CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

WEST ZONAL BENCH

EXCISE APPEAL NO: 1294 OF 2012

[Arising out of Order-in-Appeal No: US/347 & 348/M-II/2012 dated 24th May 2012 passed by the Commissioner of Central Excise (Appeals), Mumbai – II.]

Jamal Bakery
Behind Masjid, Pipe Road, Kurla West
Mumbai - 400070 … ***Appellant***

versus

Commissioner of Central Excise
Mumbai – II
9th Floor, Piramal Chambers, Jijibhoy Lane, Lalbaug
Parel, Mumbai - 400012 …***Respondent***

APPEARANCE:

Shri Viraj Reshamwala, Advocate for the appellant

Shri Sanjay Hasija, Superintendent (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: A / 86284 /2022

DATE OF HEARING: 17/06/2022
DATE OF DECISION: 17/06/2022

PER: C J MATHEW

M/s Jamal Bakery is aggrieved by order[1] of Commissioner of

[1] [order-in-appeal no. US/347 & 348/M-II/2012 dated 24th May 2012]

Central Excise (Appeals), Mumbai Zone – II rejecting their appeal against confirmation of duty of ₹ 58,238/-, under section 11A of the Central Excise Act, 1944, for the period from October 2010 to March 2011 along with recovery of interest thereof under section 11AB of Central Excise Act, 1944 and imposition of penalty of like amount under section 11AC of Central Excise Act, 1944 by the original authority.

2. The appellant, manufacturer of ‘cakes and pastries’, was denied benefit of notification no. 8/1998-CE dated 2nd June 1998, and its successor notifications, available to ‘small scale industry’ units owing to utilisation of brand name that belonged to another.

3. It is contended by Learned Counsel for the appellant that the impugned brand is not in use by any other manufacturer of the same product and that ‘Kwality’ is inscribed along with other symbols in the design of the ‘brand’ used by them.

4. We have heard Learned Authorised Representative.

5. The issue in question is correctness of the order of the lower authorities in holding that the use of a brand name not belonging to them suffices to deny the benefit of the said exemptions under the relevant notifications. Learned Authorised Representative submitted the decision of the Tribunal in *Jamal Bakery v. Commissioner of*

Central Excise, Mumbai – II [2016 (339) ELT 604) (Tri.-Mumbai)] in which the denial of exemption for the period from 2000-2001 to 2002-2003 had been considered and it had been held by the Tribunal that

> *'5. xxxxx*
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> *5.1 We find certain force in the submissions made on behalf of the appellants that they have not used the brand name or logo of anybody else and the brand name "Kwality" used by them on their products, in the manner and style, is their own brand name, which is different from the brand name/logo used by M/s. Pure Ice Cream Co. for their Ice Cream. This is also clear from a visual inspection of the labels produced before us by the learned Counsel. We find that the Hon'ble Apex Court's judgment in Rukhmani Pakkwel (supra) relied upon by the Dept. has been considered by the Hon'ble Apex Court in the case of Bhalla Enterprises (supra) and held that if the use of other's brand name was entirely fortuitous and could not on a fair appraisal of the marks indicate any such connection, then the benefit of exemption would be available. We also find that the Hon'ble Supreme Court in Meghraj Biscuits (supra) also has held that registration with the trade mark registry cannot be the sole criteria for allowing or denying SSI exemption. We find that the Hon'ble Apex Court in the case of Stingen Immuno Diagnostics (supra) has held that there should be a connection/nexus between the brand name, the product, the person and the use of same/similar brand name belonging to someone else, for denying the SSI benefit. On a careful consideration of the aforesaid judgments of Hon'ble Apex Court, one has to come to a conclusion that if someone is manufacturing any product bearing a brand name of another person, benefit of SSI exemption is not available to such person, which emphasis that there should be*

a connection/nexus between the brand name, the product, the person and the use of brand name belonging to someone else, for denying the SSI benefit. In the present case, the Dept. has proceeded mainly based on the Hon'ble Apex Court judgment in Rukhmini Packkwell (supra) and there was no occasion for the Adjudicating Authority to examine other judgments of Hon'ble Apex Court cited above by the appellants and come to a proper conclusion. We find that the ratio of the judgment in M/s. Stangen Immuno Diagnostics (supra) goes to the root of the case and the present case also has to be looked into based on the said ratio, as the facts and circumstances are somewhat identical. We are of the considered view that the Adjudicating Authority has not looked into the issue of brand name in the perspective as discussed above. Therefore, the matter needs to go back to the Adjudicating Authority for reconsideration of the issue of brand name and availability of SSI exemption under relevant Notifications in the light of our observations and the ratio of judgments of Hon'ble Apex Court discussed above.

5.2 As regards the appellants' claim of time bar of the demand covered under Appeal No. E/3158/2006 and Appeal No. E/1236/2009, we find that it has been their consistent stand that the brand name "Kwality" belongs to them because of their continued and uninterrupted use for long period of time and, therefore, they were not expected to inform the Dept. that they are using somebody else's brand name on their products. It was the submission of the appellants that till the proceedings initiated by the Dept. they were not aware that the brand name "Kwality" used by them on their products was registered in the name of someone else, including M/s. Pure Ice Cream Co. Therefore, we are of the view that the Adjudicating Authority's findings in Para 34 of the impugned Order dated 31-7-2006 that the appellants had *suppressed from the Department their manufacture of "Kwality" branded products, despite the fact that this brand did not belong to them, lacks credence and the Dept. have not brought any evidence to support such an allegation. We find that even today the Appellants are claiming that the brand name "Kwality", in the manner & style used by them, belongs to them alone and nobody else. We also find that the demand covered in Appeal No. E/1236/2009, beyond the normal period one year also cannot sustain, as the fact of using the disputed brand name "Kwality" on Cakes & Pastries was well within the knowledge of the Department when first SCN dated 3-5-2005. Therefore, the Dept. cannot allege suppression to invoke extended in subsequent SCN pertaining to Appeal No. E/1236/2009, which is supported by catena of judgments of Hon'ble Supreme Court cited by the appellants. We also note that there had been confusion with regard to brand name issue and consequential availability of SSI exemption in view of differing views expressed by Hon'ble Apex Court at different point of time and, therefore, the benefit of doubt should go to the Appellants. Therefore, we are of the view that it cannot be held that there was an attempt on the part of the Appellants to suppress any facts and they have acted on a bona fide belief that the brand name "Kwality" is owned by them; therefore, they are eligible for SSI exemption under relevant Notification. We, therefore, hold that the entire demand covered under Appeal No. E/3158/2006 and demand beyond normal period of one year in Appeal No. E/1236/2009 is barred by limitation and, therefore, not sustainable. Since we are setting aside the demand covered under Appeal No. E/3158/2006 on time bar, we are not dealing with any submissions made on valuation, etc.*

5.3 With regard to the claim of the appellants for cum-duty benefit, we find that since the Adjudicating Authority has already granted the benefit of cum-duty in the Order impugned in the first appeal (E/3158/2006) and the same has not been challenged by the Dept. Therefore, we are of the view that the benefit of cum-duty should be extended to the appellants in remaining matters also. This issue also needs to be looked into by the Adjudicating Authority in the de novo proceedings.

5.4 So far as the penalty imposed is concerned, we find that the appellants were under a firm belief that they are the owners of brand name "Kwality" in the form in which it is used on their products no mala fides can be attributed to their claim of SSI exemption for the products. Be that as it may, even there were divergent decisions from the Hon'ble Apex Court on the issue of use of brand and availability of SSI exemption in various circumstances. We also find that the issue in dispute relates to interpretation of law and there can be a possibility of differing interpretations of the same. Considering overall facts and circumstances of the case, holistically we are of the view that there was no wilful suppression of facts or mis-statement on the part of the appellants. Therefore, the penalties imposed on them are not sustainable. Accordingly, we set aside the same.'

while directing that

'5.5 With the above discussions, we set aside the demand covered under Appeals No. E/3158/2006 and No. E/1236/2009 beyond the normal period of one year, as time-barred. We also set aside the penalties imposed on the appellants in each of the appeals. We remand all matters to the Adjudicating Authority for fresh decision on the issue of

> *brand name based on our observations and judgments cited. We also direct the Adjudicating Authority to determine duty liability, if any, after extending the cum-duty benefit, as discussed above. Needless to add here that the Adjudicating Authority shall observe the principles of natural justice in the de novo proceedings. The appeals are disposed of on the above terms.'*

and pointed out that these were, as yet, pending with the adjudicating authority. Accordingly, the impugned order is set aside and the present dispute also remanded back for disposal by the original authority in accordance with the decision of the Tribunal in *re Jamal Bakery*.

6. The appeal is, accordingly, allowed by way of remand.

(Operative Part of the Order pronounced in the open court on 17th June 2022)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*