CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH

Excise Appeal No. 963 of 2012

(Arising out of Order-in-Original No. 187/19/V/2012/Commr/KS dated 21.03.2012 passed by the Commissioner of Central Excise, Mumbai-V)

M/s. Kalki Industries **Appellant**
Prop. Shri Chandrakant Gosar Gosrani (HUF),
Kalki Estate, I.B. Patel Road,
Goregaon (E), Mumbai 400 063.

Vs.

Commissioner of Central Excise, Mumbai-V **Respondent**
5th Floor, Utpad Shulk Bhavan,
Plot No. C-24, Block 'E',
Bandra-Kurla Complex,
Bandra (E), Mumbai 400 051.

Appearance:

Shri Shailesh P. Sheth, Advocate, for the Appellant
Shri Amrendra Kumar Jha, Deputy Commissioner, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

Date of Hearing: 22.12.2022
Date of Decision: 22.12.2022

FINAL ORDER NO. 86298/2022

PER: SANJIV SRIVASTAVA

This appeal is directed against Order-in-Original No. 187/19/V/2012/Commr/KS dated 21.03.2012 passed by the Commissioner of Central Excise, Mumbai-V. By the impugned order, the Commissioner has held as follows:-

"ORDER

i. I confirm the demand of Rs.81,08.341/- (Rupees eighty one lakhs eight thousand three hundred forty one only) [Basic Rs.78.85.256/- Education Cess Rs.1,57,707/-; S & HE Cess Rs.65,378/-] under Sub-Section (4) to Section 11A of the Central Excise Act, 1944, against M/s Kalki Industries;

ii. I order for recovery of interest at appropriate rate under Section 11AA of the Central Excise Act, 1944;

iii. I impose a penalty of Rs.81,03,341/- (Rupees eighty one lakhs eight thousand three hundred forty one only) under clause (a) to Sub Section (1) of Section 11AC of the Central Excise Act, 1944 and/or Rule 25 of the Central Excise Rules, 2002 upon M/s Kalki Industries;

iii. I order for appropriation of Rs.3,00,000/- (Rupees three lakhs only) against the above confirmed liabilities."

2.1 Intelligence was gathered to the effect that the appellant was evading central excise duty by wrongly availing the benefit of SSI exemption (Notification No. 8/2003-CE dated 01.03.2003) by not resorting to the correct valuation of the goods cleared by them. Appellant is a proprietary unit engaged in manufacture and clearance of excisable goods, namely electrical accessories, bells, chokes and street light fixtures classifiable under Chapter Heading 8536, 8531, 8504 and 9405 of the first schedule to the Central Excise Tariff Act, 1985. Appellant is using the brand name "KALKI".

2.2 The excisable goods falling under Chapter Heading 8536 are notified under Section 4A of the Central Excise Act, 1944 and are accordingly required to be assessed on the basis of MRP/retail sale price of the goods. Taking the value of the goods classifiable under Chapter Heading 8536 as per Section 4A, the total value of clearances as per Annexure B to the show cause notice for the period of demand is as indicated in table below:-

Sr. No.	Financial Year	Total assessable value	Duty payable		
			BED	E. Cess	H Cess
1	2006-07	9140000	1462400	29247	1154
2	2007-08	13219134	2091957	41840	20918
3	2008-09	12609553	1562370	31248	15623
4	2009-10	16316653	1324701	26495	13246

5	2010-11	14438278	1443828	28877	14437
Total	**2006-11**	**65723627**	**7885256**	**157707**	**65378**

2.3 On completion of investigation, a show cause notice dated 06.05.2011 was issued to the appellant calling them to show cause as to why:-

"i. Central Excise duty amounting to Basic Rs 78,85,256 Education Cess Rs 1,57,707/- S & HE. Cess Rs. 65,378/- aggregating to Rs 81,08,341/- (Rupees Eighty One lakhs Eight Thousand Three Hundred Forty One Only) as detailed in "Annexure-B" to this notice due on the said excisable goods, totally valued at Rs. 6,57,23,627/- manufactured and cleared from the said unit during the period from April 2006 to March 2011 without payment of appropriate Central Excise duty, by willfully and intentionally suppressing the facts and in contravention of the provisions of the Central Excise Act Rules, with intent to evade payment of Central Excise duty, should not be demanded and recovered from them under Sub-Section (4) to Section 11A of the Central Excise Act, 1944;

ii. Interest on the duty so determined to be payable should not be charged and recovered from them under Section 11AA of the Central Excise Act, 1944;

iii. Penalty equal to the duty so determined should not be imposed on them under clause (a) to Sub Section (1) of Section 11AC of the Central Excise Act, 1944 and/or Rule 25 of the Central Excise Rules,2002 for aforesaid offences and contravention of the provisions under the Central Excise Act, 1944 and the Rules made thereunder;

iv. The amount aggregating to Rs. 3,00,000/- paid by them during investigation under GAR-7 Challans dated 13.01.11 towards C.Excise duty liability should not be appropriated against the above said Central Excise duty recoverable from them as mentioned in the foregoing para 5(1) above."

2.4 The show cause notice has been adjudicated by the Commissioner as per the impugned order. Aggrieved appellant has filed this appeal.

3.1 We have heard Shri Shailesh P. Sheth, Advocate for the appellant and Shri Amrendra Kumar Jha, Deputy Commissioner, Authorised Representative for the Revenue.

3.2 Arguing for the appellant, learned counsel submits that:-

- The issue involved in the matter is with reference to the denial of SSI exemption admissible to the appellant.
- The appellant unit was functioning as a partnership firm wherein Shri Mohanlal G. Gosrani and Smt. Hemlata M. Gosrani were the partners.
- He brand name KALKI was jointly held by both of them and was used for manufacture and clearance of the goods from the unit. Certificate of registration of trade mark No. 622155 dated 14.12.2001 was issued in their name.
- In the month of September 2005, w.e.f. 01.09.2005, Shri Chandrakant G. Gosrani, the present proprietor, was inducted as the third partner in the partnership deed. Thereafter they jointly entered into a dissolution deed dated 30.09.2005 whereby the earlier partners, namely Shri Mohanlal G. Gosrani and Smt. Hemlata M. Gosrani retired from the partnership and Shri Chandrakant Gosrani continued the business as proprietor in the same name and style as was continuing earlier. A separate affidavit dated 30.11.2005 was prepared in terms of the dissolution deed and affidavit ibid, whereby the present appellant Shri Chandrakant Gosrani was handed over all the rights to the said trade mark and logo.
- As the brand name was assigned by the existing partners in the name of the proprietor, he was clearing the goods using the said brand name and it has been held in series of decisions that the benefit of SSI exemption should be allowed.
    - Vikshara Trading & Invest. P. Ltd. [2003 (157) ELT 4 (SC)]
    - ARCO Whitney Ltd. [2006 (193) ELT 217 (Tri.-Mumbai)]
    - Livinder Singh [2001 (137) ELT 1329 (Tri.-Del.)]
    - Jepika Paints [2010 (18) STR 380 (MP)]

- Que Pharma Pvt. Ltd. 2013 (288) ELT 563 (Tri.-Ahmd.)]
- Sony Enterprises [2018 (364) ELT 441 (Tri.-Mumbai)]
- Laxmi Industries [2013 (298) ELT 435 (Tri.-Ahmd.)]
- Raj Industries [2019 (370) ELT 287 (Tri.-Del.)]

➢ Accordingly he submits that the benefit of SSI exemption should be allowed to the appellant.

➢ He does not dispute that the goods classifiable under CH 8536 were to be valued under Section 4A of Central Excise Act. Accordingly if SSI exemption is allowed to the appellant, then during the entire period of demand, only for the year 2009-10 the appellant crossed the exemption limit of Rs.1.5 crores. Accordingly the duty needs to be paid by them only in respect of the clearances beyond the exemption limit of Rs.1.5 crores for the year 2009-10.

➢ Demand, is based upon the incorrect adoption of valuation under Section 4 of the Central Excise Act, 1944 ('the Act') instead of on the basis of MRP under Section 4A of the Act in respect of the goods falling under Heading 8536 of the CETA, 1985 during the relevant period. While this erroneous adoption of basis of valuation was without any malafide intention to evade duty (as discussed by the Appellant in the appeal memorandum), admittedly, even if the MRP based valuation is adopted in respect of the goods falling under Heading 8536, considering the entitlement of the Appellant to the exemption under Notification No. 8/2003-CE during the relevant period, the aggregate value of clearances made by the Appellant of all specified goods has crossed the threshold of Rs. 1.50 crores during the F. Y. 2009-10 only. As can be observed from Annexure 'B' to the show cause notice (at pg. 204 to 206 of the Paper-book), the aggregate value of clearances stood at Rs.1,63,16,653/- during F. Y. 2009-10 and therefore, the duty @8% (at 10% in case of clearances during March, 2010) would be payable on Rs.13,16,653/-. The threshold limit of Rs. 1,50,00,000/- was crossed by the Appellant during February, 2010 and consequently, the total demand of duty (including E.cess and H&S E.Cess) works out to Rs.1,28,241/-. Appellant submits that during investigation, it had already deposited an amount of Rs. 3,00,000/- which is more than sufficient to cover, not only the duty payable of Rs. 1,28,241/-, but also the interest payable thereon as applicable. Considering the fact that the matter is too old, the **Appellant waives any refund arising after the adjustment of the amount of duty payable of Rs. 1,28,241/- and interest thereon, from Rs. 3,00,000/- deposited by it during the investigation.**

- Considering the totality of the case and the non-sustainability of the demand on merit itself, it is not liable for any penalty and the penalty of Rs. 81,08,341/- imposed vide the impugned order on them under Section 11AC of the Act and/or Rule 25 of the Central Excise Rules, 2002 cannot be sustained and is liable to be set aside. Appellant is also not liable for the payment of interest, except to the extent the interest is leviable on the duty payable on Rs.13,16,653/-, under Section 11AA of the Act.
- Accordingly he prays that the appeal may be allowed in their favour to the extended indicated.

3.3 Learned AR reiterates the findings recorded by the Commissioner in the impugned order.

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments.

4.2 For confirming the demand, Commissioner has in the impugned order observed as follows:-

"25. In the conspectus thereof, the basic issue, which arise for my consideration is whether, during the relevant period, the KALKI, a registered trademark under the Trademarks Act, 1999, belonged to the notice or their proprietor for the purpose of the notification number & 2003-CE dated 01.03.2003.

26. The law in this regard has been stated in Meghraj Biscuit Industries Limited, 2007 (210) ELT 161 and restated in Meyer Health Care Private Limited 2011 (267) ELT 145. The apex court in Meyer Health Care had stated the law as under-

"3. According to the provisions of the Trade Marks Act for getting registration of a trade mark, an application is required to be filed in accordance with the provisions incorporated in the said Act. Such an application is required to be advertised and a detailed procedure is required to be followed before grant of a registration in favour of a claimant. Since a variety of procedural steps are required to be taken like issuing an advertisement, hearing objections, if any filed, it becomes a lengthy procedure and, therefore, time consuming for grant of a registration in

matters of trade mark. But once registration is granted in respect of a particular trade mark in terms of the application according to the provisions of the Trade Marks Act, the registration dates and relates back to the date of application. However, the position appears to be different as has been held by this Court so far excise law is concerned. This Court has already held in the aforementioned decision that effect of making the registration certificate applicable from retrospective date under the trade mark law is based on the principle of deemed equivalence to public user of such mark whereas such deeming fiction cannot be extended to the excise law and that the same is only confined to the provisions of the Trade Marks Act"

27. The noticee in their shown cause dated 21.12 2011 have annexed a photocopy of the Trade Marks Journal number 1506 dated 17.10.2011 at Exhibit K3, which shows the registration of trademark KALKI in the name of Chandrakant Gosrani (HUF) under the Trademarks Act, 1999. In application of the principle of deemed equivalence; the said journal shows such registration to be effective from 01.07.2009. This is the date, when Shri Chandrakant Gosrani (HUF) had made application for registration of this trademark in their name. This application had been made through M/s Aditya & Company, Trademark & Patent Attorney.

28. However, in the ratio of the decision in Meyer Health Care, supra, the date of registration of the mark KALKI, in the name of Shri Chandrakant Gosrani (HUF) would only be on and from 17.10.2011 for the purpose of the notification number 8/2003-CE dated 01.03.2003.

29. The noticee, in their defense, have pressed the affidavit dated 30.11.2005, made by Shri Mohanlal Gosar Gosrani and Shrimati Hemlata Mansukhlal Gosrani and Shri Chandrakant Gosar Gosrani as Karta of Chandrakant G Gosrani (HUF). This is at the Exhibit 11 to the show cause. Thereunder, Shri Mohanlal Gosar Gosrani and Shrimati Hemlata Mansukh Gosrani state at Para 3 that they have handed over all rights concerned to the above mentioned trade mark alongwith the goodwill of the said mark to Mr. Chandrakant Gosar Gosrani HUF vide agreement dated 30.09.2005".

30. However, immediately succeeding thereto at Exhibit 12 is the notarized affidavit dated 11.05.2011, affirmed to by Shri

Mohanlal Gosar Gosrani and Shrimati Hemlata Mansukhlal Gosrani, who have stated at clause 2 thereto that "vide deed of assignment dated 6th day of May, 2011, we have assigned the said trade mark in favour of Mr. CHANDRAKANT GOSAR GOSRAN! (karta of Chandrakant Gosrani HUF) as a sole proprietor of Kalki Industries, and we have received our consideration thereof.

31. Also, as part of the exhibit L to their shown cause is the registered 'Dead of Assignment dated 06.05.2011 entered into between Shri Mohanlal Gosar Gosrani and Shrimati Hemlata Mansukhlal Gosrani as assignor of the first part and Shri Chandrakant Gosar Gosrani (karta of Chandrakant Gosrani, HUF), assignee of the second part wherein an averment is made by the parties of the first part that "WHEREAS the assignor is the owner and registered proprietor of trade mark KALKI (LABEL) in respect of 'Electric Switch socket holders, ceiling roses, adapters, electric plugs and plug pins, plug top connector, electric wires and cables, electric fuse' being goods included under Class 9 under the Trade Mark No. 622155, which is valid and is still subsisting upto 16 March, 2018 and has used the same openly and continuously. Consequent thereto, the assignors of the first part at clause 3 of this notarized deed state that "Whereby, in consideration of a sum of Rs. 10,000.00 (Rupees ten thousand only) the receipt whereof the assignor hereby acknowledges, the assignor hereby assigns the trade mark to the assignee, with all benefits and rights accrued thereto to the said trade mark". The assignors at clause 6 thereto further state that "that the assignment has taken place along with the goodwill of the business in which the trade mark was used".

32. Appended thereto is the undated receipt given by Shri Mohanlal Gosar Gosrani and Shrimati Hemlata Mansukhlal Gosrani for receipt of the sum of Rs.10,000/- Ly the cheques number 942042 and 942043 of the HDFC Bank Limited, Mumbai for sum of Rs.5,000/- each.

33. The relevant period in this case is the financial years 2006-07 to 2010-11. The application for registration of the trademark by Shri Chandrakant Gosar Gosrani HUF is 01.07.2009.

34. The above documents, however, not only show the registration of trademark KALKI in the records of the Trademark registry on 17.10.2011; but also, its assignment, for the first time, by Shri Mohanlal Gosar Gosrani and Shrimati Hemlata Mansukhlal Gosrani in favour of Shri Chandrakant Gosar Gosrani HUF only on and from 06.05.2011 for a considered sum of 10,000/-. This assignment is, thus, not only beyond the relevant period; but also, much beyond the date of application of registration.

35. In the face of ratio, clearly stated by the apex court of this land in Meghraj Biscuit and restated in Meyer Health Care, supra, the basic proposition, made in the subject notice, that the noticee during the relevant period had made clearances of the excisable goods, which bore the brand name of another. Consequently, in the face of the prescription stated in the notification number 8/ 2003-CE dated 01.03.2003 these excisable goods ought to have been cleared by the noticee only on payment of the payable amounts of duty of excise.

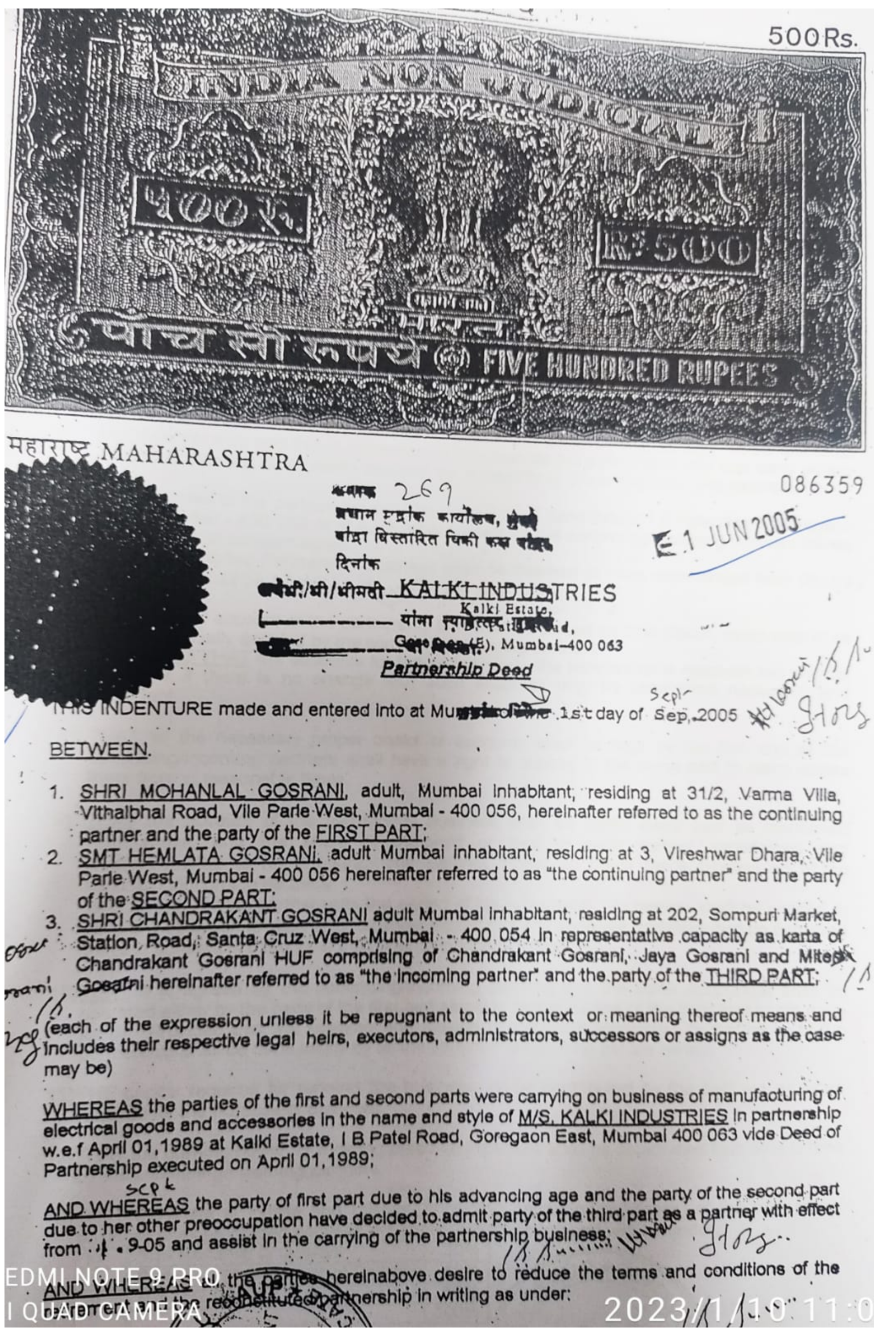
36. Having failed to do so; the demands of these unpaid duties of excise, made in the notice, must find acceptance at my hand.

37. The noticee, in their shown cause, next submit that since the subject notice had been issued only on 06.05.2011; the demand for the period prior to May, 2010 in wholly time barred. This is because, the noticee had a bona fide belief that the brand KALKI had belonged to them.

38. This argument, though attractive, is a chimera. It is evident that the deed of assignment was signed only on 06.05.2011. If the noticee had a bona fide belief of having held the registered trade mark on and after 30.09.2005; there was no necessity for them to enter into a notarized and registered deed of assignment on 06.05.2011 and that too for a considered sum of 10,000/-. Did they not bonafidely believe that there was no necessity of entering into the Deed of Assignment dated 06.05.2011, when the assignment had already occurred under the dissolution agreement dated 30.09.2005 and the affidavit dated 30.11.2005. The act of executing the deed of assignment dated 06.05.2011 itself gives away their basis of holding a bona fide belief."

4.3 Commissioner in the impugned order does not deny that the benefit of SSI exemption would be admissible to the appellant, but he mentions the date of registration of the brand name in the name of Shri Chandrakant Gosrani as the date from which SSI exemption admissible to them. As per the impugned order, the only reason which he has cited for doing so is that the earlier partners have executed another notarized registered deed of assignment on 06.05.2011 and the actual assignment could have occurred only on that date.

4.4 We refer to the various deeds which have been executed from 1st June 2005 onwards, which are reproduced below:-



500Rs.

INDIA NON JUDICIAL

पाँच सौ रुपये FIVE HUNDRED RUPEES

महाराष्ट्र MAHARASHTRA

086359

1 JUN 2005

KALKI INDUSTRIES

Kalki Estate,

Goregaon (E), Mumbai–400 063

Partnership Deed

THIS INDENTURE made and entered into at Mumbai on this 1st day of Sep, 2005

BETWEEN.

1. SHRI MOHANLAL GOSRANI, adult, Mumbai inhabitant, residing at 31/2, Varma Villa, Vithalbhai Road, Vile Parle West, Mumbai - 400 056, hereinafter referred to as the continuing partner and the party of the FIRST PART;
2. SMT HEMLATA GOSRANI, adult Mumbai inhabitant, residing at 3, Vireshwar Dhara, Vile Parle West, Mumbai - 400 056 hereinafter referred to as "the continuing partner" and the party of the SECOND PART;
3. SHRI CHANDRAKANT GOSRANI adult Mumbai inhabitant, residing at 202, Sompuri Market, Station Road, Santa Cruz West, Mumbai - 400 054 in representative capacity as karta of Chandrakant Gosrani HUF comprising of Chandrakant Gosrani, Jaya Gosrani and Mitesh Gosrani hereinafter referred to as "the incoming partner" and the party of the THIRD PART;

(each of the expression unless it be repugnant to the context or meaning thereof means and includes their respective legal heirs, executors, administrators, successors or assigns as the case may be)

WHEREAS the parties of the first and second parts were carrying on business of manufacturing of electrical goods and accessories in the name and style of M/S. KALKI INDUSTRIES in partnership w.e.f April 01,1989 at Kalki Estate, I B Patel Road, Goregaon East, Mumbai 400 063 vide Deed of Partnership executed on April 01,1989;

AND WHEREAS the party of first part due to his advancing age and the party of the second part due to her other preoccupation have decided to admit party of the third part as a partner with effect from 1.9-05 and assist in the carrying of the partnership business;

AND WHEREAS all the parties hereinabove desire to reduce the terms and conditions of the agreement and the reconstituted partnership in writing as under:

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NOW THIS INDENTURE WITNESSETH AS UNDER:

1) It is hereby agreed that the parties of the first and second parts hereinafter referred to as "the continuing partners" and the party of the third part have joined together in partnership to continue the business in the name and style of M/S. KALKI INDUSTRIES as and from Sept. 1st, 2005.

2) It is hereby agreed by all the party that the party of third part is admitted as new partner as and from 1.9.05.

3) The name of the re-constituted partnership firm shall be M/S. KALKI INDUSTRIES or any other name(s) as mutually decided by the continuing/incoming partners.

4) The business of partnership shall continue to be that of carrying on in India or elsewhere the business to manufacture; trade and deal in electrical goods and accessories of all descriptions and varieties including to act as agent, broker, representative, concessionaires, consultant, collaborator, franchiser or otherwise allied goods, articles and things related thereto and to do all incidental acts and things necessary in this regards the partnership may also carry on any other business(es) as mutually decided by a majority of continuing/incoming partners.

5) The business of the partnership shall be carried on at Kalki Estate, I B Patel Road, Goregaon East, Mumbai - 400 063 or at such other place/s as the continuing/incoming partners hereto may by mutual consent agree.

6) The re-constituted Partnership business shall be deemed to have commenced from 01.09.2005 and it shall be AT WILL.

7) The books of account of the partnership firm shall be closed on 31st March, every year or as may be mutually decided by the continuing/incoming partners.
PROVIDED THAT the accounts for the period where the partnership is reconstituted may be made as if there is no change with such effect as may be considered necessary and expedient.

8) THAT all the necessary proper books of accounts shall be kept by the firm and all the continuing/incoming partners shall have a right to access to the same and to claim copies there from at reasonable times.

9) THAT the account of the partnership business shall be made every year as mentioned hereinabove, and the share of the profit or loss of each partner ascertained and credited/debited to his account. The Balance Sheet so made up is binding on all the continuing/incoming partners
(and on the retiring partner upto the period of his retirement). No partner shall be entitled to raise any objection to such balance sheet except that any apparent mistake/s can be corrected with the consent of majority of the continuing/incoming partners.

10) THAT it is agreed by the continuing/incoming partners that the Bank Account(s) shall be operated either by the party of the first part singly or by the parties of the third and fourth parts jointly. Provided that the opening and closing of any bank account(s) in the name of the partnership shall be done jointly by all the continuing/incoming parties hereto.

11) THE capital required for running the business will be contributed by the partners as when required for the purpose of business.

12) THAT the drawing power for meeting personal expenses shall be determined from time to time by the continuing/incoming partners.

13) THAT the share of Profits and Losses (Including capital gains/Losses) of the partnership business shall be divided between the continuing/incoming partners as under:

a)	Shri Mohanlal G Gosrani	30%
b)	Smt Hemlata Mansukhlal Gosrani	10%
c)	M/s C G Gosrani HUF	60%
		100%

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14) THAT subject to these presents, each of the continuing/incoming partner hereby nominates, constitutes and appoints the other as their agent of the partnership firm for the purpose of business of the firm and each of the party hereto in the interest of the partnership business is authorized to execute, sign and deliver any contract, agreement, lease deed, purchase deed, sale deed or any other document and to receive payment due to the firm and give a valid discharge for the same. AND further each of the party hereto to the interest of the partnership business is authorized to appoint advocate for all the legal matters of the firm to nominate Arbitrator/s, Umpire/s for any disputes relating to the partnership firm or among the partner/s interest or any other matters relating to the business of the partnership as they deem fit.

15) THAT the firm may pay simple interest at the rate of 12% per annum or such other rate(s) as may be mutually decided by the continuing/incoming partners hereto on the balance standing to their credit computed in such manner as may be decided by such parties hereto on capital and/or on Loans or Deposits advanced by each of them respectively to the business of the firm shall be arrived at after accounting for the interest so payable as business expenditure of the partnership.
PROVIDED THAT the interest on capital, loans, deposits and or advances of the parties hereto may be credited to the personal account of the respective parties in the firm as mutually decided with the liberty to withdraw the amount of interest so credited.
ROVIDED FURTHER THAT at the end of the financial year, the balance of the amount of interest credited but not withdrawn by the parties hereto shall be deemed to be the capital of the respective parties, which shall be transferred to the respective capital/current accounts as the case may be.
PROVIDED FURTHER THAT the interest as aforesaid shall not exceed the prescribed limit under the Income Tax Law for the time being in force.

16A) THAT parties of the first, second and third parts shall take active part in the conduct of the business by devoting such time and attention in the conduct of the partnership business as the circumstances and business needs may require of the firm and shall be working partners. In consideration whereof, the partners shall subject to the prevalent provisions of the Income-Tax Act, 1961, and/or any statutory modification thereof in force, be entitled to draw remuneration on the basis provided herein:

500Rs.

महाराष्ट्र MAHARASHTRA

08636

क्रमांक 321
प्रधान मुद्रांक कार्यालय, मुंबई
बांद्रा विस्तारित विक्री कक्ष
दिनांक
E 2 JUN 2005

KALKI INDUSTRIES
DISSOLUTION DEED

I. R. Patel Road,

This agreement for dissolution of partnership [illegible] Mumbai, this 30th day of Sep, 2005, between:

1) SHRI MOHANLAL GOSRANI, adult, Mumbai inhabitant, residing at 31/2, Varma Villa, Vithalbhai Road, Vile Parle West, Mumbai - 400 056 hereinafter referred to as the party of the FIRST PART;

2) SMT HEMLATA GOSRANI, adult Mumbai inhabitant, residing at 3, Vireshwar Dhara, Vile Parle West, Mumbai 400 056 hereinafter referred to as the party of the SECOND PART

3) SHRI CHANDRAKANT GOSRANI adult Mumbai inhabitant, residing at 202, Sompuri Market, Station Road, Santa Cruz West, Mumbai - 400 054 in representative capacity as karta of Chandrakant Gosrani HUF comprising of Chandrakant Gosrani, Jaya Gosrani and Miteśh ~~Gosarni~~ GOSRANI hereinafter referred to as the party of the THIRD PART;

(each of the expression unless it be repugnant to the context or meaning thereof means and includes their respective legal heirs, executors, administrators, successors or assigns as the case may be)

WHEREAS the parties hereto were carrying on the business of manufacturer and dealers of electrical goods in partnership in the firm name and style of M/s. Kalki Industries in accordance with deed of partnership executed on Sep. 01, 2005;

AND WHEREAS by mutual consent and understanding the parties hereto have decided to dissolve the said Partnership from the 30 day of Sep. 2005 with the party of the third part taking over the partnership business as a going concern on as–is-basis as mutually agreed;

AND WHEREAS the parties hereto are desirous of recording the terms and conditions agreed upon in writing:

SHASHIDHAR

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NOW THIS INDENTURE THEREFORE WITNESSETH AND IT IS HEREBY AGREED TO BY AND BETWEEN THE PARTIES HERETO AS FOLLOWES:-

(1) The parties hereto declare that the Partnership between them carried on in the name and style of KALKI INDUSTRIES shall be deemed to have been dissolved by mutual consent as from close of business hours on 30. day of Sep. 2005 and the party of the third part taking over the business with all assets and liabilities as a going concern.

(2) All the parties hereby confirm that the books of accounts and records of the partnership and the accounts of the said partnership up to 30.9.2005 are under finalization and the accounts will be settled after finalization of the books of accounts and except for balances of to the credit of capital/current accounts of the respective parties nothing is found payable to any of the parties by the firm or by the other party to these presents and now there is no claim by any of the parties against the firm or against the other party.

(3) It is hereby specifically agreed that the goodwill value of the firm and the partnership business is determined to be NIL and the party of the first and second parts have no rights as to trade name, goodwill, stock, investments or any assets except for moneys receivable or payable vide clause (2) above.

(4) The party of the third part may continue the existing bank account(s) for the limited purpose of dissolution of the firm for realising the firm's book debts, advances, deposits, etc. The said Bank account shall be operated as may be determined mutually by the Parties to this Agreement.

(5) Each of the parties hereto does hereby release the other parties hereto from all actions, accounts, claims and demands in relation to the said partnership and from all clauses, covenants, agreement matters and things contained in the Agreement of Partnership entered into by the parties but without prejudice to any rights or remedies of respective parties hereto under any of the provisions herein contained.

(6) The parties of the first and second parts shall not, hereafter, be liable to bear and pay any liability or debts whatsoever of the firm after 30.9.05. However, personal liabilities shall be borne by the respective parties and any other liabilities of the partnership business until its dissolution shall be borne and paid by the parties hereto in their profit-sharing ratio as laid down in the agreement of the partnership.
To this effect, the party of the first and second parts hereby declare and undertake to indemnify and keep indemnified the party of the third part to the extent of their respective share for any liabilities of the partnership discharged by the party of the third part after the dissolution of the partnership and relating to any matter(s) or liability before the dissolution of the partnership.

(7) Each of the parties to this Agreement shall upon such request being made by the other party to this Agreement sign, execute and do such further documents, deeds, papers, receipts, acts and things as the other party may reasonably require for completely effectuating this Agreement.

(8) It is hereby specifically agreed that the party of the third part shall be entitled to carry on the business of the firm as a going concern either individually or with any other person(s).

(9) In pursuance of the above settlement, the party of the first and second parts do hereby release relinquish and renounce un to the party of the third part their respective share and interest in the said partnership business in the name and style of M/s. Kalki Industries, with all assets and outstandings including stock-in-trade, furniture and fixtures, investments, deposits and with benefits attached in the partnership business as well as all liabilities and the said parties of the first and second parts agree that after 30.9.2005 they have no interest share or claim in the said partnership business except for the amount due to them as per clause (2) above. All assets of the partnership shall vest with and all liabilities shall be borne by the party of the third part w e f 30.9.2005 and separate books of account may or may not be maintained after this date as may be convenient.

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(10) The party of the first and second parts do hereby irrevocably appoints, nominates and constitutes the said party of the third part as their true and lawful attorney to act, demand, recover, receive and due for at his cost any suit or proceedings, to sign, release and discharge partnership business and do any needful and necessary that the party of the third part may think fit, just and proper at its sole costs and consequences.

(11) The party of the first and second parts shall deliver and cause to be delivered to the party of the third part all books of account, records, letters and other documents in its possession or custody relating to the Partnership so far as they relate to any period preceding 30.9.05, who shall be responsible to attend to and produce them before any Government authority and the party of the second part hereby declares and confirms that it has not retained in its possession or custody any books, records or other documents considered relevant to the partnership and its business.

IN WITNESS WHEREOF the Parties hereto have set and subscribed their respective hands the day and year first hereinabove written.

SIGNED AND DELIVERED BY THE WITHINNAMED SHRI MOHANLAL GOSRANI, THE PARTY OF THE FIRST PART IN THE PRESENCE OF) M.Gosrani

SIGNED AND DELIVERED BY THE WITHINNAMED SMT. HEMLATA GOSRANI, THE PARTY OF THE SECOND PART IN THE PRESENCE OF) Hemlata m. Gosrani

SIGNED AND DELIVERED BY THE WITHINNAMED M/S. C. G. GOSRANI (HUF) THROUGH KARTA OF HUF SHRI C. G. GOSRANI THE PARTY OF THE THIRD PART IN THE PRESENCE OF)

For Chandrakant G. Gosrani (H U F)

Karta

9 MAY 2011

ATTESTED
CERTIFIED TRUE COPY

SHASHIDHA... NOT...

"THE TRADE MARKS ACT, 1999

BEFORE THE REGISTRAR OF TRADE MARKS, MUMBAI.

IN THE MATTER OF REGISTERED TRADE MARK NO.622155 Class -09 of MOHANLAL HEMLATA GOSAR GOSRANI MANSUKHLAL and GOSRANI both are Indian Nationals Partners of KALKI INDUSTRIES, Kalki Estate, Ishwarbhai Patel Road, Goregaon East Mumbai 400 Maharashtra, India, 063 State of Maharashtra, India,

1. That the aforesaid trade mark No.622155 l.e. KALKI label is registered in our name and the said registration is valid and subsist for the further period of 10 years l.e. up to 16th March, 2015.

2. That due to age of retirement we are not willing to continue of business of manufacturing of Electrical goods and accessories in the name and style of M/S. KALKI INDUSTRIES, at Kalki Estate, 1.B Patel Road, Goregaon East, Mumbai 400 063.

3. That the above mentioned partners I.e. Mohanlal Gosar Gosrani, and Hemlata Gosrani have handed over all rights concerned to the above mentioned trade mark along with the goodwill of the said mark to Mr. Chandrakant Gosar Gosrani HUF vide agreement dated 30-09-2005."

"AFFIDAVIT

We, MOHANLAL GOSAR GOSRANI and HEMLATA MANSUKHLAL GOSRANI, Indian Nationals partners of M/S. KALKI INDUSTRIES, Kalki Estate, Ishwarbhai Patel Road, Goregaon (East) Mumbai 400 063, State of Maharashtra, India, do hereby solemnly affirm declare as follows:

That the aforesaid trade mark No.622155 i.e. KALKI label is registered under Class -09, and it is registered in our name.

2. That vide deed of assignment dated 6th day of May, 2011, we have assigned the said trade mark in favour of

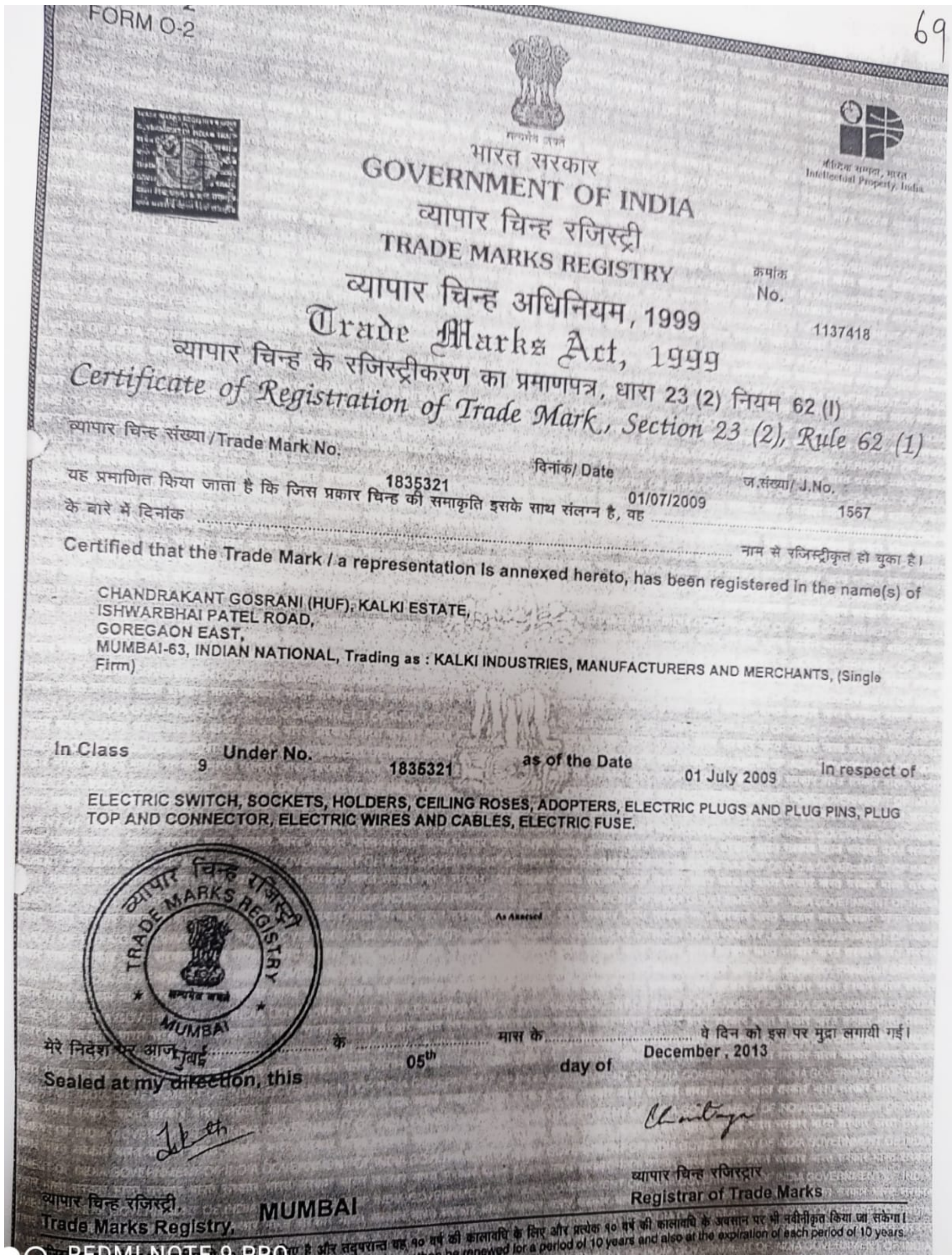
Mr. CHANDRAKANT GOSAR GOSRANI (karta of Chandrakant Gosrani H.U.F.) as a sole proprietor of M/s. Kalki Industries, and we have received our consideration thereof.

3. That the said registered mark has been assigned along with the goodwill of the firm, and the assignee shall be free to use the trading style M/S. KALKI INDUSTRIES.

4. That we have signed Form TM-24 and have no objection if the same is allowed and the assignee's name is entered in the Register of Trade Marks as the subsequent proprietor of the Registered Trade Mark No. 622155 under Class 09 w.e.f. 1st October 2005."

4.5 From the perusal of the above deeds, it is very clear that trade mark No. 622155 KALKI registered in the name of Shri Mohanlal Gosar Gosrani and Smt. Hemlata Gosrani has been assigned in the name of Shri Chandrakant Gosrani and this fact has been duly intimated in the affidavit filed before Registrar of Trade Marks, Mumbai. Affidavit of 11.05.2011 also refers to the earlier deed and says that it was assigned on 06.05.2011. Reliance by Commissioner on the affidavit of 2011 to deny the fact of assignment of the trade mark in the name of the appellant on 06.05.2011 is contrary to the above facts.

4.6 Further, even the Trade Marks authorities have issued the registration certificate in the name of the appellant which is reproduced below:-



FORM O-2

69

सत्यमेव जयते

भारत सरकार

GOVERNMENT OF INDIA

व्यापार चिन्ह रजिस्ट्री

TRADE MARKS REGISTRY

बौद्धिक सम्पदा, भारत
Intellectual Property India

क्रमांक No. 1137418

व्यापार चिन्ह अधिनियम, 1999

Trade Marks Act, 1999

व्यापार चिन्ह के रजिस्ट्रीकरण का प्रमाणपत्र, धारा 23 (2) नियम 62 (I)

Certificate of Registration of Trade Mark, Section 23 (2), Rule 62 (1)

व्यापार चिन्ह संख्या / Trade Mark No. 1835321 दिनांक/ Date 01/07/2009 ज.संख्या/ J.No. 1567

यह प्रमाणित किया जाता है कि जिस प्रकार चिन्ह की समाकृति इसके साथ संलग्न है, वह के बारे में दिनांक .... नाम से रजिस्ट्रीकृत हो चुका है।

Certified that the Trade Mark / a representation is annexed hereto, has been registered in the name(s) of

CHANDRAKANT GOSRANI (HUF), KALKI ESTATE,
ISHWARBHAI PATEL ROAD,
GOREGAON EAST,
MUMBAI-63, INDIAN NATIONAL, Trading as : KALKI INDUSTRIES, MANUFACTURERS AND MERCHANTS, (Single Firm)

In Class 9 Under No. 1835321 as of the Date 01 July 2009 In respect of

ELECTRIC SWITCH, SOCKETS, HOLDERS, CEILING ROSES, ADOPTERS, ELECTRIC PLUGS AND PLUG PINS, PLUG TOP AND CONNECTOR, ELECTRIC WIRES AND CABLES, ELECTRIC FUSE.

As Assured

व्यापार चिन्ह रजिस्ट्री TRADE MARKS REGISTRY MUMBAI

मेरे निदेश पर आज मुंबई के 05th मास के .... वे दिन को इस पर मुद्रा लगायी गई।

Sealed at my direction, this 05th day of December, 2013

व्यापार चिन्ह रजिस्ट्रार
Registrar of Trade Marks

व्यापार चिन्ह रजिस्ट्री,
Trade Marks Registry, MUMBAI

From the perusal of the above certificate of registration it is clear that the brand name KALKI was registered in the name of the appellant from 01.07.2009.

4.7 Commissioner has given no plausible reason for denying SSI exemption.

4.8 Appellant has relied upon the following decisions in his support:

A. Arco Whitney Ltd. [2006 (193) ELT 217 (Tri-Mum)]

"4. We do not find much force in the above reasoning. Scrutiny of the purchase deed show that the unit 'ARCO WHITNEY' was sold along with all its assets and properties which included trade-marks, designs etc. The words A/W was not being used by M/s.

American Refrigerators Co. Ltd. which was using the brand name ARCO in respect of the air-conditioners being manufactured by it at other place. Arco-Whitney was manufacturing hydraulic equipments, which were not being manufactured by M/s. American Refrigerator. The appellant having purchased the going concern M/s. Arco-Whitney was entitled to use the brand name as its own right and it cannot be said that they were using somebody else's brand name.

5. The Hon'ble Supreme Court in the case of CCEx., Ahmedabad v. Vikshara Trading and Invest. Pvt. Ltd. reported in 2003 (157) E.L.T. 4 (S.C.) has held that when there was an assignment of Trade mark in favour of other person, the benefit of small scale notification cannot be denied and the trade mark need not necessarily be in respect of all the goods and it is permissible in law to have same brand name for different classes of goods owned by different persons. In the instant case, it cannot be said that the brand name of M/s. Arco-Whitney was also being used by M/s. American Refrigerators Co. In fact clause 13 refers to the purchaser's sanction to the appellants for using the brand name and strengthens the appellant's case that after the day of the deed date, the trade name belongs to the appellant. Further, clause 12 of the agreement stipulates that after the date of completion, purchaser would be entitled to carry on the business under the name and style of M/s. Arco-Whitney and to refer themselves as vendor's, successor in that business and will have availed full liberty to run the said business in the manner as may be decided by the purchaser. As such, it is clear that entire assets of the running units along with trademark were purchased by the appellant. In such case it cannot be said that the same belongs to the seller. Use of the same will not disentitle the appellant from the benefit of small scale exemption of the notification."

B. Vankatesh Yedidha [2016 (332) ELT 860 (Tri-Mum)]

"7.1 After considering the submissions made by both sides and on perusal of the records, we find that as regards the issue No. 1 the entire arguments of the learned Consultant is Venky & Co. is

sole proprietorship firm while ICPL is a Private Limited Company hence, clearances cannot be clubbed as also for the reason that both the entities are geographically located at different places, while it is the findings of the adjudicating authority that Shri Venkatesh was sole proprietor of Venky & Co. and held 90% shares of ICPL hence the clubbing of clearances needs to be done, we do not agree with the findings recorded by the adjudicating authority on this point. It is undisputed that Venky & Co. is a sole proprietorship firm and ICPL is a Private Ltd. firm. C.B.E. & C. vide Circular No. 6/92, dated 29-5-1992 referred the issue and a direction under Section 37B was issued by the Board which reads as under :-

"2. The Board had then felt the position as mentioned above including in respect of Notification No. CER-8(5)-C.E., dated 1-3-1956 was sufficient to deal with the interpretation under Notification No. 176/77, dated 18-6-1977.

Now in exercise of the powers conferred under Section 37B of the Central Excise Act, 1944 for the purpose of ensuring uniformity of levy of duties of excise, the Central Board of Excise and Customs have ordered that the general principles as mentioned above in the context of Notification No. 176/77, dated 18-6-1977 will be applicable to Notification No. 175/86 also. The Board have issued the above order on 29-5-1992.

Sub : - The text of the Direction issued under Section is as follows :-

"In exercise of the powers conferred under Section 37B of the Central Excise Act, 1944 for the purpose of ensuring uniformity of levy of duties of excise the Central Board of Excise & Customs has ordered that the following general principles will be applicable to Notification No. 175/86-C.E. :-

(i) The question whether different partnerships having common partners are treatable as separate manufacturers or the same manufacturer, would be a question of fact in each case to be determined on the basis of such factors among other, like

composition of the partnership, existence of the factory, licence, nature of goods manufactured, etc.

(ii) Different firms will be treated as different manufacturers for the purpose of exemption limit. But if a firm consisting of certain partners say A, B & C has got more than one factory, all these factories should of course be combined. Limited Companies whether public or private are separate entities distinct from the shareholders composing it. Hence each limited company is a manufacturer by itself and will be entitled to a separate exemption limit.

(iii) If there are two firms with only some of the partners in common, each firm is entitled to separate exemption limit and hence the question of distributing the exemption may not arise. If one firm or individual owns several factories, he or it gets exemption only in respect of one individual owns several factories, he or it gets exemption only in respect of one lot and the manufacturer being only one entity there will be no question of distributing the exemption.

(iv) Whether or not in the expression 'by or on behalf of a manufacturer' the expression 'from one or more factories' is added, the effect would be the same if the manufacturer is also the same. The expression 'one or more factories' only further clarifies that whether the factory is one or more, it is the clearances by or on behalf of the same manufacturer which is to be taken into consideration for purposes of interpreting the exemption notification". (emphasis supplied)

7.2 It can be seen from the above reproduced portion at point No. (ii), the Board has specifically stated and clarified that Limited Companies whether public or private are separate entities and partnership firm is separate entity than the Ltd. Company. In the case in hand, the Limited Co. being separate entity and distinct from share holders, it cannot be said that Shri Venkatesh having 90% of shares in ICPL by virtue of being proprietor of Venky & Co., the clearances could be clubbed. In our view Revenue is arguing against their own circular which is *incorrect. This view was taken by the Hon'ble High Court of Madras in the case of Campion Plastic Industries Ltd. - 1996 (84) E.L.T. 189. Accordingly, we hold that the clearances effected by the sole proprietorship firm Vinky & Co. and ICPL cannot be clubbed for arriving at the total clearances of ICPL. This view of ours is also from the fact that both the entities are located at different places and registered with authorities under whose jurisdiction they fall.*

7.3 As regards the using of Brand name "Irony" and "Terminator", we hold that the Brand name "Irony" was assigned to the appellant ICPL by Venky & Co. by an assigned deed. We find that the adjudicating authority in the impugned order in unnumbered paragraph at internal page No. 15 of order-in-original has recorded as under :-

"So far as the Brand name is concerned, the assessee has submitted a proof that the Brand name "Irony" had since been registered in their name in the Certificate No. 300446, dated 31-5-2004 with effect from 24-11-1997. The Certificate was sent for verification and the Trade Marks Authority had certified the same as true ……………………… It is a settled law that unless a Trade Mark or Brand Name was registered in the name of the assessee, he was not entitled to the benefit of SSI exemption notification……………"

It can be seen from the reproduced portion of the findings it is undisputed that the Brand name "Irony" was registered with the authorities in the name of Venky & Co. and from the deed of assignment it could be deduced that the said Brand name was assigned to the appellant ICPL in this case. Nothing is brought on record to show that even after assigning the Brand "Irony", Venky & Co. were using and clearing the products with the said Brand name. In the absence of any such evidence we have to hold that by virtue of being Brand assigned to them, ICPL is entitled to avail the benefit of small scale exemption."

We are of the view that case of the appellant is squarely covered by the above decisions and nothing contrary has been produced before us. SSI exemption would be available to the appellant during the entire period of demand.

4.9 We have reproduced in para 2.2 above the excerpts from Annexure B to the show cause notice whereby the value of clearances has been indicated. On perusal of the said annexure it is evident that only during the financial year 2009-10 appellant had crossed the exemption limit as provided in terms of Notification No.8/2003-CE dated 01.03.2003. Accordingly central excise duty is demandable only for the said year and value of clearances which is beyond the exemption limit of Rs.1.5 crores.

4.10 Taking note of the submission of the counsel for the appellant we agree that the total duty demand and interest and penalty under Section 11AC for the duty so short paid would be within the amount already deposited and appropriated by the Commissioner by the impugned order. Learned counsel has undertaken not to claim any refund in respect of the amount of Rs.3,00,000/- deposited and appropriated by the Commissioner.

5.1 In view of the above discussions, after allowing the benefit of Notification No.8/2003-CE dated 01.03.2003, the appeal is partly allowed as indicated in para 4.10 above, modifying the order confirming the demand along with interest and penalty.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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