A COMMISSIONER OF CENTRAL EXCISE, MUMBAI

v.

M/S. KALVERT FOODS INDIA PVT. LTD. AND ORS.

(Civil Appeal Nos.4500-4502 of 2003)

AUGUST 9, 2011

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[DR. MUKUNDAKAM SHARMA AND ANIL R. DAVE, JJ.]

Central Excise Act, 1944*: s.11A – Demand of duty and* C *levy of penalty – Suppression of facts – Extended period of limitation – Invocation of – Allegation that assessee-company clandestinely removed excisable goods by showing them as non-excisable – Held: The statement of Managing Director was on record where he had admitted the fact of clandestine* D *clearance of excisable goods and, therefore, has voluntarily come forward to sort out the issue and to pay the central excise duty liability – The company was also maintaining two sets of computerized commercial invoices, one for excisable products and the other for non-excisable goods – Plea of* E *company that the goods were not excisable inasmuch as they were not packed in containers under a brand name not tenable since the Managing Director of the company had himself stated that they have been selling their products under the brand name "Kalvert" – Goods manufactured and sold by the* F *company under a brand name "Kalvert" were, therefore, liable to be charged for excise duty – Since there was clandestine removal of excisable goods, the period of limitation has to be computed from the date of knowledge, arrived at upon raids on the premises – Extended period of limitation would be* G *invokable as there was suppression of facts by the company with the intention to evade the excise duty.*

Evidence*: Statement made before Central Excise Officers – Admissibility of – Plea that statement made by the Managing Director of the assessee-company was not reliable*

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– Held: Statements of Managing Director of the company and other persons were recorded by the central excise officers and they were not police officers, therefore, their statements containing all the details about the functioning of the company which could be made only with their personal knowledge could not have been obtained through coercion or duress or through dictation – These statements, therefore, can be relied upon.

***Trade Mark**: Registered and unregistered brand name/ trade marks – Held: It is not necessary that "Brand name" should be compulsorily registered – A person can carry on his trade by using a "Brand name" which is not even registered – But in violation/infringement of trade mark, remedy available would be distinctly different to an unregistered brand name from that of remedy available to a registered brand name.*

Respondent no. 1-company was engaged in the manufacture of P & P Food Products, such as, assorted jams, pickles, squashes, cooking sauces, chutneys, syrups, synthetic vinegars etc. It was also trading in sugar, salt and pepper by packing them into small packs. Respondent no. 2 was the Managing Director of the Company.

On 22.11.2000, on receiving information that respondents were indulging in clandestine removal of its finished P & P food products without payment of central excise duty, the revenue authorities searched its factory premises. Searches were also carried out at the premises of its distributors/wholesale dealers/traders situated in and around Mumbai and other connected premises. During the search conducted at the premises of the respondent-company several incriminating documents, articles and records were found. A huge quantity of finished goods were also found lying in the factory premises. It was also noticed that there was one tempo parked inside the factory premises loaded with cartons containing the excisable goods manufactured by the

A company and was about to leave the factory premises. On inquiry from the driver of the said tempo, it was found that the driver was not in possession of any documents relating to the goods loaded in the said tempo. On inspection of invoices at the premises of the respondent-
B company, it was also found that there were two invoices with the same serial number, in respect of different products. The officers took stock of the goods in the factory and it was found that the finished goods lying in the factory were in excess of the stock shown and
C accounted for in the RGI Register. Thereafter, search was also carried out at the premises of the dealers/traders, to whom the company allegedly supplied the finished goods. The goods found lying in those premises were also seized on the ground that they were not duty paid.
D Similarly, the search was carried out by the officers at the premises of the selling agent of the respondent-company (M/s. RTC), a partnership firm of the Managing Director of the respondent-company (M/s. SKC); and at the premises of sole proprietor of M/s RTC and records pertaining to the sale and purchase of the goods lying
E in the offices of these companies were seized. The searching officers found that, in fact, the respondent-company had cleared jams, syrup, sauces, pickles, etc., from the factory premises to the said selling agents without payment of duty, but had shown those
F clearances as that of the sugar, in the invoices and had also cleared the branded goods to the dealers/traders.

A show cause notice was issued to the respondent-company, its Director, the proprietor of M/s. RTC, its
G partner and M/s. SKC. Through notices issued, duty demand was raised from the company and penalty was also proposed to be imposed on the company. The adjudicating authority held that the respondent-company with the connivance of the respondents 2 and 3 had
H deliberately attempted to pass off excisable goods as

non-excisable goods with an intent to evade payment of excise duty and confirmed the duty demand and ordered confiscation of the seized goods and also imposed penalty equivalent to the amount of duty on the company.

The Tribunal set aside the findings of the adjudicating authority on the ground that the respondents were not guilty of clandestine removal of excisable goods and also that the goods of respondent-company were not excisable inasmuch as they were allegedly not packed in containers under a brand name and therefore not required to pay any excise duty. The instant appeals were filed challenging the order of the Tribunal.

Allowing the appeal, the Court

HELD: 1. The plea of the respondent that the statements of the Managing Director of the Company and other persons were retracted and cannot be relied upon was not tenable. The statements of Managing Director of the Company and other persons were recorded by the Central Excise Officers and they were not police officers. Therefore, such statements made by the Managing Director of the Company and other persons containing all the details about the functioning of the company which could be made only with personal knowledge of the respondents and, therefore, could not have been obtained through coercion or duress or through dictation. There was no reason why the said statements made in the circumstances of the case should not be considered, looked into and relied upon. It was established from the record that the said statements were given by the concerned persons out of their own volition and there was no allegation of threat, force, coercion, duress or pressure being used by the officers to extract the statements which corroborated each other. Besides, the Managing Director of the Company on his own volition

A deposited the amount of Rs. 11 lakhs towards excise duty. This fact clearly proved the conclusion that the statements of the concerned persons were of their volition and not outcome of any duress. The statement of Managing Director of the Company was on record B where he had admitted the fact of clandestine clearance of excisable goods and, therefore, has voluntarily come forward to sort out the issue and to pay the Central Excise duty liability. Similar statement of the proprietor of RTC was also recorded under Section 14 of the Central C Excise Act, 1944 along with the Production Supervisor of the respondent-company. [Paras 18-20] [914-G-H; 915-A-H]

2. The adjudicating authority came to the conclusion that the respondent-company with the connivance of D respondent nos. 2 and 3 were clandestinely removing excisable goods as non-excisable goods with intent to evade payment of excise duty. However, the said order passed by the adjudicating authority was set aside by the Tribunal holding that neither the tempo nor the goods E loaded therein could be legally seized and confiscated when the relevant documents were shown to the officers at the spot. It was also observed by the Tribunal that it could not be said that an attempt was being made to clear those goods in tempo in a clandestine manner, when the F company representative produced the invoices and other relevant documents in respect thereof. These findings were arrived at by the Tribunal apparently ignoring the materials. There was no reference about the statement of the sole proprietor of M/s. RTC, in the order passed by G the Tribunal, when she was examined under Section 14 of the Central Excise Act, she had clearly stated that her company bought large quantities of excisable goods from the respondent-company and in turn sold them to its distributors. She also confirmed the documents seized H from her residence which included correspondence with

their customers regarding promotion of the "Kalvert brand" products. The Tribunal failed to consider and discuss the specific allegation of the appellant that respondent-company maintained two sets of computerized commercial invoices, one for excisable products like jams, sauce, syrup etc and the other for non-excisable goods such as salt, sugar and pepper which were marked as L series. It also came on evidence that L series sales for the period 1996-1999 was only made to M/s RTC in huge quantities and that in the guise of selling salt, sugar and pepper, the respondent-company was in fact selling excisable goods to M/s RTC. These facts were found and taken note of by the adjudicating authority but the same were totally ignored by the Tribunal. Due to the said reasons and on the basis of the materials available on record, the Company was guilty of clandestine removal of excisable goods as non-excisable goods in order to evade excise duty. It was proved from the fact that the Managing Director voluntarily came forward to sort out the issue and to pay the Excise duty and paid Excise duty to the extent of Rs. 11 lacs on different dates. The said act of the respondent-company was very material and relevant but the same was also ignored by the Tribunal while arriving at a wrong conclusion. Therefore, the issue with regard to the clandestine removal of excisable goods as non-excisable goods by the respondent from their premises and selling to its dealers and distributors was clearly proved from the materials on record. [Para 22-26] [916-E-H; 917-A-H; 918-A]

3. Since there was clandestine removal of excisable goods, the period of limitation in the instant case has to be computed from the date of knowledge, arrived at upon raids on the premises. Therefore, the extended period of limitation would be available as there was suppression of facts by the respondents with the intention to evade

A the central excise duty inasmuch as they did not account for the manufactured goods in the prescribed record. The Tribunal also recorded a finding that the respondents never cleared the goods in question under any brand name and being unbranded they were chargeable to NIL B rate of duty. The said finding was also unacceptable. The Managing Director of the respondent-company has himself stated that they have been selling their products under the brand name "Kalvert" and on the basis of the said statement and other record found on the articles sold C by the respondent company the said finding of the Tribunal was wrong and perverse. The Tribunal also held that because the brand name "Kalvert" was not registered in their name therefore it could not be held that respondents were using 'brand name'. The Tribunal D further held that the name on the goods manufactured and cleared by the respondent in the market could at best be termed as "House mark" and not brand name/trade name. The said findings were also totally wrong and recorded in violation of the law of Trade Marks. It is not E necessary that "Brand name" should be compulsorily registered. A person can carry on his trade by using a "Brand name" which is not even registered. But in violation/infringement of trade mark, remedy available would be distinctly different to an unregistered brand name from that of remedy available to a registered brand F name. Unfortunately, the Tribunal did not consider and properly appreciate the apparent distinction between the two distinct expressions i.e. "House mark" and "Brand name" and thereby proceeded to set aside the well-written Judgment passed by the adjudicating authority G who had recorded his reasons giving cogent basis for his reasoning. It is clear that what was being used by the respondent under the expression "Kalvert" was a "Brand name" and not a "House mark" as sought to be alleged by the respondent and was wrongly accepted by the H Tribunal. Therefore, the articles of assorted jams, pickles,

squashes, cooking sauces, chutneys, syrups, synthetic vinegars etc. manufactured and sold by the respondent company under a brand name "Kalvert" were liable to be charged for excise duty at the rate prescribed in the Excise Law. [Para 27-31, 34, 35, 37] [918-B-H; 919-C-E-H; 920-A-E-F] A B

Tarai Food Ltd. v. Commissioner of Central Excise, Meerut-II **2007(8) S.T.R. 442 (S.C.)**; *Astra Pharmaceutical Pvt. Ltd. v.* Collector of Central Excise, Chandigarh **1995 (75) E.L.T. 214 (S.C.) – relied on.** C

Narayanan's Book on Trade Marks and Passing-Off ; "***Trade Marks***"**by** ***Sarkar***; "*Law of Trade Marks*" **by** *K.C. Kailasam and Ramu Vedaraman* **– referred to.**

Case Law Reference: D

2007 (8) S.T.R. 442 (SC)	**relied on**	**Para 31**
1995 (75) E.L.T. 214 (SC)	**relied on**	**Para 32, 34**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4500-4502 of 2003. E

From the Judgment and Order dated 02.08.2002 of the Hon'ble Central Excise and Gold Control Appellate Tribunal in Appeal A. No. E/1595-1597/2002-NB(DB).

Harish Chandra, Sunita Rani Singh, B.K. Prasad, Mohd. Mannan, P. Parmeswaran for the Appellant. F

Balbir Singh, Abhishek Singh Bagnel, Rajesh Kumar and Rupender Sinhmar for the Respondents.

The Judgment of the Court was delivered by G

DR. MUKUNDAKAM SHARMA, J. 1. These appeals arise out of Judgment and Order passed by the Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi Bench [for short "CEGAT"] on 02.08.2002 whereby the Tribunal had allowed the appeals filed by the respondents holding that the H

A respondents were not guilty of clandestine removal of excisable goods and also that the goods of the respondent no. 1 were not excisable inasmuch as they were not packed in containers under a brand name.

B 2. Before entering into rival contentions of the parties, it would be necessary although in a nutshell to look into the facts of the case leading to filing of the present appeals.

3. The respondent No. 1, M/s. Kalvert Foods India Pvt. Ltd. is a company (in short hereinafter referred to as 'the Company') C engaged in the manufacture of P & P Food Products, such as, assorted jams, pickles, squashes, cooking sauces, chutneys, syrups, synthetic vinegars etc. The company is also trading in sugar, salt and pepper by packing into small packs. The respondent No. 2, Shri Yunus A. Kalvert is the Managing D Director of the Company.

4. On 22.11.2000, on receiving information that respondents were indulging in clandestine removals of its finished P & P food products without payment of Central Excise Duty, the revenue authorities searched the factory premises of E the respondent no. 1. Searches were also carried out at the premises of its distributors/wholesale dealers/traders of respondent no. 1 situated in and around Mumbai and other connected premises.

F 5. During the search conducted at the premises of the respondent no. 1 several incriminating documents, articles and records were found. A huge quantity of finished goods were also found lying in the factory premises. Further, it was also noticed that there was one tempo parked inside the factory premises loaded with cartons containing the excisable goods G manufactured by the said company and was about to leave the factory premises. On inquiry from the driver of the said tempo it was found that the driver was not in possession of any documents relating to the goods loaded in the said tempo. On inspection of invoices at the premises of the respondent no. 1,

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it was also found that there were two invoices with the same serial number, in respect of different products. The officers took stock of the goods in the factory and it was found that the finished goods lying in the factory were in excess of the stock shown and accounted for in the RGI Register.

6. Specific allegation against the respondent is that the goods found lying excess in the stock than what were entered into RGI register, valued at Rs. 7,33,668/- and the same was seized.

7. Thereafter, search was also carried out at the premises of the dealers/traders, to whom the company allegedly supplied the finished goods. The goods found lying in those premises to the value of Rs. 6,22,946/- were also seized on the ground that they were not duty paid.

8. Similarly, the search was carried out by the officers on 28-11-2000, at the premises of M/s. Relish Trading Company (in short 'RTC')/the selling agent of the respondent-company, M/s. Sai Krupa, a partnership firm of the Managing Director of the respondent No. 1; and at the premises of sole proprietor of RTC and records pertaining to the sale and purchase of the goods lying in the offices of these companies, were seized. It revealed to the searching officers that, in fact, the respondent-company had cleared jams, syrup, sauces, pickles, etc., from the factory premises to the above said selling agents without payment of duty, but had shown those clearances as that of the sugar, in the invoices and had also cleared the branded goods to the dealers/traders.

9. After completion of the entire process a show cause notice was issued to the Company and its Director. Such notices were also issued to the proprietor of M/s. RTC, its partner and M/s. Sai Krupa Corporation. Through notices issued, duty demand was raised from the company and penalty was also proposed to be imposed on the company. Reply was filed by the respondents to the aforesaid show cause notices.

A 10. The adjudicating authority, namely, the Commissioner of Central Excise, Mumbai, passed an order dated 27.02.2002, holding that the respondent no. 1 with the connivance of the respondents 2 and 3 have deliberately attempted to pass off excisable goods as non-excisable goods with an intent to evade B payment of excise duty. Consequently, the Commissioner confirmed the duty demand and ordered confiscation of the seized goods and also imposed penalty equivalent to the amount of duty on the company and also directed to pay interest on the excise duty etc.

C 11. Being aggrieved by the aforesaid order, respondents filed appeals before the CEGAT. The said appeals were heard and Tribunal passed the judgment and order on 02.08.2002, which is impugned herein. The Tribunal by its order set aside the findings of the Commissioner of Central Excise, Mumbai D holding that the respondents were not guilty of clandestine removal of excisable goods and also that the goods of respondent no. 1 were not excisable inasmuch as they were allegedly not packed in containers under a brand name and therefore not required to pay any excise duty.

E 12. The present appeals are directed and preferred against the said judgment and order on which we heard learned counsel appearing for the parties.

13. The learned counsel appearing for the parties have F painstakingly and extensively taken us through the relevant documents on record to which reference shall be made during the course of our discussion hereinafter. However, before we record our findings and the conclusions on the issues raised, we must also deal with the tariff headings and some of the G documents which are relevant for our purpose and material available on record.

14. Admittedly, the years with which we are concerned in these appeals are 1996-97, 1997-98 and 1998-99. So far the H year of 1996-97 is concerned the relevant entry for our purpose

is 20.01 and sub-heading 2001.00 under Chapter 20 of the Central Excise Tariff of India 1996-97 (incorporating rates of Central Excise & Service Tax). Chapter 20 relates to preparations of vegetables, fruits, nuts or other parts of plants and it prescribes "Nil" rate of duty for the goods mentioned in this sub-heading 2001.00. Description of goods in the said sub-heading is as under:

> "preparations of vegetables, fruit, nuts or other parts of plants, including jams, fruit jellies, marmalades, fruit or nut puree and fruit or nut pastes, fruit juices and vegetable juices, whether or not containing added sugar or other sweetening matter put up in unit containers and bearing a brand name"

15. Chapter 20 of the Central Excise Tariff of India 1998-99 (incorporating rates of Central Excise & Service Tax as in operation on 2nd June, 1998) prescribes 8% excise duty for the goods mentioned under sub heading 2001.10. Description of goods mentioned in sub-heading 2001.10 is as under:

> "preparations of vegetables, fruit, nuts or other parts of plants, including jams, fruit jellies, marmalades, fruit or nut puree and fruit or nut pastes, fruit juices and vegetable juices, whether or not containing added sugar or other sweetening matter put up in unit containers and bearing a brand name".

What is brand name is also explained in the notes included in Chapter 20 to the following effect:

> ""brand name" means a brand name, whether registered or not, that is to say, a name or a mark, such as a symbol, monogram, label, 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

A indication of the identity of that person".

16. Chapter 21, of the Central Excise Tariff of India 1998-99 (incorporating rates of Central Excise & Service Tax as in operation on 2nd June, 1998) relates to "Miscellaneous Edible Preparations". It also prescribes 8% excise duty for the goods B mentioned under sub heading 2103.10. Description of goods mentioned in sub-heading 2001.10 is as under:

> "Sauces, ketchup and the like and preparations therefore; fixed condiments and mixed seasonings; mustard flour and C mead and prepared mustard put up in unit containers and bearing a brand name"

Sub-heading 2108.20 prescribes 18% excise duty for "Edible preparations, not elsewhere specified or including Sharbat" D under Chapter 21. Sub-heading 2203.00 also prescribes 18% excise duty for "Vinegar and substitutes for vinegar obtained from acetic acid" under Chapter 22.

17. During the search operation carried out by the appellants several incriminating articles were found with brand E name "Kalvert Anchor" or "Kalvert" in assorted forms which were manufactured by M/s. Kalvert Foods (I) P. Ltd. During the course of investigation statement of Shri Yunus A. Kalvert, Managing Director of respondent company was recorded under Section 14 of the Central Excise Act, 1944, who inter alia deposed that F the respondent company was engaged in the manufacture of P & P food products like jams; pickles; syrups; vinegars etc. bearing their brand name "KALVERT ANCHOR" and the other Directors of the company viz. Shri Akbar Ali Kalvert, his father and Shri Irshad Y. Kalvert.

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18. During the course of arguments learned counsel appearing for the respondent submitted before us that although the aforesaid statements of Managing Director of the Company and other persons were recorded during the course of judicial H proceedings but the same were retracted statements, and

therefore, they cannot be relied upon. However, the statements were recorded by the Central Excise Officers and they were not police officers. Therefore, such statements made by the Managing Director of the Company and other persons containing all the details about the functioning of the company which could be made only with personal knowledge of the respondents and therefore could not have been obtained through coercion or duress or through dictation. We see no reason why the aforesaid statements made in the circumstances of the case should not be considered, looked into and relied upon.

19. We are of the considered opinion that it is established from the record that the aforesaid statements were given by the concerned persons out of their own volition and there is no allegation of threat, force, coercion, duress or pressure being utilized by the officers to extract the statements which corroborated each other. Besides, the Managing Director of the Company on his own volition deposited the amount of Rs. 11 lakhs towards excise duty and therefore in the facts and circumstance of the present case, the aforesaid statement of the counsel for the respondents cannot be accepted. This fact clearly proves the conclusion that the statements of the concerned persons were of their volition and not outcome of any duress.

20. During the course of arguments our attention was also drawn to the statement of Managing Director of the Company where he had admitted the fact of clandestine clearance of excisable goods and therefore has voluntarily come forward to sort out the issue and to pay the Central Excise duty liability and that he has paid Central Excise duty voluntarily under TR6 Challans totaling to Rs. 11,00,000/- on various dates. Similarly statement of Miss Vinita M. Khanolkar – proprietor of RTC was also recorded under Section 14 of the Central Excise Act, 1944 along with Shri Shekhar Mogaviera – Production Supervisor of M/s. Kalvert Foods India Pvt. Ltd. Statements of various other

A persons were also recorded under Section 14 of the Central Excise Act.

21. Our attention was also drawn by the counsel appearing for the appellant to the findings recorded by the adjudicating authority to the fact that there have been recovery of B unaccounted finished excisable goods from 8 different dealers in and around Mumbai and that there have been creation of firms dealing in similar products from the same premises by the same persons having no capital or machinery and also that there have been only one tempo invariably used for delivery of C excisable goods from factory to the buyers though some invoices were issued by the firms other than M/s. Kalvert Foods India Pvt. Ltd. and that there have been use of parallel sets of invoices of the same serial numbers supported by recovery of a serially numbering machine and blank invoices without any D printed serial numbers.

22. On the basis of the aforesaid material discussed hereinbefore the adjudicating authority came to the conclusion that the respondent no. 1 with the connivance of respondent nos. E 2 and 3 have been deliberately clandestinely removing excisable goods as non-excisable goods with intent to evade payment of excise duty. However, the aforesaid judgment and order passed by the adjudicating authority, namely, the Commissioner of Central Excise, Mumbai, was set aside by F the Tribunal holding that neither the tempo nor the goods loaded therein could be legally seized and confiscated when the relevant documents were shown to the officers at the spot. It was also observed by the Tribunal that it could not be said that an attempt was being made to clear those goods in tempo in G a clandestine manner, when the company representative produced the invoices and other relevant documents in respect thereof. These findings were arrived at by the Tribunal apparently ignoring the materials which are considered hereinbefore and referred to.

H 23. There is no reference about the statement of Miss

Vinita M. Khanolkar - sole proprietor of M/s. RTC, in the judgment of order passed by the Tribunal, when she was examined under Section 14 of the Central Excise Act, she had clearly stated that her company bought large quantities of excisable goods from the respondent company and in turn sold them to its distributors. She also confirmed the documents seized from her residence which included correspondence with their customers regarding promotion of the "Kalvert brand" products.

24. The Tribunal also failed to consider and discuss the specific allegation of the appellant that respondent no. 1 maintained two sets of computerized commercial invoices, one for excisable products like jams, sauce, syrup etc and the other for non-excisable goods such as salt, sugar and pepper which were marked as L series. It has also come on evidence that L series sales for the period 1996-1999 was only made to RTC in huge quantities and that in the guise of selling salt, sugar and pepper, the respondent No. 1 was in fact selling excisable goods to RTC. These facts have been found and taken note of by the adjudicating authority but the same were totally ignored by the Tribunal.

25. Due to the aforesaid reasons and on the basis of the materials available on record it is clear that the Company was guilty of clandestine removal of excisable goods as non-excisable goods in order to evade excise duty. It is proved from the fact that the Managing Director voluntarily came forward to sort out the issue and to pay the Excise duty and paid Excise duty to the extent of Rs. 11,00,000/- on different dates. The aforesaid act of the respondent no. 1 was very material and relevant but the same was also ignored by the Tribunal while arriving at a wrong conclusion.

26. Therefore, according to us the issue with regard to the clandestine removal of excisable goods as non-excisable goods by the respondent from their premises and selling to its

A dealers and distributors is clearly proved from the materials on record.

27. In view of the aforesaid position and since there was clandestine removal of excisable goods, the period of limitation B in the present case would have to be computed from the date of their knowledge, arrived at upon raids on the premises. In the present case therefore the extended period of limitation would be available as there was suppression of facts by the respondents with the intention to evade the central excise duty C inasmuch as they did not account for the manufactured goods in the prescribed record.

28. The Tribunal has also recorded a finding that the respondents never cleared the goods in question under any brand name and being unbranded they were chargeable to NIL D rate of duty.

29. The aforesaid finding is also unacceptable. The Managing Director of the respondent company has himself stated that they have been selling their products under the brand E name "Kalvert" and on the basis of the said statement and other record found on the articles sold by the respondent company the aforesaid finding of the Tribunal is wrong and perverse.

30. The Tribunal has also held that because the brand name "Kalvert" was not registered in their name therefore it F cannot be held that respondents were using 'brand name'. The Tribunal further held that the name on the goods manufactured and cleared by the respondent in the market could at best be termed as "House mark" and not brand name/trade name.

G 31. In our considered opinion, the aforesaid findings are also totally wrong and recorded in violation of the law of Trade Marks. During the course of arguments, our attention was drawn to a Judgment of this Court in the case of *TARAI FOOD LTD. V. COMMISSIONER OF CENTRAL EXCISE, H MEERUT-II*, reported in 2007(8) S.T.R. 442 (S.C.). While

placing reliance on the said Judgment, the counsel appearing for the respondents submitted that what is a 'Brand name' is as stated in paragraph 4 of the said Judgment. He relied on the said definition of 'Brand name' and then submitted that the phrase "New Improved Quick Frozen French Fries" was not held to be a brand name, and therefore, according to him the brand name of the respondent company "Kalvert" being a "House Name" could not be termed as "Brand Name".

32. In our considered opinion, the aforesaid brand name "New Improved Quick Frozen French Fries" is a descriptive word and the same could not have been termed and coined either as a "house name" or a "brand name" under any circumstances. There can be no dispute therefore with regard to the proposition of law laid down by this Court in the aforesaid decision. We may also refer to another decision of this Court in *Astra Pharmaceutical Pvt. Ltd. V. Collector of Central Excise, Chandigarh,* reported in [1995 (75) E.L.T. 214 (S.C.)]. That was a case of Pharmaceutical product. In the said decision also the manner and scope of "Brand name" and distinction between 'House mark' and "Product mark/Brand name" has been brought out. It was stated therein by this Court that "House mark" which is usually a device in the form of an emblem, word or both is an identification of the manufacturer which is compulsory under the Drug Rules. On the other hand, product mark or brand name is invariably a word or a combination of a word and letter or numeral by which the product is identified and asked for. In paragraph 6 of the said Judgment, *Narayanan's Book on Trade Marks and Passing-Off* was also referred to and since the same may have a bearing to the facts of the present case, it is extracted herein below:

> "677A. House mark and Product mark (or Brand name).
>
> In the pharmaceutical business a distinction is made between a House mark and a Product mark. The former is used on all the products of the manufacturer. It is usually a device in the form of an emblem, word or both. For each

A product a separate mark known as a product mark or a brand name is used which is invariably a word or a combination of a word and letter or numeral by which the product is identified and asked for. In respect of all products both the Product mark and House mark will B appear side by side on all the labels, cartons etc. Goods are ordered only by the product mark or Brand name. The House mark serves as an emblem of the manufacturer projecting the image of the manufacturer generally."

33. In the book of "Trade Marks" by Sarkar, the distinction C between the expressions "House mark" and "Product mark" or "Brand name" has been clearly brought out by way of reference to the decision in *Astra Pharmaceutical Pvt. Ltd.* (supra). It is stated therein that "House mark" is used on all the products of the manufacturer and that it is usually a device or a form of D emblem of words or both. It was also pointed out that for each product a separate mark known as a "Product mark" or "Brand name" is used which is invariably a word or combination of word and letter or numeral by which the product is identified and asked for. It was also stated that in respect of all products both E the "Product mark" and "Brand name" would appear side by side on all the labels, cartons etc. and that the "House mark" is used generally as an emblem of the manufacturer projecting the image of the manufacturer, whereas "Brand name" is a name or trade mark either unregistered or registered under the Act.

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34. Therefore, it is not necessary that "Brand name" should be compulsorily registered. A person can carry on his trade by using a "Brand name" which is not even registered. But in violation/infringement of trade mark, remedy available would be G distinctly different to an unregistered brand name from that of remedy available to a registered brand name.

35. Unfortunately, the Tribunal did not consider and properly appreciate the apparent distinction between the two distinct expressions i.e. "House mark" and "Brand name" and thereby H proceeded to set aside the well-written Judgment passed by

the Commissioner of Central Excise, Mumbai who has recorded his reasons giving cogent basis for his reasoning. A

36. In the book of "Law of Trade Marks" by K.C. Kailasam and Ramu Vedaraman the distinction between 'Product mark' and 'House mark' has been beautifully delineated, which is as under: B

> "It is possible that the proprietor may use several trade marks in respect of his goods (known as Product mark), besides using a common mark in all his products to indicate the origin of the goods from the enterprise (known as House mark). This practice is more predominant in the pharmaceutical trade. Though both are trade marks and are registrable as such, each has its own distinct function. While the House mark represents the image of the enterprise from which the goods emanate, the Product mark is the means by which goods are identified and purchased in the market place and it the focal point of presentation and advertisement." C D

37. In view of above discussion, it is clear that what was being used by the respondent under the expression "Kalvert" was a "Brand name" and not a "House mark" as sought to be alleged by the respondent and has been wrongly accepted by the Tribunal. Therefore, the articles of assorted jams, pickles, squashes, cooking sauces, chutneys, syrups, synthetic vinegars etc. manufactured and sold by the respondent company under a brand name "Kalvert" were liable to be charged for excise duty at the rate prescribed in the Excise Law. E F

38. The Tribunal committed manifest error in coming to its conclusion and therefore the order passed by the Tribunal is set aside and the order dated 27.02.2002 passed by the Commissioner of Central Excise, Mumbai is restored. G

39. The appeals are allowed to the aforesaid extent but leaving the parties to bear their own costs.

D.G. Appeals allowed. H