

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, KOLKATA**

EASTERN ZONAL BENCH: KOLKATA

Appeal No. E/99/2009

(Arising out of Order-in-Original No. 31/COMMISSIONER/CE/KOL-V/ADJN/2008 dt. 28/11/2008 passed by Commissioner of Central Excise, Kolkata-V.)

M/s. Switz Foods (P) Ltd.

Appellant (s)

Vs.

CCE-Kol-V

Respondent (s)

Appearance

Shri A. K. Das, Adv. for the Appellant

Shri A. Roy, Suptd. (A. R.) for the Revenue

CORAM:

HON'BLE SHRI P. K. CHOUDHARY, MEMBER (JUDICIAL)

HON'BLE SHRI V. PADMANABHAN, MEMBER (TECHNICAL)

Date of Hearing-15.01.2019

ORDER NO. FO/75217/2019

PER CORAM

The appeal is against the Order-in-Original No. 31/COMMISSIONER/CE/KOL-V/ADJN/2008 dated 28/11/2008. The appellant is engaged in the manufacture of cakes and pastries falling under chapter CTH 1905 Brand Name "Monginis". A team of Central Excise Officers visited the appellant's factory and during the course of scrutiny of the records they noticed that the appellant was selling their goods through M/s. Banami Enterprises, Gariahat Road, Kolkata-700031 said to be a dealer of the appellant. After scrutiny of the agreement entered into by the appellant with M/s. BAMAMI Enterprises, the Departmental officers formed the opinion that the latter cannot be considered as a dealer since the appellant had substantial control over the said goods after its removal from the factory till its disposal. Even though, cakes manufactured by the appellant were sold at Maximum Retail Price

(MRP) fixed by the appellant by M/s. Banami, they were found to pay to the appellant amounts after availing significant discounts. The department officers came to the conclusion that the relationship between the appellant and M/s. Banami was in the nature of Consignment Agent and accordingly proceeded to re-determine the value in terms of Rule 7 of the Central Excise (Valuation) Rules, 2000. The assessable value was worked out on the above basis and differential duty demanded by the issue of Show Cause Notice dated 07/05/2008. The proceedings were concluded with the issue of the impugned order in which the adjudicating authority upheld the demand in the Show Cause Notice along with interest and penalty equal to such duty demand. This order is under challenge in the present proceedings.

2. The appellant is represented by Shri A. K. Das, Ld. Advocate and the Revenue by Shri A. Roy, Ld. AR.

3. The Ld. Advocate submitted that the demand is without any basis. He took us through various clauses of the agreement between the appellant and M/s. Banami Enterprises. He submitted that the agreement has been entered strictly on principal to principal basis according to which M/s. Banami will act as dealer of the appellant in respect of their cakes.

4. Ld. Advocate further submitted that the goods manufactured by the appellant were perishable in nature with limited shelf-life and hence, the agreement provided for a clause that such goods which become un-fit for

consumption may be returned to the appellant and no payment is to be made for such goods returned. To support his arguments, he also relied on the following cases:-

- (i) Union Of India & Others Vs. Atic Industries Ltd. reported in 1984 (17) E.L.T. 323 (S.C.)
- (ii) Commr. of C. Ex., Chandigarh Vs. Kwality ICE Cream Co. reported in 2010 (260) E.L.T. 327 (S.C.)
- (iii) Philips India Ltd. Vs. CCE reported in 1997 (91) ELT 540 (SC)

Finally he submitted that the impugned order may be set aside.

5. The Ld. DR justified the impugned order with the following arguments:-

- (i) He referred to the clauses of the agreement between the appellant and M/s. Banami and submitted that the said agreement is different from a normal dealer's agreement. This is evident from the fact that M/s. Banami is required to use only the paper trays, packing papers etc. with the name and logo of the appellant. The appellant was also controlling all aspects of the sale such as the option to return goods which have become unfit for consumption. They were also not allowed to sell goods manufactured by anybody else.

- (ii) He submitted that M/s Benami Enterprises was found acting as consignment agent and accordingly, the value is required to be adopted, in terms of Rule 7 ibid at the price at which such consignment agent has sold the goods.
- (iii) The Ld. DR also relying on the following case law:-

(i) Snow White Industrial Corporation Vs. Collector of C. Ex. Reported in 1989 (41) E.L.T. 360 (S.C.)

6. Heard both sides and perused the record.

7. The agreement entered into by the appellant with M/s. Banami Enterprises is the subject matter of the dispute. More specifically, dispute is centred around clauses 10, 11, 15 & 30 of the said agreement. For ready reference these clauses are reproduced below:

"10. The Company shall supply to the Dealer the requisite quantities of paper boxes, trays, packing papers and carry bags with the name and logo of the Company. The Dealer should take adequate care to ensure that the above items are utilised solely for the selling of the Company's range of products only.

11. The Dealer's shop premises shall be kept open during business hours as stipulated by the Company and as applicable under local laws. In no case, would the Dealer keep the shop closed, without a minimum of three days prior notice to the Public and consent in writing by the company. This, however, will not be applicable for any civil disturbances or Acts of God.

12-14.....

15. The Dealer shall remit to the Company the invoice value of the goods sold to him by a crossed A/c payee cheque after deducting there from the net value of the goods returned which have become unfit for consumption. In case of any default on the part of the Dealer to return the defective goods the Dealer shall be solely responsible for the costs thereof.

16-29.....

30. On the termination of this agreement for whatsoever reason, the Company shall have the right to remove and the Dealer will permit the Company to remove immediately all the property belonging to the Company, such as stocks supplied by the Company not paid for by the Dealer, furniture, name boards and other materials entrusted by the Company to the Dealer from time to time."

8. The agreement evidently is entered into by two parties and appellant on the one hand and M/s. Banami Enterprises on the other hand. Various terms and conditions have been mutually agreed upon between them including the discount which should be extended to the dealer by the appellant. It is further evident that M/s. Banami has agreed to act as exclusive dealer of the appellant, in exclusion to other products. But on perusal of the agreement, it does not reveal that M/s. Banami was acting as a consignment agent of the appellant. A consignment Agent is required to receive the goods manufactured and dispatches them to customers, identified by the manufacturer (Principal), accompanied by invoices issued on behalf of the manufacture. On perusal of the terms of agreement indicates otherwise. There is absolutely no restriction as to whom the goods are being sold further. The goods are sold under the invoices of M/s. Banami at MRP fixed by the appellant. In view of the

above discussions, there is nothing on record to conclude that M/s. Banami was acting as a consignment Agent of the appellant.

9. They have acted as a dealer of the appellant and have repatriated amounts to the appellant after availing the discount in terms of the agreement. It is evident further that the transaction between appellant and M/s. Banami is on Principal to Principal basis and hence, Excise Duty is to be paid only in terms of Section 4 (1a) of the Act.

10. In view of the above, we find no justification for resorting to valuation in terms of Rule 7 of the Central Excise Valuation Rules, 2000. The impugned order is set aside and the appeal is allowed.

(Dictated and pronounced in the open court.)

Sd/-
(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/-
(V. PADMANABHAN)
MEMBER (TECHNICAL)

Pooja