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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
EXCISE APPEAL BRANCH

Appeal No. E/4914/2004-4917/2004 - EX[DB] Date 06/01/2009

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
1. AVC ENGG. CO. (P) LTD.
A-26, SECTOR 58, NOIDA
2. SH. S.K. MANNA, DIRECTOR.
M/S. AVC ENGINEERING CO. PVT. LTD,
A-26, SECTOR-58, NOIDA (UP)

AVC ENGG. CO. (P) LTD. Appellant
Vs
C.C.E. NOIDA Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 05-08/2009- EX[DB] dated 24-12-08

passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(Excise Appeal Branch)

Copy to :
1. Respondent
C.C.E. NOIDA
B-123, SEC-5, NOIDA (U.P.)
2. Adv. / Consult
MR.BIPIN GARG
B-1/1289,A-VASANT KUNJ, NEW DELHI

3 S.D.R
~~4 J.C.D.R~~
5 Bar association, CESTAT, New Delhi
6 M/s. Deeparchi Publications, M-93, Marg. 46, Saket, New Delhi 110017
7 M/s Centax Publictions (P) Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New - 3
8 Excise & Customs cases, B-37, Sector -1, NOIDA - 201301 Gautam Budh Nagar, (U.P.)
9 Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT, U.P.
10 Nidheshak publications, I.P.Estate, new Delhi
11 Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026
12 Commercial Laws of India Pvt Ltd Post Bag No. 1033, No.70(Old No. 88), Thyagaraya Road, T. Nagar,Chennai
13 Taxindiaonline.com Pvt.Ltd, B-XI/8183,Vasant Kunj, New Delhi - 110070
14 Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,Ahmedabad-15
15 Office Copy
16 Guard file

Assistant Registrar
(Excise Appeal Branch)

17. SH. DINESH KUMAR SHARMA, C/o
18. M/S ADVANCE VALVE CO.
C-37, SEC 2, NOIDA

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
COURT NO.II

E/Appeal No.4914 - 4917/2004 -Ex(Br)

(Arising out of order in appeal No.200-203/CE/Appl/Noida/04 dated 9.7.04 passed by the Commissioner of Central Excise (Appeals), Noida)

M/s AVC Engg Co (P) Ltd & Others — Appellant
(Rep. by Shri Bipin Garg, Advocate)

Vs

CCE, Noida — Respondent
(Rep. by Shri B.S.Suhag, DR)

Coram: Hon'ble Mr.D.N. Panda, Judicial Member
Hon'ble Mr. Rakesh Kumar, Technical Member

Date of Hearing: 17.11.08

FINAL Order No. 05 - 08/09 - /2009-Ex(BR)

Per D.N. Panda:

The appellant being aggrieved by the first appellate order dated 9.7.04 has come in appeal before this forum pleading that following issues as appearing in paragraph 19 of the impugned order were before the learned authority for decision:-

1) Whether the word 'advance make' can be treated as a brand name or trade name for the prupsoes of small scale exemption under notification No.16/97-CE dated 1.4.97.
2) If it is held that the word 'Advance make' is a brand name for the goods manufactured by the assessee, can it be said to have been belonged to third person.

2. Learned Counsel Shri Bipin Garg, appearing on behalf of the appellants submits that treatment of a particular symbolic expression as brand name is baseless and irrelevant since the authorities below have not brought out any categorical charge against the appellant for adjudication as to whether the

appellant had used any brand name for clearance of its goods. He submitted that the goods were cleared with trade mark but because Revenue collected some documents like pamphlets and paper pads and ISO certificates, those documents are not basis for levelling charge against the Appellant. Therefore the issues framed not flowing from show cause notice are wrong. Accordingly adjudication was without any basis..

3. He further pleads that mere finding of Authority without granting proper opportunity of defence through show cause notice does not disentitle the appellant to the SSI benefit. Mere allegation that a brand name was used by the appellant is baseless. He drew our attention to the show cause notice to establish that the goods were not embossed with a particular mark and the invoices clearing the goods were also not showing any specification as to the trade mark. He pleaded that the department has not brought out a clear case to demonstrate how 'advance make' was a trade mark used and whether the trade mark was affixed to the goods. Learned first appellate authority committed an error of law and fact coming to a conclusion that the appellant had used the brand name without any charge that such brand was all along in existence

4. Learned DR appearing on behalf of the respondents submits that the appellant with another namely M/s Shanker Casting Pvt Ltd (known as Advcance Valves Company w.e.f. 31.8.99) was using the brand name 'advance' for clearance of the goods. He drew our attention to the statement recorded from Uma Shanker, Director of Advance Valve Pvt Ltd showing that they were manufacturing the goods from 1986 affixing a particular mark called 'Advance'. Accordingly, he submits that when the facts and circumstance prove that the appellant was using brand name, it should not be entitled to the SSI exemption benefit.

5. In the course of hearing, learned DR required us to look into appeal case No.4916/04 which relates to Advance Valve Company. He emphasized that there was a categorical statement recorded from Dinesh Sharma of

Advance Valve company which was on 24.4.2002. It was stated by Shri Sharma that they had been using Advance mark on their product which was not registered under trade mark. This mark was used by M/s Advance Valve Company since 1992 to 1997. The appellant Advance Valve company is before this forum for the period from April 1997 to March, 1999. According to him brand name was squarely covered during the impugned order. It was also on record that Shri Sharma stated that there was 'advance' mark embossed on monometers. Record also shows that sticker of 'advance' mark was affixed to containers. He drew our attention to the investigation and submitted that scrutiny of documents revealed that M/s Advance Valve Company had all along been using the term 'Advance' as brand name. CT-3 certificate submitted by the appellant showed the inscription that Advance Valve Co. was using brand name 'Advance'. Such position was still corroborated by declaration made by the party under Rule 173-B of Central Excise Rules, 1944. The outcome of the investigation revealed that the term 'Advance' was used as brand name and claimed as Proprietory brand name by one of the appellant company namely Shankar Casting Pvt Ltd and Advance Valve Co, both situated in Sector 2 Noida. With this submission, he submits that the appellants have availed wrong concession and that should be withdrawn from them.

6. Learned Advocate Shri Garg was fair enough to state that recording of findings in appeal case of Advance Valve Co. as submitted by the DR has remained on record and that calls for testing. Shri Garg argued that in both the appeals the adjudication suffers from bar of limitation. He further submits that the appellant's name being Advance Valve Co., the term 'Advance' was only used. He also submits that ownership of the trade mark does not belong to another for which the appellant should not suffer.

7. Heard both sides in great length and in view of the common cause involved in all these appeals registered as Appeal Case Nos. 4914-4917/2004, we consider it proper to dispose of all the four appeals by this

common order. So far as Appeal Case No. 4914/04 relating to AVC Engineering Company Pvt Ltd is concerned, we have noticed that Shankar Casting (P) Ltd which was using brand name 'Advance' has undergone change of its name as Advance Valve Ltd. Prior to that, there was no whisper whether the word 'Advance' anyway was adopted by Shanker Casting (P) Ltd by any particular mark of registration. In both the appeals, the period involved was April 1997 to August, 1998, April, 1997 and March, 1999. It appears that there is intimacy of appellants in Appeal Case No. 4914/05 relating to AVC Egg Co Pvt Ltd with appellants in Appeal Cae No. E/4916/-4 relating to Advance Valve Co. Appeal case No. 4915/04 and E/4917/04 are consequential appeals of Shri S.K. Mannad and Shri Dinesh Kumar Sharma respectively. A common cause being involved in Appeal E/4914/04 and 4916/04 such intimacy and live link of use of brand name cannot be ignored. We observe that in Appeal No. 4914/04, there is no whisper of use of the brand name 'Advance' affixed to the goods of the appellants. But the Authority has proceeded with the impression that the allegation in para 3.1. of the show cause notice dated 30th April, 2002 has indicated that the brand name was in use by the appellant.

8. We have noticed from the page 23-D of the paper book that a term called 'Advance' appears in purchase order placed by the buyer. Also perusal of page 23-A confirm that the term 'Advance' was used by the Appellant. It was observed in both the appeals that the Revenue has proceeded with the impression that Shankar Casting (P) Ltd , Advance Valve Co and AVC Engg Co. belonged to a group who have found it convenient to use the particular mark 'Advance 'and that has caused prejudice to Revenue in view claim of SSI exemption. Hence that was denied to the appellants. Whether there was any connection of goods to the brand name used by appellant and their link with Shankar Casting Pvt Ltd should be thoroughly examined to hold that there was a brand name which belong to a different concern and that was used by Appellants. We are unable to notice whether use of the term 'Advance' was

agreed to be used between the parties and whether there was any agreement for such use. However, the impression left to us is that 'Advance' was a device used by the present appellants to encash their goods and to foster marketability thereof.

9. In view of our aforesaid observations, we appreciate learned Counsel's argument in so far as the appellant AVC Engg Co (P) Ltd is concerned as to determination of existence of brand name and use thereof, entitlement and disentitlement of clearances with concessional advantage under law. Therefore, we remand all the appeals to learned Adjudicating Authority and direct that authority as under:-

a) The authority should examine the matter in depth in respect of all the appellants by proper analysis of entire evidence granting reasonable opportunity of hearing to the appellants and come to the conclusion whether there was any brand name and whether such brand name was used by the appellants.

b) The authority should examine all relevant materials and declaration which have become basis in Appeal No. 4916/04 and come to a proper conclusion as to use of brand name. The authority should first see that the term 'Advance' was at all a brand name of any concern and if so, to whom the brand name belongs. While doing the exercise, the learned Appellate Authority should take into account recorded statements used in adjudication under Appeal No 4916/04.

c) The matter being related to 1994, the appellant should submit before the learned Authority sometimes in January 2009 for fixation of date of hearing. Once the appellants submit for hearing, learned adjudicating Authority shall fixa date of hearing and issue notice and decide the issue within 3 months of last date of hearing.

10. Since the Appeal No. 4915 and 4917/04 emanates from Appeal No. 4914-4916/04, these appellants are equally entitled for fair hearing in view of aforesaid decision to remand the Principal Appeals.

11. In the result all the four appeals are remanded. It is made clear that appellants may raise all legal pleas and adduce evidence as admissible by law in the course of hearing and entitle to reasonable opportunity of hearing.

(Order dictated and pronounced in the open Court).

(D.N. Panda)
Judicial Member

(Rakesh Kumar)
Technical Member

MPS*