

Swastik Appliances vs Commissioner Of Central Excise, ... on 28 May, 2015

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT No. I

APPEAL No. E/1274/2011; E/25/2012 & E/85356 & 88243/2013-Mum

(Arising out of Order-in-Appeal Nos: PKS/18-22/Bel/2010 dated 29.4.2011; PKS/119/Bel/2010 dated 29.4.2011)

For approval and signature:

Hon ble Mr. P.K. Jain, Member (Technical)
and
Hon ble Mr. Ramesh Nair, Member (Judicial)

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1. Whether Press Reporters may be allowed to see : No the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?

2. Whether it should be released under Rule 27 of the :

CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?

3. Whether Their Lordships wish to see the fair copy : Seen of the Order?

4. Whether Order is to be circulated to the Departmental : Yes authorities?

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Swastik Appliances

Appellant

Vs.

Commissioner of Central Excise, Mumbai-III

Respondent

Appearance:

Shri Mihir Mehta, Advocate, for appellant

Shri V.K. Agrawal, Additional Commissioner (AR), for respondent

CORAM:

Hon ble Mr. P.K. Jain, Member (Technical)

Hon ble Mr. Ramesh Nair, Member (Judicial)

Date of Hearing: 25.3.2015

Date of Decision: 28.5.2015

ORDER NO

Per: P.K. Jain

Brief facts of the case are that the appellant is engaged in the manufacture of mixer and grinder. They availed the benefit of small scale exemption. The mixer and grinder being manufactured by them bear the brand name Swastik as also some other brand names.

2. Based upon an intelligence about the evasion of duty by the appellant, certain searches were conducted on 27.4.2006 at various places including factory, residential premises, transporter etc. and investigations were carried out. Based upon the investigations, it came out that the appellant was manufacturing mixer grinder in the brand name of Vipanchi along with the logo of Veena . Further, the said brand name and logo belong to one M/s. R.K. Fans & Allied Products, Hyderabad. Investigation also revealed that the mixer grinder bearing the said name Vipanchi were being manufactured by the appellant on behalf of the said M/s. R.K. Fans & Allied Products, Hyderabad and after manufacture, these were being sold to the said firm/their marketing arms who, in turn, was marketing the same. Appellants were not permitted to sell the said goods bearing the said brand name to anyone else.

3. A statement of Shri M. Krishna, Director of M/s. R.K. Fans & Allied Products, Hyderabad, was recorded on 27.12.2006, wherein he stated that his company was into the manufacturing of ceiling fans, voltage stabilizers under Vipanchi brand and they were into trading of mixer grinder in the name of Vipanchi . He further stated that the said brand name Vipanchi belongs to M/s. R.K. Fans & Allied Products, Hyderabad. In the statement he submitted that they have placed orders to the appellant for the manufacture of different models of mixer grinder and while placing the order, they have also forwarded a compact disc containing the details of their logo Vipanchi , design and the name which can be used whenever required. Shri Ramkishan also confirmed in his statement the uses of brand were exclusively for their supplies only. In nutshell, the appellant was prohibited from selling the Vipanchi brand mixer and grinder to anyone other than M/s. R.K. Fans & Allied Products, Hyderabad or other marketing firm. Further, statements of Shri Amritlal Jain, proprietor of the appellant-company, was recorded on 27.4.2006, 26.2.2007. In the statements, he broadly confirmed the investigation details carried out. He admitted that the artwork of the logo Vipanchi was provided to them by M/s. R.K. Fans & Allied Products, Hyderabad. Based upon the investigation, it appeared that the goods manufactured and bearing the brand name Vipanchi along with its logo will not be entitled to the small scale exemption Notification No. 8/2003 dated 1.3.2003. Accordingly a demand notice was issued on 16.7.2007 covering the period September 2004 to March 2007. In spite of the said show cause notice, the appellant did not take the registration or started filing the returns. Another show cause notice dated 26.6.2008 was thereafter issued covering the period April 2007 to March 2008. Similar show cause notice dated 9.4.2010 was issued covering the period April 2008 to March 2009, another show cause notice dated 8.7.2010 was issued covering the period April 2009 to March 2010 and yet another show cause notice dated 30.8.2011 was issued covering the period April 2010 to March 2011. The first two show cause notices

were adjudicated by a single order-in-original dated 17.12.2008. Other show cause notices were adjudicated vide orders-in-original dated 31.1.2011, 25.5.2011, 31.12.2012. Appellant filed appeal against the four orders-in-original. In respect of the first order-in-original, the Commissioner (Appeals) decided the matter vide his order dated 23.7.2013. In respect of order-in-original dated 31.1.2011, the Commissioner (Appeals) decided vide his order dated 29.4.2011. Similarly, order dated 25.5.2011 was decided by order dated 27.9.2011 and the order-in-original dated 31.12.2012 was decided vide order-in-appeal dated 27.7.2012. In the said orders, the Commissioner (Appeals) has upheld the duty demand and penalties. Against the said orders-in-appeal, the appellant is before this Tribunal.

4. It is seen from the orders-in-original and the Commissioner (Appeals) s various orders that though in his statement dated 27.12.2006 Shri M. Krishna, Director of M/s. R.K. Fans & Allied Products, Hyderabad, claimed that the said brand name Vipanchi belongs to them and the same was shown to Shri Amritlal Jain during a statement in February 2007 and he did not object to the said statement of Shri A. Ramkishan, however, after more than a year of receiving the first show cause notice at the time of personal hearing, the appellant produced a memorandum of understanding between him and Shri M. Krishna. The said memorandum of understanding is dated 10.6.2004 and on the basis of the said memorandum of understanding, the appellant claimed that the said brand name was assigned to them by Shri M. Krishna, Director of M/s. R.K. Fans and Allied Products, Hyderabad in respect of mixer/grinder. It is also the contention of the appellant that they have applied to the Trade Marks Registry for registration of the said brand name on 1.2.2007 and the Trade Marks Registry granted Certificate of Registration of Trade Mark under Section 23(2), Rule 62(1), on 7th October 2008, in Class 7 for the said brand name Vipanchi .

5. It is to be noted that the first two show cause notices are for the period prior to obtaining the registration from the Trade Marks Registry while in respect of the third one, a part of the demand is for the period prior to taking the registration (7.10.2008) from the Trade Marks Registry and part of the period is thereafter. In fourth and fifth show cause notices, the period involved is after obtaining the registration from the Trade Marks Registry. In respect of the last three show cause notices, the ground taken by the Revenue is that the symbol of Veena is the logo of M/s. R.K. Fans and Allied Products, Hyderabad, and the same is being printed on the mixer grinder as also on the cartons and the said symbol/logo has not been registered by the appellant with the Trade Marks Registry. Further, the carton of the said mixer grinder depicts the name of the marketing firm of Shri A. Ramkishan. According to the Revenue, in view of the symbol/logo on the mixer grinder as also the above factual aspect, even the goods manufactured post taking the registration would fall outside the scope of SSI Notification No.8/2003.

6. The learned counsel for the appellant s main submission is that, as per the memorandum of understanding dated 10/06/2005, the brand Vipanchi has been assigned to the appellant in April, 2004 itself and in view of this position it is an incorrect assertion that the band-name Vipanchi belongs to M/s. R.K. Fans & Allied Products, Hyderabad. The brand-name actually belongs to the appellant in respect of mixers and grinders and Shri M. Krishna in respect of fans, cookers, etc. It was further submitted that in April 2004 the brand-name has been assigned to the appellant and thus all rights vesting with Shri M. Krishna in respect of Vipanchi was transferred

to the appellant for consideration upon execution of the memorandum of understanding dated 10/06/2004. It was submitted that the appellants are the owner of the brand-name Vipanchi from April 2004 onwards after the deed of assignment by Shri A Ramkishan. The learned counsel further relied upon the following case laws: Commissioner of Central Excise, Ahmedabad vs. Vikshara Trading & Invest Pvt. Ltd. 2003 (157) ELT 4 (SC); Commissioner of Central Excise vs. West Coast Diesel Ltd. 2000 (122) ELT 103 (Tri.Mum) and Gavas Laboratory vs. Commissioner of Central Excise 2000 (122) ELT 516 (Tri.Del) wherein it was held that once there was an assignment in favour of another person and that fact was not in serious dispute; the mere fact that the assignment was not registered could not alter the position for the purpose of benefit of SSI exemption. It was also submitted that the brand-name Vipanchi is held by Shri M. Krishna for electrical fans, voltage stabilizer, etc. in Class 9 from May 2003 onwards and he has assigned/sold the brand-name to the appellants in respect of mixer grinders. It was also submitted that there is no objection by the Revenue in the show cause notice or in the impugned order-in-original and order-in-appeal regarding the authenticity of memorandum of understanding and once the assignment of the trademark is not in dispute, the fact that the brand-name Vipanchi actually belonging to the appellant from April, 2004 onwards cannot be disputed.

6.1 The learned counsel submitted that it would be seen that the department had issued number of show cause notices invoking extended period. It is well settled principle that after the first show cause notice, in subsequent show cause notices, extended period cannot be invoked.

7. The learned Additional Commissioner (AR), on the other hand, reiterated the findings in the orders-in-original and in the orders-in-appeal. He submitted that it cannot be said that the said memorandum of understanding was accepted by the department. In fact, no such averment i.e. existence of memorandum of understanding, was made by the appellant or Shri A. Ramkishan during the course of investigation. On the contrary, Shri M. Krishna very categorically stated in his statement that the brand name Vipanchi belongs to them. Neither Shri Amritlal Jain or Shri M. Krishna had at any point of time, talked about the said memorandum of understanding. During investigation, what was claimed was that Shri M. Krishna, Director of M/s. R.K. Fans and Allied Products, Hyderabad, got the mixer grinder manufactured from the appellant in the brand name Vipanchi which belonged to M/s. R.K. Fans and Allied Products. It is also submitted that the so called as memorandum of understanding was submitted after about 13 months of the issuance of the first show cause notice and at the time of personal hearing. The learned Additional Commissioner (AR) also submitted that the document submitted is only memorandum of understanding which has no legal force whatsoever. It is not even notarised leave alone registered. It is not even an agreement between the appellant and Shri M. Krishna, which can be enforced in a court of law. A perusal of the said memorandum of understanding would indicate that this cannot even be considered as a deed of assignment. It is at the most an understanding about business deal between the two. The learned AR relied upon the Hon ble Supreme Court's judgment in the case of Meghraj Biscuits Industries Ltd. vs. Commissioner of Central Excise 2007 (210) ELT 161 (SC); this Tribunal's judgment in the case of Vee Gee Faucets P. Ltd. vs. Commissioner of Central Excise 2010 (259) ELT 273; Swift Finvest Pvt. Ltd. vs. Commissioner of Central Excise 2010 (260) ELT 461 (Tri.-Del.). The learned AR also relied upon the Hon ble Supreme Court judgment in the case of Commissioner of Central Excise vs. Rukmani Pakkwell Traders 2004 (165) ELT 481 (SC).

7.1 It was further submitted that from the carton produced during the hearing, it is clear that the symbol of Veena is being printed on the carton as also on the mixer grinder and the said logo is clearly identifiable as the logo belonging to Shri M. Krishna/M/s. R.K. Fans and Allied Products, Hyderabad. Since the said logo has not been registered in the name of the appellant, it cannot be said that after getting the registration, there is no case of Revenue. The brand name registered and that depicted on the goods are not the same.

7.2 The learned AR further submitted that the object of the Notification is to protect the small scale industries who are manufacturing the goods in their own brand name. The purpose of the exemption is not to permit manufacture in the name of other's brand name. In the present case, it is undisputed fact that the goods being manufactured in the Vipanchi brand name were required to be compulsorily sold to M/s. R.K. Fans and Allied Products, Hyderabad or their marketing company and thus it is a case of a brand name owner getting the goods manufactured from a small scale unit. The purpose of the prohibition under Notification 8/2003 is to clearly debar such cases. He further submitted that in case of a small scale unit, the returns are required to be filed quarterly and, therefore, the period of limitation has to be counted from such date. In view of this position, the show cause notice dated 26.6.2008 cannot be said to have been issued after the prescribed period of limitation. In any case the appellant did not take registration or file any returns during the period in question and hence the extended period of limitation in various show cause notices has been correctly invoked.

8. In rebuttal, the learned counsel submitted that the decision in the case of Meghraj Biscuits Industries Ltd. (supra) is not applicable in the present facts and circumstances of the case, as in the said judgment, the Hon'ble Supreme Court has observed that there is no deed of assignment to M/s. Meghraj Biscuits Industries Ltd. Similarly, the other judgments quoted by the AR are distinguishable due to the facts of the present case. It was also submitted that the show cause notices issued post April 2008, after the receipt of the Trade Mark Registration certificate by the appellant are on the ground that the name of the marketing firm on the carton amounts to brand-name and picture of Veena is appearing on the carton as well as on the mixer. The learned counsel further submitted that the brand-name belongs to the appellant and writing the name of the marketing firm/or printing Veena on carton/mixer grinder will not disentitle the benefit of SSI Notification. He relied upon the following case laws in support of his contention that merely because the goods are distributed by some other company whose name and logo are also printed on cartons of its specified goods, it cannot be said that they are identified with the user of the brand name and the SSI exemption cannot be denied on this ground.

(i) DCI Pharmaceuticals Pvt. Ltd. vs. Superintendent of Central Excise 2000 (115) ELT 45 (Bom.);

(ii) Commissioner of Central Excise vs. Aarem Enterprises 2003 (153) ELT 111 (Tri.-Mum.);

(iii) Vi John Beauty Tech vs. Commissioner of Central Excise 2002 (143) ELT 148 (Tri.-Del);

(iv) Commissioner of Central Excise vs. Thio Pharma 2003 (151) ELT 84 (Tri.-Del.);

(v) Emkay Investments Pvt. Ltd. vs. Commissioner of Central Excise 2000 (124) ELT 741 (Tri.-Cal.);

(vi) CCE, Goa vs. Christine Hoden (I) Pvt. Ltd. reported in 1999 (113) ELT 591 (Tri.-Del.);

(vii) Palsons Drugs & Chemical Industries vs. CCE, Calcutta-I reported in 1998 (98) ELT 665 (Tri.-Cal.),

(viii) CCE, Mumbai vs. Ark Laboratories reported in 2005 (180) ELT (Tri.-Mum.).

8.1 The learned counsel also relied upon the judgment of the Tribunal in the case of Electron Industries Ltd. vs. CCE, Mumbai reported in 2014 (307) ELT 802 (Tri.-Mum.), to support the contention that penalty is not imposable since the issue relates to interpretation of notification. The learned counsel also submitted the following two case laws for advancing the plea that consideration paid for getting the brand name assigned is not relevant for determining exemption National Appliances vs. CCE, Mumbai reported in 2006 (206) ELT 802 (Tri.-Mum.) and CCE, Goa vs. Premella Sanitary Products reported in 2005 (184) ELT 125 (SC).

9. We have considered the submissions made by both the sides. We note that the benefit of small scale exemption is vide Notification 8/2003 dated 01/03/2003. Para 4 of the said Notification, which is relevant present discussion, is as under:

. The exemption contained in this notification shall not apply to specified goods bearing a brand name or trade name, whether registered or not, of another person, except in the following cases:-

(a) .

.

(b) .

..

The exclusion clauses are not relevant for the present dispute.

Further, in para 5, Explanation (A) defines brand-name or trade-name as under:

(A) brand name or trade name means a brand name or a 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; Thus in brief if a SSI unit manufactures specified goods bearing a brand/trade name of other person, benefit of SSI exemption is not available.

10. Before examining the applicability of the above mentioned Exemption Notification, the factual matrix emerging in the case is as under:-

Shri A. Ramkishan, Director of M/s. R.K. Fans & Allied Products Pvt. Ltd., along with its marketing company, M/s. Vipanchi Marketing Pvt. Ltd., are engaged in the business of trading, manufacturing and marketing of electrical ceiling fans with a brand name Vipanchi along with a logo of Veena and the same are sold in the markets in Andhra Pradesh and Maharashtra States. The said brand/trade name has considerable goodwill in this area. Shri A. Ramkishan thought of extending his business by selling mixer grinder under his brand name Vipanchi along with logo and for this purpose he approached the appellant firm and ordered for manufacture of mixer grinders different models and these mixer grinders were to be manufactured by the appellant firm carrying the brand name Vipanchi along with the logo. The goods were supplied by the appellant at the agreed price. The artistic style of brand name and logo were provided by Shri A. Ramkishan and the appellant. From the statements recorded during the investigation, it is clear that Shri A. Ramkishan was the brand name holder Vipanchi along with the logo. The same statement was also shown to Shri Amritlal Jain and he had no objection to that statement. It is to be noted that all throughout the period of various show cause notices, the goods have been manufactured under the brand name Vipanchi along with the logo Veena to Shri A. Ramkishan's firm R.K. Fans and Allied Products/Vipanchi Marketing Pvt. Ltd. There has been no change as far as indication of the brand name and logo on the mixer grinder as also on their carton is concerned. There are two factors that have come in between which are important. The first factor is the appellant after about 13 months of issuance of the show cause notice, during the personal hearing has produced copy of memorandum of understanding between Shri A. Ramkishan and Shri Amritlal Jain. Copy of the said memorandum of understanding is reproduced below for ready reference:-

According to the appellant, on 10th June 2014 they have entered into the said memorandum of understanding with Shri A. Ramkishan and as per serial No.3 on page 2 of the said memorandum of understanding, the trade mark Vipanchi (with logo) was assigned to the appellant in class 7 and they were required to complete the procedure and formality for registration of the trade mark. It is to be noted that the statements were recorded much later than 10th June 2004. During both statements neither Shri A. Ramkishan nor the present appellant talked anything about the said memorandum of understanding or the so called deed of assignment.

10.1 We have gone through the said memorandum of understanding. At the outset, we note that the document produced is only a memorandum of understanding. It is not even an enforceable agreement, leave alone the deed of assignment. A plain reading of the said memorandum of understanding would indicate that the appellant has entered into a contract with Shri A. Ramkishan to manufacture mixer grinder of 550 watts and the price has been fixed at Rs.750/- per piece excluding the tax etc. It also details about the testing and okaying of the goods as also the guarantee period etc. Para 3 does not indicate that Shri A. Ramkishan has assigned the said brand name to the appellant. It only talks that the appellant will complete all required procedure and formalities for registration of trade mark Vipanchi and the name with the logo in class 7 on their firm/company/individual name for which Shri A. Ramkishan does not have any objection. It is also seen that the memorandum of understanding is valid for five years and thereafter required to be renewed. In our opinion, the said memorandum of understanding which is not even notarized or registered and is not even an agreement, cannot be considered as a deed of assignment. It is at the most understanding between the appellant and Shri A. Ramkishan about the business model.

10.2 Another important development that had taken place on 1st February 2007 is that the appellant applied to the Trade Marks Registry for registration of the brand name Vipanchi and the appellant was granted registration on 7th October 2008. It is interesting to note that the appellant did not apply for registration of the logo which is being used by Shri A. Ramkishan on his products as also by the appellant on the goods manufactured and are matter of dispute in the present case. It is also important to note that the goods manufactured and supplied after the registration of the above trade mark continue to bear the logo of Veena on the mixer grinder as also on the carton being supplied to Shri A. Ramkishan or his two firms. Another important factor to be noted is that as per the statement of Shri A. Ramkishan, the appellant can use the said brand name and logo only for the goods manufactured and supplied to him/his firms and not to anyone else.

10.3 Keeping in view the above factual matrix, in our opinion, that before 7th October 2008 when there was no registration in favour of the appellant and Vipanchi was a brand name of Shri A. Ramkishan, Director of M/s. R.K. Fans and Allied Products, no case whatsoever can be said to have been made that the appellant was not using the brand name of another person which is the primary requirement for availing the benefit of small scale exemption notification. After 7th October 2008 also, we find that the logo of Veena which is exclusively used to denote the products of R.K. Fans and Allied Products continued to be used on the mixer grinder as also on the cartons. In nutshell, all throughout the period, the goods were bearing the brand name Vipanchi as also the logo Veena which are understood by the customers/purchasers as the products of R.K. Fans and Allied Products/Vipanchi Marketing Pvt. Ltd. and the appellant was prohibited from selling the same goods to anyone else other than R.K. Fans and Allied Products or their marketing company.

The various issues raised by the appellant have already been decided by the Hon ble Supreme Court in various judgments and subsequently this Tribunal has also decided certain cases based upon the decision of the Hon ble Supreme Court.

10.4 First issue is that the appellant is using the brand/trade name for mixer grinder in class 7 while R.K.Fans and Allied Products for class 9 goods. The Hon ble Supreme Court in the case of CC, Chandigarh-I vs. Mahaan Dairies reported in 2004 (166) ELT 23 (SC), in para 6, has to state the following:-

. We have today delivered a Judgment in Commissioner of Central Excise, Trichy v. Rukmani Pakkwell Traders - 2004 (165) E.L.T. 481 (S.C.) (Civil Appeal Nos. 3227-3228/1998) wherein we have held in respect of another Notification containing identical words that it makes no difference whether the goods on which the trade name or mark is used are the same in respect of which the trade mark is registered. Even if the goods are different so long as the trade name or brand name of some other Company is used the benefit of the Notification would not be available. Further, in our view, once a trade name or brand name is used then mere use of additional words would not enable the party to claim the benefit of the Notification. In view of the above decisions of the Hon ble Supreme Court, the fact that the appellant was using the brand name Vipanchi on mixer grinder while their customer was using the same brand name on other products, does not help the cause of the appellant.

10.5 Second issue is that goods were bearing brand name Vipanchi along with logo of Veena belonging to R.K. Fans and Allied Products Ltd. while what is registered was Vipanchi . Further, the Hon ble Supreme Court in the case of CCE, Trichy vs. Rukmani Pakkwell Traders reported in 2004 (165) ELT 481 (SC), in para 7, has to state as under:-

. 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.

11. The learned AR has quoted the judgment of the Hon ble Supreme Court in the case of Meghraj Biscuits Industries Ltd. (supra) and we note the following paragraphs are relevant for some of the pleas advanced by the appellant:-

1. We do not find? any merit in the above arguments. In the case of Pahwa Chemicals Pvt. Ltd. v. Commissioner of Central Excise, Delhi - 2005 (189) E.L.T. 257 (S.C.) this Court has held that the object of the exemption notification was neither to protect the owners of the trade mark nor the consumers from being misled. These are considerations which are relevant in disputes arising out of infringement/passing of actions under the Trade Marks Act. The object of the notification is to grant benefits only to those industries which otherwise do not have the advantage of a brand name [See : para].

12. Applying the? ratio of the above judgment to the present case, it is clear that grant of registration certificate under the Trade Marks Act will not automatically provide benefit of exemption to the SSI Unit.

13. In the case of? Commissioner of Central Excise, Chandigarh v. Bhalla Enterprises - 2004 (173) E.L.T. 225 (S.C.), this Court held that the assessee will not be entitled to the benefit of exemption if it uses on goods in question, same/similar brand name with intention of indicating a connection with the goods of the assessee and such other person or uses the name in such manner that it would indicate such connection. It was further held that the burden is on the assessee to satisfy the adjudicating authority that there was no such intention [See : paras 6 and 7].

16. Lastly, we are? required to examine the retrospective effect of the registration certificate dated 30-6-2000 with effect from 30-9-91. At the outset, we may reiterate that the object of the exemption notification was neither to protect the owners of the trade mark nor the consumers from being misled. These are considerations which are relevant in disputes arising under the Trade Marks Act. The object of the exemption Notification No. 1/93-C.E. was to grant benefits to those industries which do not have the advantage of a brand name. However, since retrospective nature of the registration certificate dated 30-6-2000 is repeatedly being raised in this Court we would like to examine the case law in this regard.

19. On reading the? above quoted paragraphs from the above judgment, with which we agree, it is clear that the effect of making the registration certificate applicable from retrospective date is based on the principle of deemed equivalence to public user of such mark. This deeming fiction cannot be extended to the Excise Law. It is confined to the provisions of the Trade Marks Act. In a given case like the present case where there is evidence with the Department of the trade mark being owned by M/s. Kay Aar Biscuits (P) Ltd. and where there is evidence of the appellants trading on the reputation of M/s. Kay Aar Biscuits (P) Ltd. which is not rebutted by the appellants (assessee), issuance of registration certificate with retrospective effect

cannot confer the benefit of exemption notification to the assessee. In the present case, issuance of registration certificate with retrospective effect from 30-9-91 will not tantamount to conferment of exemption benefit under the Excise Law once it is found that the appellants had wrongly used the trade mark of M/s. Kay Aar Biscuits (P) Ltd. 11.1 We also note that this Tribunal in the case of Swift Finvest Pvt. Ltd. (supra), has discussed about the deed of assignment and para 14 and 15 of the said judgments which are relevant to the present case are reproduced below:-

4.?At the outset it is to be noted that in a case where there is no dispute that the name used by the manufacturer for his product is a brand name of another person, taking resort to the explanation clause does not arise at all. Even otherwise, if we peruse the explanation clause, it lends no support to the case pleaded by the appellants. Plain reading of explanation would disclose that the name which is used in relation to a product for indicating some connection of that product in the course of trade with the person using such names then it would be a brand name of that person. It is not in dispute that Kamdhenu Cement is a brand name of Kamdhenu Ispat Ltd. In fact having admitted so, they have even produced copy of the agreement entered into between the appellants and M/s. Kamdhenu Ispat Ltd. for that purpose.

15.?The right of the appellants to use the said brand name pursuant to the agreement between the parties cannot entitle the party to contend that it ceased to be the brand name of another person or that it would become an exclusive brand name of the manufacturer. The agreement between manufacturer and the owner of the brand name may entitle the manufacturer to use such brand name for his product without any objection from the owner of the brand name. But that by itself will not result in amending the conditions of exemption notification. The exemption notification clearly requires that the benefit thereunder would not be available to the manufacturer of the cement bearing a brand name or trade name, whether registered or not, of another person. It does not make any exception when such use is permitted by the owner of the brand name. Irrespective of the fact whether the manufacturer has full consent of the owner of the brand name to use such brand name for his product or not, the use of such brand name would disentitle the manufacturer of cement from claiming any benefit under the said notification. 11.2 This Tribunal had occasion to again examine similar issues in the case of Vee Gee Faucets P. Ltd. (supra). In the said case, this Tribunal in para 11 to 14, 16, 21 to 23, has observed as under:-

1.?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.

12.?In Mahaan Dairies the Apex Court while dealing with the question as to whether the assessee was entitled to exemption under Notification No. 8/98-C.E., dt. 2-6-98 which excluded the benefit of exemption if the goods bore a brand name or trade name of another person and the explanation clarified the said term brand name or trade name as above while reiterating the decision in Rukmani Pakkwell Traders case held that even if the goods are different so long as the trade name or brand name of some other Company is used, the benefit of the Notification would not be available and further, once a trade name or brand name is used then mere use of additional words would not enable the party to claim the benefit of the Notification.

13.?In Bhalla Enterprises case while observing that there was no reason to differ from the reasoning in the earlier decisions in Rukhmani Pakkwell Traders and Mahaan Dairies case it was held by the Apex Court that Clause 4 of Notification No. 1/93-C.E. exempted certain goods upto a particular value and excluded such benefit in case of product bearing brand name or trade name of others and that therefore, Clause 4 of the said Notification clearly disapproved the benefit of the exemption in cases where someone else's name in connection with their goods was used either with the intention of indicating in a manner a connection between the assesses goods and such other person. There is no requirement for the owner of the trade mark should use the name or mark with reference to any particular product. The object of the exemption notification was neither to protect the owners of the trade mark/trade name nor the consumers from being misled. These are considerations which are

relevant in cases relating to disputes arising out of trade mark infringement or passing off actions under the Trade Marks Act. The object of the Notification under the Excise Act is clearly to grant benefit only to those industries which otherwise do not have the advantage of a brand name.

14.?In Meghraj Biscuits Industries Ltd. case, the Apex Court was dealing with the matter in relation to Notification No. 1/93-C.E., dt. 28-2-93 which was issued to help the SSI Units to survive in the market dominated by brand name or trade name. The object of the Notification was to help such units and thereby increase industrial production. Therein the Explanation IX to the said Notification defined the word brand name and trade name as under :

Explanation IX - 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 .

Para 7 which was added to the said notification w.e.f. 1-3-94 read thus -

Para 7 - 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 .

Plain reading of the above decision of the Apex Court would reveal that a notification which specifically excludes the benefit thereunder in cases where the goods carry a brand name or trade name, merely because there is some arrangement either in the form of contract between the parties giving consent for use of such brand name or trade name by person other than the proprietor thereof cannot result in nullifying the mandatory condition imposed and incorporated in such notification in order to enable the manufacturer to avail the benefit thereunder. It is well settled law that the exemption notifications are to be strictly construed. A notification which grants the benefit in the form of exemption from payment of duty when it requires the claimant of such benefit to comply with certain condition, the claimant has no option but to comply with such condition to enable him to avail the benefit under such notification.

16.?Plain reading of the Notification nowhere discloses that the exemption thereunder can be availed for the product bearing brand name or trade name of other person on the basis of consent of the proprietor of such brand name or trade name. Neither it discloses that assignment of right in relation to brand name or trade name by the proprietor thereof in favour of manufacturer of goods would exclude such manufacturer from the exclusion clause in the notification. It is well established that

the product which carries the brand name or trade name whether registered or not of another person, such product would be non-eligible to claim the benefit under the notification. That is the law laid down in clear words by the Apex Court in Bhalla Enterprises and reiterated in Meghraj Biscuits Inds. Ltd. case.

21.?Taking into consideration rival contentions in this regard as well as the decisions of the Apex Court referred to above, it is difficult to accept the contention on behalf of the appellants that mere consent or the mere assignment deed would entitle the appellant to claim benefit under the said notification.

22.?As regards the registration of brand name, the same does not disclose the appellants to be the exclusive owner of the brand name or trade name, rather it discloses that the appellant to be subsequent proprietor and that too on the basis of assignment deed. In the absence of the appellant being exclusive proprietor of the brand name and trade name and there is a clear admission that M/s. United Cocks Pvt. Ltd. were the original owners, use of the brand name GURU by the appellant would continue to be a use of a brand name of another person. Being so that would be hit by the conditions incorporated under the said notification and would disentitle the benefit thereunder .

23.?Besides the registration has been effected from 6-4-04. Applying the law laid down by the Apex Court in Meghraj Biscuits case, retrospective grant of registration cannot create any right in revenue matters even assuming that such registration could be said to be exclusive registration of the brand name in favour of the appellants. It is also not clear as to whether registration in the manner and the circumstances it had been granted, has at all resulted in creating the brand name to be the exclusive property of the appellants. 11.3 We find the appellant has quoted catena of judgments. However, we observe that all these judgments are for period prior to the judgments of the Hon ble Supreme Court mentioned earlier and the Hon ble Supreme Court has laid down the law and interpreted the intention of the notification and in view of the said position, we do not consider it necessary to discuss the said case laws. The judgment of Hon ble Supreme Court in the case of Vikshara Trading & Investment P. Ltd. (supra) does not help the appellant as there is no deed of assignment.

12. Another contention raised by the appellant is that after issuance of the first show cause notice, extended period cannot be invoked in the subsequent show cause notices. It is noted that the appellant was not registered and they did not take the registration even after issuance of the first show cause notice of 16th July 2007. We also note that the SSI units are generally required to file quarterly returns. It is also noted that the fact that the symbol Veena continues to be used on the mixer grinder as also on the cartons could be found only during the visit of the officials at the premises of the appellant. Vital facts were suppressed and thus, in our view, this is appropriate case for invoking the extended period of limitation in subsequent

notice. We, therefore, do not see any infirmity in invoking the extended period of limitation in subsequent notices.

13. The appellant has also stated that penalty is not imposable since the issue relates to the interpretation of notification. We are not impressed with the said argument. In the present case, from the day one it was very clear that the appellant was manufacturing the goods in their own brand name and entered into a contract with Shri A. Ramkishan, Director of R.K. Fans and Allied Products, to manufacture mixer grinder in their brand name to be exclusively supplied to them. There can be no doubt that they were manufacturing the goods in the brand name of others and that is exactly what the said notification prohibits to permit. In any case, the period involved in the present case is 2004 onwards when the decisions of the Hon ble Supreme Court on the issue were available and there could have been no doubt whatsoever relating to the interpretation of the notification.

14. In the result, all the appeals are dismissed.

(Pronounced in Court on 28.5.2015) (Ramesh Nair) Member (Judicial) (P.K. Jain) Member (Technical) tvu