RE: APPEAL FROM ASST. CHIEF, PATENT/TRADEMARK REGISTRAR'S DECISION	)	Cert. of Reg. No. 29308 Issued : May 22, 1981 Registrant : New Far Eastern Foundry Shop Co. Trademark : ANCHOR REPRESENTATION
NEW FAR EASTERN FOUNDRY SHOP CO., Respondent-Registrant.	)	DECISION NO. 94-12 (TM) January 21, 1994

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DECISION

This refers to the Appeal lodged by New Far East seeking to set aside the decision of the Asst. Chief, Patent/Trademark Registrar, dated 14 September 1992. Said decision refused the acceptance of the required affidavit of use of Appellant's mark "ANCHOR REPRESENTATION" for aluminum kettles, frying pans and "kawa" on the ground that the said affidavit of use was filed out of time.

The facts of the case were assiduously enumerated in the appeal as follows:

"1. On 10 January 1978, the registrant filed an application for registration in the Principal Register of this Office for the trademark "Anchor Representation", for aluminum kettles, frying pans and kawa.

2. The said trademark had been continuously used by the registrant since 1948 up to present.

3. The registrant's trademark was registered on 22 May 1981 under Registration No. 29308. The said registration shall remain in force for twenty (20) years from 22 May 1981. Photocopy of the Certificate of registration in the Principal register is hereto attached and made an integral part hereof as Annex "A".

4. Attached to the Certificate is a reminder which states thus:

> "TO AVOID CANCELLATION of this registration BY THE DIRECTOR OF PATENTS, the registrant SHALL FILE AN AFFIDAVIT OF USE OR NON-USE after the 5th and within the 6th year from the date of registration with the necessary fees as required by law".

5. On 10 March 1987, within the 6th year from the date of registration, registrant filed its Affidavit of use dated 13 August 1986, photocopy of which is hereto attached and made an integral part hereof as Annex "B".

6. The Affidavit of Use was accepted by this Honorable Office, as shown in the notation in Annex "B".

7. The trademark Anchor Representation has been and is being continuously used by the registrant up to the present date.

8. On the eleventh (11) year of its use, the registrant filed its Affidavit of Use dated 23 June 1992, which was filed with this Office together with the

corresponding payment on 3 July 1992. Photocopies of the Affidavit of Use and Official Receipt No. 701977 are hereto attached and made integral parts hereof as Annexes “C” and “D”, respectively.

9. However, on 4 August 1992, registrant received a letter dated 22 July 1992 from this Honorable Office informing the former that its trademark will be included in the list of registrations to be cancelled through the order of the Director of Patents, on the ground that the Affidavit of Use was filed out of time. The same should have been filed from 22 May 1991 to 22 May 1992. Photocopy of the said letter is hereto attached and made an integral part hereof as Annex “E”.

10. On 12 August 1992, registrant sent a letter dated 6 August 1992 to this Honorable Office, requesting for a reconsideration of the Decision to include the subject trademark for cancellation. Photocopy of the letter dated 6 August 1992 is hereto attached and made an integral part hereof as Annex “F”.

11. On 9 October 1992, registrant received a letter dated 14 September 1992 from its Honorable Office, which states thus:

> “This is with reference to your response dated 12 August 1992. The fact that you were not able to file the required affidavit of use on the period provided for in Rule 141 of the Revised Rules of Practice in trademark case and Sec. 12 of R.A. 166 as amended, we are constrained to deny said affidavit.
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> There is sufficient notice in the certificate. Moreover, the law may be had but such is the law (Dura lex sed lex).
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> Appeal to the Director of Patents may be made if desired.”

Admittedly, the required Affidavit of use for the subject trademark should have been filed from 22 May 1991 to 22 May 1992. The fact that the same was filed on 23 June 1992 or two months after the reglementary period was not and could not be denied by the Appellant.

However, Appellant believes that there has been substantial compliance with the statutory requirement of filing the affidavit of use. It further argued that the law should never be interpreted in such a way as to cause injustice as this is never within the legislature intent citing the case of Alonzo vs. Intermediate Appellate court, 150 SCRA 261.

This Office is not unmindful of rationale explained by the Honorable Supreme Court in the aforesaid decision. However, the facts in that case are different from the facts in the case at bar.

A trademark is a creation of use and what perfects a trademark right is not registration but the use thereof (Unno Commercial, Inc., vs. General Milling Corp., 120 SCRA 80A). On the other hand, a certificate of registration is a prima facie evidence of the validity of the registration, of the registrant’s exclusive right to use the same in connection with the goods, business or services specified in the registration (Sec. 20, R.A. 166).

In order to ascertain that a mark is still being used by the registrant, the law requires that he should file affidavit of use within one year following the fifth, tenth and fifteenth anniversary of the effective date off the registration. The law provides for a definite period of time to do so. In fact, the law was lenient enough to provide for a one-year period to comply with the said requirement which is clearly imprinted in the certificate of registration itself. For easy reference, the notation reads as follows:

"TO AVOID CANCELLATION of this registration by the Director of Patents, the registrant SHALL FILE AN AFFIDAVIT OF USE OR NON-USE after the 5th and within the 6th year from the date of registration with the necessary fees as required by law."

Based on the facts of the case, the affidavit of use was belatedly filed. Appellant can not claim excusable negligence because it has complied with the filing of the affidavit of use when it was required for the first time (during the 6th year). It is therefore clear that it knew when to file the next affidavit of use (11th year) The two-moth delay in doing so was not justified under the circumstances. Hence, no fault or mistake could be attributed to the decision subject of this Appeal.

WHEREFORE, premises considered, the Decision appeal from is hereby SUSTAINED.

Let the filewrapper of this case be forwarded to the Patents/Trademarks Registry and EDP Division for appropriate action in accordance with this Decision.

SO ORDERED.

IGNACIO S. SAPALO
Director