CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

Date of hearing/Decision:27.06.2018

Appeal No. E/54432 and 54739/2014 – EX (DB)

[Arising out of common Order-in-Original No.09/2014-15 dated 30.06.2014 passed by the Commissioner of Central Excise, Delhi-II].

M/s .Esquire Electrovision Pvt. Ltd. **….Appellant**
Shri Balram Nathani, Director

(Rep by Shri S.K. Pahwa, Shri Rohan Pahwa and Shri Kuldeep Singh, Advocates)

VERSUS

CC, Delhi-II **...Respondent**

(Rep. by Sh. S.K. Bansal, DR)

CORAM **: HON'BLE SHRI ANIL CHOUDHARY, MEMBER (JUDICIAL)**
HON'BLE SHRI BIJAY KUMAR, MEMBER (TECHNICAL)

Final Order Nos.52647-52648/2018

Per Anil Choudhary:

The issue in this appeal is, whether the SSI benefit is rightly denied to the appellants; and secondly, whether the valuation adopted by Revenue for valuing the goods cleared by the appellants is correct and justified.

2. The appellant, M/s. Esquire Electrovision Pvt. Ltd., is engaged in the manufacture of DVD and other electronic items falling under CTH 8404 and 8521 of CTH using 'BESTON-S' brand. Acting on intelligence, Revenue conducted search on 20.08.2011 at the three premises as follows:-

(i) M/s. Esquire Electrovision Pvt. Ltd., (ii) M/s. Beston Eletrovision Pvt. Ltd.; (iii) and M/s. Beston Sky Vision Pvt. Ltd.; belonging to brothers and close relatives of the appellant, Balram Nathani (mentioned in the show cause notice). During the course of search in the premises of the appellant, its Director, Shri Balram Nathani, informed that they have stopped their manufacturing activities since June 2011. Further, before May 2011 they were engaged in manufacturing DVD, CFL inverters and inverter with brand name of 'Beston' and trading of multimedia speakers. He further informed that, they were engaged in the business of importing of Multimedia speakers, mobile phones, USB FM sets (Multimedia Speaker) and selling the same without affixing/labeling their brand to the product, and that the value of clearances remained below exemption limit of Rs.1.5 crores. During the course of search, a CPU and some documents were seized for further investigation.

3. Mr. Nathani further informed in his statement dated 20.11.2011 that his wife and son were the other two Directors in the company and he was the person who was looking after the sale-purchase-marketing of the products and day-to-day routine work. He also stated that his company was engaged in the manufacture of electronic and electrical items under the brand name of "BESTON-S". They were also engaged in trading of multimedia speakers, adapter, cellphones and selling the same without affixing/labelling their brand in the market. They had applied for registration of their brand name in the year 1995 in Trademark Registry Office, but the same was rejected owing to opposition from some persons. They again applied for registration in the year 2010, but the same is still pending with the Department of Trademark Registry. Further, he stated that he was aware that brand name

'BESTON-S' was registered in favour of M/s. BDP Radio Corporation, owned by Shri PD Nathani (his own brother). On being asked, he stated that they have chosen 'BESTON-S' in resemblance of brand 'BESTON' to capture the market of 'BESTON' brand; that M/s BDP Radio Corporation opposed the application of registration of brand name 'BESTON-S' before the Trademark Registry.

4. On scrutiny of manufacturing retail sale invoice book for the financial year 2010–11 (serial no. 9 to Panchanama drawn in the factory at W–17 Okhla Indl. Area, New Delhi-20), it appeared that the logo of brand 'BESTON-S' was printed on each of the sale invoices issued by the appellants, which was having the same type and style of logo brand "BESTON". The MRP of the goods DVD/VCD falling under Central Excise Tariff Heading 8521 was not declared by the appellants on sales invoices which appeared to be mandatory as per standards of Weights & Measurement Act, 1976.

5. Inquiries were also conducted from some of the buyers of the appellants. One Mr. Biren Gupta, Proprietor of Pradeep Electronics & Communications, Okhla Indl. Area, New Delhi, stated that, his firm is engaged in the business of retail sale of electronic items like DVD/VCD players, fans, mobile etc. After seeing invoice no. RT 4693 dated 15/10/2009 and RT 04856 dated 23.02.2010, issued by M/s Esquire Electrovision Private Ltd, New Delhi – appellant, he confirmed the genuineness of the invoices and further confirmed that he received the goods under those invoices with the logo of 'BESTON-S' which was the same as printed on both the invoices. He further stated that they were procuring the

goods from the appellants since last 34 years. Further, he stated that they have not purchased any good since March 2011 from the appellants.

6. The proprietor of another retailer, M/s Vishnu Electronics, East of Kailash, New Delhi 65, Shri Bachchiram, on enquiry stated that, he was also engaged in the retail sale of electronic items and after seeing invoice number RT 5457 dated 29.03.2011 issued by the Appellant confirmed the genuineness and receipt of goods with 'BESTON' logo. He further stated that he had been purchasing the goods for the last 34 years from the appellant with 'BESTON-S' logo only.

7. Inquiry was also made with the manufacturer of packing material, M/s. Art Maker and its authorised person, Shailendra Aggarwal, who in his statement under Section 14 had stated that they were supplying cartons to the appellants with the designs as per various models being printed on those cartons.

8. On perusal of the examination report number TMR/MUMBAI/EXM/2012 dated 27/06/2011 issued by the Registrar of Trademarks, Mumbai, with reference to the appellant's application number 2034850 in class 9 (Stereo, deck tape recorder, two-in-one and other electronic items) retrieved from the site of trademark authority, it was observed by the Revenue that, the said application of the appellant was refused by the Trademarks authority under Section 12 of the Trademark Act, 1999 on the ground that same/similar trademarks is/are already on record of the register for the same or similar goods/services. It was also mentioned in the said letter that because of its identity with an earlier trademark and similarity of goods or services covered by; the

Trademark, or its similarity to an earlier trademark and the identity or similarity of the goods or services covered by the trademark; there exists a likelihood of confusion on the part of the public which includes a likelihood of Association with the earlier trademark. The search report dated 27/06/2011 was found as under:

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Application No.	Class	Conflicting Mark	Journal No.	Prop. Name	Prop.'s Address	Status	Appl. Date
421671	9	BESTON	1078	Prabha Dass Nathani	E-167, Kalkaji, New Delhi.	Registered	9.5.1984
806030	9	BESTON-S (LABEL)	1360	Balram Nathani	B-211, Phase-I, Okhla Indl.Area, Delhi	Registered	15.6.1998
1359427	9	BESTONS, with device	---	Prabha Dass Nathani	W-17, Okhla Indl. Area, New Delhi.	Exam Report issued	25.5.2005
1359452	9	BESTON with Device	1339	Jacob George	B-70, Okhla Indl.Area, New Delhi.	Registered	25.5.2005
1390714	9	BESTON	1344		Market Road, Udyamproor, Ernakulam, Distt. Kerala.	Opposed	4.10.2005

9. It appeared to Revenue that the application of the appellant for registration of Trademark had failed. It further appeared that the appellant is manufacturing and clearing goods under trademark of another and accordingly it was proposed to deny the SSI exemption. Further, it appeared to Revenue that the appellant was required to disclose the MRP and pay duty under Section 4A of the Act, which they have failed to do. Accordingly, the Authority verified the MRP of similar products from the market and adopted the retail sale price of branded goods like Philips, Samsung etc. for the purpose of valuation and adopted the highest MRP of Rs. 3790/-.

10. Accordingly, vide show cause notice dated 09/07/2012 relating to the period April 2007 to June 2011 (invoking the extended of limitation), it was proposed to demand Central excise duty of Rs 51,73,623/- involved on the goods cleared by the appellant during the relevant period with further proposal to classify the goods, namely, DVD/VCD under Central Excise Tariff Heading 8521 and other items like CFL inverter, emergency light under classification Central Excise Tariff Heading 8504 with further proposal to deny the SSI exemption along with interest and penalty. Penalty was also proposed under Rule 26 on Shri Balram Nathani, the Director.

11. The SCN was adjudicated and on contest the amount was reduced to Rs.35,60,160/- including cess and the classification was confirmed along with confirmation of invocation of extended period of limitation. Further, the benefit of SSI Exemption under Notification no. 08/2003–CE was denied. Further, interest was demanded and equal amount of penalty was imposed under Section 11 AC read with Rule 25 of the Act. Further, personal penalty of Rs.4 lakh was imposed under Rule 26 on the Director, Shri Balram Nathani.

12. Being aggrieved, the appellant-company and the Director, Shri Balram Nathani, have filed appeals before this Tribunal.

13. The ld. Counsel for the appellant has brought to our notice a certificate of registration granted by the appropriate authority under the Trade Marks Act, 1999 bearing trademark no. 806030 dated 15/10/1998 - JN No. 1366 granting registration of the brand name “BESTON-S” in favour of Shri Balram Nathani –

trading as Esquire Electronics, Okhla Industrial Area, Delhi, manufacturer and merchants. The learned Counsel further states that, in view of the registration certificate granted by the appropriate authority, there remains no doubt that the appellant have been using brand name of their own and not of any other person. Further, he also relied on the ruling of this Tribunal in the case of **Sanjay Aggarwal CCE versus Sanjay Aggarwal 2017 (345) ELT 568,** wherein it was held that, benefit of exemption is not to be denied if the brand name as registered in the name of Managing Director, who was earlier using the same for the goods manufactured by him as proprietor of the firm, and hence the demand was held as not sustainable and SSI exemption was available.

14. The learned counsel, to substantiate his submissions, also produced packing material of the goods manufactured by the appellants indicating brand name ‘BESTON-S’. He further brought to our notice the fact that the sample of goods in question were also shown to the adjudicating authority which also had brand name ‘BESTON-S’ on them.

15. The ld. counsel states that, the facts in the present appeal are similar as of Shri Balram Nathani, who was originally operating as a proprietor using the brand name “BESTON-S” and the said business was subsequently succeeded by the company floated by him and his family members, appellant herein.

16. So far as the issue of valuation is concerned, the learned counsel has stated that, adopting the MRP of an international brand as compared to a local brand,

which has a range of only 200 to 300 kms. is wholly irrational and unjustified and accordingly not sustainable in the facts and circumstances of the present case.

17. The Ld. Counsel has also pointed out that, the Adjudicating Authority has conceded in his adjudication order that the valuation proposed in the show cause notice is not correct and, therefore, he relied on the retail sale price available on the website in the name of ‘BESTON-S’ which was Rs. 2350/-. In addition, the inquiry was also conducted for the price of similar goods which indicated the price as Rs. 1350/- . In view of the above, the ld. Adjudicating Authority has reduced the demand from Rs. 51,73,623/- to Rs. 35,60,163/-. He also contended that the MRP, as available on website, in the light of the market enquiry and the quotations submitted by the Appellants regarding the retail sale price of ‘BESTON’ brand, was not sustainable because the website price did not pertain to the relevant period and Indian market.

18. The ld. AR for Revenue has relied on the findings in the impugned order. He has further drawn our attention to the statement recorded during the course of search on investigation of Shri Balram Nathani, wherein he stated that he was using the brand name “BESTON-S” and was aware that the brand name "BESTON" belongs to his brother, Shri P.D Nathani. The learned AR further said that in this view of the matter, the appellant was consciously using the brand name of his brother and accordingly is not entitled to the SSI exemption as rightly held by the adjudicating authority. As regards valuation is concerned, he submitted that the goods of the appellant are similar to international brand and as such the MRP

found on the website and adopted in the present case is justified and requires no interference. The learned AR also submitted that the appellant was printing the brand name 'BESTON-S' also on their invoices which is an admitted fact. He also drawn our attention to the case laws cited by the ld. Counsel for the appellant and submitted that they are not relevant to the facts and circumstances of the present case.

19. Having considered the rival contentions, we are satisfied that the brand name 'BESTON-S' is registered in the name of Mr. Balram Nathani, the main Director and shareholder in the appellant company along with other family members. In this view of the matter, following the present ruling of this Tribunal in the case of **Sanjay Aggarwal** (supra), we hold that the denial of SSI exemption on the ground of use of brand name of another person is unjustified and untenable in the eyes of law and accordingly we allow this ground holding that the SSI exemption cannot be denied on this ground.

20. So far the valuation is concerned, we are satisfied that adoption of MRP from the website of 'BESTON-S' brand is nowhere justified in the light of the market enquiry conducted by the Department which supports the quotations submitted by the Appellant of the comparable brand.

21. In this view of the matter, the variation made on account of valuation is also untenable and accordingly set aside.

22. In view of the above, the impugned order is set aside and the appeal filed by the appellants is allowed with consequential reliefs, if any. However, the question of extended period of limitation is left open.

[order dictated & pronounced in open court]

(Anil Choudhary)
Member (Judicial)

(Bijay Kumar)
Member (Technical)

Ckp