REGISTERED/AD

Email : delhi@cestat.gov.in

GRAM : CEGCANAL
Website : www.cestat.gov.in

2

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
EXCISE APPEAL BRANCH

Date 11/08/2010

Appeal No. E/1702/2005-1704/2005 - EX[DB]

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S VEE GEE FAUCETS P LTD
36, IDC, MEHRAULI ROAD, GURGAON — Appellant
Vs
M/S VEE GEE FAUCETS P LTD — Respondent

C.C.E. DELHI III

I am directed to transmit herewith a certified copy of **Final order No.** 552 - 554 **2010 EX[DB]** dated 25.03.2010 passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(Excise Appeal Branch)

Copy to :
1. Respondent
   C.C.E. DELHI III
   UDYOG MINAR, UDYOG VIHAR, VANIJYA NIKUNJ, PHASE V, GURGAON - 122016 (HARYANA)
2. Adv. / Consult
   ~~MR.BHASIN SETHI & ASSICIATE~~
   ~~401,SATYAM CINEMA BUILDING,RANJEET NAGAR,DELHI~~
   SH. S.P. KAUSHIK, ADV, A-14/3, SFS FLATS, SAKET, N. DELHI-17
3 S.D.R
~~4 J.C.D.R.~~
5 Bar association. CESTAT. New Delhi
6 Director Publications. Customs. Excise. I.P. Estate. New Delhi
7 M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi - 3
8 Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
9 M/s. Deeparchie Publications. M-93. Marg. 46. Saket. New Delhi 110017
10 Taxmann Allied Service Pvt Ltd.. 59/32. New Rohtak Road. New Delhi - 110005
11 Easy Service Tax Online Dot Com Pvt.Ltd.407A.Iscon Mall.Above Star India Bazar.Satellite Road.Ahmedaba
12 LAWCRUX Advisors Pvt Ltd. LAW House.1-8.Sector - 10. Faridabad 121003 (Haryana)
13 TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
14 Office Copy
15 Guard file
16. SH. ASHOK SHARMA, DIRECTOR M/S VEE GEE FAUCETS PVT. LTD.
    36, IDC, MEHRAULI ROAD, GURGAON
17. SHRI DHEERAJ SHARMA, DIRECTOR, M/S VEE GEE FOAUCETS PVT. LTD.
    36, IDC, MEHRAULI ROAD, GURGAON
18. HON'BLE PRESIDENT.

Assistant Reg
(Excise Appeal Br

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block 2, R.K.Puram,New Delhi-110066
Principal Bench, New Delhi.

For approval and signature:

Hon'ble Mr. Justice R.M.S.Khandeparkar, President
Hon'ble Mr. Rakesh Kumar, Member (Technical)

1.Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	:	Yes
2.Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	:	Yes
3.Whether their Lordships wish to see the fair copy of the order?	:	Seen
4.Whether order is to be circulated to the Department Authorities:	:	Yes

Appeal No.1702/05

(Arising out of Order-in-Appeal No.102/AKG/GGN/2005 dated 28.2.2005 passed by Commissioner(Appeals), Gurgaon)

M/s. Vee Gee Faucets P. Ltd. — Appellants

Versus

CCE, Gurgaon — Respondent

AND

Appeal No.1703/05

(Arising out of Order-in-Appeal No.103/AKG/GGN/2005 dated 28.2.2005 passed by Commissioner(Appeals), Gurgaon)

Shri Ashok Sharma, Director — Appellants

Versus

CCE, Gurgaon — Respondent

AND

Appeal No.E/1704/05

(Arising out of Order-in-Appeal No.104/AKG.GGN/2005 dated 28.2.2005 passed by Commissioner(Appeals), Gurgaon)

Shri Deeraj Sharma, Director Appellants

Verses

CCE, Gurgaon Respondent

Appearance
Shri J.P.Kaushik, Adv. For Appellants

Shri Sunil Kumar, DR for Respondent

Coram: Hon'ble Mr. JUSTICE R.M.S.KHANDEPARKAR, PRESIDENT
Hon'ble Mr. RAKESH KUMAR, MEMBER (TECHNICAL)

FINAL ORDER No. 552-554/10-EX

Date of decision: 25.3.2010
Oral Order No.______________

Per Justice R.M.S.Khandeparkar:

Since common questions of law and facts arise in all these appeals, they were heard together and are being disposed of by this common order.

2. These appeals arise from Order-in-Appeal No.102-104/AKG/GGN/2005 dated 28.2.2005 passed by Commissioner(Appeals), Gurgaon whereby the appeals filed by the appellants against the order of the adjudicating authority have been dismissed. The Additional Commissioner, Delhi by his order dated 27.8.04 had confirmed the demand of duty to the extent of Rs.40,00,163/- while appropriating the amount of duty of Rs.12,50,000/- already deposited by the appellants and had ordered payment of interest under Section 11AB of the Central

Excise Act,1944 and had also imposed penalty of equal amount of duty against the company and further penalty of Rs.90,000/- under Rule 25 of the Central Excise Rules,2002 on the ground of contravention relating to the goods seized at their premises. Besides penalty of Rs.20,00,000/- and Rs.15,00,000/- has been imposed against the Directors namely Shri Ashok Sharma and Sh. Dheeraj Sharma respectively under Rule 26 of the said Rules as also there is order for confiscation of the goods valued at Rs.5,89,273/- seized at the premises of the company while giving option to redeem the same on payment of fine of Rs.2,50,000/- and also the goods worth Rs.18,29,209/- seized at the premises of different traders are ordered to be redeemed on payment of fine of Rs.10,00,000/- alongwith appropriate amount of duty. The said order was passed pursuant to the adjudication of the show cause notice which was issued to the appellants on 7.1.04 in relation to the period from February,2001 to July,2003.

3. The appellants are engaged in the manufacture of Bathroom and Sanitary fittings classifiable under Chapter Heading 8481.80 of the Schedule to the Central Excise Tariff Act,1985 and the goods manufactured by them were affixed with brand name of "GURU". The appellants were availing benefit of SSI exemption in terms of Notification No.8/2001 dated 1.3.2001 as amended from time to time and were accordingly clearing the goods at Nil rate of duty upto the exemption limit of Rs.one crore available under the said Notification.

4. Acting upon information that the appellants were engaged in manufacture and clearance of the said goods under brand

name 'GURU' belonging to another person and simultaneously claiming SSI exemption under the said Notification, the officers of the Commissionerate at Delhi visited the factory premises of the appellants' company on 11.7.2003. On scrutiny of the records at the factory premises, it was revealed that the brand name 'GURU' was owned by M/s. United Cocks Pvt. Ltd., A/22, Shardapuri, Ramesh Nagar, New Delhi. Consequently investigation commenced and ultimately the said show cause notice dated 7.1.2004 came to be issued after recording various statements and obtaining various information from the appellants. The specific accusation against the appellants was that they were concerned with the manufacture and clearance of branded goods without payment of appropriate excise duty and availment of the benefit under Notification No.8/2001-CE dated 1.3.2001 resulting in evasion of payment of the excise duty.

5. It is the case of the appellants that the brand name 'GURU' was originally registered with Trade Mark Authority in favour of M/s. United Cocks Pvt. Ltd., New Delhi. The appellants were engaged in manufacture of Bathroom and Sanitary fittings affixed with the brand name 'GURU'. They started the production of goods sometimes in February,2001 and entered into agreement with M/s. United Cocks Pvt. Ltd. on 13.2.2001 for the use of the said brand name. A Memorandum of Understanding was executed on 2.4.2001 regarding the right of the appellants to use the said brand name and further Deed of Assignment was executed by the parties on 1.4.2003. The application for registration of the brand name in favour of the appellants was

filed on 23.7.2003 and the letter dated 17.10.03 from the Trade Marks Registry, Mumbai was received by the appellants acceding to their request for entry in the register in relation to the said brand name in favour of the appellants. The said entry was made on 16.10.2003. The certificate in terms of Section 137 of the Trade Marks Act was forwarded to the appellants on 6.4.2004 registering the appellants as subsequent proprietor of the brand name 'GURU' w.e.f. 1.4.2001.

6. In the background of the above facts, it is the case of the appellants that apart from lawful permission from the erstwhile original owners of the brand name 'GURU' right from the beginning for use of the said brand name for the product manufactured by the appellants, there was also a Memorandum of Understanding executed between the parties sanctioning such use of the brand name by the appellants w.e.f. 2.4.2001 and further even the appellants were registered as the subsequent proprietor of the brand name w.e.f. 1.4.2001. Meanwhile there was also a Deed of assignment executed on 1.4.2003. In the background of these facts according to the appellants, they were fully protected for the use of the brand name 'GURU' right from the commencement and in any case from 1.4.2001 and hence it cannot be said that they have in any manner violated the conditions of the said notification or that they were not entitled for benefit under the said notification. It is their further case that the goods which were seized, were not liable to be confiscated as the manufacture thereof was not in violation of any of the rules or provisions of law. It is also their case that the use of the brand

name was under the bonafide belief that they were lawfully entitled to use the same as the proprietor and further by virtue of Assignment Deed and also in terms of subsequent registration of the brand name in their favour, there was no justification to confirm the duty liability as sought to be done by the authority and for the same reason, there was no justification for demand of the interest. It is the further case that the provisions of Section 11AB are not attracted to the case prior to 11.5.2001 as the said provision of law came into force from that day. Since the goods which were seized, were not liable to be confiscated, there was also no occasion to impose the penalty either against the company or against the Directors.

7. Learned Advocate appearing for the appellants placing reliance in the decisions in the matter of **CCE, Goa vs Primella Sanitary Products** reported in 2005(68)RLT.716, **CCE, Ahmedabad vs Vikshara Trading & Invest P. Ltd.** reported in 2003(58)RLT.604, and **CCE, Mumbai vs Bigen Inds. Ltd.** reported in 2006(74)RLT.448 submitted that law on the point of entitlement of the assessee to claim the benefit under the said Notification pursuant to the use of the brand name on the basis of consent of the proprietor of the brand name or assignment is well settled by the said decision of the Apex Court. Considering the same according to the learned Advocate, the authority below was not justified in saddling the appellants with duty liability. He further submitted that the authorities below did not properly analyse the documentary evidence placed on record disclosing lawful assignment of the brand name in favour of the appellants

for use thereof and further lawful registration of the said brand name in favour of the appellants with retrospective effect. He further submitted that the records nowhere disclose any intention on part of the appellants to evade the duty at any point of time. He further submitted that the records nowhere disclose that the goods, which were seized, were liable to be confiscated. He also submitted that in view of the fact that the provisions of law under Section 11AB came into force from 11.5.2001, the claim for interest cannot relate to the period prior to the said day. It was also the contention on behalf of the appellants that there was no suppression of any fact at any point of time and therefore, the show cause notice could not have been issued on 7.1.2004 in relation to the period prior to one year preceeding issuance of the said show cause notice and claim in that regard in any case is barred by limitation. Further referring to the decision of the Larger Bench in the case of **Ramply (India) Ltd. vs CCE, Belapur** reported in 2007(82)RLT.363, learned Advocate submitted that mere non-disclosure of the use of brand name of another person in the classification list cannot justify invocation of extended period of limitation.

8. Learned DR on the other hand placing reliance in the decision of the Apex Court in the case of **Meghraj Biscuits Industries Ltd. vs CCE** reported in 2007(210)ELT.161, **CCE, Chandigarh vs Bhalla Enterprises** reported in 2004(173)ELT.225(SC), **CCE, Trichy vs Rukmani Pakkwell Traders** reported in 2004(165)ELT.481(SC) and **CCE, Chandigarh vs Mahaan Dairies** reported in

2004(166)ELT.23(SC) submitted that Notification No.8/2001 dated 1.3.2001 does not permit a manufacturer to avail the benefit thereunder in cases where such manufacturer uses the brand name or trade name of others. Mere consent of such other person or assignment of such brand name or trade name also cannot create a right in favour of the manufacturer to insist for benefit under the said notification, as no such facility is available under the said notification. He further submitted that the decision of the Apex Court in Meghraj Biscuits Inds. Ltd. case further clarifies that registration of the brand name in favour of the manufacturer retrospectively cannot be of any help to such manufacturer to claim benefit under the said notification. He further submitted that records clearly disclose that the registration certificate in relation to the brand name was pursuant to the Deed of Assignment dated 1.4.2003 and the affidavit of one Ashok Sharma dated 1.10.2003. Records also disclose that the request for such registration was made only on 5.8.2003; even the copy of the application in form TM-24 under Trade and Merchandise Act,1958 was filed on 23.7.2003. Being so, during the period from February,2001 till July,2003, there was no lawful authority to the appellants to use the said brand name. Even assuming that the proprietor had permitted such use of their brand name by the appellants, taking into consideration the decisions of the Hon'ble Supreme Court, the same would not be of any help to the appellants in any manner.

9. As already pointed out above, undisputedly, the period involved in the matter is between February.2001 and July,2003. It is also undisputed fact that the appellants had sought to avail the benefit under the said notification and at the same time, the appellants had been manufacturing the goods and clearing the same with the brand name 'GURU' being affixed thereto. It is also undisputed fact that the said brand name belonged to United Cocks Pvt. Ltd. It was only pursuant to the certificate dated 6.4.04 that the appellants acquired the right of subsequent proprietor in relation to the said brand name. There was also Assignment Deed dated 1.4.2003 and the affidavit of Sh. Ashok Sharma dated 1.10.2003 permitting the use of the brand name.

10. It is also not in dispute that the notification in question clearly provides that the exemption contained under said notification shall not apply to the specified goods bearing a brand name or trade name whether registered or not of another person except in the cases specified in the said notification and that the appellants' case does not fall in any of the said exceptions. It is, however, the contention on behalf of the appellants that they were lawfully entitled to use the brand name 'GURU' pursuant to the consent, assignment and registration of the said trade name in favour of the appellants.

11. 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 writting 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-CE 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-CE 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-CE 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-CE 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.

15. The expression "brand name or trade name (registered or not) of another person" found in the explanatory notes describing the scope of the term brand name and trade name under the said notification cannot be construed either to enlarge the scope of exemption or reduce the same. Grant of exemption is essentially an executive function of the Government based on the policy framed in relation to revenue the matters by the Government. It is not for the Tribunal or any Court or the authority in the name

of interpretation to read down such notification or add to or substract something from 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.

17. The learned Advocate for the appellants, however, drawing our attention to para 22 of Meghraj Biscuits decision submitted that it had distinguished the decision in the Bigen Industries Ltd. case. Para 22 of Meghraj Biscuits Indus. Ltd. decision reads thus –

> "Before concluding we may refer to the judgment of this Court in the case of **Commissioner of Central Excise, Mumbai vs Bigen Industries Ltd.** – 2006(197)ELT.305(SC). In that matter a show cause notice was issued calling upon the assessee to show cause by the exemption be not denied to the assessee. In para 19 of the show cause notice the authority accepted the existence of a deed of assignment. However, the show cause notice denied the exemption on the ground that Notification No.140/83-CE did not make any distinction between a brand name owned by a person in India or abroad. In the present case, the facts are entirely different. In

the present case, there is no deed or assignment from M/s. Kay Aar Biscuits (P) Ltd. to the M/s. Meghraj Biscuits Industries Ltd.(appellants herein). As stated above, there is no proof of acquisition on payment or consideration by the appellants to M/s. Kay Aar Biscuits (P) Ltd. In the present case, there is no evidence of assignment or licence from M/s. Kay Aar Biscuits(P) Ltd. to the appellants. In the present case, we are concerned with the retrospective effect of the certificate issued by the Registrar of Trade Marks on 30.6.2000 with effect from 30.9.91. In the circumstances, the judgment of this Court in the case of Bigen Industries(supra) has no application".

18. In Bigen Industries case, the Apex Court had held thus –

> "The adjudicating authority as well as the Commissioner(Appeals) have proceeded on the basis as if the order passed by the Trade Mark Registry registering the trade mark in favour of the assessee is erroneous and of no consequence. The Tribunal is right in observing that once the trade mark has been registered in the name of the assessee by the statutory authority authorized to do so recognizing the assessee to be the sole proprietor of the trade mark for India, the adjudicating authority as well as the Commissioner(Appeals) erred in denying the benefit of the notification under consideration. This apart, the earlier decision of the Tribunal in Bigen Industries(supra) between the parties on the same facts for the period from 12th August,1989 to 25th August,1989 having attained finality, as the Revenue did not file any further appeal, the Revenue is precluded from taking a different stand in the present appeals as per law laid down by this Court in a catena of cases. (See Collector of Central Excise, Pune v. Tata Engineering & Locomotives Co. Ltd. reported in (2003) 11 SCC 193; Berger Paints India Ltd. vs Commissioner of Income Tax, Calcutta reported in (2004) 12 SCC 42, Birla Corporation Ltd. vs. Commissioner of Central Excise reported in (2005) 6 SCC 95 = 2005(186)ELT.266(SC); and Jayaswals Neco Limited vs. Commissioner of Central Excise, Nagpur reported in 2006(195)ELT.142(SC)".

Proper reading of the decision in Bigen Industries case would disclose that the Apex Court therein has held that the Tribunal was right in observing that once the trade mark has been registered in the name of assessee by the statutory authority authorised to do so, recognizing the assessee to be the sole proprietor of the trade mark for India, the adjudicating authority as well as the Commissioner(Appeals) erred in denying the benefit of the notification under consideration. The order of the Hon'ble Supreme Court does not relate to any assignment or consent of the proprietor. It was essentially on the point that once the statutory authority had recognized in accordance with the provisions of law the right of the assessee to be "the sole proprietor of the trade mark for India", it was improper for the revenue authorities to deny the benefit of the exemption notification to such assessee. Once the manufacturer is declared as the sole proprietor in relation to the brand name, it is needless to say that he ceases to be the manufacturer of the product with the brand name or trade name of some other person. The Apex Court has clarified that the revenue authorities in such circumstances were not justified in denying the benefit of exemption notification and had taken note of the same in Meghraj Biscuits case while dealing with the issue which was sought to be raised in relation to existence or non-existence or denovo assignment between the partie. In Meghraj case, there was no deed of assignment. It was on that count that reference was made to the decision in Begin Industries case. That itself cannot be construed to hold that the Apex Court thereby has held that wherever there is a deed of assignment, it would mean that the manufacturer can avail the benefit under the notification.

19. The decision in **Primella Sanitary Products** was in the facts of the said case where there was no dispute as to whether

assignment can create right to claim benefit of the exemption notification. The said point was never raised before the Apex Court in the said decision and therefore, it cannot be said to be a ruling on the point whether the existence of assignment can justify the benefit of the said notification.

20. In **<u>Vikshara Trading</u>** case, the issue was not as to whether assignment will disentitle the benefit of notification but the issue was as to whether assignment needs registration or not. This is evident from para 3 of the decision which reads thus –

> "The contention putforth before the Tribunal as well as before us is that no document has been shown that the subsequent assignment in favour of M/s.Vikshara Trading & Investment P.Ltd. was registered as contemplated under the Trade and Merchandise Marks Act,1958. This aspect was taken note of by the Tribunal that the trade mark need not necessarily be in respect of all goods unless registration has been so acquired and it is therefore, permissible in law to have same brand name for different classes of goods owned by different person, and in that background found in favour of the respondent and held that the Notification No.223/87-CE dated 22.9.1987 was applicable. <u>When as a matter of fact it is held that there was an assignment in favour of the first respondent and that fact was not in serious dispute the mere fact that the assignment was not registered could not alter the position.</u> Therefore, we decline to interfere with the order made by the Tribunal and to that extent the appeal is dismissed in respect of respondent No.1".(Emphasis reported)

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.

24. It is also sought to be argued that the claim is barred by limitation as far as it relates to the period prior to one year preceding the issuance of the show cause notice. The show cause notice was issued on 7.1.04. It related to the period February,2001 to July,2003. Learned Advocate for the appellants has fairly conceded that there is no documentary evidence to disclose that the appellants at any point of time specifically

informed the Department that the appellants had been using brand name which belonged to M/s. United Cocks Pvt. Ltd. prior to recording of statement during the investigation on 11.7.03. Being so, it was not within the knowledge of the respondent that the appellants were using the brand name of other person. In the facts and circumstances of the case, it cannot be said that there was no suppression of the fact by the appellants.

25. In any case the point of limitation does not arise at all for consideration at this stage as point of limitation is not a pure question of law. It is a mixed question of law and facts. A party who wants to raise such point has to raise the same at the earliest point of opportunity so that the defending party can rebut the same by producing proper evidence. Admittedly the appellants had not raised the said point either in reply to the show cause notice or even in the appeal memo filed in the present case. It is only in the course of the argument that the learned Advocate sought to raise the said point. Such a procedure is not permissible.

26. It is also sought to be contended that considering the provisions of Rule 25 of the Central Excise Rules,2002, the goods seized were not liable to be confiscated. Rule 25 provides that subject to the provisions of Section 11AC of Central Excise Act,1944, if any producer, manufacturer, registered person of a warehouse or a registered dealer either removes any excisable goods in contravention of any of the provisions of these rules or the notifications issued under these rules or does not account for any excisable goods produced or manufactured or stored by him

or engages in the manufacture, production or storage of any excisable goods without having applied for the registration certificate required under Section 6 of the Act; or contravenes any of the provisions of the said rules or the notifications issued under these rules with intent to evade payment of duty, then all such goods shall be liable to confiscation and the producer or manufacturer or registered person of the warehouse or a registered dealer, as the case may be, shall be liable to a penalty not exceeding the duty on the excisable goods in respect of which any contravention of the nature referred to any of the provisions to the said rule has been committed or Rs.10,000/- whichever is greater. Indeed we find no material on record to justify the action of the authority under Rule 25 of the said Rules. It is sought to be contended on behalf of the respondent that there was no strict compliance of the said Rules in-as-much as there was no disclosure of the relevant factors in quarterly returns filed by the appellants. That may be so in relation to the goods which were cleared and not in relation to the goods in question because there was still time for the appellants to file such return. Being so on the said ground, the authorities could not have invoked the powers under Rule 25 of the said Rules. To that extent impugned order cannot be sustained. Obviously, therefore alongwith the confiscation, the penalty also cannot be sustained under Rule 25 in relation to the goods which were seized from the premises of the appellants.

27. It was also the contention on behalf of the appellants that there was no justification for penalty against the Directors in

exercise powers under Rule 26 of the said Rules. Rule 26 provides that any person who acquires possession of, or is in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing or in any other manner deals with, any excisable goods which he knows or has reason to believe are liable to confiscation under the Act or these rules, shall be liable to a penalty not exceeding the duty on such goods or Rs.10,000/- whichever is greater. Perusal of the impugned order does not disclose any finding regarding the involvement of the Directors in the matter of either concealment or storage or dealing with the goods which were seized from the premises of the appellants so as to warrant the imposition of penalty against them under Rule 26. It is not mere observation that the Directors have role in clandestine removal of the goods that would support the imposition of penalty under the said provision. The order should disclose some connection between the transaction and the Directors and the fact of clandestine removal or other such activity in relation to the goods. In the absence thereof, the appellants are justified in contending that the penalties against Directors cannot be sustained.

28. In the result the appeals partially succeed and the impugned order to the extent it confiscates the goods valued at Rs.5,89,273/-seized at the premises of the appellants and imposition of penalty Rs.90,000/- against the appellant company as well as imposition of penalty of Rs.20,00,000/- and Rs.15,00,000/- against the Directors under Rule 26 is liable to be set aside.

29. As far as interest is concerned, the appellants are also justified in saying that there cannot be any demand of interest for the period prior to 11.5.2001. The interest payable under Section 11AB of the Said Act would be w.e.f. 11.5.2001 and not prior to that day. No other interference is called for in the impugned order.

30. The appeals are accordingly disposed of in the above terms.

(Justice R.M.S.Khandeparkar)
President

(Rakesh Kumar)
Member Technical

km