudan stated that they were aware that their statement could be used in any court of law as an evidence.

20. The statement of Shri Ravi Gupta and Madhu Sudan were recorded under section 14 of Central Excise Act, 1944 on 27.08.1998 and 01.09.98 respectively and the assignment deed between M/s. ALASKA Tyres Pvt. Ltd. and M/s. Vinko Auto Industries Ltd., Jalandhar was made on 01.07.96 which is very much before the date of the statements. ***It is very much surprising and unbelievable that both of them i.e. transferor and transferee were unaware about a major business incident which occurred between them before their statements and they were totally unaware about the assignment deed at the time when case was booked and investigation were going on.***

Further, the party filed an application for registration for the brand name 'ALASKA' in the office of the Registrar of the Trade Mark on 14.09.98 which is also date of impugned SCN.

21. ***On perusal of the assignment deed carefully, it is evidence that there are no signature of the independent witness which should be the integral part of any deed. While taking into consideration the two vital evidences i.e. statement of Shri Ravi Gupta and Shri Madhu Sudan and Assignment deed dated 01.07.96, I should rely upon the former one i.e. the statement of Ravi Gupta and Shri Madhu Sudan which were duly signed by them along with independent witnesses****. Also, the party at as valid document for allowing the party the concessional rate of duty, under SSI benefit under Notification No. 01/93 dated 01.03.93. "* *[Emphasis supplied]*

5.3. From the above observations of the original adjudicating authority as well as appellate authority namely Commissioner (Appeals) and after careful consideration of facts on record and submissions of all the parties, it appears that during the relevant period, the brand 'ALASKA' was owned by the entity namely M/s. Vinko Auto Industries Ltd., Jalandhar, who is a different entity than the assessee-appellant, namely ALASKA Tyres Pvt. Ltd. When it is so, the appellants are not entitled to SSI benefit for the relevant period.

6. The appellants have taken the plea that under the provisions of Trademark Act, 1999, such registration is to be treated as their brand

retrospectively and therefore, they should be given the benefit of SSI exemption during the relevant period. In this regard, we refer to Hon'ble Supreme Court decision in the case of ***Meghraj Biscuits Industries Ltd. vs. CCE, UP [2007 (210) ELT 161 (SC)]*** wherein the Apex Court has observed as under :

> *"12. Applying the ratio of the above judgment to the present case, it is clear that grant of registration certificate under the Trade Marks Act will not automatically provide benefit of exemption to the SSI Unit.*
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> *13. ……..*
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> *18. Law in India under our present Act is similar.*
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> *"38.* ***A person may become a proprietor of a trade mark in diverse ways. The particular mode of acquisition of proprietorship relied upon by the applicant in this case is of his user for the first time in India*** *in connection with watches and allied goods mentioned by him of the mark "Caltex", which at the material time was a foreign mark belonging to Degoumois & Co. of Switzerland and used by them in respect of watches in Switzerland. Before the Deputy Registrar and before Mr. Justice Shah, proprietorship was claimed on the basis that the applicant was entitled to it as an importer's mark. Several authorities were*

cited and were considered and principles deduced and relied upon in that behalf. In our opinion, it is not necessary in this case to go into details about facts in the various decided cases dealing with importer's marks. In many of those cases, the dispute was between a foreign trader using a foreign mark in a foreign country on goods which were subsequently imported by Indian importers and sold by them in this country under that very mark. In short it was a competition between a foreign trader and the Indian importer for the proprietorship of that mark in this country. We have already reached a conclusion that so far as this country is concerned, Degoumois & Co. have totally disclaimed any interest in the proprietorship of that mark for watches etc. In India, the mark "Caltex" was a totally new mark for watches and allied goods. The applicant was the originator of that mark so far as that class of goods is concerned, and so far as this country is concerned. He in fact used it in respect of watches. There is no evidence that that mark was used by anyone else in this country before the applicant, in connection with that class of goods. Unquestionably, the applicant's user was not large, but that fact makes no difference, because so far as this country is concerned, the mark was a new mark in respect of the class of goods in respect of which the applicant used it. We ***therefore, hold that the applicant is the proprietor of that mark****."* *[emphasis supplied]*

19. On reading the above quoted paragraphs from the above judgment, with which we agree, it is clear that the effect of making the registration certificate applicable from retrospective date is based on the principle of deemed equivalence to public user of such mark. ***This deeming fiction cannot be extended to***

> ***the Excise Law. It is confined to the provisions of the Trade Marks Act****. In a given case like the present case where there is evidence with the Department of the trade mark being owned by M/s. Kay Aar Biscuits (P) Ltd. and where there is evidence of the appellants trading on the reputation of M/s. Kay Aar Biscuits (P) Ltd. which is not rebutted by the appellants (assessee),* ***issuance of registration certificate with retrospective effect cannot confer the benefit of exemption notification to the assessee. In the present case, issuance of registration certificate with retrospective effect from 30-9-91 will not tantamount to conferment of exemption benefit under the Excise Law once it is found that the appellants had wrongly used the trade mark of M/s. Kay Aar Biscuits (P) Ltd."*** *[Emphasis supplied]*

6.1 Further, in the light of above observations of Hon'ble Apex Court, it is very clear that for the present facts, the assessee- appellant is not entitled to the benefit of SSI exemption during the said period, as during the said period, the brand name 'ALASKA' was owned by another party, namely, M/s. Vinko Auto Industries Ltd., Jalandhar.

7. In case of appeal of Shri Ravi Gupta, the prayer is that the impugned order imposing penalty of Rs. One lakh on him be set aside. However, the ground facts indicate that Shri Ravi Gupta, who is director of the assessee appellant failed to file necessary declaration under Rule 173 B of Central Excise Rules, 1944, that the assessee unit was to manufacture branded goods during the relevant period. Shri Ravi Gupta was found to be instrumental in preparing the assignment

deed in connivance with M/s. Vinko Auto Industries, in order to evade the duty of Central Excise. Thus there has been active involvement of appellant Shri Ravi Gupta in evasion of duty of Central Excise in the present proceedings making him liable to imposition of penalty under Rule 209 A of Central Excise Rules, 1944. Consequently, the impugned order in his case also is sustained and the appeal filed by him deserves to be rejected.

12. In the result, the impugned order is sustained and both the appeals are dismissed as without merits.

(pronounced in the open Court on 06.06.2017)

(Justice (Dr.) Satish Chandra)
President

(Ashok K Arya)
Member (Technical)

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