CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH

Excise Appeal No. 1730 of 2011

(Arising out of Order-in-Appeal No. PKS/99-100/MIII/2011 dated 06.09.2011 passed by the Commissioner of Central Excise (Appeals), Mumbai-III)

M/s. Telebrands (I) Pvt. Ltd. **Appellant**
Plot No.A-168, Road No.25,
MIDC Wagle Industrial Estate,
Thane 400 604.

Vs.

Commissioner of Central Excise, Mumbai-III **Respondent**
3rd & 4th floor, Vardaan Centre, MIDC
Wagle Indl. Estate, Thane (W), Mumbai 400 604.

WITH

Excise Appeal No. 1731 of 2011

(Arising out of Order-in-Appeal No. PKS/99-100/MIII/2011 dated 06.09.2011 passed by the Commissioner of Central Excise (Appeals), Mumbai-III)

M/s. Telebrands (I) Pvt. Ltd. **Appellant**
Plot No.A-168, Road No.25,
MIDC Wagle Industrial Estate,
Thane 400 604.

Vs.

Commissioner of Central Excise, Mumbai-III **Respondent**
3rd & 4th floor, Vardaan Centre, MIDC
Wagle Indl. Estate, Thane (W), Mumbai 400 604.

Appearance:

Shri Anil Balani, Advocate, for the Appellant
Shri Sanjay Hasija, Superintendent, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO. A/**86687-86688/2021**

Date of Hearing: 12.08.2021
Date of Decision: 12.08.2021

PER: SANJIV SRIVASTAVA

These appeal is directed against order in appeal No PKS/99-100/MIII/2011 dated 06.09.2011 of Commissioner of

Central Excise (Appeals), Mumbai III. By the impugned order, the Commissioner (Appeals) has rejected the appeals filed by the appellant against order in original No 303/Adj/KDN/RKD/2010-11 dated 28.02.2011 of the Deputy Commissioner Central Excise Kanjur Division, Mumbai III holding as follows:

"***ORDER***

(i) I confirm the duty of Rs 3,34,551/- (Rupees Three Lakhs thirty four thousand five hundred and fifty one Only) for the clearance as shown in the Annexure I AND Annexure II of the SCN under Section (2) of Section 11A of the C E Act, 1944.

(ii) I hereby confirm and order recovery of interest at the appropriate rate under Section 11AB of the Central Excise Act, 1944.

(iii) In view of the findings recorded at par 11(a) above, I refrain from confiscating the goods valued at Rs 20,30,041/- or imposing a redemption fine in respect of the said goods.

(iv) I hereby impose a penalty of Rs 3,34,551/- under Section 11AC of C Ex act, 1944 Rule 25(1) of the C Ex Rules, 2002 on the confiscated goods as above.

(v) I hereby impose a personal penalty of Rs 10,000/- under Rule 26 of the C Ex Rules, 2002.

2.1 Appellant is engaged in telemarketing of products by TV advertising. The Appellant purchases goods from importers to local level and carry out the process of packing in secondary boxes as well as putting stickers which bears the name of the product, the importer's name, name of the company marketing it, item code, date of import and the MRP.

2.2 The officers of DGCEI, Zonal Unit Mumbai, visited the Appellant's business premises and detained certain goods. In case of goods i.e. Magic Bullet Food processor (MG Fresh), Magic Bullet Food Processor MG (Return), Power Juicer PJ (Return), Drink N Fit Juicer DNK (Fresh), Drink N Fit Juicer DNK (Return) were classifiable under Chapter heading 8509 and Steam Xtreme SX, classifiable under chapter sub heading 8516. These goods were liable to duty in terms of Section 4A of the Central Excise Act.

2.3 As Appellant has affixed the MRP on packing of goods and since the goods are falling under third schedule to the Central Excise Act, hence in terms of Section 2(f) (iii) the activity of the Appellant amounts to manufacture.

2.4 The Appellant were issued show cause notice dt.02.01.2008 wherein it was proposed to confiscate the seized goods valued at Rs. 86,12,914/- in terms of Rule 25 and to impose penalty under section 11AC read with Rule 25 and Rule 27. Further penalty under Rule 26 was also proposed on Shri Hitesh Israni. In case of clearances for the period September, 2003 to June, 2007 the Appellant were issued another show-cause notice dt.08.10.2008 wherein it was proposed to demand duty of Rs. 77,44,129/- along with interest and to impose penalty under Section 11AC read with Rule 25. It was also proposed to impose penalty on Shri Israni. The demands and proposals of both the show cause notices were confirmed vide order dt. 21.12.2009.

2.5 Pursuant to the Show Cause Notice dated 02.01.2008, for the subsequent period range officer issued Show cause Notice dated 01.06.2010 for the subsequent period.

2.6 The show cause notice dated 01.06.2010 was adjudicated by the Deputy Commissioner as per the order referred to in para 1, supra and upheld by the Commissioner (Appeal) as per the impugned order.

2.7 Aggrieved by the impugned order, appellants have filed these appeals

3.1 We have heard Shri Anil Balani, Advocate for the Appellant and Shri Sanjay Hasija, Superintendent, Authorized Representative for the revenue.

3.2 Arguing for the appellants, learned counsel submits that-

- they are engaged in the trading of various imported goods which are purchased by them from various importers. That the said goods are brought to their godown and packing is not changed but for additional safety in transport and to prevent damage during transit and also as per requirement of postal authorities an additional package on the outer side of the packaged goods are provided. Also as per the requirement of Standards of Weights & Measures Act the MRP is affixed and their name is affixed.

- Even if the process of putting an outer packing on traded goods for safety in transit amounts to manufacture, even then they are entitled for benefit of SSI exemption. The Brand "Magic Bullet" belongs to Thane Direct an overseas company and the same has been allowed to be used by them. Further in case of three other products SSI exemption is undisputedly available.
- If the process is considered as manufacture in that case they are entitled for the credit of the duty paid on inputs, packing material used in such packing;
- He relies upon the judgment of *Formica India Division v. CCE 1995 (77) ELT 11 (SC)*, *Bharat Wagon & Engg. Co. Ltd. v. CCE Patna 2001 (131) ELT 681 (Tri) Kolkata*, *Ajay Ind. Corp v. CCE Meerut 2002 (147) ELT 786 (TRI)* and *Bombay Dyeing & Mfg. Co. Ltd. v. CCE 2004 (176) ELT 180 (Tri)*.
- He further submits that in case of product named as "Magic Bullet" the overseas company has granted them right to use the trademark in India and hence the SSI exemption on said product is also available to them. He relies upon the judgments in case of *CCE v. ESBI Transmission Pvt. Ltd. 1997 (91) ELT 292 (Cal). Vikshara Trading & Invest P. Ltd. 2003 (157) ELT 4 (SC)* and *Bhalla Enterprises 2004 (173) ELT 225 (SC)*.
- The appeal filed by them against the order dated 21.12.2009 has been allowed by the Tribunal vide its order dated 03.05.2017 as reported at [2017 (367) ELT 1144 (T-Mum)]. In view of this decision of the appeal in this case needs to be allowed.

3.3 Learned authorized representative reiterates the findings of the impugned order, and submits

- the appellant are not eligible for SSI Exemption even if the Brand name is registered in their name as the same belongs to some other person overseas.
- Hon'ble Apex Court has in case of Vetcare Organics P Ltd [2015 (32) ELT 384 (SC)} held that "***4.*** *In the face of the aforesaid findings which were arrived at on the basis of record, we fail to understand as to how the CESTAT could still hold that the brand name VETCARE and the logo which were owned by M/s. Tetragon Chemie (P) Ltd., Bangalore registered in their name, belongs to the respondent. The CESTAT has merely gone by the assertion of the respondent that M/s. Tetragon Chemie (P) Ltd., Bangalore has permitted them to use this name. That permission shall not make the respondent owner of the brand name. It is thus, clear that the brand name belongs to M/s. Tetragon Chemie (P) Ltd., Bangalore, which brand name is allowed to be used by the respondent and in these circumstances, following Explanation 8 to the Notification No. 175/86, dated 1-3-1986 would clearly become applicable. This explanation defines brand name and reads as under :-*

  "Explanation VIII - "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."
- Delhi bench of Tribunal has in the case of Vee Gee Faucets P Ltd [2010 (259) ELT 273 (T-Del)] held that "***11.*** *The notification explains the term "brand name" or "trade name" to mean a brand name or a trade name, whether registered or not, i.e. to say, the 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. ***It is also clarified that where the specified goods manufactured by the manufacturer bear a brand name or trade name whether registered or not of any other manufacturer or trader, such specified goods shall not, merely by reason of that fact be deemed to have been manufactured by such other manufacturer or trader. The Apex Court in Rukmani Pakkwell Traders case held that the explanation to clause 4 of the Notification No. 1/93-C.E. provides that the exemption contained in the notification would not apply to specified goods bearing a brand name or trade name registered or not of another person. Referring to Explanation IX to the said notification which explained meaning of the brand name or trade name to mean that 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 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, it was held that the said explanation makes it clear that the brand name or trade name shall mean a brand name or trade name whether registered or not of another person that is to say a name or a mark, code number, design number, drawing number, symbol, monogram, label, signature or invented work or writing and same makes it further clear that even a use of part of a brand name or a trade name, so long as it indicates a connection in the course of***

the trade would be sufficient to disentitle the person from getting exemption under the notification."

- Since the Mumbai Bench has failed to take note of these decisions while deciding the issue, the decision of the Mumbai Bench, in the case of Appellants is per-incuriam and cannot be binding precedent.
- The appeal needs to be dismissed.

3.4 In rejoinder learned counsel submits that-

- In case of Ritzbury India (P) Ltd [2012 (283) ELT 92 (T-Chennai)] after considering the decision of Hon'ble Apex Court, the tribunal held as follows:
- The decision in Vee Gee Faucets referred by the learned Authorized Representative is distinguishable, as the registration of the brand name in that case was retrospective.
- The issue should be considered in light of Hon'ble supreme Court in case of Primella Sanitary Products and Convertech Equipment.
- Following the decision in their case the appeal should be allowed.
- In alternate they have paid the entire duty on these goods at the time of clearance of the goods from Custom as countervailing duty which should be available to them as CENVAT Credit and demand should be made only after offsetting the same against the admissible CENVAT Credit.

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments.

4.2 Tribunal has in the case of the Appellants vide the order referred by the counsel allowed the appeal in their favour, holding as follows:

"6. We have carefully considered the submission made by both sides. We find that in the case the Appellants were importing goods and after packing of same in corrugated boxes were affixing the importers name as well as MRP in addition to other details. Such activity is covered under manufacture under Third

Schedule to the Central Excise Tariff (sic) as stipulated under Section 2(f) of the Central Excise Act. The Appellant has contended that the they are the owner of Trade Mark as the brand name was registered in their name in India. We find that once the brand name "Magic Bullet" though belonging to overseas company but permitted to be used by the Appellant in India and registered in their name will make the Appellants the owner of such brand name. In such a case the Appellant shall be entitled to SSI exemption on their clearances and after crossing of the exemption limit they are entitled for credit of duty paid on Inputs and Input services. Our views are based upon the judgment of Hon'ble High Court of Kolkatta in case of CCE v. ESBI Transmission Pvt Ltd. 1997 (91) ELT 292 (Cal). Vikshara Trading & Invest P Ltd. 2003 (157) ELT 4 (SC) and Bhalla Enterprises 2004 (173) ELT 225 (SC). In case of M/s ESBI case supra the brand name belonged to overseas company but was permitted to be registered in India in assessee's name and hence permitted to be used by them. The Hon'ble Court held that the assessee is entitled for benefit of SSI exemption. We find that the facts of present case are identical to the facts of the above referred case. Further we also find that the duty demand has been made from the Appellant by holding the goods excisable on ground of their activity being amounting to manufacture. ***In such case when the appellant's activity are amounting to manufacture they are entitled for the credit of duty paid inputs and input services received by them. We agree with the Appellant's submission and reliance placed by them on Tribunal's order in case of M/s Bharat Wagon & Engg Co Ltd v. CCE 2001 (131) ELT 681 (Tri-Kolkata), Ajay Industrial Corporation v. CCE 2002 (147) ELT 786 (Tri-Del), 2002 (147) ELT 786 (Tri-Del), Parle Biscuits Pvt Ltd. v. CCE 2016 (339) ELT 132 (Tri-Chan) and DSM Anti-Infective India Pvt Ltd. 2004 (165) ELT 69 (TRI).***

7. We further find that the Appellant have challenged the demands on time bar on the ground that the show cause notice was issued on 08.10.2008 for the period September' 2003 to June' 2007 by invoking extended period of limitation. We find that as apparent from the investigation there is no instance *showing that the Appellant had intention to evade payment of duty. We find that the Appellants were in ignorance of schedule Third to the Central Excise Tariff (sic). It was only during investigation that the Appellant realized that their activity of packing of goods and affixing labels would fall into the category of manufacture as per Section 2(f)(iii) and third schedule. Further the sales record and all business transactions were recorded by them in transparent manner. Moreover, the advertisement and marketing of products in question were very much on public domain through television. As per this undisputed fact, we find that there is no suppression of fact on part of the appellant. Therefore, entire demand being under extended period could not have been confirmed under the proviso to Section 11A. Thus, in absence of any contumacious conduct on the part of the Appellant as well as in absence of any intention to evade payment of duty, we hold that the demands made against the Appellant M/s Telebrands is hit by limitation of time and are time barred. Similarly due to the reasons discussed above, the confiscation of goods and imposition of penalty cannot be justified. We therefore set aside the demands on the grounds of time bar. As far as charges against the Appellant Shri Hitesh Israni is concerned, since the intention to evade payment of duty is not present in this case, there is no reason to impose penalty upon him. Consequentially we hold that no penalty could have been imposed upon him under rule 26."*

4.3 Learned Authorized Representative relied upon the decision of the Hon'ble Apex Court in case of Vetcare Organics P Ltd and CESTAT in case of Vee Gee Faucets, to argue against the order of tribunal in the case of appellants themselves. Even if the arguments of the learned Authorized Representative were correct and the decision of the Vetcare and VEE Gee Faucets, decided the issue of admissibility of SSI Exemption under Notification No 8/2003-CE otherwise, then also the order of tribunal in the appellants own case cannot be faulted to the extent of allowing the credit of duty paid on the inputs and input services.

4.4 In para 64 of his order, Deputy Commissioner, notes as follows:

"64. The submitted that in any event, if it is held that they are manufacturers of the products in question, they are entitled to avail CENVAT Credit of the duty paid on the products in question when procured by them and to that extent, entitled to set off against the duty demand raised in the SCN. They have also accumulated a large amount of CENVAT Credit, which credit is also adjustable against the duty sought to be demanded from them."

In para 88 (vi), he records his finding stating as follows:

"(vi) To claim Modvat/ Cenvat credit, in the first place M/s TELEBRANDS should get themselves Registered under C Ex and follow the procedure. But the fact is, M/s TELEBRANDS till date have not got themselves registered under excise and in spite of demands issued, have filed declaration with the jurisdictional excise authorities claiming SSI exemption of Rs 150 lacs. The claim for SSI exemption disentitles them from the benefit of CENVAT credit. Hence their actions are contradictory."

4.5 Commissioner (Appeal) has in para 9 of the impugned order observed as follows:

"9. The Appellant No 1 has also contended that facility of Cenvat Credit be extended to them, if it was held that process undertaken by them amounts to manufacture. While on principle, the said ground may merit consideration, yet, the scheme of cenvat credit mandates preparation and maintenance of some vital documents/ registers. The Appellants No 1 has not produced such documents or have not confirmed maintenance of such registers/ documents. As such, this request of them, cannot be considered at this stage."

4.6 Admittedly the goods in the present case are the imported goods and would have been cleared on the payment of countervailing duty, determined on the basis of the declared Retail Selling Price. If the goods at the time of clearance have suffered the countervailing duty on the basis of Retailing Selling Price and as per Section 4A, there cannot be any further demand, if the benefit of CENVAT Credit is allowed to the appellant. In our view without even referring to admissibility of the SSI Exemption Notification, this appeal can be decided by allowing the CENVAT Credit to the appellant subject to the requisite duty paying documents against which the CENVAT credit is claimed. Tribunal has in the Appellants own case, held in favour of admissibility of the CENVAT Credit to the appellant, in case they are asked to pay duty by denying the SSI exemption.

4.7 Tribunal has held against invoking of the extended period for making the demand and penalties imposed in the earlier order, we do not find any reason to differ with that part of the order. Hence the penalties imposed are set aside and we hold that extended period cannot be invoked in this case, where the issue is purely an interpretational.

5.1 Without going into the controversy of the admissibility of SSI Exemption, we set aside the impugned order and order of the original authority and remand the matter back to original authority to allow the CENVAT Credit as admissible, of the duty paid by the appellants on these goods and other inputs and input services received by them, subject to production of the requisite duty paying documents.

5.2 Since the matter is quite old, the original authority should decide upon the issue within three months of the receipt of this order.

5.3 Appeals are allowed and the matter remanded as per para 5.1.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

tvu