CASE NO.:
Appeal (civil) 2348-2349 of 2000

PETITIONER:
Commissioner of Central Excise, Trichy

RESPONDENT:
M/s Grasim Industries Ltd.

DATE OF JUDGMENT: 12/04/2005

BENCH:
S. N. Variava, Dr. AR. Lakshmanan & S. H. Kapadia

JUDGMENT:

J U D G M E N T

S. N. VARIAVA, J.

These Appeals are filed against the Judgment of the Customs, Excise and Gold (Control) Appellate Tribunal (CEGAT) dated 14th October, 1999. The Respondents are a subsidiary of one M/s Grasim Industries Ltd. On the bags of cement manufactured by them the Respondents use the following words:
"Manufactured by Dharani Cements Ltd.
A Subsidiary of Grasim Industries Ltd."

The Tribunal has, following the earlier Judgments of the Tribunal in the cases of Chemguard Coatings Pvt. Ltd. vs. Commissioner of Central Excise, Chennai reported in 2000 (116) ELT 43 and Nippa Chemicals (Pvt.) Ltd. vs. Collector of Central Excise, Madras reported in 1998 (100) ELT 490, and a Judgment of this Court in the case of Astra Pharmaceuticals (P) Ltd. vs. Collector of Central Excise, Chandigarh reported in 1995 (75) ELT 214 (S.C.), held that the benefit of Notification No. 5/98 CE dated 2nd June, 1998 is not lost by the Respondents because they show on their product the name of the holding company, namely M/s. Grasim Industries Ltd.

For a consideration of these Appeals, it is first necessary to set out Notification 5/98 CE dated 2nd June, 1998, which reads as follows:

"Notification No. 5/98-C.E., dated 2-6-1998

Effective rate of duty for specified goods of Chapters 13 to 96

In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excise Act, 1944 (1 of 1944), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts excisable goods of the description specified in column (3) of the Table below or column (3) of the said Table read with the relevant List appended hereto, as the case may be, and falling with the Chapter, heading No. or sub-heading No. of the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) (hereinafter referred to as the said Schedule), specified in the corresponding entry in column (2) of the said Table, from so much of the duty of excise leviable thereon which is specified in the said Schedule, as is in excess of the amount calculated at the rate specified in the corresponding entry in column (4) of the said Table, subject to the relevant conditions specified in the Annexure

to this notification, and referred to in the corresponding entry in column (5) of the said Table.

Explanation. \026 For the purposes of this notification, the rate specified in column (4), is ad valorem rate, unless otherwise specified.

TABLE

S.No.	Chapter or heading No. or sub-heading No.	Description of goods	Rate	Conditions
(1)	(2)	(3)	(4)	(5)
1.	13	Lac	Nil	-
9.	2502.29	All goods manufactured in. \026 Factory using vertical shaft kiln, with installed (I) capacity certified as not exceeding 300 tonnes per day or 99,000 tonnes per annum and the total clearances of cement produced by the factory, in a financial year, shall not exceed		

1,09,500 tonnes; factory using rotary kiln, with installed capacity (II) certified as not exceeding 600 tonnes per day or 1,98,000 tonnes per anum and the total clearances of the cement produced by the factory, in a financial year, shall not exceed 2,20,000 tonnes.	Rs. 2 per tonne	2

Condition No.	Conditions
1.	If the manufacturer of the food preparations produces a certificate from an officer not below the rank of a Deputy Secretary to the Government of India or not below the rank of a Deputy Secretary to the State Government concerned to the effect that such food preparations have been distributed free to the economically weaker sections of the society under a programme duly approved by the Central Government or the State Government concerned, within five months from the date of clearance of such gods or within such further period as the Assistant Commissioner of Central Excise may allow in this regard.
2.	If the cement manufacturer produces to the Assistant (i) Commissioner of Central Excise a certificate issued by an officer not below the rank of Director of Industries in the State Government indicating the installed capacity of the factory.
	The explanation under this notification shall be (ii) applicable upto a maximum quantity of ninety-nine thousand tones in a financial year. For computing the quantity of ninety-nine thousand tonnes in a financial year, the clearances of cement effected under any other notification shall be included. However, the clearances of cement effected on payment of duty at the rate of Rs. 350 per tonne shall not be taken into account for computing the above mentioned quantity of ninety-nine thousand tonnes.
	The exemption under this notification shall not be (iii) applicable to, cement manufactured from such clinker which is not (a) manufactured within the same factory and
	(b) cement bearing a brand name or trade name (whether registered or not) of another person;
	Explanation. \026 For the purpose of condition (ii), "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."

The Appellants contended that the Respondents were using the name of M/s. Grasim Industries Ltd. with the purpose of indicating a connection between the product i.e. the cement manufactured by them, and M/s Grasim Industries Ltd. which is a well known cement manufacturer. In reply, it has not been denied that M/s. Grasim Industries Ltd. is a well known cement manufacturer. It has also not been denied that the purpose of putting the name "M/s. Grasim Industries Ltd." was to show a connection between the product and M/s. Grasim Industries Ltd. However, what has been contended is that the words "M/s. Grasim Industries Ltd." are neither a brand name nor a trade name. It is contended that mere use of the name of a company does not amount to using a brand name or trade name of some other company.

The Commissioner, by his Order dated 19th May, 1999, held that the Respondents were not entitled to the benefit of the Notification. It was held that they were liable to pay a differential duty of Rs. 47,74,961/- and a penalty of Rs. 10,00,000/- under Rule 173Q of the Central Excise Rule, 1944. The Respondents filed an Appeal before the CEGAT which, as stated above, has been allowed on the basis of Judgments referred to earlier.

Apart from the Judgments relied upon by the Tribunal, some other Judgments of the Tribunal, taking a similar view, have also been cited before us. It was submitted by Mr. Vellapally, on behalf of the Respondents, that based on the Judgment of this Court in Astra Pharmaceuticals (P) Ltd.'s case (supra) the Tribunal has consistently been holding that the benefit of such Notification is not lost by use of the name of a company. It was submitted that most of the Judgments of the Tribunal were not appealed against by the Department. It was submitted that as no Appeal had been filed against those Judgments, the Department should not be allowed to discriminate by filing an Appeal in this case.

In support of this submission reliance was placed upon the Judgment of this Court in the case of Berger Paints India Ltd. vs. Commissioner of Income Tax, Calcutta reported in 2004 (165) ELT 488 (S.C.), wherein this Court has held that if the Revenue has not challenged the correctness of the law laid down earlier and accepted it in the case of one assessee then it is not open to the Revenue to challenge the correctness in other cases without a just cause.

Reliance was also placed upon an unreported Judgment passed in the case of Suptd. Of Central Excise vs. D.C.I. Pharmaceuticals Pvt. Ltd. in Civil Appeal No. 6862 of 1999 dated 22nd February, 2005. However, in this case, we find that the Court refused to interfere because there was an earlier Judgment which had not been challenged in the case of concerned assessee itself.

We find some substance in this submission. However, Mr. Dutta points out to us that no Affidavit in Reply had been filed in these Appeals. He submits that no such contention had been taken in advance. He states that he is therefore not in a position to make a statement as to whether or not Appeals were filed against the various Judgments of the Tribunal shown to this Court. He submits that time should be given to him in order to find out whether Appeals were filed or not.

This contention was taken up by Mr. Vellapally after a full day of argument and only after finding that this Court was against him on

merits. It is not just a legal submission but is based on a factual situation which would require checking. After a full hearing this Court is not going to adjourn this case. As no such contention was taken earlier by filing any Affidavit in Reply we do not propose to dismiss these Appeals on this ground. Even otherwise, we find that in all Judgments, relied upon, the Tribunal has taken a patently erroneous view. It becomes necessary for this Court to clarify the law so that the erroneous Judgments of the Tribunal do not remain binding precedents.

The Judgments of the Tribunal appear to be based upon the Judgment of this Court in Astra Pharmaceuticals Ltd.' case (supra). Even in the impugned Judgment Astra Pharmaceuticals Ltd.'s case has been relied upon. In our view, the Tribunal is misconstruing and misunderstanding the Judgment of this Court in Astra Pharmaceuticals Ltd.'s case.

In Astra Pharmaceuticals Ltd.'s case the question was whether the Appellants (therein) were liable to pay duty on Dextrose Injection manufactured by it under Tariff Item 14E. The said Tariff Item read as follows:

"

Tariff Item No.	Description of Goods	Rate of duty Basic	Special Excise
14E	Patent or Proprietary Medicines not containing alcohol, opium, Indian Hemp or other narcotic drugs or other narcotics other than those medicines which are exclusively ayurvedic, unani, sidha or homoeopathic.	12-1/2% Adv.	10% of the basic duty chargeable

Explanation : I

"Patent or proprietary medicines" means any drug or medicinal preparation, in whatever form, for use in the internal or external treatment of, or for the prevention of ailments in human beings or animals, which bears either on itself or on its container or both, a name which is not specified in a monograph in a Pharmacopoeia Formulary or other publications notified in this behalf by the Central Government in the Official Gazette, or which is a brand name, that is a name or a registered trade mark under the Trade and Merchandise Marks Act, 1958 (43 of 1958) or any other mark such as a symbol, monogram, label, signature or invented words or any writing which is used in relation to that medicine for the purpose of indicating or so as to indicate a connection in the course of trade between the medicine and some person, having the right either as proprietor or otherwise to use the name or mark with or without any indication of the identity of that person.

Explanation : II.
'Alcohol', 'Opium', "Indian Hemp", "Narcotic Drugs" and
'Narcotics' have the meanings respectively assigned to them in
Section 2 of the Medicinal and Toilet Preparations (Excise Duties)
Act, 1955 (16 of 1955)."

To be immediately noted that in Astra Pharmaceuticals Ltd.'s case this Court was considering the phrase "Patent or proprietary medicines". In our case and the other cases earlier dealt with by the Tribunal the phrase under consideration is "brand name or a trade name". The subject matter of Tariff Item 14E and the Notifications being considered are completely different. Whilst interpreting the phrases "brand name or trade name" an interpretation given in respect of "Patent or proprietary medicines" can be of no assistance. Even otherwise, there is a considerable difference between the Explanation to Tariff Item 14E and the Explanation in the concerned Notification. The explanation to Tariff Item 14E provides that the patent or proprietary medicine must, amongst other things, be a brand name i.e. a name or a registered trade mark under the Trade and Merchandise Marks Act. In the Explanation under consideration the "brand name or a trade name" may be registered or unregistered. The registration need not be only under the Trade and Merchandise Marks Act. Undoubtedly, the words "any other mark such as a symbol, monogram, label, signature or invented words or any writing which is used in relation to that medicine for the purpose of indicating or so as to indicate a connection in the course of trade between the medicine and some person" are almost identical. But in the Explanation to Tariff Item 14E they are used in the context of a "Patent and proprietary medicine" which must be a name or a registered trade mark under the Trade and Merchandise Marks Act. In the Explanation to the concerned Notifications these words are used in the context of a "Brand name or a trade name". These words, when used in the context of a "Patent or a proprietary medicine" assume a completely different context from that when they are used in the context of a "Brand name or a trade name" which may be registered or not. Further, the Explanation to Tariff Item 14E nowhere uses the words "trade name". As is commonly known, a trade name can be a name in which or by which a person or body carries on their trade. It would, if the context so permits, include the name of a company. In the context of a "trade name" the words "a name" and "or any writing" would cover the name of a company so long as it is used in relation to the product and is used for the purpose of indicating a connection in the course of a trade between the product and other person.

As has been set out hereinabove, in this case there is no denial that M/s. Grasim Industries Ltd. were manufacturer of cement. There is also no denial that the purpose of using the words:
"Manufactured by Dharani Cements Ltd.
A Subsidiary of Grasim Industries Ltd."

was with an intention of indicating a connection between the product i.e. the cement and M/s Grasim Industries Ltd. In such cases, clearly the Respondents were using a trade name of some other company with the purpose of indicating a connection in the course of trade between the product and that person. The Respondents were therefore clearly not entitled to the benefit of the Notification. The decision of the Tribunal is therefore clearly erroneous and requires to be set aside.

Reference was made to certain decisions of the Tribunal which are now required to be taken note of.

In the case of Nippa Chemicals (Pvt.) Ltd.'s case (supra) the question was whether the Appellants (therein) were entitled to the benefit of Notification No. 175/86-C.E. dated 1st March, 1986. That Notification also contained an explanation (being Explanation VIII) which in terms is identical to the Explanation under consideration by us. The Appellants therein used the following words:

"MANUFACTURED IN INDIA BY
NIPA CHEMICALS LTD.,
In Collaboration with
Nihon Parkerizing Co. Ltd., Japan.
46, Garuda Buildings,
Cathedral Road, Chennai-600086.
MARKETED IN INDIA BY
Goodlass Nerolac Paints Ltd.,
GANPATRAO KADAM MARG,
LOWER PAREL, MUMBAI\026400013."

The Tribunal held that the use of these words did not preclude the Appellants (therein) from availing of the benefit of the Notification. To be immediately noted that in that case it was neither admitted nor proved that the words were used to indicate a connection between the product and Nihon Parkerizing Co. Ltd. The Tribunal so notes. Had the Tribunal based its decision on this aspect no fault could have been found. However, the Tribunal then goes on to hold as under:

"9. It is further mentioned in the above said explanation by stating that the name or a mark means a symbol, monogram, label, signature or invented word or writing which is used in relation to such specified goods for the purpose of indicating the above said connection. The writings in the above said case, in our opinion cannot come within the purview of symbol. It cannot also be a monogram. The same cannot be a label or a signature. It cannot be an invented word in view of the fact that these are names of the company but are comprised of two/three words.

10. The learned JDR stated that this will come within purview of "name". But in order to come within the purview of 'name', we have to again look into the definition of "brand name" and the elaboration given therein. The elaboration given therein is 'symbol, monogram, label, signature or invented word or a writing'. We have already ruled out that it does not come within the purview of a mark or a symbol or a monogram or label or any invented word in view of the reasons furnished above.

11. The next question is whether it comes within the purview of a writing which is used in relation to such specified goods for the purpose of indicating a connection in the course of the trade. In this connection, we have to look into the definition of "WRITE" & "WRITING" in the OXFORD DICTIONERY. The same are defined as follows:-

Write (r-) v. (past t. Wrote, past part, Wri'tten). Form symbols representing letter(s) or word(s) esp. on paper, parchment, etc., with pen, pencil, brush, etc., form (such symbols), set (words etc.) down in writing, express in writing; chronicle, make record or account of; convey (message, information, etc.) by letter; engage in writing or authorship; produce writing; ~ down, set down in writing; write in disparagement or depreciation of; reduce (total, assets, etc.) to lower amount; ~ off, record cancelling of (bad debt, depreciated stock, etc.); reckon as lost or worthless; ~- off (n.) something that must be regarded as total loss or wreck, failure; ~ out, make written copy of; transcribe in full or detail; ~ up, write full account or record of; give full or elaborate description of; commend by appreciative writing, praise in writing; ~-up (n.) review or report.

Writing (r-) n. (esp.) Written document;
(piece of) literary work; personal script, handwriting;
put in ~, write down; the Writings, =
HAGIOGRAPHA; ~- case, case holding writing
materials; ~-desk, desk; ~-master, instructor in
penmanship; the yellow-hammer (from marks like
scribbling on eggs); ~-paper, paper for writing on
with ink, esp. note-paper; ~-table, desk.

12. It is therefore seen that these are certain words enumerated to project the name of the two particular companies and they do not come within the purview of "Writing" or "name". These are mere printed words indicating the names of two companies. Therefore, in our view, these will never come within the purview of "brand name" in view of the fact that they do not come within the meaning of "name" or "mark" which is elaborated in the explanation to "brand name" and this being the position, the arguments of the learned DR cannot be accepted. ....."

In our view, the Tribunal has completely misdirected itself. The term "brand name or trade name" is qualified by the words "that is to say". Thus, even though under normal circumstances a brand name or a trade name may have the meaning as suggested by the Tribunal, for the purposes of such a Notification the terms "brand name or trade name" get qualified by the words which follow. The words which follow are "a name or a mark". Thus even an ordinary name or an ordinary mark is sufficient. It is then elaborated that the "name or mark" such as a "symbol" or a "monogram" or a "label" or even a "signature of invented word" is a brand name or trade name. However, the contention is that they must be used in relation to the product and for the purposes of indicating a connection with the other person. This is further made clear by the words "any writing". These words are wide enough to include the name of a company. The reasoning given by the Tribunal based on a dictionary meaning of the words "write" and "Writing" is clearly erroneous. Even the name of some other company, if it is used for the purposes of indicating a connection between the product and that company, would be sufficient. It is not necessary that the name or the writing must always be a brand name or a trade name in the sense that it is normally understood. The exemption is only to such parties who do not associate their products with some other person. Of course this being a Notification under the Excise Act, the connection must be of such a nature that it reflects on the aspect of manufacture and deal with quality of the products. No hard and fast rule can be laid down however it is possible that words which merely indicate the party who is marketing the product may not be sufficient. As we are not dealing with such a case we do not express any opinion on this aspect.

This Court has, in the case of Royal Hatcheries Pvt. Ltd. vs. State of A. P. reported in 1994 Supp (1) SCC 429, already held that words to the effect "that is to say" qualify the words which precede them. In this case also the words "that is to say" qualify the words "brand name or trade name" by indicating that these terms must therefore be understood in the context of the words which follow. The words which follow are of wide amplitude and include any word, mark, symbol, monogram or label. Even a signature of an invented word or any writing would be sufficient if it is used in relation to the product for purpose of indicating a connection between the product and the other person/company. It is thus clear that the Tribunal's decision in Nippa Chemicals (Pvt.) Ltd.'s case is clearly erroneous and will stand overruled.

In the case of Collector of Central Excise, Goa vs. Christine Hoden (I) Pvt. Ltd. reported in 1999 (113) ELT 591 the question was

whether the use of the word "comfit" with the name "Christine Hoden London, Rome Stockholm" would disentitle the Respondents therein from the benefit of the Notification. It was however found, as a matter of fact, that the word "comfit" was owned by the Respondent. It was on that basis held that the Respondents therein were entitled to the benefit of Notification. To this extent the Tribunal was right. However, the Tribunal has unnecessarily also gone on to comment as follows:

"Mere indication of the foreign company's name does not create any association in the course of trade between the goods and the foreign company."

There would be no purpose in indicating the foreign company's name in relation to the product except to indicate a connection between the product and the foreign company. Therefore, to this extent, the Tribunal is not correct.

In the case of Commissioner of Central Excise, Hyderabad vs. Sarat Electronics reported in 2004 (167) ELT 404 the question was whether the Respondents (therein) were entitled to benefit of Notification No. 1/93-C.E., which Notification was identical to the one under consideration by us. The Respondents therein used the words "SARAT" in bold letters following which the words "A quality product from ITL group" and "Technical licencee of ITL" were also printed. The Tribunal, following its earlier decisions, held as follows:

"6. In the facts of the present case, we are of the view that the expression "ITL" was used to convey the name of the company and not as a trade mark. It showed that the technical know-how was obtained from Instrument Techniques Pvt. Ltd. The expression "A quality product from ITL group" also would not mean that the product was manufactured by Instrument Techniques Pvt. Ltd. According to us, the facts of the case are more akin to the facts in Weigand India (P) Ltd. and Chemguard Coatings Pvt. Ltd. rather than Chopra Appliances."

In our view, the Tribunal was clearly erroneous. As indicated above, the Explanation makes it clear that it need not be a trade name or brand name as commonly understood. Any name or mark or writing, even the name of a company is sufficient so long as it is used for the purpose of indicating a connection between the product and that Company. The use of the words "A quality product from ITL group" clearly showed an intention to show a connection between the product and the ITL group. These words indicated that the quality of the product was the same as that of a product of ITL group. If use of such words did not disentitle a party from the benefit of the Notification, we fail to understand what sort of words would disentitle a party. The decision of the Tribunal in this case is clearly erroneous and will stand overruled.

In this view of the matter, we set aside the impugned Judgment and restore the Order passed by the Commissioner of Central Excise dated 19th May, 1999.

However, by this Order, the Commissioner has also imposed penalty in a sum of Rs. 10,00,000/- under Rule 173Q of the Central Excise Rules. While the conclusions of the Commissioner that the Respondents were not entitled to the benefit of the Notification are correct, the fact still remains that the Tribunal has in a number of matters given an interpretation as understood by the Respondent. It therefore cannot be said that the Respondents could not have taken the view they did. It cannot be said that they could never have concluded that they were entitled to the benefit of the Notification. We therefore feel that this is a case where penalty should not be imposed. We therefore delete the imposition of penalty on the Respondents.

The Appeals stand disposed of accordingly. There will be no order as to costs.