

Namtech Systems Ltd. Vs. Commissioner of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Dec-08-1999

Reported in : (1999)(115)ELT238TriDel

Appellant : Namtech Systems Ltd.

Respondent : Commissioner of Central Excise

Judgement :

1. The issue referred to the Larger Bench for consideration is, whether the benefit of small scale exemption under exemption Notification No.175/86-C.E., dated 1-3-1986, as amended by Notification No.223/87-C.E., dated 22-9-1987, and subsequent exemption Notification No.1/93-C.E., dated 28-2-1993 was available in terms of para 7 of Notification No. 175/86-C.E. and para 4 of Notification No. 1/93-C.E.when the specified excisable goods were affixed with a brand name or trade name of a person who was not Indian, or the brand name or trade name of a person who was not a manufacturer.Sharp Business Machines (P) Ltd. v. C.C.E., Bangalore, 1995 (61) ECR 637 (Tribunal), the South Regional Bench at Madras while disposing of the Stay Applications had referred the matter to the Hon'ble President for constituting a Larger Bench for the purpose of deciding whether the benefit of small scale exemption under Notification No. 1/93-C.E., dated 28-2-1993 was available to a manufacturer who was affixing his goods with the brand name of a foreign manufacturer.

M/s Sharp Business Machines Pvt. Ltd. were engaged in the manufacture of plain paper copier and were affixing them with the brand names 'Canon', 'Richo' and

'Nashua' which belonged to foreign manufacturers.

Under Notification No. 1/93-C.E. the exemption contained in that notification was not available to the specified goods bearing a brand name or trade name (registered or not) of another person. In the show cause notices dated 21-10-1993 and dated 24-12-1993, it was alleged that the Canon, Richo and Nashua brand plain paper copiers manufactured and cleared by M/s. Sharp Business Machines were not eligible for small scale exemption under Notification No. 1/93-C.E., as these brand names were owned by foreign companies who were not eligible for the exemption under the relevant exemption notification applicable to small scale units - Notification No. 1/93-C.E.. Both the show cause notices were adjudicated by the Asstt. Collector of Central Excise, Bangalore, who under his common order-in-original dated 28-2-1994 observed that admittedly the brand names 'Canon', 'Richo' and 'Nashua' were popular brand names of Japanese companies and that the provisions of Notification No. 1/93-C.E. were not applicable to a foreign company. As long as the brand name owner whether in India or outside India was not eligible for the benefit under Notification No. 1/93-C.E., the user of the said brand name was also not entitled for the benefit of small scale exemption under the aforesaid exemption notification and that it was immaterial whether such brand name owner was in India or was outside India. He held that the assessee were not eligible for the benefit of Notification No. 1/93-C.E. in respect of the goods affixed with the brand names of foreign companies 'Canon', 'Richo' and 'Nashua'. On appeal, the Collector of Central Excise (Appeals), Bangalore, under his order-in-appeal dated 22-12-1994 confirmed the view taken by the adjudicating authority.

When the matter came up before the South Regional Bench of the Tribunal at Madras for disposal of the stay applications, relying upon an earlier stay order dated 17-8-1992 in the case of FOSROC Chemicals India Ltd. v. C.C.E., 1993 (65) E.L.T. 119 (T), the Bench referred the matter to the Hon'ble President for constituting a Larger Bench. FOSROC Chemicals India Ltd. v. C.C.E., 1993 (65) E.L.T. 119 (T), the appellants were engaged in the manufacture of construction and mining chemicals, and were affixing their goods with the brand name 'FOSROC' which was the brand name of a foreign manufacturer in United Kingdom. The benefit of exemption Notification No. 175/86-C.E. had been denied to the

appellants on the ground that the brand name 'FOSROC' used by them was the brand name of an ineligible person - manufacturer in U.K. While disposing of the stay application filed by the appellants, the Bench took note of their earlier stay order - Stay Order No. E/Stay/495/92 in Appeal No. E/371/92 in the case of Ceramed Engineers Pvt. Ltd. v. C.C.E., Bangalore, and following the said interim orders had granted waiver of pre-deposit of the duty amount and the penalty amount.

In Ceramed Engineers Pvt. Ltd. v C.C.E., Bangalore, Appeal No.E/371/92, the brand name used by the appellants was a foreign brand and the brand name owner was not in India. The Bench observed that unless the brand name owner himself was in India and was himself not entitled to the benefit of Notification No. 175/86-C.E., the benefit of the said exemption Notification No. 175/86-C.E. could not be denied to the Indian manufacturer using such foreign brand name.

3. In the other referring order in the case of Namtech Systems Ltd. v.C.C.E., Bangalore, Appeal No. R/510/95 Madras, Order No. 436/97, dated 4-2-1997 reference was made to the above decision in the case of Sharp Business Machines, and the matter was similarly referred to the Larger Bench. Bentex Motor Control Indus, v. C.C.E., New Delhi, the appellants were engaged in the manufacture of various excisable goods and were affixing the brand name 'Bentex' on their goods. The brand name 'Bentex' did not belong to them. It belonged to another person M/s. Chopra Electrical Sales Corpn. which were earlier a manufacturer, but thereafter had discontinued their manufacturing operations. While disposing of the stay applications filed by the appellants, the Bench noted that there were different views with regard to the use of the brand name of a foreign manufacturer, for applicability of para 7 of Notification No. 175/86-C.E.; there were a line of decisions taking the view that a person in order to fall under the purview of para 7 of the notification, aforesaid, must be a person manufacturing excisable goods in India and must be governed by the excise law of India and that where a brand name of a foreign manufacturer was used, para aforesaid was not attracted; at the same time there were a line of decisions taking a contrary view. The Bench noted that the matter with regard to the brand of foreign manufacturer had already been referred to the Larger Bench, and the

bench was of the opinion that a similar stand could be taken in regard to the controversy arisen from the use of a brand name belonging to an Indian non-manufacturing brand name owner. *Rajdoot Paints Ltd. v. C.C.E.*, Appeal No. E/2158 to 2164/98-C, the appellants were engaged in the manufacture of paints and varnishes, and claimed the benefit of Notification No. 175/86-C.E. They were manufacturing and marketing their products under the brand names 'Spred' and 'Glidden' which belonged to M/s. Glidden International Co.

of USA. The Department had taken a view that the appellants were not eligible to the benefit of Notification No. 175/86-C.E. as they were using the brand name of a person who was not eligible for the benefit of said notification.

Similar references had been made in other matters, which have been listed before us, and which are taken up for consideration and decision together and the reference in all the cases is being disposed of by this common order.

5. S/Shri V. Lakshmikumaran, G. Shiv Das and M.P. Devnath, Advocates, appeared for M/s Bentex Motor Control, Bentex Linger and Switchgear Co., Bentex Electronics, Bentex Udyog, Bentex Control and Switchgear, Chopra Electricals, Bentex Indus. Rajdoot Paints, Architect Paints, UK Paints, Spred Coating, Kanwar Paints, Harman Paints, Ideal Coatings, Punjab Tele Printers, Switchgear and Ref Co. and Wessamit Appliances Pvt. Ltd. Shri Jitender Singh, Advocate, appeared for M/s Maini Materials Movement. No one appeared for the other manufacturers. The Revenue was represented by Shri M.P. Singh, DR, and Shri R.D. Negi, DR. Shri A.K. Jain, Advocate, appeared as intervener.

6. We have carefully considered the submissions made by both the sides.

We have also given due thought and consideration to the points raised by the intervener. We have also gone through the facts on record and have analysed the matter in detail.

7. To begin with let us have a look at the legal provisions whose interpretation we are called upon to settle. Under exemption Notification No. 175/86-C.E., dated 1-3-1986, the specified excisable goods cleared for home consumption on or after the

first day of April in any financial year, by a manufacturer from one or more factories, upto the given limits in terms of value, were exempted from full or part payment of central excise duty subject to the various conditions and limitations as provided under that notification. The eligibility criteria, extent of exemption, slab exemption, the aggregate value of clearances beyond which no exemption was available etc. were provided in para 1 of the said notification. There were specific provisions with regard to a factory run by more than one manufacturer, and with regard to a manufacturer having more than one factory. In subsequent paragraphs there was a condition with regard to the registration, with the Director of Industries of the concerned State or the Development Commissioner concerned with Small Scale Industries, as a small scale industry under the provisions of Industries (Development and Regulations) Act, 1951, with certain specific provisions in that regard. Various provisions as contained in the aforesaid notification were aimed to limit the Revenue sacrifice in favour of genuine small-scale units. From time to time, provisions were added in the said notification to specify the area of relief and to provide conditions in furtherance of the objective of the scheme.

8. As a part of this continuing exercise, amending Notification No.223/87-C.E., dated 22-9-1987 (effective from 1-10-1987) was issued.

Under this amending notification, para 7 was inserted in the Notification No. 175/86-C.E. as under - "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." For the purposes of this para, brand name or trade name was to 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 words 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.

By way of explanation, it was made clear that where the specified goods manufactured by a manufacturer were affixed with a brand name or trade name (registered or not) of another 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.

Under Notification No. 1/93-C.E., dated 28-2-1993, the same provisions were incorporated in para 4. The explanation of the expression 'brand name' and 'trade name' was given in explanation IX and the Explanation IV of Notification No. 175/86-C.E. (with regard to the fact that the brand name owner or the trade name owner will not be deemed to be the manufacturer merely by reason of the fact that the specified goods bear his brand name or trade name), was incorporated in Notification No.1/93-C.E. by way of Explanation X. By Notification No. 59/94-C.E., dated 1-3-1994, the expression "who is not eligible for the grant of exemption under this notification" was omitted, and the amended para 4 w.e.f. 1-3-1994 read as under : "4. The exemption contained in this notification shall not apply to the specified goods, bearing a brand name or trade name (registered or not) of another person." 9. Under the provisions which are the subject matter of the present study, the small scale manufacturers otherwise eligible for the benefit of small scale exemption, in terms of Notification No. 175/86-C.E., or Notification No. 1/93-C.E., become ineligible when they affix their specified goods with the brand name or trade name of a person who is not eligible for the benefit of small scale exemption in terms of those notifications. A person could be ineligible for the benefit of small-scale exemption for various reasons. He could be a person who is not producing or manufacturing goods in India. He could be a person who is not engaged in the production or manufacture of excisable goods. He could be a person who is producing or manufacturing excisable goods in India, but who is not covered by the various conditions and limitations subject to which the benefit of small-scale exemption was available in terms of the small-scale exemption notifications.

The benefit of exemption is available to the manufacturers of specified excisable goods but the conditions and limitations, subject to which the benefit of small-scale exemption notification was available to the manufacturers of specified excisable

goods, could have reference to the non-manufacturers or to the non-specified/non-excisable goods etc. Till no duty liability was being fastened on the non-manufacturers and the conditions imposed had a nexus with the exemption granted, no fault could be found by the conditions/limitations. In the present case while under the amending notification dated 22-9-1987, the condition for eligibility of the small scale exemption was applicable to the manufacturers of the specified goods, the non-eligibility with regard to the person to whom the brand name or the trade name belonged, had been referred to by way of condition/limitation (for the eligibility of the manufacturer of the specified goods). There is a clear nexus between the two. Further, this condition in no way imposes any duty liability on the person foreign or Indian to whom the brand name or trade name belonged. Under Explanation IV in Notification No.175/86-C.E., it has been made clear that where the specified goods were affixed with a brand name of another 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. This Explanation has been incorporated in Notification No. 1/93-C.E. as Explanation X.10. Under Rule 8(1) of the Central Excise Rules, 1944 and under Section 5A(i) of the Central Excises Act, 1944, the Central Government could specify the conditions subject to which the excisable goods were to be exempted from the whole or any part of the duty leviable thereon. The condition imposed in Notification No. 175/86-C.E. and Notification No.1/93-C.E. in terms of para 7 and para 4 respectively in these notifications, was qua-manufacturer to whom the exemption was to be granted or was not to be granted. It in no way brought within the excise net the foreign brand owner or the non-manufacturing trader as already indicated above. It did not impose any liability on the non-manufacturer. In the case of Bata India Ltd. v. Asstt. Collector of Central Excise, Patna, 1978 (2) E.L.T. J-211 (Patna), the Patna High Court in para 24 of the judgment had observed that the condition, which the Central Government could impose while granting exemption must be qua-manufacturer to whom the exemption is being granted. In the present provisions, this has been done so.

In the course of trade and commerce, the brand name or trade name exist independently of the registration which affords further protection under the Statute (refer Bombay High Court decision in the case of Consolidated Foods Corpn. v.

Brandon & Co. Pvt. Ltd., AIR 1965 Bom.

35). The foreign brand names could not be placed on a more advantageous position, than the national brand names.

The expression "who is not eligible for the grant of exemption under this notification" restricts the eligibility of the small-scale manufacturer for the benefit of small scale exemption. Even when the person, whose brand name or trade name is affixed on the specified goods by the small scale manufacturer, is a manufacturer under the provisions of the Central Excises Act, 1944 the benefit of Notification No. 175/86-C.E. and Notification No. 1/93-C.E. was sought to be denied.

In such a situation where such person is not a manufacturer under the provisions of the Central Excises Act, 1944 or who is beyond the purview of the Central Excises Act, 1944 how even after the affixation of his brand name or trade name on the specified goods, the benefit of small scale exemption could be available.

11. The expression used in the relevant provisions was 'another person'. The expression 'person' is wider than the 'manufacturer' as the expression 'manufacturer' is wider than the manufacturer of excisable goods. It has to be assumed that the Legislature has used the expression 'person' purposely and the said expression cannot be detached from the context. The affixation of brand name gives an advantage to the product affixed with such brand name, particularly when it is a popular brand name having association in the mind of the consumer with the quality of the product and the reputation of those to whom the brand name belongs, when the affixation of the Indian brand name, (when the brand name owner is not eligible for the benefit of small scale exemption) deprives the goods affixed with such Indian brand name from the benefit of small scale exemption, certainly the affixation of the foreign brand name could not make such goods eligible for the benefit of small scale exemption.

The definition of 'person' in the General Clauses Act is illustrative and is not applicable to all contexts and purposes. Under Section 3(42) of the General Clauses Act, 1897, 'person' shall include any company or association or body of

individuals whether incorporated or not. The definition is illustrative and is not exhaustive. In the case of *Duli Chand Laxmi Narayana v. Commissioner of Income Tax, Nagpur*, AIR 1956 (43) S.C. 354, the Hon'ble Supreme Court had observed that to read the definition of the word 'person' occurring in Section 3(42) of the General Clauses Act, 1897 into Section 4 of the Partnership Act will be totally repugnant to the subject of Partnership Law. Further we find that the Indian merchants can secure registration of their brand names in foreign countries and similarly in certain circumstances foreign merchants could secure registration of their brand names in India.

Section 131 and 132 of the Trade and Merchandise Act, 1958 are extracted below :- 131. Special provisions relating to applications for registration from citizens of convention countries. - (1) With a view to the fulfilment of a treaty convention or arrangement with any country outside India which affords to citizens of India similar privileges as granted to its own citizens, the Central Government may by notification in the Official Gazette, declare such country to be a convention country for the purposes of this Act.

(2) Where a person has made an application for the registration of a trade mark in a convention country and that person, or his legal representative or assignee, makes an application for the registration of the trade mark in India within six months after the date on which the application was made in the convention country, the trade mark shall, if registered under this Act, be registered as of the date on which the application was made in the convention country and that date shall be deemed for the purposes of this Act to be the date of registration.

(3) Where applications have been made for the registration of a trade mark in two or more convention countries the period of six months referred to in the last preceding sub-section shall be reckoned from the date on which the earlier or earliest of those applications was made.

[a] Denmark has so declared - See S.O. 2314, published in Gaz. of India 19-9-1961. Pt. II. S.3(ii), Ext. p. 1567.

132. Provision as to reciprocity. - Where any country specified by the Central Government in this behalf by notification in the Official Gazette does not accord to citizens of India the same rights in respect of the registration and protection of trade marks as it accords to its own nationals, no national of such country shall be entitled, either solely or jointly with any other person- (a) to apply for the registration of or be registered as the proprietor of a trade mark in Part A or Part B of the register.

(b) to be registered as the assignee of the proprietor of a registered trade mark or (c) to apply for registration or be registered as a registered user of a trade mark under Section 49. [1940-S. 83.] 12. When the matter was referred to the Hon'ble President for constituting Larger Bench in the case of Sharp Business Machines under stay order dated 12-7-1995, there were a line of decisions taking a view that small scale exemption was not available when the specified goods were affixed with the brand name of a foreigner or of a trader.

The DR had also referred to the Tribunal's Stay Order No. S/19 to 26/98-B1, dated 7-4-1998 in the case of Bentex Motor Control Indus. & Ors v. C.C.E., New Delhi, and had submitted that the observations in para 3 of the order were not correct. In para 3, the Tribunal had observed "there is a line of decisions taking the view that a person in order to fall under the purview of Clause 7 must be a person manufacturing excisable goods in India and governed by the excise law of India and where a brand name of a foreign manufacturer is used.

Clause 7 is not attracted". He submitted that there were only interim orders to that effect, and on the other hand there were a number of final orders taking the contrary view which had not been referred to by the South Regional Bench when the matter was referred to the Hon'ble President for constituting the Larger Bench on the subject.

13. We find that prior to 12-7-1995 when the South Regional Bench referred the matter to the Hon'ble President for constituting the Larger Bench, there were a number of decisions taking a view that when the specified goods were affixed with the brand name of a foreigner or the brand name of a trader, then the benefit of small scale exemption under Notification No. 175/86-C.E. was not available.

In the case of Thio Pliarma v. C.C.E., 1992 (60) E.L.T. 395 (T), decided on 21-2-1992 the appellants were engaged in the manufacture of medicines. They were affixing the medicines manufactured by them with the brand name 'Synthico' which did not belong to them. The brand name 'Synthico' belonged to M/s Synthico Formulations who were a marketing concern. They were not engaged in the manufacture of excisable goods.

The Collector of Central Excise (Appeals), New Delhi, had held that the appellants were not entitled to the benefit of Notification No.175/86-C.E. as amended by Notification No. 223/87-CE., dated 22-9-1987.

The Tribunal observed that the word 'Person' in its ordinary connotation would include any person whether he is a manufacturer or a non-manufacturer and that the marketing/selling agents cannot have the benefit of Notification No. 175/86-C.E.. The Tribunal held that the Synthico Formulations were not the manufacturer, they were the marketing/selling agents and they could not have the benefit of Notification No. 175/86-C.E., and the Patent or Proprietary Medicines bearing their trade name 'Synthico' were not entitled to exemption under Notification No. 175/86-C.E. in terms of para 7 read with Explanation IV and Explanation VIII of the said notification. Shah Machine Tools Pvt. Ltd. v. C.C.E., Allahabad, 1994 (69) E.L.T. 101 (T), decided on 15-10-1993, the appellants were engaged in the manufacture of grinders, polishers and presses and were affixing their goods with the brand name 'Cinni' which did not belong to them but belonged to one M/ s Raj Kumar Shah and Sons, a non-manufacturer.

The benefit of Notification No. 175/86-C.E. was denied to the appellants on the ground that they were affixing on their goods the brand name of another person who was not eligible for exemption. The Tribunal held that when the brand name of another person was used by the assessee on his product and when the brand name owner was not eligible for small scale exemption, the assessee was also not eligible for exemption in terms of para 7 of the said Notification No.175/86-C.E..

In the case of Nectar Beverages Pvt. Ltd. v. U.O.I., 1994 (70) E.L.T.172 (Karnataka) decided on 3-12-1993, the Karnataka High Court dealt with the same provisions and held that because certain advantage is available to goods having

brand names, the Central Government thought it unnecessary to extend the benefit of exemption to those goods which were affixed with the brand name of ineligible person (para 8.3). In para 9.3 the High Court observed as under - 9.3 SSI Units using brand names of others are class by themselves, because the goods produced by them have certain advantages in the market. Therefore, it cannot be held that the classification is arbitrary and based on irrelevant considerations. Concession is granted obviously to SSI Units who has to struggle hard to earn a good market for their goods and to prevent brand name holders adopting the device of manufacturing those goods through SSI Units - Contention is accordingly rejected.

Further contentions raised in W.P. No. 7204 and 3805 of 1989 require to be considered: The High Court upheld the validity of para 7 of Notification No.175/86-C.E.Indian Reprographic Systems Pvt. Ltd. v. C.C.E., New Delhi, 1995 (75) E.L.T. 112 (T), decided on 11-5-1994, the Tribunal had held that the small scale exemption was not applicable to specified goods affixed with the brand name of foreign company.Festo Controls Pvt. Ltd. v. C.C.E., Bangalore, 1994 (72) E.L.T. 919 (T), decided on 13-5-1994, the appellants were manufacturers of Pneumatic valves, cylinders, base plate, manifold and fillings and were affixing the said goods with the brand name 'Festo' which was owned by their collaborators 'M/s Festo K.G. (Festo Pneumatic) Germany'. The markings 'Festo' were relatable to the brand name of M/s Festo KG, Germany. The Tribunal on a very careful consideration of the matter came to a considered view that the appellants were not entitled to the benefit of Notification No. 175/86-C.E. in terms of para 7 of the said notification. The Tribunal observed "the use of the word 'Festo' links the appellants' goods with the goods of the other person who are not entitled to the benefit of the notification." The 'other person' were the Festo KG of Germany.Sonoma Aeromatics Pvt. Ltd. v. C.C.E., Bangalore, 1995 (78) E.L.T. 285 (T), the appellants were affixing the brand name 'H&R' on their products flavour compounds, perfume compounds, aroma chemicals, natural essential oils, spice extracts, spice compounds, fruit powders and spray-dried flavour - the brand name belonging to M/s Harmann & Reimer GMBS, Germany, foreign company. The Tribunal while denying the benefit of exemption Notification No. 175/86-C.E. made certain pertinent observations with regard to the rationale of denying the benefit of small

scale exemption to the goods affixed with foreign brand names. It was observed that the buyers identify the goods with the brand name and logo and the colour scheme on the labels; the goods affixed with the foreign trade name get mixed up with the foreign company's goods; the customer genuinely believes both the goods to be the same and identical. The Tribunal held that M/s Sonoma Aromatics (P) Ltd. were not eligible to the benefit of exemption Notification No. 175/86-C.E. since it was using as agent of the foreign company, the company's brand name, logo and colour of their products and the foreign company was not entitled to the benefit of the said notification.

This decision of the Tribunal has been confirmed by the Hon'ble Supreme Court by way of dismissal of Civil Appeal No. 5180 of 1995 filed by M/s. Somona Aromatics Pvt. Ltd. as per Court Room Highlights appearing at page A-70 of 1997 (93) E.L.T. Unnati Indus v. C.C.E., Ahmedabad, 1995 (75) E.L.T. 541 (T), decided on 28-11-1994 the Tribunal had followed the Karnataka High Court decision in the case of Nectar Beverages. Pvt. Ltd. v. U.O.I., 1994 (70) E.L.T. 172 (Karnataka).

The Madras High Court in the case of Kali Aerated Water Works v. U.O.I., 1995 (76) E.L.T. 265 (Mad.), decided on 16-12-1994 with regard to Notification No. 1/93-C.E., dated 1-3-1993 as amended by Notification No. 59/94-C.E., dated 1-3-1994 held that as the petitioners manufactured the goods by affixing the same with the brand name or trade name of another ineligible person they are also not eligible for the grant of exemption claimed by them (para 13).

The Madras High Court in the case of Bell Products Co. v. U.O.I, 1995 (78) E.L.T. 404 (Madras) decided on 11-1-1995 had rejected the challenge made to the constitutional validity of similar provisions as contained in para 4 of Notification No. 1/93-C.E., dated 28-2-1993 as amended by Notification No. 59/94-C.E., dated 1-3-1994.

The validity of para 7 of Notification No. 175/86-C.E. had also been upheld by the Gujarat High Court in Gandhi Nagar Bottling Pvt. Ltd. v. U.O.I, 1995 (75) E.L.T. 54 (Guj.). The High Court referred to the object of amendment by Notification No. 223/87-C.E., dated 22-2-1987 as to see that the concessional rate of excise duty protects the smaller units in the industry from the competition, by the larger ones

(para 7).

The Supreme Court had also upheld the validity of para 7 of Notification No. 175/86-C.E. in the case of U.O.I, v. Paliwal Electricals Pvt. Ltd., 1996 (83) E.L.T. 241 (S.C.). The Hon'ble Supreme Court observed that the object of the notification was to help the small manufacturers to survive in the market which is dominated by brand names/ trade names (para 4).

In the case of U.O.I. v. J.J. Electricals, 1999 (106) E.L.T. 15 (S.C.) the Apex Court affirmed the view taken by them in the case of U.O.I. v. Paliwal Electricals Pvt. Ltd., 1996 (83) E.L.T. 241 (S.C.) and did not find any ground to take a view different than the one taken in that case.

14. Thus, there was a long line of decisions taking a final view when the Tribunal on 12-7-1995 sought to reopen the issue and referred the matter to the Hon'ble President for constituting the Larger Bench on this subject.

15. We find that even after that date the Tribunal has taken a consistent view that the benefit of small scale exemption was not available when the specified goods were affixed with the brand name of a foreigner or of a trader. *Harts Cocoa Products Pvt. Ltd. v. C.C.E., Madras*, 1996 (17) RLT 428 (CEGAT-SZB), decided on 27-6-1996, the confectionery were affixed on the wrapper with the brand name 'Mikie' of M/s Mikie Orient Confectioners, Madras, a trading concern and not a manufacturer. M/s Mikie Orient Confectioners were not eligible to the benefit of Notification No. 175/86-C.E.. The Tribunal held that the provisions of para 7 of Notification No. 175/86-C.E. were attracted.

In the case of *C.C.E., Madras v. Rathna Industrials*, 1998 (24) RLT 202 (T), decided on 23-7-1997 the hub cup and show cup were affixed with the insignia of M/s Maruti Udyog Ltd., the Tribunal held that the benefit of Notification No. 175/86-C.E. was not available as the goods came within the mischief of para 7 of the said notification, although the word 'Maruti' in Hindi was not affixed. *Alfa Electricals v. C.C.E., Pune*, 1998 (104) E.L.T. 356 (T), decided on 5-5-1998, the brand name 'Swift ' was affixed on the excisable goods manufactured by the assessee and 95% of such goods were sold through another person in the name of Swift Sales

and Services.

The Tribunal held that the benefit of Notification No. 175/86-C.E. was not available to the assessee since the use of brand name showed association in the course of trade between the assessee and another person. C. C.E., Aurangabad v. Ideal Chemicals, 1999 (32) RLT 354 (CEGAT) decided on 31-3-1999 and Super Delicacies v. C.C.E., New Delhi, in Appeal Nos.

E/407 and 5229/91-C and E/3097/93-C vide Final Order No. 672 to 674/99-C, dated 10-8-1999.

16. The main argument advanced on behalf of the manufacturers is that the Law of Central Excise is not applicable to foreign persons and the non-manufacturing traders. It is contended that when the Law of Central Excise was not applicable to foreign persons and to the non-manufacturing traders, the issue of their eligibility or non-eligibility to the benefit of small scale exemption under Central Excise Notifications was not relevant for extending the benefit to the manufacturers of excisable goods. We have already analysed the legal provisions above and have noted that by denying the benefit of small scale exemption to the manufacturers of the specified goods (who were affixing such specified goods with the brand name or trade name of ineligible persons), no levy was sought to be imposed on the ineligible persons. As the levy, so the exemption, was applicable and available to the tax payers under the Excise Law. The eligibility or non-eligibility of the brand name owner has been brought in by way of condition subject to which the exemption was available to the small scale manufacturers.

The validity of these provisions has been upheld at the highest level.

Thus, we consider that the denial of the benefit of small scale exemption to the specified goods where the manufacturers affixes the specified goods with the brand name or the trade name of a foreign person or a non-manufacturing trader in no way extends the levy of central excise to the persons in foreign country or to the non-manufacturing traders in India.

17. The Counsels appearing for the appellants had submitted that prior to the amendment in Notification No. 1/93-C.E., dated 28-2-1993 by amending Notification No. 59/94-C.E., dated 1-3-1994 the benefit of small scale exemption was not applicable to the specified goods bearing a brand name or trade name (registered or not) of another person, who was not eligible for the grant of exemption under that Notification No.1/93-C.E., dated 28-2-1993. The relevant para-4 as in force prior to 1-3-1994 was as under :- "4. 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".

By amending Notification No. 59/94-C.E., dated 1-3-1994 the expression "who is not eligible for the grant of exemption under this Notification" was omitted and the relevant para-4 as in force after amendment on 1-3-1994 reads as under :- "4. The exemption contained in this Notification shall not apply to the specified goods, bearing a brand name or trade name (registered or not) of another person." It was submitted that on and from 1-3-1994 there was no doubt that when the specified goods were affixed with a foreign brand name or the trade name of a trader, who was not a manufacturer of excisable goods, the said specified goods were not eligible for the benefit of small scale exemption. It was argued that the expression "of another person who is not eligible for the grant of exemption under this Notification" in the relevant para-4 of Notification No. 1/93-C.E., prior to 1-3-1994 will refer only to the Indian manufacturers. We consider that there is no doubt that when an Indian manufacturer of excisable goods is not eligible for small scale exemption, the use of his brand name on specified goods will make the specified goods ineligible to the benefit of small scale exemption. When such is the treatment given to the Indian manufacturers how it could be that the affixation of foreign brand, which will have consequences on the competing ability of the other goods not affixed with such foreign brand name, will have no effect on the liability to exemption of the specified goods. The appellants want to read the expression 'person' as 'excise manufacturer'. As we have already analysed above this is not borne out by the express language of the relevant provisions.

18. It was also argued that the Notifications had to be strictly construed and when strictly construed only those persons who were manufacturers of excisable goods but were not eligible for the grant of exemption under Notification No. 175/86-C.E. or Notification No.1/93-C.E. would be in-eligible persons for the purposes of the para 7 and para 4 respectively of the aforesaid notifications. On plain reading, the ineligible person is one, who is not eligible for the grant of exemption under Notification No. 175/86-C.E. or Notification No. 1/93-C.E. No construction could place the foreign person or the non-manufacturing trader as eligible for small scale exemption under the Excise law. A person, who is not producing or manufacturing excisable goods in India whether an Indian citizen or not an Indian citizen, is not a manufacturer for the purpose of Central Excise Law.

When a person is not liable to pay any duty of excise how could he be eligible for the benefit of any exemption. Thus, even on strict construction the foreign person or the non-manufacturing trader could not be considered as eligible for the grant of exemption under Notification No. 175/86-C.E. and Notification No. 1/93-C.E..

19. It had also been pleaded on behalf of the manufacturers that the eligibility or in-eligibility in the context of Notification No.175/86-C.E. and Notification No. 1/93-C.E. should flow from the Excise Law. Reliance has been placed on the Supreme Court's decision in the case of Manohar Nathu Rao Samarth v. Marotrao Rao - 1979 (4) SCC 93 (S.C.). In that case, the matter related to the city corporation elections. The appellant was declared elected to the Corporation of the City of Nagpur from Ward No. 34. The defeated candidate had challenged the victory of the appellant on the legal ground of ineligibility of the appellant, who was during the election a Development Officer under the Life Insurance Corporation (LIC). Under Regulations 25 of the LIC of India (Staff) Regulations 1960 framed by the LIC, all its employees were under an embargo on taking part in Municipal Elections save with the permission of the Chairman of the LIC. The appellant was an employee of the LIC and had not sought or got the Chairman's permission. It was charged that the appellants laboured under legal in-eligibility as contemplated in Section 15 (g) of the City of Nagpur Corporation Act, 1948. The Hon'ble Supreme Court observed that contravention of the Regulation 25 of the LIC of India (Staff) Regulations 1960 invites disciplinary action which may range from

censure to dismissal but could not in-validate the election duly held and validly declared as per City of Nagpur Corporation Act, 1948. It was in such a situation that the Apex Court made an observation "in-eligibility must flow from a specific provision of law designed to deny eligibility or to lay-down disqualification". It was added "if a Rule of Conduct makes it undesirable, objectionable or punishable for an employee to participate in elections to a legal authority, it is a distortion even an exaggeration out of proportion of that provision to extract out of its a prohibition of a citizen franchise to be member in the shape of a dis-qualification from becoming a member of a local authority." As will be seen in the facts and circumstances of that case that there were distinctly two separate provisions and two separate disciplines.

Under the LIC of India (Staff) Regulations 1960 the terms and conditions of service of the staff of the LIC, code of conduct, discipline and appeals were laid-down whose violation called for disciplinary proceedings. It was not a Law dealing with elections.

These provisions defined and controlled the conduct of the employees in order to ensure efficiency and discipline in the Corporation and providing for penalties against erring employees. There was another distinct and separate enactment - City of Nagpur Corporation Act, 1948 that concerned elections of Councillors to the Corporation and to other allied subjects. The election to the post of Councillors was determined by the provisions of the Corporation Act, and any misconduct under the LIC of India (Staff) Regulations could not affect the conduct of elections under the City of Nagpur Corporation Act, 1948. It was with such a situation that the Hon'ble Supreme Court observed "in-eligibility must flow from a specific provision of law designed to deny eligibility or to lay-down disqualification". We cannot cull out this sentence out of context and apply the same to an utterly unrelated situation. Mere culling out a few sentences here and there from the judgment does not amount to citation of a precedent of binding nature. Union of India v. Indo-French Pharmaceutical Co. -1983 (12) E.L.T. 725 (Madras), the issue for consideration before the Madras High Court was whether the three Indian Pharmacopoeia products viz. (i) Sulpha Gunidire tablets (ii) Sulpha Dimidine tablets and (iii) Calcium Gluconets tablets manufactured by M/s. Indo-French

Pharmaceutical Co.

were patent or proprietary medicines for the purposes of Item No. 14E of the erstwhile Central Excise Tariff. The labels on the medicines contained a symbol with the words superscribed "Indo French". The symbol was very small one and appeared to be very insignificant when compared to the overall size of the label. The High Court concluded that the symbol "Indo-French" used by the respondents could not be said to be distinctive enough to attract Item No.14 E read with explanation 1 of the erstwhile Central Excise Tariff.

We do not consider that the facts of this case have any relevancy to the issue before us.

In the case of State of Andhra Pradesh v. Venkateshwara Roller & Flour Mills - 1988 (70) STC 299 (A.P.) the question for determination was whether the supplies made to the nominees of the Director of Civil Supplies were sales within the meaning of Section 2 (n) of the Andhra Pradesh General Sales Tax Act, 1957. The appellants' counsel had referred to the observations in para-13 of that decision and submitted that the claim for exemption must be with reference to any of the provisions contained in the Act, the Rules or the Notifications and that a mere claim to non-liability under the Act cannot amount to a claim for exemption as it is statutorily understood.

In the present case, the non-eligibility of the exemption flow from the express language of the notification. The exemption is being claimed by the manufacturer of specified goods. The exemption is not unconditional. It is subject to the conditions specified therein . When it comes to the affixation of brand name on the specified goods, no liability is being fastened on the person, whose brand name was being affixed. It is specifically made clear in the Notification itself. Collector of Central Excise, v. Bengal Chemicals and Pharmaceutical Works Ltd. - 1989 (43) E.L.T. 591 (Tribunal). The pilfer proof caps fixed to the containers of the medicines in question had on them the legend "Bengal Chemicals". The Tribunal observed that it did not constitute a brand name or mark used in relation to the medicines for indicating or to indicate a connection between the medicines and M/s. Bengal Chemicals and Pharmaceutical Works Ltd., the manufacturers. After referring to

the Madras High Court's decision in the case of Indo French Pharmaceutical Co., Madras v. Union of India -1978 (2) E.L.T. (J 478) (Madras), the Tribunal held that only on this ground the medicines in question could not be considered as patent or proprietary medicine and were not covered by Item No.14 E of the erstwhile Central Excise Tariff.

20. We find that none of these decisions referred to by the Counsels for the manufacturers directly relate to the issue before us, while there are a long line of decisions dealing with the specific issue before us, which had been referred to above and which had held that the benefit of small scale exemption under Notification No. 175/86-C.E. and Notification No. 1/93-C.E. was not available when the specified goods were affixed with a brand name of a foreign person or of a non-manufacturing trader, who were not otherwise eligible to the benefit to small scale exemption under the aforesaid exemption notifications.

21. Shri Jitendra Singh, Advocate appearing for M/s. Maini Materials Movement Pvt. Ltd. submitted that in their case the appellants themselves were the owner of the trade mark. He prayed that the matter be delinked. Shri M.P. Singh, Departmental Representative objected to the same and submitted that it was not an admitted position that the appellants were the owners of the trade mark used by them, and that it was not proper to delink this matter. We consider that the matter could be disposed of by the concerned Bench in the light of our view taken in the present reference. At this stage, we, therefore, do not consider it appropriate to delink this matter.

22. Shri A.K. Jain, Advocate appearing as intervenor had submitted that the eligibility of a foreigner cannot be judged till he comes to India.

In these provisions, we are concerned with the brand name or trade name affixed on the goods. The brand name or trade name of a foreign person can be affixed by the Indian manufacturer on excisable goods, and the presence or absence of a foreign person owning such trade name or brand name is not material.

He has also submitted that the Excise Authorities were not the proper authority to judge the eligibility of the foreign person. The excise authorities had to determine

the eligibility or non-eligibility of the assessee to the benefit of exemption. They are the proper authority to adjudicate upon the applicability or non-applicability of the conditions subject to which the benefit of exemption was available.

23. On a careful consideration of the matter in all its relevant aspects, we are of the view that the benefit of small scale exemption under Notification No. 175/86-C.E., dated 1-3-1986 (as amended) and Notification No. 1/93-C.E., dated 28-2-1993 (as amended) was not available to the specified goods where the manufacturer affixes the said specified goods with the brand name or trade name of a foreign person and of a non-manufacturing trader. The reference is answered accordingly.

The matter be now placed before the respective benches for disposal of individual cases.

Sd/- Sd/- Sd/-(Lajja Ram) (S.S. Kang) (P.S. Bajaj) Member (T) Member (J) Member (J) 24. I have gone through the proposed order written by my learned brother Shri Lajja Ram, Member (Technical). With respects, I am unable to agree with his views on the issue referred to the larger bench, particularly with reference to the expression 'of another person who is not eligible' as incorporated in the amending Notification No. 223/87 by inserting para 7 in the Notification No. 175/86. Hence, this separate order.

25. The issue for our consideration in this reference is whether the benefit of small scale exemption was available in terms of para 7 of the Notification No. 175/86-C.E. and para 4 of Notification No.1/93-C.E. when the specified excisable goods were affixed with the brand name or trade name of a person who was not Indian or the brand name or trade name of a person who was not manufacturer.

26. Notification No. 175/86, dated 1-3-1986 was issued to facilitate small scale units to avail exemption in respect of specified goods cleared for home consumption subject to the conditions specified therein. Notification No. 175/86 was amended by Notification No.223/87, dated 22-9-1987 inserting para 7 to Notification No.175/86-C.E. which is as under :- "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." 27. Therefore, under paragraph 7 of the said notification, the exemption contained in the notification shall not apply to the specified goods whether the 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 in pursuant to the said notification.

28. Under Notification No. 1/93-C.E., dated 28-2-1993 the similar provisions were incorporated in para four, which reads as under :- "4. The exemption contained in the 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." Provided. Further, Notification No. 1/93 was amended by Notification No. 59/94-C.E., dated 1-3-1994 omitting the expression 'who is not eligible for grant of exemption'. The amended relevant para 4 is as under : - "4. The exemption contained in this notification shall not apply to the specified goods, bearing a brand name or trade name (registered or not) of another person".

29. In view of the above amended clause to the Notification No. 1/93, there would be no difficulty in holding that the exemption contained in the notification No. 1/93 will not apply if the specified goods are affixed with brand name or trade name of another person from 1-3-1994.

But the difficulty arises with reference to the period prior to 1-3-1994. It is true that some of the decisions of the Tribunal held that benefit of small scale exemption under Notification No.175/86-C.E. and Notification No. 1/93-C.E. was not available when the goods were affixed with the brand name of foreign person or of a trader who is not manufacturer observing that latter was not eligible to the benefit of small scale exemption under the aforesaid exemption notification. There are contrary views also on this issue. There is a line of decisions taking the view that a person in order to fall under the purview of clause 7 must be a person manufacturing excisable goods in India and governed by the excise law of India and where a brand name of a foreign manufacturer is used, Clause 7 is not

attracted. The decisions which have taken this view have expressed serious doubts with reference to the earlier decisions of the Tribunal and accordingly matter was referred to the larger bench to resolve the issue. While referring the matters in the subsequent decisions it was observed that "A reading of the notification, prima-facie, would show that the provision regarding the use of the brand name and disentitlement of the benefit of Notification No. 175/86-C.E. by virtue of the use of the brand name, is only to take care of the cases where a person owning the brand name in manufacturing the goods in India is not entitled to the benefit of Notification No. 175/86 and in case somebody else uses this brand name he would also be disentitled to the benefit of notification.

Therefore, unless the brand name owner himself is in India and is himself not entitled to the benefit of the notification, then alone the notification in question would come into force. (FOSROC Chemicals India Ltd. v. C.C.E.(Tribunal), Sharp Business Machines (P) Ltd. v. C.C.E., Bangalore reported in 1995 (61) ECR 637 (Tribunal).

30. It was submitted on behalf of the appellant relying upon the decision of the Bombay High Court in the case of Mrs. Kaushalya Narayanan and Ors. v. Dadajee Dhackjee & Co. (Pvt.) Ltd., reported in 1980 (6) E.L.T. 102 (Bom.) and ESBI Transmission Pvt. Ltd., v. C.C.E.1997 (91) E.L.T. 47 and 1997 (91) E.L.T. 292 that in construing the provisions of a Notification or Trade notice regard should be had to the dominant intention of those who issued the Trade Notices or who granted the exemption under the notification, even though the words used are general in nature and are without restriction or limitation.

The principles that govern the interpretation of statutes should be applied while construing the provisions of a trade notice and notifications. Further, it was submitted that in India, several big manufacturing units used to get their products manufactured by SSI units using their brand names and was thus avoiding payment of excise duty. It is with an intention to arrest such avoidance of excise duty, the Notification No. 223/87 was issued initially to take effect from 1-10-1987. It was not at all the intention of the Central Government to deny the SSI exemption, if a SSI unit uses the brand/trade name of the foreign company. Such

use is the course of normal international trade and incentive to foreign collaboration. It was contended that the notification cannot be extended beyond the territorial jurisdiction of India - particularly when no other company is involved in India, in the similar manufacturing activity.

31. It was contended on behalf of the assesseees that expression 'another person who is not eligible for the grant of exemption' under Notification No. 175/86, Notification No. 1/93 would not cover all the categories of persons. Small scale exemption under Notification No.175/86, Notification No. 1/93 cannot be denied to manufacturer making use of brand name of a foreign manufacturer foreign trader or trader in India who do not manufacture excisable goods. It was the contention of the Revenue that 'person' has been used in a broader sense and accordingly benefit cannot be extended in view of the wordings of the aforesaid notifications. It was submitted on behalf of the assesseees that para 7 of the Notification No. 175/86 as inserted by Notification No. 225/87 which was invoked by the department to deny the benefit of small scale notification to the manufacturers making use of brand name of a foreign manufacturer/trader and such categories of persons was struck down as unconstitutional by the Allahabad High Court and Calcutta High Court. While upholding the vires of para 7 of the Notification No. 175/86 the Apex Court in the case of Union of India v.Paliwal Electricals (P) Ltd., reported examined the scope of this para and the object underlying insertion of this paragraph and observed in para 4 of the said judgment as follows :- "The object of the notification is self evident. It is to help the small manufacturers to survive in the market which is dominated by brand-names/trade names. It is a matter of common knowledge that people prefer well-known brand-names. They buy them under an implicit faith that they are of reliable quality. In such a situation, a small manufacturer faces an uphill task in having his goods accepted in the market. If he prices his goods at the same level as the price of goods manufactured by well known brand name.

He stands no chance; he will be priced out of market in no time. It is precisely to enable him to survive in the market that the said exemption is granted. By virtue of exemption from duty, the small manufacturer would be able to sell his goods at a cheaper price thus making them attractive in the market and more

competitive. The notification thus serves the socio-economic objectives of helping the small manufacturers and increasing the industrial production. So far as Explanation IV is concerned, it is really clarificatory in nature; it merely reiterates the principle of the decision of this Court in *Union of India and Ors. v. Cibatul Limited* "The object underlying Para 7 is self-evident. If a small manufacturer who affixes the brand name or trade name of an ineligible manufacturer (a convenient expression to denote a manufacturer outside the purview of Notification No. 175 of 1986 and who owns or entitled to use a brand name or trade name), the very reason d'etre for granting the exemption disappears. The exemption is designed to enable the small manufacturer but if joins, or identified himself with, the ineligible manufacturer, his goods become one with the goods of such ineligible manufacturer. They become indistinguishable. In the market, they will all be understood as one and the same goods.

32. It was submitted that it is evident from the above observations that the Apex Court itself had construed the expression 'person not eligible for grant of this exemption under the Notification' as a large scale manufacturer in India only. Consequently, it is only the use of a brand name of a large scale manufacturer in India that would render a small scale manufacturer ineligible for the benefit of this notification, and not the use of the brand name of a foreign manufacturer/trader who do not manufacture goods in India.

33. Although some decisions have denied the benefit of small scale exemption in view of the wordings in para 7 of Notification No. 175/86 and Clause 4 of Notification No. 1/93, none of the decisions has dealt with the specific issue with reference to the 'eligibility of another person'. In view of the conflicting views matter has been referred to the larger bench. Our endeavor is to resolve the issue.

"A brand is not a product, not a service, but an experience. And as we look to the new millennium, developing and delivering a brand experience will be more important than ever to marketers"- By Allen Rosenshine, Chairman & CEO of BBDO Worldwide.

Further, he said that a brand name is an understanding and appreciation by the users of how a product fits in their lives both rationally and emotionally".

"Customers today are looking for not just functional benefits (appearance, quality, cost) or process benefits (easy access to product information, convenient transaction), but relationship benefits. That is, emotional bonds formed through a history of experiences" - By McKinsey & Co. Partner Anthony Freeling.

34. Here we are not concerned with the use and functional benefits of branded goods but whether 'another person' that is brand owner manufacturing goods outside India or trader owning a trade mark who do not manufacture goods in India is eligible or not eligible in view of the expression used in Clause 7 of Notification No. 175/86 and Clause 4 of Notification No. 1/93-C.E.".

35. Eligibility is co-extensive with that of liability. Whether 'another person' is eligible or not eligible is an important issue to be decided herein. The criterion of liability of a person depends upon the liability to pay duty under excise law. If a person is liable to pay duty under excise law he may be eligible or not depending upon the quantum of clearances effected by him during the financial year and subject to other conditions specified in the relevant notification. If a person is not liable to pay any duty the question of considering whether he is eligible or not does not arise. If a person is not liable to pay any duty under excise law it would be absurd to treat him as he is not eligible.

36. It is true that the term 'a person' has been used in a broader sense and not restricted to manufacturer only as it was urged by the Revenue. In legal terminology a person has been used in a wider sense and person may be an individual, HUF, firm (partnership concern) or association of persons or any artificial judicial person. But here we are concerned with 'eligibility of person'.

Which categories of persons are eligible is an issue to be decided herein. Under the General principles of contract any person can enter into a contract provided he is not disqualified. It means all persons are not competent to enter into a contract. They cannot enter into a contract because not that they are not persons but because of their incapacity. Section 11 of the Indian Contract Act reads as under :
- "Section 11. Who are competent to contract - Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to

which he is subject." Accordingly, certain persons are, by law, incapable, wholly or in part, of binding themselves by a promise or enforcing a promise made to them.

It means they cannot enforce the performance of the contract nor they can be benefited by the terms of contract. At the first instance they cannot enter into a contract because of their incapacity and even if they enter into a contract the transaction becomes "abinitio void" and such void transactions will confer no rights and obligations. By mere use of word 'person' in the notification it cannot be said that all persons are not eligible. Eligibility or ineligibility of a person is to be understood in the context and ineligibility must flow from statute as it was rightly argued on behalf of the manufacturers relying upon the decision of the Supreme Court in the case of Manohar Nathu Rao Samarih v. Marotrao Rao - 1979 (4) SCC 93 (S.C.). In that case it was held that eligibility must flow from specific provision of law design to deny eligibility or to lay down disqualification. This observation is very much relevant in the context particularly with reference to the para 7 of Notification No. 175/86 and 4 of Notification No. 1/93.

37. Accordingly, the eligibility criterion cannot be extended to a person who is not liable to pay any duty under excise law. In view of this position, benefit in terms of Notification No. 175/86 or Notification No. 1/93 cannot be denied in respect of specified goods manufactured by small scale units on the ground that specified goods are affixed with brand name of foreign manufacturer or trader in India who do not manufacture goods, if otherwise permissible subject to the conditions of relevant notifications prior to 1-3-1994.

38. The issue referred to the Larger Bench is to be answered accordingly, and the appeals involving the above issues may be disposed of in the aforesaid terms by the respective benches.

39. I have perused the texts of the orders written by my learned Brothers, Shri Lajja Ram, Member (Technical) and Shri G. A. Brahma Deva, Member (Judicial) on the referred issue. On my own appreciation of the rival arguments put forward on behalf of the assesseees and the Revenue and also the submissions made by the learned Advocate who appeared as intervenor, in the light of the relevant provisions of law as interpreted by competent courts, I would, respectfully,

disagree with the view taken by Learned Brother, Shri Lajja Ram, for the reasons hereinafter stated.

40. The issue at hand is whether the benefit of SSI exemption under Notification No. 175/86-C.E., dated 1-3-1986 (as amended by Notification No. 223, dated 22-9-1987) and under Notification No.1/93-C.E., dated 28-2-1993 was available, in terms of Para (7) and Para (4) respectively of Notification No. 175/86-C.E. (as amended) and Notification No. 1/93-C.E., in respect of those specified excisable goods which were affixed with a brand name or trade name of a person who was not Indian or with a brand name or trade name of a person who was not a manufacturer, during the respective relevant periods (prior to 1-3-1994).

41. Paragraph (7) of Notification No. 175/86-C.E. as inserted by the Amending Notification No. 223/87-C.E. and paragraph (4) of Notification No. 1/93-C.E. as in force till its amendment by Notification No.59/94-C.E., dated 1-3-1994, are identically worded as follows :- "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." The argument advanced on behalf of the assessee (manufacturer) is that the expression "another person who is not eligible for the grant of exemption under this Notification" in the above paragraph 7/4 (vide underlined words) has to be strictly construed so as to give effect to the main purpose of the Notification and, when so construed, would only mean another manufacturer (in India) of excisable goods who is not eligible for the grant of exemption under the Notification (No.175/86-C.E. or 1/93-C.E., as the case may be). In other words, the above expression cannot include any person (whether natural or juristic) who is not a manufacturer of excisable goods in this country.

If this argument is accepted, the specified goods manufactured by an SSI unit in India and affixed with a brand name or trade name belonging to a foreign manufacturer/trader (not engaged in manufacture of any excisable goods in India) or to an Indian trader (not manufacturing any excisable goods in India) would not fall under the excluded category of specified goods referred to in the above para

7/4 and hence would merit consideration for exemption under the Notification (175/86-C.E. or 1/93-C.E., as the case may be) for the relevant period.

On the other hand, the Revenue's argument is to the effect that "person" figuring in the underlined expression above has been used in a wider sense to mean "any person" [whether Indian or foreign, natural or juristic] and not in a restricted sense to mean only (Indian) manufacturer. According to them, the underlined expression above has got to be so liberally construed as to bring within its ambit any foreign manufacturer/trader and any Indian trader, not manufacturing any excisable goods in India. Such persons are "not eligible for the grant of exemption under the Notification" and, therefore, if the specified goods manufactured by the SSIs (claiming exemption under the Notification) were affixed with any brand name or trade name owned by such persons, the exemption would not be applicable to such goods during the relevant period by virtue of para 7/4 of Notification No.175/86-C.E. or 1/93-C.E., as the case may be. The basis of this argument of the Revenue is that there is no question of such persons (viz. foreign manufacturers/traders as well as Indian traders, not manufacturing any excisable goods in India) being eligible for the grant of exemption under any of the two Notifications.

42. It is quite true that the question of such persons (viz. foreign manufacturers/traders and Indian traders, not manufacturing any excisable goods in this country) being eligible for the grant of exemption under Notification No. 175/86-C.E. or under Notification No.1/93 does not arise. It is but equally true that the question of such persons being ineligible for the grant of such exemption also does not arise. This is, simply, because such persons, not being manufacturers of excisable goods in India, do not have any liability to pay duty under Section 3 of the Central Excise Act, 1944 [hereinafter referred to as "the Act"] and hence do not at all come within the field of operation of Section 5A of the Act which contains provisions for exemption of certain excisable goods from excise duty wholly or partly subject to certain conditions. Unless a person is liable under Section 3 of the Act, the question whether he is eligible or ineligible for grant of exemption under any Notification issued or deemed to have been issued by the Central Government under Section 5A of the Act cannot arise. In other words, eligibility to duty has to

pre-exist if any question as to eligibility/ineligibility for exemption from duty should arise at all. Only a person who is eligible under Section 3 of the Act can be held to be eligible or not eligible for the grant of exemption under any Notification issued or deemed to have been issued under Section 5A of the Act. Therefore, in the underlined expression "another person who is not eligible for the grant of exemption under this Notification", "another person" must denote a person who is eligible to Central Excise duty i.e., a person who is a 'manufacturer' [within the meaning of this term under Section 2(f) of the Act] of 'excisable goods' [within the meaning of this expression under Section 2(d) of the Act]. It is also pertinent to note that a "person, who is not eligible for the grant of exemption under this notification" can possibly be one eligible for the grant of exemption under another notification (issued under Section 5A of the Act). Such a person can by no stretch of imagination be anybody other than a manufacturer of excisable goods in India.

43. In order that any specified goods manufactured and affixed with any brand name/ trade name by an SSI unit in India during the relevant period should attract the mischief of para 7/4 of Notification No.175/86-C.E. [as amended by Notification No. 223/87-C.E.] or Notification No. 1/93-C.E. [as it stood prior to 1-3-1994], as the case may be, the owner of such brand name/trade name should be a person who was not eligible for the grant of exemption under the particular notification. The crucial question that must necessarily arise in this context is whether the brand name/trade name-owner was eligible (or not) for the grant of exemption under the particular Notification. If the answer to this question is in the negative, the exemption provisions of the Notification would not apply to the branded goods of the SSI manufacturer thanks to the mischief of para 7/4. If, in relation to a brand name/trade name-owner, the question whether he was eligible (or not) for the grant of exemption under the particular Notification does not at all arise, such a person cannot come within the expression "another person who is not eligible for the grant of exemption under this Notification", contained in para 7/4. A foreign manufacturer/trader or an Indian trader, not manufacturing any excisable goods in India, is a person in relation to whom the above question does not arise as he is not amendable to Section 3 of the Act, for that matter, to Section 5A of the Act. Such a person, therefore, would not fall within the purview of the aforesaid expression " another person who is not eligible...this Notification". The inevitable

result is that the taboo contained in para 7/4 cannot be extended to Indian small scale manufacturers' specified goods affixed with brand names/trade names of persons [whether foreign or Indian] not engaged in the manufacture of any excisable goods in India.

44. The above construction of Para 7/4 is in keeping with the scheme of Notification Nos. 175/86-C.E. and 1/93-C.E. whereby the Central Government's policy of augmenting industrial production by encouraging small scale manufacturers was sought to be implemented by way of exempting certain specified products of their's from Central Excise duty subject to certain conditions. Underlying the Government policy was there also the socio-economic objective of enabling the small manufacturers to compete with the big ones for survival in the market.

Government were, however, aware of the fact that those small manufacturers who affixed their products with the brand names or trade names of big manufacturers were doing so well in the market (by virtue of the popularity of such brand names/trade names) that they did not deserve any governmental support for survival in the market.

Government, therefore, sought to exclude such small scale manufacturers from the purview of exemption granted to SSIs under Notification Nos.

175/86-C.E. and 1/93-C.E.. Thus para 7/4 came to be incorporated in Notification No. 175/86-C.E./No. 1/93-C.E.. In *Union of India v. Paliwal Electricals (P) Limited* reported in 1996 (83) E.L.T. 241 (S.C.), the Hon'ble Supreme Court, while upholding the constitutional validity of para 7 of Notification No. 175/86-C.E., spelt out the object of the Notification thus :- "The object of the notification is self-evident. It is to help the small manufacturers to survive in the market which is dominated by brand-names/trade-names. It is a matter of common knowledge that people prefer well-known brand-names. They buy them under an implicit faith that they are of reliable quality. In such a situation, a small manufacturer faces an uphill task in having his goods accepted in the market. If he prices his goods at the same level as the price of goods manufactured by well-known brand-name.

He stands no chance; he will be priced out of market in no time. It is precisely to enable him to survive in the market that the said exemption is granted. By virtue of exemption from duty, the small manufacturer would be able to sell his goods at a cheaper price thus making them attractive in the market and more competitive. The notification thus serves the socio-economic objectives of helping the small manufacturers and increasing the industrial production." The Apex Court, further, explained para 7 of the Notification as follows :- "Now, what does para 7 provide and why? It provides that the benefit of Notification No. 175 shall to be available to a small manufacturer, who affixes the brand-name or trade-name (registered or not) of another person, who is not eligible for the grant of exemption under the said notification. Explanation VIII defines the expression "brand-name or trade-name". The explanatory note appended to the notification states that "(T) his amendment seeks to deny small scale exemption in respect of specified goods affixed with the brand-name/ trade-name of a person who is not eligible for the exemption under Notification No. 175/86-C.E., dated 1-9-1986. The object underlying para 7 is self-evident. If a small manufacturer who affixes the brand-name or trade-name of an ineligible manufacturer (a convenient expression to denote a manufacturer outside the purview of Notification No. 175 of 1986 and who owns or entitled to use a brand-name or trade-name), the very reason d'etre for granting the exemption disappears. The exemption is designed to enable the small manufacturer to survive in the market in competition with the ineligible manufacturer but if he joins, or identifies himself with, the ineligible manufacturer, his goods become one with the goods of such ineligible manufacturer. They become indistinguishable. In the market, they will all be understood as one and the same goods. They no longer need the benefit under the Notification." 46. The expression "another person who is not eligible for the grant of exemption under this Notification" in para 7 has, thus, been held (by the apex court) to be a manufacturer who is outside the purview of the notification and owns, or is entitled to use, brand or trade name. It is noteworthy that such a manufacturer is seen as one who is outside the purview of the Notification and not as one who is outside the purview of the Act. It is also pertinent to note the court's observation, "...But if he (i.e., small scale manufacturer) joins, or identifies himself with, the ineligible manufacturer (i.e. large scale manufacturer outside the purview of the

Notification), his goods become one with the goods of such ineligible manufacturer." The Hon'ble Supreme Court has thus clearly explained the expression, "another person who is not eligible for the grant of exemption under this Notification." Accordingly, such person [whom the apex court conveniently called "ineligible manufacturer"] is a manufacturer of excisable goods in India. Any person (whether foreign or Indian) who is not engaged in the manufacture of excisable goods in India will be a misfit in the above concept of "ineligible manufacturer" because such person is not a manufacturer and the question whether he is eligible or ineligible under the Notification does not arise.

47. To include such a non-manufacturer of excisable goods (in India) within the expression "another person who is not eligible...this Notification" in para 7/4 of Notification No. 175/86-C.E. or 1/93-C.E., as the case may be, will have the effect of rendering the said para 7/4 incompatible with the very Scheme of the Notification and the underlying socio-economic policy of Government. The Government's policy, as already stated, was to help small scale manufacturers survive in the domestic market by competing with large scale manufacturers as well as with those small manufacturers who chose to market their products under brand names or trade names of large scale manufacturers. No person [whether natural or juristic, foreign or Indian] who had a brand name or trade name (registered or not) but did not manufacture any excisable goods in India was considered (by Government) as a competitor for small manufacturers in our domestic market. Therefore, even if some small manufacturers affixed the brand name or trade name of any such person on their products, they did not ipso facto pose any formidable challenge to the other small manufacturers who chose to go without such brand names and trade names.

A proper and balanced understanding of this ground reality must have prompted the Government to formulate its policy as embodied in para 7/4 of the Notification. It was, thus, in keeping with the aforestated socio-economic policy of Government that, in para 7/4 of the Notification, the expression "another person who is not eligible...this Notification" was used to mean "another manufacturer of excisable goods in India." 48. The expression "another person who is not eligible ... this Notification" in para 7/4 has got to be construed in accordance with the "plain

meaning rule" as done hereinbefore. Support for this view can be drawn from the following observations of Justice Krishna Iyer in *Manohar Nathurao Samarth v. Marotrao and Ors.*

"A policy-oriented understanding of a legal provision which does not do violence to the text and the context gains preference as against a narrow reading of the words used. Indeed, this approach is a version of the plain meaning rule, and has judicial sanction." 49. The issue before this Larger Bench can very well be settled as above in the light of the Apex Court's judgment in the case of *Union of India v. Paliwal Electricals* (supra), which has been successfully relied on by learned Advocate, Shri V. Lakshmikumaran appearing on behalf of the appellants in some of these appeals. It may be noted that *Paliwal Electricals* has been followed with approval by another coordinate Bench of the Supreme Court, later on, in the case of *Union of India v. J.J. Electricals* 1999 (106) E.L.T. 15 (S.C.). The submission of learned JDR, Shri M.P. Singh that the Apex Court has not held that "person", in para 7 of Notification No. 175/86-C.E. meant only "manufacturer" cannot be accepted inasmuch as the court had categorically held the person to be an "ineligible manufacturer". The DR's reliance on the Tribunal decisions in *Sah Machine Tools v. C.C.E.* 1994 (69) E.L.T. 101 (T), *Harts Cocoa Products v. C.C.E.* 1996 (88) E.L.T. 714 (T) and a few other cases also has not advanced the Revenue's position any further since such decisions were based, by and large, on the incorrect premises that brand name/trade name-owners not engaged in any manufacturing activity in India were also covered by the expression "another person who is not eligible...this Notification" in para 7/4 inasmuch as the question whether they were eligible for such grant of exemption did not arise. The learned DR and the learned Advocate, Shri A.K. Jain (as intervenor) have also argued at length on the meaning of the words "person" and "eligible" as used in para 7/4 with the aid of dictionary and otherwise. The significance of these words as used in para 7/4 was also considered by the Tribunal in some of the cases cited before us. But the task of this Bench hardly calls for any research into the import of any particular word inasmuch as the Apex Court has given its binding exposition of the entire clause or expression in para 7 of Notification No. 175/86-C.E. containing the words in question vide *Paliwal Electricals*. To go into the aspect of registration of brand name/trade name is, also, otiose.

50. Having carefully examined all aspects of the matter in detail as above and having thoughtfully considered the rival arguments, I arrive at a conclusion concurrent with learned Brother, Shri G.A. Brahma Deva.

Accordingly, it is held that the exemption from Central Excise duty in terms of Notification No. 175/86-C.E. (as amended by Notification No.223/87) and Notification No. 1/93-C.E. (as it stood prior to 1-3-1994) cannot be denied to small scale industrial units on account of their products (specified goods) being labelled or affixed with brand names or trade names of foreign manufacturers and Indian traders not engaged in the manufacture of excisable goods in India, who are not covered by the expression "another person who is not eligible for the grant of exemption under this Notification" in para 7 of Notification No.175/86-C.E. (as amended by Notification No. 223/87-C.E.) and para 4 of Notification No. 1/93-CE. (as it stood prior to 1-3-1994).

51. The referred issue stands answered as above. The appeals may be posted before the appropriate benches for final disposal.

52. By majority it is held that the benefit of small scale exemption under Notification No. 175/86-C.E., dated 1-3-1986 (as amended) and Notification No. 1/93-C.E., dated 28-2-1993 (as amended) was not available to the specified goods where the manufacturer affixes the said specified goods with the brand name or trade name of a foreign person and of a non-manufacturing trader.

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