

CASE NO.:
Appeal (civil) 5204 of 2001

PETITIONER:
NIRLEX SPARES PVT. LTD.

RESPONDENT:
COMMISSIONER OF CENTRAL EXCISE

DATE OF JUDGMENT: 04/01/2008

BENCH:
Tarun Chatterjee & Dalveer Bhandari

JUDGMENT:
J U D G M E N T

TARUN CHATTERJEE, J

1. The pivotal question that needs to be adjudicated upon in this appeal is whether the appellant company is entitled to exemption from payment of central excise duty under Notification No. 175/1986-CE dated 1st of March, 1986 (in short \023the notification\024).

2. Before deciding this question, it would indeed be worthwhile to briefly highlight the facts of the present appeal.

3. The appellant i.e. Nirlex Spares Pvt. Ltd. was and/or is engaged in the business of manufacture and sale of Riderless Steel Healds and Flat Steel Healds. It is important to note that these goods were manufactured and sold by the company under its own brand names/trade names viz. \021Intatex\022 and \021Intaco\022 which were affixed/ printed on its corrugated boxes. However, since it is a company registered as a Small Scale Industrial Unit, it was availing the benefit of exemption from payment of central excise duty under the notification, which grants such exemption to Small Scale Industrial Units.

4. The appellant, however, from 1st of April, 1990 started printing a hexagonal artistic design (alleged monogram) along with its brand names/trade names \021Intatex\022 and \021Intaco\022 on its corrugated boxes. On 30th of September, 1992, an investigation was carried out in the factory of the appellant. The investigating officers came to the conclusion that the appellant was making use of a monogram of a related person, namely, L.M.S. Marketing Company (in short \021the Marketing Company\022) as a brand name for the goods manufactured and cleared by it and therefore, the appellant was not entitled to exemption in view of paragraph 7 read with Explanation VIII of the notification for the period from 1st of April, 1988 and 30th of September, 1992. The investigating officers had also found that the Marketing Company to which the appellant sold its goods was a related person and therefore, the correct assessable value was the price at which the goods were sold by the Marketing Company and not the price at which the goods were sold to the Marketing Company by the appellant. Accordingly, a show cause notice dated 26th of March, 1993 was issued to the appellant under which the following demands were raised:

- i. Central excise duty amounting to Rs. 13, 43, 264/- on Riderless Steel Healds manufactured during the period 1.4.1988 to 30.9.1992.
- ii. Value difference of Rs. 10, 835/- between the value

of the appellant and the Marketing Company.

5. The appellant filed its reply dated 22nd of November, 1993 denying and disputing the allegations made in the show cause notice. The Commissioner of Central Excise, however, by his order dated 8th of April, 1994 confirmed the entire demand for duty and the value difference to be paid, as was arrived at by the investigating officers. Thereafter, the appellant preferred an appeal under S.35 of the Central Excise Tariff Act, 1985 to Customs, Excise and Gold (Control) Appellate Tribunal (in short 'the CEGAT'). The CEGAT also confirmed the decision of the Commissioner of Central Excise by the impugned order except that it had dropped the demand for excise duty for the period before 1st of April, 1990 since it accepted the contention of the appellant that the monogram was used by it only from 1st of April, 1990 onwards. Aggrieved by the impugned order passed by the CEGAT, the appellant has approached this court by filing this appeal, which was heard in presence of the learned counsel for the parties.

6. The CEGAT in its order observed that the hexagonal design, i.e. the monogram/logo must be held within the ambit of Explanation VIII of Paragraph 7 of the notification as it belonged to the Marketing Company and was used by the appellant on the goods manufactured by it. While coming to this conclusion, the CEGAT rejected the contention of the appellant that the conclusion that the alleged monogram was a brand name of the Marketing Company could not be arrived at by placing sole reliance on the visiting cards of the executives of the Marketing Company and some of the drawings of the same company. It further held that the said monogram cannot be printed on these documents merely for the sake of printing and had the same not been a brand, there was no reason to print it on the visiting cards of the executives of the Marketing Company. Accordingly, the CEGAT, in essence, held that the hexagonal design was a brand name of the Marketing Company on a finding that although the said design was printed on the corrugated boxes and not on the goods in question, but since these goods were sold in the very same corrugated boxes, it could not be said that the goods did not bear the design merely because it did not appear on the goods. The CEGAT, however, as noted herein earlier, held that the excise duty would have to be paid from 1st of April, 1990 onwards from which date the appellant had started using the monogram on the goods manufactured by it. This was so observed by placing reliance on the fact that the revenue had not brought on record any evidence to show that the monogram was used even before 1st of April, 1990 and therefore, the amount of duty was reduced to Rs. 6,59,724/- along with the value difference of Rs. 10, 835/-. The CEGAT also approved the reasoning of the Commissioner in holding that the appellant and the Marketing Company were related persons.

7. We have heard the learned senior counsel for the parties and examined the impugned order as well the order of the Commissioner and the other materials on record. The question, as noted herein earlier, which needs to be answered by us is whether the appellant is entitled to avail the exemption under the notification and whether the monogram was qualified to be the brand name/trade name of the Marketing Company. But before we take up this question, it would be appropriate at this stage to reproduce paragraph 7 and Explanation VIII of paragraph 7 of the notification which run as under: -

'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.

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."

8. Before we deal with Paragraph 7 read with Explanation VIII of the notification, we may reiterate that in the show cause notice issued by the Commissioner of Central Excise, it was alleged that the hexagonal shape/design printed on the packings of the goods of the appellant was a brand name/trade name of the Marketing Company by placing reliance on the following: -

- a. Visiting Card of Shri Nilesh Doshi and Shri Paresh Shukla of the Marketing Company.
- b. One drawing prepared by LMS Industrial Group.

9. We now turn to paragraph 7 of the notification. From a bare reading of the same, we cannot doubt that the exemption notification shall not apply if a manufacturer affixes the specified goods with a brand name or trade name of another person who is not eligible for grant of exemption under the said notification. Such being the position, the first requirement for non-availability of the benefit of exemption under this notification is that the brand name or the trade name must be of another person.

10. We find that the said hexagonal shape/design was not at all a brand name/trade name of the Marketing Company. After examining the Hexagonal shape/design affixed on the corrugated boxes of the appellant, we are unable to agree with the findings of the Tribunal that the said design was the brand name or trade name of the Marketing Company, which would be clear from the following admitted facts:

- a. The said hexagonal shape/design was not at all owned by or belonged to the Marketing Company. The Marketing Company had no proprietary or other right over the said shape/design.
- b. The Director of the Marketing Company was examined by the authorities with regard to the shape and design and in his statement, the Director of the Marketing Company has categorically stated as under:
 - a. \023In reply, I have to state that M/s.L.M.S. Marketing Pvt. Ltd. does not have any brand name or symbol of its own.\024
 - b. \023As stated earlier, M/s.L.M.S. Marketing Pvt. Ltd. does not have any brand name/symbol. The symbol referred is only a geometrical design and, therefore, question of our allowing use of this does not arise.\024
 - c. \023We do not get any royalty and as stated

earlier, we do not claim any proprietary rights on the design referred above.\024 (Emphasis supplied)

11. Thus, according to the Marketing Company itself, the said shape/design did not belong to it nor it had any proprietary or other right over the same. The executive of the appellant Shri Nileshbhai R.Doshi also deposed and he stated in his statement as under :

\023On being asked about the monogram and brand name used by Nirlex Spares Private Limited, I have to state that so far as monogram is concerned, I have to state that this is not the monogram in sense of ourselves with reference to our trade mark or anything else but this is simply a design which is selected out of 6/7 designs given by designers. In connection with brand names \021INTATEX\022 and \021INTACO\022, I have to state that these are our own brand names.\024

12. From a bare reading of the aforesaid statement of Shri Nileshbhai R.Doshi, which we do not find any ground to disbelieve, it appears that there is nothing on record to show that the said hexagonal shape/design belonged to or was owned by the Marketing Company and thus they had permitted the appellant to use the same on their corrugated boxes. That apart, there was no agreement or letters showing that the said hexagonal shape/design belonged to or was owned by the Marketing Company or that it had permitted the appellant to use the same. In fact this position was specifically admitted during the cross-examination of the Assistant Collector of Central Excise. In any view of the matter, the printing of the said design on the visiting cards of the executives of the Marketing Company and a drawing of the same company cannot, in our view, confer any right or ownership of the Marketing Company over the said hexagonal shape/design. Therefore, it is difficult for us to agree with the findings of the Tribunal to the extent that the hexagonal design affixed on the corrugated boxes of the appellant had in fact reflected the nexus between the concerned goods namely, Riderless Steel Healds and the Marketing Company. At the same time, the fact that the said hexagonal design appears on the visiting cards of the Executives of the Marketing Company and some of the drawings of the same Marketing Company cannot by itself mean that the design had any association with the Marketing Company.

13. There is another aspect of this matter. It is an admitted position that the said hexagonal shape/design was only printed on the visiting cards of the two executives of the Marketing Company and the same was not even printed on the commercial documents like letterheads and sales invoices of the Marketing Company. It also appears from the record that the design printed on the letterheads and sales invoices of the Marketing Company was totally different. In any view of the matter, in view of the admitted position that the Marketing Company never came forward to say that the hexagonal design in fact belonged to them and they had permitted the appellant to use the same on their corrugated boxes, we are unable to agree with the findings arrived at by the Tribunal on the aforesaid question. Accordingly, we hold that the hexagonal design cannot be said to be descriptive enough to serve as an indicator of nexus between the goods of the appellant and the Marketing Company. Therefore, we hold that the alleged monogram cannot be said to be the brand name or trade name of the

Marketing Company and such being the position and in view of the discussions made herein above, we hold that the benefit of exemption provided by the notification is available to the appellant.

14. That apart, in our view, the nexus between the hexagonal design and the Marketing Company cannot be found when the Marketing Company itself had categorically disowned the title to the said design and admitted that the said design did not belong to them. That being the position, it cannot be held that the appellant was using the brand name of the Marketing Company when the Marketing Company has itself disowned the brand name, more so, since it is unusual that the person who is owning a brand name would come forward to disown the same when such disowning would deprive the said person of a valuable asset. In Commissioner of Central Excise Vs. Bhalla Enterprises [(2005) 8 SCC 308], this Court, while considering similar provisions of a subsequent notification NO.1/93-CE, in paragraph 6, observed as under: -

\023The notification clearly indicates that the assessee will be debarred only if it uses on the goods in respect of which exemption is sought, the same/similar brand name with the intention of indicating a connection with the assessee's goods and such other person or uses the name in such a manner that it would indicate such connection. Therefore, if the assessee is able to satisfy the assessing authorities that there was no such intention or that the user of the brand name was entirely fortuitous and could not on a fair appraisal of the marks indicate any such connection, it would be entitled to the benefit of exemption. An assessee would also be entitled to the benefit of the exemption if the brand name belongs to the assessee himself although someone else may be equally entitled to such name.\024

As noted hereinabove, we have already indicated that the brand name used on the corrugated boxes would not show any intention of indicating a connection between the goods manufactured by the appellant and the Marketing Company. Again, in Commissioner of Central Excise Vs. Grasim Industries Ltd. [(2005) 4 SCC 194], this court, while considering similar provisions of the Notification No. 5/98-CE, observed in paragraphs 15 and 16 as under: -

\023In our view, the Tribunal has completely misdirected itself. The term \023brand name or trade name\024 is qualified by the words \023that is to say\024. Thus, even though under normal circumstances a brand name or a trade name may have the meaning as suggested by the Tribunal, for the purposes of such a notification the term \023brand name or trade name\024 gets qualified by the words which follow. The words which follow are \023a name or a mark\024. Thus even an ordinary name or an ordinary mark is sufficient. It is then elaborated that the \023name or mark\024 such as a \023symbol\024 or a \023monogram\024 or a \023label\024 or even a \023signature of invented word\024 is a brand name or trade name. However, the contention is that they must be used in relation to the product and for the purposes of indicating a connection with the other person. This is further made clear by the words \023any writing\024. These words are wide enough to include the name

of a company. The reasoning given by the Tribunal based on a dictionary meaning of the words 'write' and 'writing' is clearly erroneous. Even the name of some other company, if it is used for the purposes of indicating a connection between the product and that company, would be sufficient. It is not necessary that the name or the writing must always be a brand name or a trade name in the sense that it is normally understood. The exemption is only to such parties who do not associate their products with some other person. Of course this being a notification under the Excise Act, the connection must be of such a nature that it reflects on the aspect of manufacture and deal with quality of the products. No hard-and-fast rule can be laid down however it is possible that words which merely indicate the party who is marketing the product may not be sufficient. As we are not dealing with such a case we do not express any opinion on this aspect.

16. This court has, in the case of Royal Hatcheries (P) Ltd. V. State of A.P. already held that words to the effect 'that is to say' qualify the words which precede them. In this case also the words 'that is to say' qualify the words 'brand name or trade name' by indicating that these terms must therefore be understood in the context of the words which follow. The words which follow are of wide amplitude and include any word, mark, symbol, monogram or label. Even a signature of an invented word or any writing would be sufficient if it is used in relation to the product for purpose of indicating a connection between the product and the other person/company.

In Tarai Foods Ltd. Vs. Commissioner of Central Excise [2006 (198) ELT 323], this court, while considering a similar definition of the expression 'brand name', in paragraphs 7 and 9, held as under: -

'37. The words brand name connotes such a mark, symbol, design or name which is unique to the particular manufacturer which when used on a particular product would establish a connection between the product and the manufacturer.'

'39. Furthermore the definition of the words 'brand name' shows that it has to be a name or a mark or a monogram etc. which is used in relation to a particular product and which establishes a connection between the product and the person. This name or mark etc. cannot, therefore, be the identity of a person itself. It has to be something else which is appended to the product and which establishes the link.'

In Commissioner of Central Excise Vs. Superex Industries [2004 (174) ELT 4], in the context of the Notification No. 175/86-CE, this court in paragraph 3 held as under: -

'33. CEGAT has held that the benefit of the Notification would be lost only if the manufacturer affixes the specified goods with a brand name or trade name of the another who is not eligible to the exemption under the notification. It could not be denied that the name Kirloskar is not affixed to the generating sets. CEGAT has held that merely because, in the invoices, the set is passed off as a

Kirloskar generating set, the benefit of the Notification would not be lost. We see no infirmity in this reasoning. We, therefore, see no reason to interfere.\024

15. It is an admitted position that the goods in question were manufactured by the appellant and the Marketing Company was its marketing agent. There is also no dispute that on the packings of the goods, the brand names of the appellant \021Intatex\022 and \021Intaco\022 were clearly and prominently printed. In between these two brand names, the hexagonal shape/design was also printed. Therefore, if the said hexagonal shape/design was also printed as the design of the appellant\022s marketing agent, it could not be taken as a ground to deny the exemption to the appellant under the notification. In this connection, reliance can be placed on a judgment of this court in the case of P&B Pharmaceuticals Pvt. Ltd. Vs. Commissioner of Central Excise [(2003) 3 SCC 599] wherein this court in paragraph 15 held as under:-

\023From a perusal of para 7 of Notification No. 175/86-CE, it is clear that the exemption granted by the notification is not applicable 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 the said notification\005\005\005..It is only when a manufacturer of the specified goods affixes them with a logo-brand name or trade name - of another person who is not eligible for the exemption that he becomes ineligible to avail the benefit under the notification. Use of the logo of the manufacturer by other person, whether an assignor or a third party, has no relevance for purposes of para 7. That is not the import of Explanation VIII.\024

At this stage, the relevant extracts of the opinion of the Law Ministry, Union of India contained in paragraph 3 of the Circular No. 52/52/94-CX, dated 1/9/1994 issued by the Ministry of Finance (Department of Revenue) may also be reproduced as under:

\023Perusal of the said explanation (Explanation IX to the Notification NO.1/93-C.E.) will show that to satisfy the requirement of brand name or trade name, it is necessary that the trade name must 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 or identity of that person. Unless connection between the trade name and the person with whom that trade name is to be identified can be established, the requirement of brand name or trade name as provided for in the said notification will not be satisfied. It is an admitted case of the department that in respect of locks, the units are making locks bearing the same name or mark even though there is no person who claims ownership to that mark or name. The names being used in the manufacture of locks by these small scale units do not belong to any particular manufacturer and any unit is free to use any name. Therefore, in our view, even without the issue of Notification of 4th

/11th May, 1994 units which are using trade name or brand name, which does not belong to any person, were eligible for exemption under the said notification because of explanation IX in the said notification. Admittedly, the notification, dated 4th / 11th May, 1994 is clarificatory in nature and the purpose could have been achieved by issuing a clarification to the field formations.\024

From a bare reading of this opinion of the Law Ministry and in view of the discussions made hereinabove and relying on the decisions of this court, as noted hereinabove, it is, clear that if a brand name was not owned by any particular person, the use thereof shall not deprive a unit of the benefit of the small scale exemption scheme. Such being the position, we are of the view that the printing of the hexagonal design on the goods of the appellant, where such hexagonal design is not owned by the Marketing Company, would not disentitle the appellant from the benefit of the exemption under the notification.

16. Before parting with this judgment, we may deal with the submissions made on behalf of the learned senior counsel for the respondent Mr. K. Radhakrishnan. The learned senior counsel for the respondent Mr. K. Radhakrishnan contended that the appellant was using the mark of the Marketing Company with the purpose of indicating a connection between the goods manufactured and cleared by the appellant and the Marketing Company. The learned senior counsel for the respondent Mr. K. Radhakrishnan cited various cases in support of this contention. Having heard the learned senior counsel for the respondent Mr. K. Radhakrishnan and the learned senior counsel for the appellant Mr. Bagaria, we are of the view that the authorities cited by Mr. K. Radhakrishnan would not help the respondent as they do not apply to the facts of the present case. Let us first take up the decision of this court in the case of Commissioner of C.Ex., Calcutta Vs. Emkay Investments (P) Ltd. [2004(174) E.L.T. 298 (S.C.)] on which Mr. K. Radhakrishnan has placed strong reliance. In our view, this case is of no help to the respondent as the same is distinguishable on facts. In this case, unlike our case: -

- a) Merino was registered brand name of Merinoply & Chemicals;
- b) Merinoply & Chemicals was a large scale manufacturer of the same goods;
- c) Merinoply & Chemicals never disputed that the brand name \023Merino\024 does not belong to them;
- d) The intention to indicate, if not connection, atleast the fact that the quality was similar to a particular type of plywood was there.

It is true that in so far as the first point of difference in clause a) is concerned, registration of the brand name is not a pre-requisite for the application of paragraph 7 read with Explanation 8 of the notification. Nevertheless, the purpose behind bringing the same to light is only to suggest that in that case, the other company had a proprietary right over the brand name by virtue of the registration whereas in the present case, the Marketing Company is totally denying any association with the brand name, much less any proprietary right by virtue of the registration.

The learned senior counsel for the respondent Mr. Radhakrishnan has also placed reliance on the decision of this court in Commissioner of Central Excise, Trichy Vs. Grasim Industries Ltd. [2005 (183) E.L.T. 123 (S.C.)]. That case too is

distinguishable on facts in as much as the intention to indicate a connection was present in that case, unlike the case in hand. Another decision relied upon by the learned senior counsel for the respondent in Commissioner of Central Excise, Chandigarh-I Vs. Mahaan Dairies [2004(166) E.L.T. 23 (S.C.)] is also, in our view, distinguishable on facts. In that decision, it was an admitted position that a name was being used, which was the registered trade mark of another company. This fact was not disputed. Thus the court held, with which we are in full agreement, that the mere use of additional words in addition to the name of another person would not by itself enable the party to claim the benefit of the Notification. We have already stated that in that decision, admittedly, a registered name of another person was used on the product of the respondent of that case. That decision, therefore, would not apply to the facts and circumstances of the present case.

17. Before we close, we may also consider a short submission of the learned senior counsel for the respondent. According to the learned senior counsel for the respondent Mr. K. Radhakrishnan, the question as to whether the brand name of the Marketing Company was used by the appellant on the corrugated boxes in which the goods were kept and supplied is a question of fact and this court, therefore, is not entitled to interfere with such a finding of fact. In our view, the Tribunal as also the Commissioner, while coming to the conclusions as arrived by them, failed to consider the admissions and the material evidence on record and thereby came to a finding which, on the face of it, was not tenable on facts. Under these circumstances, it is open to this court to interfere with such a finding of fact and accordingly, this argument of the learned senior counsel for the respondent is not acceptable.

18. For the reasons aforesaid, we are not in agreement with the views expressed by the CEGAT and the Commissioner of Central Excise and accordingly, we answer the question posed by us, as noted herein earlier, by holding that the benefit of exemption under the notification in question would be available to the appellant.

19. Accordingly, the order of the CEGAT and that of the Commissioner is set aside and we hold that the appellant shall be permitted to get exemption under the notification No. 175/86-CE dated 1st of March, 1986.

20. The appeal is thus allowed with no order as to costs.