

CASE NO.:
Appeal (civil) 4424 of 2004

PETITIONER:
Commnr. of Central Excise, Raipur

RESPONDENT:
M/s. Hira Cement

DATE OF JUDGMENT: 02/02/2006

BENCH:
S.B. Sinha & P.K. Balasubramanyan

JUDGMENT:
J U D G M E N T

S.B. SINHA, J : .

This appeal under Section 35L(b) of the Central Excise Act, 1944 (for short "the Act") is directed against a final judgment and order dated 22.1.2004 passed by the Customs, Excise & Service Tax Appellate Tribunal, New Delhi in Appeal No. 145/2004-B whereby and whereunder the appeal preferred by the Appellant herein was dismissed.

The basic fact of the matter is not in dispute. The assessee is one M/s. Hira Cement. It carries on business of manufacture of cement in the town of Raipur. It is a small-scale industry (SSI) being a proprietary concern of one Shri Suresh Agrawal. Another industry, known as M/s. Hira Industries Limited, is also a manufacturer of cement having a factory in the town of Jagdalpur which is situated at a distance of about 300 kms. from Raipur. Hira Industries Limited was incorporated and registered under the Companies Act on or about 20th October, 1983 whereas the Respondent herein was set up in the year 1988. Hira Industries Limited is not a SSI unit. The unit of the Respondent was earlier known as Bajrang Bali Cement whereas that of Hira Industries Limited was known as Jai Bajrang Cement Ltd. The capacity of production of the Respondent's cement industry is about 60 tonnes per day whereas that of Hira Industries Limited is 150 tonnes per day.

As a SSI unit, the Respondent herein claimed exemption from payment of excise duty in terms of a notification dated 28.2.1993. The said notification was issued under Section 5A of the Act; paragraph 4 whereof reads as under:

"4. The exemption contained in this notification shall not apply to the specified goods where a manufacturer affixes the specified goods with a brand name or trade name (registered or not) of another person who is not eligible for the grant of exemption under this notification:

Provided that nothing contained in this paragraph shall be applicable to the specified goods which are component parts of any machinery or equipment or appliances and cleared from a factory for use as original equipment in the manufacture of the said machinery or equipment or appliances and the procedure set up out in Chapter X of the said Rules is followed:

Provided further that nothing contained in this paragraph

shall be applicable to the specified goods where a manufacturer affixes the specified goods with a brand name or trade name (registered or not) of the Khadi and Village Industries Commission or of the State Khadi and Village Industries Board."

"Brand name" or "trade name" has been defined in Explanation IX of the said notification in the following terms :

"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 identify of that person."

The Respondent herein states :

"Hira Industries Ltd. is thus a Limited company run by Shri B.L. Agrawal and other Directors whereas Hira Cement is a proprietorship concern owned by Shri Suresh Agrawal. Shri Suresh is the nephew of Shri B.L. Agrawal and that was the main reason for which both the units were held to be related parties. However, there is no other nexus or relation between Hira Industries Ltd. and Hira Cement. Shri B.L. Agrawal and Shri Suresh Agrawal are not even falls within the ambit of definition of Relatives as defined under Section 6 of the companies Act, read with Schedule 1A of the Act.

The Hira Industries Ltd. has hired a portion of premises of Hira Cement for maintaining its Registered Office at Raipur and a small godown for keeping its goods. Hira Industries Ltd. used to purchase Cement from Hira Cement and for catering to the needs of its Raipur customers Hira Industries Ltd. used to keep those goods in the said godown. Accordingly, the Registered Office and Telephone Numbers of Hira Industries Ltd. and Office Address and Telephone Numbers of Hira Cement happened to be the same. Both the entities were operating independently."

The Appellant contends that the Respondent, herein was not entitled to claim the benefit of SSI exemption on the ground that the same would not apply to the specified goods bearing a brand name of another person, in view of the fact that the Respondent has been using the brand name of said Hira Industries Limited.

Further contention of the Appellant is that the said Hira Industries Limited being engaged in the manufacture of cement with the brand name of Hira Cement which demonstrates the financial interrelationship of both the concerns as belonging to a group of industries, known as Hira Group of Industries.

Indisputably, 10 show-cause notices were issued by the Superintendent/ Assistant Commissioner concerned upon the Respondent calling upon it to show cause as to why the SSI exemption granted to it should not be disallowed and the duty which was not paid for the period December, 1993 and December, 1997 should not be recovered. In the said proceedings, the Respondent was held to be not entitled to such exemption.

However, on an appeal made by the Respondent, by an order dated

28.12.2001, the Commissioner dropped the proceedings inter alia relying on or on the basis of a decision of the Tribunal in Emkay Investment Pvt. Ltd. v. Commissioner [2000 (124) ELT 741 (Tribunal)], holding :

"Thus, I hold that both firms were not using common brand name on the packings of their products which will disentitle the notice from benefit of exemption under Notification 1/93-CE dtd. 28.2.93 as amended, 7/97-CE dtd. 1.3.97 (Superseded by Notification No. 16/97-CE dtd. 1.4.97) and 38/97-CE dtd. 27.6.97 etc. by merely alleging that they have used the brand name of another firm, i.e., M/s. Hira Industries Ltd., Jagdalpur. Hence, I find that there is no justification in demand of duty of Rs. 49,77,206/- from the noticee for the concerned period alleged in the Show Cause Notices listed in para \026 I of this order by disallowing the benefit of exemption notification No. Notification 1/93-CE dtd. 28.2.93 as amended, 7/97-CE dtd. 1.3.97 (superseded by Notification No. 16/97-CE dtd. 1.4.97) and 37/97-CE dtd. 27.6.97 etc. to the Noticee."

As regard the question that the Respondent and the said Hira Industries Limited are related persons to each other, it was held that they are separate juristic persons. An appeal thereagainst was preferred by the Appellant before the Tribunal and by reason of the impugned judgment, the same was dismissed.

The Tribunal upon comparing the logos of both Hira Cement and Hira Industries Limited observed:

"A perusal of the logo and brand name used by the respondents clearly reveals that their brand name is "BBC CEMENT", whereas the brand name of M/s. Hira Industries Ltd. is "HIRA CEMENT". Merely, because the logo is similar in both the cases, it cannot be alleged by the Revenue that the respondents are using the brand name of another person for the purpose of attracting the mischief of para 4 of the Notification. In the present matter, the Revenue has not established that the brand name used by M/s. Hira Industries Ltd. is used by the Respondents. There is a substantial force in the submissions of the learned Advocate for the respondents that the words 'Hira Cement' written on their bags of cement is the name of their company and not the brand name of M/s. Hira Industries Ltd\005"

It is not in dispute that the Appellant in its notice dated 20th/22nd May, 1992 mentioned that a proceeding was initiated against the Respondent as also the said Hira Industries Limited as regard valuation of the goods wherein ultimately by an order dated 21.9.2001, the Commissioner dropped the proceedings. It is also not in dispute that in the appeal preferred by the Appellant, herein before the Tribunal questioning the order dated 28.12.2001, the assessee objected to the maintainability of the appeal by filing a cross-objection before the Tribunal. The Commissioner in its earlier order dated 21.9.2001 opined:

"d) On comparing the two bags submitted by the two noticees No. 1 and 2 which was submitted by them during the course of personal hearing on 3.9.2001, it is clear that notice No. 1's brand name 'BBC' was more prominent on their bags whereas in case of bags of noticee No. 2 brand 'HIRA' with a logo of diamond on top is more prominent. This fact may be further corroborated with samples and drawings of HDPE/ Jute bags submitted by noticee No. 1 to the Assistant

Collector Central Excise & Customs, Anupam Nagar Raipur under their letter No. HC: 91-92 dtd. 4.2.92 enclosing the photocopies of the documents. Hence noticee No. 1 M/s. Hira Cement (firms name) have used only brand name 'BBC' on their products. They have not used Hira Cement as their brand name which is being alleged in the show cause notice belongs to noticee No. 2. Noticee No. 2 sold their products with brand name 'HIRA CEMENT' with diamond logo/ mark on the top. Brand name of the both the firms are different. These are not further substantiated during the course of investigation and facts brought on the record.

e) Thus, I hold that both the noticees were not using common brand name on the packings of their product which will disentitle the noticee No. (1) from benefit of exemption under notification No. 175/86 by merely alleging that they have used the brand name of noticee No. 2. Hence, I find that there is no justification in demand of duty of Rs. 326357.75 from noticee No. 1 for the period 21.6.91 to December, 91 by way of disallowing the benefit of exemption notification No. 175/86 CE to noticee No. 1"

However, in the said proceedings, penalties of Rs. 50,000/- and Rs. 25,000/- were imposed against the Respondent and the said Hira Industries Limited, respectively.

An appeal thereagainst was preferred by the Respondent to the extent of demand confirmed on the ground of alleged related person under Section 4 of the Act. The said appeal was dismissed. An appeal preferred thereagainst by the Respondent before this Court was also dismissed. The contention of the Respondent in the aforementioned situation is that the said order dated 21.9.2001 attained finality and, thus, having been accepted by the Appellant, the present appeal was not maintainable.

Mr. G.E. Vahanavati, learned Solicitor General appearing on behalf of the Appellant would, at the outset, draw our attention to the fact that the decision of the Tribunal in Emkay Investment (supra) has expressly been reversed by a 3-Judge Bench of this Court in Commissioner of Central Excise, Calcutta v. Emkay Investments (P) Ltd. and Another [(2005) 1 SCC 526] stating:

"15. We have gone through the common order passed by the Tribunal. In our view, the Tribunal has erred in not appreciating that to attract provision of clause 7 of Notification No. 175/86-CE, it is sufficient that the product contained a trade mark/logo of another ineligible person which was fully satisfied in the instant case and whether the product also contained the brand name/trade name/logo of the manufacturer would not and cannot alter such position. Likewise, the interpretation of Explanation VIII as advanced by the Tribunal does not appear to be correct in law and in fact. It was imperative that by using the registered logo "MERINO" belonging to M/s Merinoply and Chemicals Ltd. on their own product M/s Emkay Investments Ltd. fulfilled the purpose of indicating a relation between the said products and the logo owner so as to influence the trade and therefore, the provisions of Explanation VIII were fully satisfied so far as the case on hand was concerned. The finding of the Tribunal to the contrary, in our opinion, is wrong and liable to be set aside."

It was submitted that in that view of the matter the impugned judgment of the Tribunal and the order of the Commissioner cannot be sustained. As regard the cross-objection filed by the Respondent, it was urged that the order of the Commissioner dated 21.9.2001 having a limited effect, the same will not debar the Appellant from maintaining an appeal. In any event, the law having been declared by this Court, the decision of the Commissioner must give way to the decision of this Court.

Mr. R. Santhanan, learned counsel appearing on behalf of the Respondent, on the other hand, would submit that once the said order dated 21.9.2001 attained finality, the Appellant did not have any locus standi to maintain an appeal before the Tribunal and consequently this appeal. It was further contended that a finding of fact has been arrived at by the Commissioner as also the Tribunal to the effect that it is not the assessee who had been using the brand name of the said Hira Industries Limited and as if Hira Industries Limited was using the brand name of Hira Cement belonging to the Respondent herein, the assessee cannot be blamed therefor, the impugned judgments should not be interfered with. Drawing our attention to various distinctive features in the respective logos of the Respondent as also the said Hira Industries Limited, the learned counsel urged that the question must be adverted to keeping in view of the fact that the dispute does not relate to trade mark and in that view of the matter if the said Hira Industries Limited had been using the premises belonging to the Respondent as also the telephones which are installed therein or had been selling cement from it, the same by itself cannot be a ground for holding that the Respondent had been using the brand name of the said Hira Industries Limited. It was submitted that in fact the said Hira Industries Limited had been purchasing cement from the Respondent.

The purport and object of grant of exemption to a SSI unit is clear and unambiguous. It can be availed of, provided that they satisfy the conditions precedent therefor. The criteria for determining the eligibility of an entrepreneur for becoming entitled to have the benefit of exemption notification, it is well-settled, must be construed strictly. [See *Tata Iron and Steel Co. Ltd. v. State of Jharkhand and Others*, (2005) 4 SCC 272 and *Government of India & Ors. v. Indian Tobacco Association*, 2005 (6) SCALE 683].

In *Commissioner of C. Ex., Trichy v. Rukmani Pakkwell Traders* [2004 (165) ELT 481 : (2004) 11 SCC 801], the expression "such brand name" was considered holding:

"7. The Tribunal had also held that under the Notification the use must be of "such brand name". The Tribunal has held that the words "such brand name" shows that the very same brand name or trade name must be used. The Tribunal has held that if there are any differences then the exemption would not be lost. We are afraid that in coming to this conclusion the Tribunal has ignored Explanation IX. Explanation IX makes it clear that the 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, code number, design number, drawing number, symbol, monogram, label, signature or invented word or writing. This makes it very clear that even a use of part of a brand name or trade name, so long as it indicates a connection in the course of trade would be sufficient to disentitle the person from getting exemption under the Notification. In this case admittedly the brand name or trade name is the words "ARR" with the photograph of the founder of the group. Merely because the registered trade mark is not entirely reproduced does not take the Respondents out of Clause 4 and make them eligible to the benefit of the Notification."

In Commissioner of Central Excise, Chandigarh-I v. Mahaan Dairies [2004 (166) ELT 23], the same view was reiterated. The views expressed therein have also been reiterated in Commissioner of Central Excise, Calcutta v. Emkay Investments (P) Ltd. and Another (supra).

The ratio of the decisions referred to hereinbefore shortly stated is that if the manufacturer uses some brand of its own, it would be entitled to, but it would not be, for one reason or the other, it had been using the brand of another. The learned Commissioner or the learned Tribunal, as noticed supra, did not have the occasion to consider the question in the light of the aforementioned decisions of this Court.

Emkay Investment (supra) which was the basis for the decision of the Commissioner has expressly been overruled by this Court. The cross-objections filed by the Respondent, herein before the Tribunal also had not specifically been adverted to as the matter relating to maintainability of the appeal preferred by the Appellant, herein before the Tribunal does not appear to have been discussed nor any reference thereto has been made in the concluding paragraph of the judgment.

Before us, the parties have placed the entire facts. We may also place on record that it has been conceded before us by the learned counsel appearing on behalf of the Respondent that the earlier order dated 26.9.2001 shall not operate as a res-judicata but, as noticed hereinbefore, the only contention raised was that once the Revenue accepts a judgment, it cannot raise the said question once again.

Although some decisions to this effect have been cited by Mr. Santhanam, we are of the opinion that the matter should be considered afresh by the Tribunal upon considering all aspects of the matter. We refrain ourselves from going into the said question. We may, however, notice that a Bench of this Court in Government of W.B. v. Tarun K. Roy and Others, [(2004) 1 SCC 347] stated:

"Non-filing of an appeal, in any event, would not be a ground for refusing to consider a matter on its own merits. (See State of Maharashtra v. Digambar.)

In State of Bihar v. Ramdeo Yadav wherein this Court noticed Debdas Kumar by holding:

"4. Shri B.B. Singh, the learned counsel for the appellants, contended that though an appeal against the earlier order of the High Court has not been filed, since larger public interest is involved in the interpretation given by the High Court following its earlier judgment, the matter requires consideration by this Court. We find force in this contention. In the similar circumstances, this Court in State of Maharashtra v. Digambar and in State of W.B. v. Debdas Kumar had held that though an appeal was not filed against an earlier order, when public interest is involved in interpretation of law, the Court is entitled to go into the question."

As we intend to remit the matter back to the Tribunal, we should not make any observation at this juncture which would affect the merit of the matter one way or the other. We may also be misunderstood. Suffice it to say that having regard to the definition of the brand name as contained in Explanation IX to the notification dated 28.2.1993, the matter requires fresh consideration by the Tribunal upon taking into consideration the fact of the matter. If, however, the Tribunal comes to the conclusion or is of the opinion that further investigation in facts may be necessary, it may pass such order or orders as it may think fit and proper.

This appeal is allowed and the impugned judgment is set aside and the matter is remitted to the Tribunal for consideration of the matter afresh in the

light of the observations made hereinbefore. No costs.

JUDIS