

[2010] 14 (ADDL.) S.C.R. 851

PARLE BISLERI PVT. LTD.

v.

COMMR. OF CUSTOMS & CENTRAL EX., AHMEDABAD
(Civil Appeal No. 1160 of 2006)

DECEMBER 15, 2010

[DR. MUKUNDAKAM SHARMA AND ANIL R. DAVE,
JJ.]

Central excise Act, 1944 – Excise duty – Appellant, holding company of PEL, manufacturing flavour, assigned code name by PEL – Appellant selling flavours to PEL company, PIL company and franchise bottlers – PEL using product sold by appellant – PEL also manufacturing flavours as appellant – SSI Exemption under Notifications No. 175/86 and No. 1/93 CE dated 28.02.93 – Claim by the appellant – PEL also availed the exemption benefit during the same period as claimed by appellant – Held: Appellant not entitled to the benefit of the Notification for the products with code names which belonged to PEL since appellant was not the owner of the brand names – As regards, clubbing of valuation of production/clearance of the companies, three companies were intertwined in their operation and management – Purported fragmentation of manufacturing process was to avail SSI exemption – Evidence proved the connection in the course of trade between the flavours and the entity using the flavours through code names – Flavours were earlier manufactured by PEL and supplied to franchise holders, but were subsequently allowed to be made by the appellant – Flavours were developed, researched and concocted by PEL – PEL were in fact, the owner of the code/brand names.

The appellant is the holding company of PEL. It was engaged in the manufacturing of soft drink flavours which were assigned certain 'code names' given by PEL. The appellant was selling its product to PEL, PIL and

A franchise bottlers of M/s. PEL and M/s. PEL was using the same. M/s. PEL also manufactured flavours as the appellant. The appellant availed of the benefit of Notifications 175/86 and 1/93 for the years 1989-1990 to 1993-1994 and M/s PEL for year 1992-1993 and 1993-1994 (Oct 1993). The Revenue Officers found that M/s PEL and their group companies had indulged in evasion of excise duty. The Revenue Officers demanded excise duty and imposed penalty. The Commissioner set aside the demand raised. On appeal, the Tribunal held that the undervaluation of flavor by appellant was not sustainable; that M/s. PEL owned the brand name and it could not be said that the flavours of the appellant were marked only by virtue of a code and not identified as a brand; that for the years 1989-1990, 1990-1991 1991-1992 and 1993-1994 (till Oct 1993) the appellant would not be entitled to the benefit of Notification No. 175/86 and 1/93 for the products with code names which belonged to M/s. PEL; and that the effective financial control and management emanated from a common core and, therefore, the companies could well be said to be inter-dependent and even inter-related. The Tribunal partly allowed the appeal. Therefore, the appellant filed the instant appeal.

The question which arose for consideration in the instant appeal was whether the value of production/clearances of the three companies, namely the appellant, M/s PEL Ltd. and M/s PIL Ltd. could be clubbed for the purposes of ascertaining the eligibility to exemption under Notification No. 1/93 CE dated 28.02.93; and whether the Tribunal was correct in denying the benefit of the Notification by treating the product code name as a 'brand name' within the meaning of Explanation VIII to the Notifications.

Dismissing the appeal, the Court

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HELD: 1.1. The Directors of the appellant are among those who also serve on the Board of Directors in M/s PEL Ltd. and M/s PIL Ltd. M/s. PEL advanced an interest-free loan of Rs. 1 crore to the appellant, which was used for the purchase of raw material by the latter, as evidenced from the balance sheet. The flavours being manufactured by the appellant were developed by M/s PEL at their R & D Lab at Bombay, whose services were at the disposal of the appellant. They were at one point of time manufactured by M/s. PEL and admittedly, owned by them. The three companies were intertwined in their operation and management. Therefore, a careful scrutiny of the records establish that the two basic features, pervasive financial control and management control, were present in the instant case. It would be likely that the purported fragmentation of the manufacturing process was but a mere ploy to avail the SSI exemption. Piercing the corporate veil, the notions of beneficial ownership and inter-dependency come into the picture. Therefore, the order of the tribunal is upheld. [Para 13] [861-B-F]

1.2. It cannot be said that the Explanation VIII to Notifications No. 175/86 and 1/93 refers only to 'brand names' and cannot be used to determine whether code names, as used by the appellant, fall within the said category. The mere difference in nomenclature cannot take away the substance of the Explanation from its applicability to the instant case. The appellant manufactures flavours which fall within the ambit of the 'code names' and it is a fact on the record that these codes are key to identifying the flavours which are commercially transferable. It is expressly clear that the code names on the flavours indicate a connection in the course of trade between the specified goods and such person using such name or mark. The flavours which were earlier manufactured by M/s PEL Ltd. and supplied

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- A to the franchise holders, were subsequently allowed to be made by the appellant. The franchise holders were in effect buying the very same flavours from the appellant and were placing orders by referring to the same code name, as is evident from the respective purchase orders.
- B The users of the flavours, i.e. M/s PEL Ltd., M/s PIL Ltd. and specified bottlers are all interconnected since the latter group comprises franchisees of PEL and, thus, there is evidence to prove the connection in the course of trade between the flavours and the entity using the
- C flavours through code names. The ownership of the code names by M/s PEL Ltd. is clearly evidenced from the fact that these flavours were developed, researched and concocted by M/s. PEL Ltd in its research laboratories. M/s. PEL Ltd. gave the brand names to the flavours and
- D allowed them to be manufactured by the appellant and their holding company cannot hide the fact that M/s PEL Ltd were in fact, the owner of the code/brand names. This conclusion is fortified by the fact that it was M/s PEL Ltd. who transferred the right of the codes when they were sold to M/s. Coca Cola Company in November, 1993.
- E Since the appellant was not the owner of the brand names, the tribunal was justified in holding that the appellant would not be entitled to the benefit of Notification No. 175/86 and 1/93 for the products with code names G-44T, L-33A, T-IIPC, T-IIP, R-66M and K-
- F 55T which belonged to M/s. PEL Ltd. [Para 14 and 15] [862-C-H; 863-A-C]

Commissioner of Central Excise, New Delhi v. Modi Alkalies and Chemicals Ltd. and Ors. 2004 (171) E.L.T. 155 (S.C.) – referred to.

Case Law Reference:

2004 (171) E.L.T. 155 (S.C.) Referred to. Para 11

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1160 of 2006.

From the Judgment & Order dated 27.10.2005 of the A
Customs, Excise & Service Tax Appellate Tribunal, WZB,
Mumbai in Appeal No. E/1735-R/1997.

S. Ganesh, V.A. Rana, Mrinal Mazumdar, Gagrat & Co.,
for the Appellant. B

Parag Tripathi, ASG, Rahul Kaushik, Kunal Bahri, B.
Krishna Prasad for the Respondent.

The Judgment of the Court was delivered by

DR. MUKUNDAKAM SHARMA, J. 1. This appeal is C
preferred by M/s Parle Bisleri Pvt. Ltd (formerly known as M/s
Limca Flavours and Fragrances Ltd and appellant herein) and
is directed against the order of the Customs, Excise and
Service Tax Appellate Tribunal (CESTAT), Mumbai which set D
aside the order of Commissioner of Central Excise,
Ahmedabad. The Commissioner *vide* order-in-original No.11/
Commr/96 dated 16.9.1996, dropped all proceedings initiated
against the respondents in the Show Cause Notice F. No. V/
22/15-18 DA 94 dated 24-2-94. However, on appeal, the E
CESTAT partly allowed the claim of the Revenue, and
aggrieved by the same, the appellant has approached this
Court.

2. The facts may be stated in brief here. M/s. Parle Bisleri
Pvt., the appellant, manufactures soft drink flavours which are F
assigned 'code names', namely G-44T, L-33A, T-11PC, T-11P,
R-66M, K-55T and L-22L. During the period from years 89-90
to 93-94, the appellant availed of the benefit of Notifications 175/
86 & 1/93 as an SSI unit. It is the holding company of M/s. Parle
Exports Ltd. (PEL). The appellant sells its product to PEL, Parle G
International Ltd. (PIL) and franchise bottlers of M/s. PEL. It
maybe stated at the outset that the changes the appellant
underwent in its transformation from 'M/s Limca Flavours and
Fragrances Ltd' to 'M/s Parle Bisleri Pvt. Ltd' bear no
significance to the outcome of this appeal. H

A 3. M/s. PEL uses the products sold by the appellant to
manufacture Non-alcoholic Beverages Base (NABB). In
addition to NABB, M/s. PEL also manufactures flavours as the
appellant does. During the same period mentioned above, M/
s PEL enjoyed the benefit of Notification No. 175/86 and 1/93
B for the year 92-93 and 93-94. (Oct. 93). The flavours named
above are researched and developed by PEL, but were
allowed to be manufactured by the appellant with the code
names given by PEL. The flavours are used in the manufacture
of beverages like Gold Spot, Limca, Rimzim etc.

C 4. Consequent upon the visit to the factory premises and
office premises of Parle Group of Companies at Ahmedabad
and Bombay on 20.03.93 by the officers of the Directorate
General of Anti Evasion (Central Excise), New Delhi on the
basis of the information that M/s PEL and their Group
D Companies were indulged in evasion of Central Excise Duty,
various documents were seized and the statement of key
personnel recorded. As we have mentioned earlier, the order-
in-original passed by the Commissioner of Central Excise and
Customs withdrew the demand for differential duty and found
E no case for imposition of penalty for any of the companies in
question.

5. Before we move on to the appeal as it unraveled before
the CESTAT, it is pertinent to note here that Notification No.
F 175/86 and 1/93 require that the aggregate value of clearances
of all excisable goods from a factory by one or more
manufacturer should not exceed Rs. 150 lakhs and Rs. 200
lakhs respectively in the preceding financial year. The
allegations against the appellant before the CESTAT, then,
G were that the clearances of the appellant during the period from
1989 to October 1993 must be clubbed with that of M/s PEL
and M/s PIL as they are effectively one and the same company,
and thus the appellant is not entitled to the benefit of the
aforesaid Notifications. It was also an issue of appeal before
H the CESTAT that the appellant herein was using the brand

name belonging to another person (M/s PEL) who was not entitled to the benefit of the said Notifications. The third and final issue concerned the allegation of undervaluation of flavours by the appellant, which resulted in an inaccurate assessment and hence the differential duty should be extracted.

6. In response to these issues in appeal, the CESTAT ruled the Revenue's claim of undervaluation in favour of the appellant primarily on the ground that the Department did not come out with quantifiable data to indicate the extent to which the price was suppressed by the appellant. However, on the issue of misuse of brand name by the appellant, the Tribunal came to the conclusion that M/s. PEL did in fact, own the brand name and held that the defence of the appellant that the flavours were marked only by virtue of a code and not identified as a brand did not hold water. To quote the Tribunal: -

"25. In view of the language of the explanation [Explanation VII of Notifications No. 175/86 and 1/93] quoted above it is necessary to see whether the code names on the flavours indicate a connection in the course of trade between the specified goods and such person using such name or mark. It is revealed during the course of investigation that the flavours in question were earlier manufactured by PEL and supplied to the franchise holders. The same flavours were later on allowed to be made by LFFL [appellant herein]. The franchise holders thereupon were buying the very same flavours from LFFL and were placing their orders by mentioning the same code name, as is evident from their purchase orders. The users of the flavours i.e. PEL PIL and specified bottlers are all interconnected. The specified bottlers are franchisees of PEL. Being the franchisees of PEL they are aware that the flavours belonged to PEL with the code names. Thus the code name indicated a connection in the course of trade between such specified goods and same person using such name or mark. The defence that the

A code number has been given only for identification of the product cannot therefore be accepted.”

B On this line of reasoning, the Tribunal held that the appellant will not be entitled to the benefit of Notification No. 175/86 and 1/93 for the products with code names G-44T, L-33A, T-IIPC, T-IIP, R-66M and K-55T which belonged to M/s PEL. However, the Tribunal also observed that this finding was only in respect of the years 89-90, 90-91 91-92 and 93-94 (till Oct 93) and not for the year 92-93 because in 92-93, as ruled by the Tribunal subsequently in the same judgment, the brand owner (M/s. PEL) of these flavours himself was entitled to the benefit of Notification No. 175/86.

7. On the primary issue of whether the clearances of the said companies could be clubbed together, and the companies themselves could be treated as one manufacturer, the Tribunal found that the effective financial control and management emanated from a common core, and therefore the companies could well be said to be interdependent and even interrelated. However, the Tribunal only partly allowed the appeal of the Revenue in so far as it held that the appellant herein was indeed entitled to SSI exemption between the period from 88-89 to 92-93 (upto 31.3.93]. Such a conclusion was based on the ruling of this Court in *Commissioner of Central Excise, New Delhi v. Modi Alkalies & Chemicals Ltd. & Ors* reported at 2004 (171) E.L.T. 155 (S.C.) which purportedly took notice of Circular 6/92 issued by the Ministry of Finance, Government of India which stated that the clearance of Limited Companies are not be clubbed together, and held that the Circular was concurrent in operation with that of Notification No. 175/86. However, since this Court, according to the Tribunal, also held that the same Circular was not applicable after the issue of Notification No. 1/93, the appellant could not claim SSI exemption from 1.4.1993 to October, 1993. To this effect, the appeal was partly allowed. Aggrieved by the decision of the Tribunal, the appellant has approached this Court by way of Civil Appeal.

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8. The appeal was listed for hearing and we heard the learned counsel appearing for the parties who have ably taken us through all the relevant documents on record and also placed before us the various decisions which may have a bearing on the issues raised in the present appeal. A

9. The issues in contention between the parties have been filtered through the stages of appeal, and before this Court we are primarily faced with two of them, which are: B

- I. Whether the value of production/clearances of the three Companies, namely the appellant, M/s PEL Ltd. and M/s PIL Ltd. can be clubbed for the purposes of ascertaining the eligibility to exemption under Notification No. 1/93 CE dated 28.02.93? C
- II. Whether the Tribunal was correct in denying the benefit of the said Notification by treating the product code name as a 'brand name' within the meaning of Explanation VIII to the aforesaid Notifications? D

Since the parties to this appeal have raised arguments that are almost identical in form and substance to those submitted in the previous stages of appeal, we may dispense with a reiteration of the same to proceed directly to the decision and its reasoning. E

Issue I F

10. In so far as the issue of clubbing the value of production/ clearances is concerned, it is significant to note that it is now beyond dispute that Circular 6/92 operated concomitantly with Notification No. 175/86. The Revenue has admitted to this in its Counter-Affidavit to this appeal, and thus the only point of question is whether the operation of Circular 6/92, and consequently, the benefit of SSI exemption may be halted from the commencement of Notification No 1/93. G

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A 11. The Tribunal, in deciding this question in the affirmative,
 relied solely on an interpretation of the decision of this Court
 in *Modi Alkalies & Chemicals Ltd. & Ors* (supra). Therefore,
 we may examine the operative part of the decision to adjudicate
 the correctness of the Tribunal's verdict. In *Modi Alkalies &*
 B *Chemicals Ltd. & Ors*, this Court held

The statements of the employees/Directors show that the
 whole show was controlled, both on financial and
 management aspects by MACL. If these are not sufficient
 to show inter-dependence probably nothing better would
 C show the same. The factors which have weighed with
 CEGAT like registration of three companies under the
 sales tax and income tax authorities have to be considered
 in the background of factual position noted above. When
 the corporate veil is lifted what comes into focus is only
 D the shadow and not any substance about the existence of
 the three companies independently. *The circular no.6/92*
dated 29.5.1992 has no relevance because it related to
notification no.175/86-CE dated 1.3.1986 and did not
relate to notification no.1/93.

E 12. What this Court was emphasizing in the aforesaid
 decision was not only the fact that Circular 6/92 has no effect
 upon commencement of Notification No. 1/93, but also the fact
 that the distinct legal nature of Companies cannot be used as
 F eyewash to portray its independent nature. Where the
 companies are indeed interdependent and possibly even
 related through financial control and management, the value of
 clearances has to be clubbed together in the interests of justice.
 The operation of Circular 6/92 admittedly protected entities like
 G the appellant prior to the commencement of Notification No. 1/
 93, but certainly not after the same. In this case, this Court has
 been presented with a preponderance of evidence to suggest
 that the companies are related not only in terms of financial
 control, but also through management personnel. In *Modi*
 H *Alkalies & Chemicals Ltd. & Ors* (supra) this Court has held

that two basic features which prima facie show interdependence are pervasive financial control and management control. We, therefore, proceed to apply the said two tests to the facts of this case.

13. R. Chauhan, P. Chauhan, R.N. Mungale and S.K. Motani, who are the directors of the appellant herein are among those who also serve on the Board of Directors in M/s PEL Ltd. and M/s PIL Ltd. It is also a fact on record that that M/s. PEL advanced an interest-free loan of Rs. 1 crore to the appellant, which was used for purchase of raw material by the latter (As evidenced from the balance sheet). Furthermore, the flavours being manufactured by the appellant were developed by M/ SPEL at their R & D Lab at Bombay, whose services were at the disposal of the appellant. They were at one point of time were manufactured by M/s. PEL and admittedly owned by them. Clearly, all this points to the inescapable conclusion that the three companies in question were intertwined in their operation and management. A careful scrutiny of the records therefore establish that both the aforesaid two basic features are overwhelmingly present in this case. Therefore it would likely seem that the purported fragmentation of the manufacturing process was but a mere ploy to avail of the SSI exemption. Piercing the corporate veil, when the notions of beneficial ownership and interdependency come into the picture, are no longer *res integra*. On this count therefore, we have no hesitation whatsoever in affirming the order of the Tribunal, which was justified entirely through the precedent set by this Court.

Issue II

14. The second issue concerns the question whether the 'code names' used to denote soft drink flavours manufactured by the appellant could in fact be termed as 'brand names' and if so, whether they belonged to another entity. The yardstick in this regard is Explanation VIII which is *pari materia* in both

A Notifications No. 175/86 and No. 1/93 and reads as:

B 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.

C We are not convinced by the argument of the appellant that this Explanation refers only to 'brand names' and cannot be used to determine whether code names, as used by the appellant in the present case, fall within the said category. The mere difference in nomenclature cannot take away the import of the Explanation from its applicability to the present case. The appellant herein manufactures flavours which fall within the ambit of the 'code names' and it is a fact on record that these codes are key to identifying the flavours which are commercially transferable.

F 15. Furthermore, it is expressly clear that the code names on the flavours indicate a connection in the course of trade between the specified goods and such person using such name or mark. The flavours in question, which were earlier manufactured by M/s PEL Ltd. and supplied to the franchise holders, were subsequently allowed to be made by the appellant. The franchise holders were in effect buying the very same flavours from the appellant and were placing orders by referring to the same code name, as is evident from the respective purchase orders. The users of the flavours, i.e. M/s PEL Ltd., M/s PIL Ltd. and specified bottlers are all interconnected since the latter group comprises franchisees of PEL and thus there is more than an iota of evidence to prove the connection in the course of trade between the flavours and the entity using the flavours through code names. Furthermore,

the ownership of the code names by M/s PEL Ltd. is clearly A
evidenced from the fact that these flavours were developed,
researched and concocted by M/s. PEL Ltd in its research
labs. That M/s. PEL Ltd. have given the brand names to the
flavours and allowed them to be manufactured by the appellant,
their holding company cannot hide the fact that M/s PEL Ltd B
were in fact, the owner of the code/brand names. This
conclusion is fortified by the fact that it was M/s PEL Ltd who
transferred the right of the codes when they were sold to M/s.
Coca Cola Company in November, 1993. Since the appellant C
was not the owner of the said brand names in question, the
Tribunal was justified in holding that the appellant will not be
entitled to the benefit of Notification No. 175/86 and 1/93 for
the products with code names G-44T, L-33A, T-IIPC, T-IIP, R-
66M and K-55T which belonged to M/s PEL Ltd.

16. After careful consideration of the issues in question and D
on a thorough reading of the facts on record, we are of the firm
opinion that the appeal bears no merit. Consequently, we
dismiss this appeal, but leave the parties to bear their own
costs.

N.J.

Appeal dismissed.