

SC redefines "Brand Name"

(By Swamy Associates)

"Brand name / Trade name" and " a connection in the course of trade", are the most intricate terms in the Excise lexicon. There are catena of judgments delivered by various Tribunals, interpreting the meaning and scope of the above said terms. In the latest land mark judgment, in the case of CCE, Trichy Vs. M/s. Grasim Industries Limited as reported in _____, the Honourable Apex Court has laid down the law, as to the meaning and scope of the above said terms. In the days to come, with its enormous binding value, the said judgment is going to create powerful waves among the taxmen and the taxpayers. Thoroughly redefining the terms brand name / trade name, the Honourable Apex Court has knocked down the various decisions of the Honourable Tribunals pronounced on the said subject, like ninepins.

Now to the judgment:

M/s. Dharani Cements Limited, (Respondents in the said case), are a subsidiary company of M/s. Grasim Industries Limited. They were engaged in the manufacture of Cement. They were availing the benefit of the Notification 5/98 dated 02/06/98, which specified the effective rate of duty for various goods, *interalia*, Cement. There was a condition attached to the said notification, whereby, the exemption under the said Notification shall not be available to such Cement which bears a brand name or trade name (whether registered or not) of another person.

The Explanation to the said notification read as under:

"brand name" or "trade name" means a brand name or trade name, whether registered or not, that is to say, a name or a mark, such as a symbol, monogram, signature, or invented words or any writing which is used in relation to a product for the purpose of indicating, or so as to indicate, a connection in the course of trade between the product and some person using such name or mark with or without any indication of the identity of that person.

On the bags of Cement manufactured by M/s. Dharani Cements, they used the following words "Manufactured by Dharani Cements Limited. A subsidiary of Grasim Industries Limited". The department contended that, by using the name "M/s. Grasim Industries Limited" on the bags, the Respondents are not eligible for the said exemption and would attract the mischief of the condition specified under the said Notification. Originally, the Commissioner has denied the exemption, but on appeal, the Honourable Tribunal has allowed the benefit of the Notification to them. The Revenue appealed to the Supreme Court. After a detailed analysis, the Honourable Apex Court has set aside the Tribunal's order and denied the exemption to the Respondents. While delivering the above said judgment, the Honourable Apex Court has also overruled various other decisions of the Tribunal and amplified the celebrated judgment in the case of **M/s. Astra Pharmaceuticals {1995 (75) E.L.T 214 (S.C)}**.

While doing so, the Honourable Apex Court has held that the term "trade name", would cover the name of a company also, so long as it is used for the purpose of indicating a connection in the course of a trade between the product and the other person. In the instant case, it has been held that, the name "M/s.Grassim Industries Limited" is a "trade name" and the same has been used by the Respondents with an intention of indicating a connection between the product i.e. the Cement and M/s. Grassim Industries Limited.

While deciding the said issue, the Honourable Apex Court has also taken note of and **overruled** the decisions of the Tribunal, in the cases of , **Nippa Chemicals Private Limited Vs. CCE, Madras (1998 (100) E.L.T 490), ChemGuard Coatings Private Limited Vs CCE, Chennai (2001(116) E.L.T 43), CCE, Goa Vs Christine Hoden (I) Private Limited (1999 (113) E.L.T. 591) and CCE, Hyderabad Vs. M/s. Sarat Electronics (2004 (167) E.L.T. 404).**

In the case of M/s. Christine Hoden (supra), the Tribunal has held that, the mention of the name "Christine Hoden London, Rome Stockholm" would not disentitle the assessee from the benefit of the Notification, based on two facts viz., 1. the word "comfit" was owned by the assessee and 2. "Mere indication of the foreign companies' name does not create any association in the course of trade between the goods and the foreign company". The Honourable Apex Court has held that the

Tribunal was correct on account of its finding that the word "comfit" was owned by the assessee which would entitle them to the benefit of the Notification, but it is incorrect in respect of the second finding of the Tribunal, as there would be no purpose in indicating the foreign company's name, except to indicate a connection between the product and the foreign company.

In the case of M/s. Sarat Electronics (supra), the assessee were using the words "SARAT" followed by "A quality product from ITL Group" and "Technical license with ITL". The Tribunal has allowed the benefit of the SSI Notification (1/93 -CE) to the assessee. The Hon'ble Apex Court has now observed that, the use of the words " A quality product from ITL Group", clearly shows an intention to show a connection between the product and the ITL Group and use of such words would disentitle the assessee from the benefit of the Notification.

In the case of M/s. Nippa Chemicals (supra), the assessee sought to avail the benefit of the SSI Notification 175/86 (predecessor to 1/93). The assessee were using the words " In Collaboration with Nihon Parkarizing Company Limited, Japan" and "Marketed in India by Goodlass Nerolac Paints Limited" on the goods manufactured by them. The Tribunal has allowed the benefit of the Notification to the assessee, based on a finding that, mere printing of the words indicating the name of two companies, would never come within the purview of the "brand name" or "name" or "mark" so as to attract the mischief of the said Notification. After giving a detailed finding as to the meaning and scope of the terms "brand name" and "trade name", the Honourable Apex Court has overruled the said decision of the Tribunal by stating that, even the name of some other company, if it is used for the purposes of indicating a connection between the product and the company, would be sufficient to disentitle the assessee from the benefit of the Notification. While deciding so, the Apex Court has also observed that the exemption is available only to such parties who do not associate their products with some other persons and the connection must be of such a nature that it reflects on the aspect of manufacture and deal with the quality of products.

The following three sectors should be grossly concerned as a result of the said decision. They are 1. SSI Sector, 2. Pharma Sector and 3. The Jewellery Sector, which are addressed in *seriatim*:

1.SSI Sector:

In the last two years, the SSI Sector has borne the brunt of various decisions of the Honourable Supreme Court and this decision is a latest addition to the showcase. With the Apex Court already holding that :

1. Use of a part of brand name of another person indicating a connection in the course of trade would be sufficient to disentitle the exemption in the case of M/s. Rukmani Packwell Traders (2004 (165) E.L.T. 481),

2. Use of a brand name of another person in respect of goods of other class or kind shall also disentitle the benefit of SSI exemption in the case of M/s. Bhalla Enterprises (2004 (173) E.L.T. 225),

3. Mere use of additional words to an existing brand name or trade name of another person would not enable the assessee to claim the benefit of the Notification in the case of M/s. Mahaan Dairies (2004 (166) E.L.T. 23),

the present judgment, makes the square complete.

There is a common prevalent trade practice that (mainly in Pharma sector), the assessee would print / indicate the name and address of the party, who is marketing the said product. To put it illustratively, for a product bearing a brand name "X", manufactured by a company A, there would be a marketing company B. The brand name "X" will be owned by the manufacturing company "A". The outer carton of the product would bear the brand name "X" with a mention that "Manufactured by A" and "Marketed by B". Except for the fact that, the company B is engaged in marketing the product, there would be no other connection / relationship, whatsoever, between the product and the company B. In such cases, there is a possible question that, with the advent of the present judgment, whether the mention of the marketing company's name in the product, would disentitle the assessee from availing the benefit of the SSI Notification.

As a reprieve, the Honourable Apex Court has itself observed in the judgment that, mere indication of the company, who is marketing the product, alone would not be sufficient to attract the mischief of the Notification and the connection must be in the nature that, it reflects on the aspects of **manufacture and deal with the quality of the products**. Thus, as long as, there is no connection between the marketing company and the products, in respect of the manufacture or with the quality of the products, mere mention of the name of the marketing company, would not disentitle the assessee from availing the exemption notification.

2. Pharma Sector:

In the above said judgment, the Honourable Apex Court has amplified the earlier judgment of the Supreme Court in the case of M/s. Astra Pharmaceuticals (supra). In the case of M/s. Astra Pharmaceuticals, the Honourable Apex Court has given a clear distinction between a "brand name" and a "house mark". In the Astra case, the issue was about deciding whether the mention of the word "AP" or "Astra" on the containers or packing, would render the product to be classified as a "Patent or Proprietary Medicines" (P or P, for short). In deciding the said case, the Honourable Apex Court has observed as under:

" In the pharmaceutical business a distinction is made between a house mark and a product mark. The former is used on all the products of the manufacturer. It is usually a device in the form of an emblem, word or both. For each product a separate mark known as a product mark or a brand name is used which is invariably a word or a combination of a word and letter or numeral by which the product is identified and asked for. In respect of all products both the product mark and house mark will appear side by side on all the labels, cartons etc. Goods are ordered only by the product mark or brand name. The house mark serves as an emblem of the manufacturer projecting the image of the manufacturer generally.

The 'AP' or 'Astra' on the container or packing was used to project the image of manufacturer generally. It did not establish any relationship between the mark and the medicine. For instance, if the appellant instead of using Dextrose injections would have described it as Astra injections or Astra Dextrose injections then it could be said that a relationship between the monograph and the medicine was established. In the case of appellant it was only a monograph to identify the manufacturer".

This celebrated judgment has been the fabric of all the earlier Tribunal decisions. In the present judgment, the Honourable Apex Court has clarified that, the decision of the Astra case was given, considering the phrase "Patent or Proprietary Medicine",

whereas, the present case was with reference to the phrase "brand name / trade name". Distinguishing from the Astra case, The Apex Court has observed that there is a considerable difference between the Explanation dealt with in the Astra case and the Explanation under the present Notifications. The Apex Court has observed that, whereas, the "brand name" dealt in the present Notifications may be either registered or not, it was not so in the Astra case. Further, it has observed that, whereas, the Astra case has dealt with only the "brand name", the present Explanation deals with both the "brand name" and "trade name". Thus, the Honourable Apex Court has decided that, the name of the company would fall under the term "brand name/ trade name ". Thus, the Honourable Apex Court has summarily held that, the interpretation given in the Astra case is totally different and will not assist in interpreting the phrases "brand name or trade name" under the Explanation contained in the Notifications 5/98, 1/93, 175/86.

During the relevant period when the judgement was rendered in Astra case, P or P medicines were subjected to excise duty and the Generic medicines were exempted from the duty. Hence the Astra case assumed vital significance in deciding as to whether the name indicated on the goods would constitute a brand name or not. As on date, both the P or P medicines and the Generic medicines are subjected to levy and there is no discrimination between them. Thus, in the Pharma sector, the impact of this judgment on determining as to whether the name would be a P or P or not, would be of little consequence.

The panic button to the Pharma sector by this present judgment is only on their SSI eligibility, which has been addressed above.

3. Jewellery Sector:

In Budget 2005, branded Jewellery (Chapter Heading 7113) has been subjected excise levy @ 2% advalorem. We all witnessed a national chaos, when the Department "**surveyed**" all the Jewellery shops, left, right and center, to ascertain the applicability of the said levy. Kindly refer to our article titled as "**The Jewel Hunt**", wherein, we tried to clarify the scope and extent of this levy. Taking cue from the Budget speech of the Honourable Finance Minister, the decision of the Apex Court in the Astra case (supra) and the Ministry's letter dated 28.02.2005, we opined

that only the jewelleries with specific brand / trade name such as *Tanishq, Asma* etc., would attract this levy and not the jewellery bearing a mark or acronym of the name of the shop. The Board also clarified in identical lines, vide its letter F.No. B-1/1/2005-TRU dated 4-3-2005.

Note 12 to Chapter 71 reads akin to the Explanation dealt in this Supreme Court judgment. Going by the ratio now laid down by the Apex Court, the name of the Jewellery shop also would constitute a "trade name" and the same would also indicate a connection in the course of the trade between the jewellery and the jewellery shop. If so, the above clarification given for the Jewellery, would take a nosedive and all the jewellery, being affixed with the mark / name of the jewellery shop would be categorised as "branded jewellery" thus rendering all jewellery shops liable for excise duty. The Department, by way of its clarificatory circular (supra), has already made it very clear that it is not the intention of the levy. With the advent of the above judgment, the Department has to immediately act, either by amending the Chapter Note in tune with the said judgment or by issuing a suitable Exemption Notification to that extent.

Otherwise, let us all be ready for the premiere of **THE JEWEL HUNT - Part II** !