

Commissioner of Central Excise Vs. Fine Industries

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Oct-22-2002

Reported in : (2003)(85)ECC97

Judge : K Usha, P Chacko, B T K.K.

Appellant : Commissioner of Central Excise

Respondent : Fine Industries

Judgement :

1. We have before us the following two issues referred by the 'B' Bench as per Misc. Order No. 23/2002-B, dated 4-3-2002 in the captioned appeals :- (a) Whether the benefit of small scale exemption is available to a manufacturer who is manufacturing and clearing excisable goods bearing Brand name/Trade name similar to the Brand name belonging to another person (b) Whether the benefit of small scale exemption is deniable to a manufacturer, using Brand name/Trade name of another person, only when the excisable goods manufactured by him are same goods as being manufactured or dealt with by the persons owning the Brand name/Trade name 2. The respondents in Appeal No. E/2383/2001, M/s Fine Industries, were engaged in the manufacture and clearance of Diesel Engine parts (CET sub-heading 8409.00). During 1994-95 to 1997-98 (up to 17-10-1997), they manufactured and cleared without payment of duty Diesel Engine parts namely Rocker Box, Rocker Box with Lever and Fuel Pump Bracket under the brand name 'BHALLA FINE' as also Lubricating Pumps under the brand name 'BHALLA'. The brand name 'BHALLA' belonged to M/s. United Foundry and Engineering Works

who had got the brand name registered in their favour under the Trade and Merchandise Marks Act, 1958 (hereinafter referred to as the Trade Marks Act) in respect of Lubricating Pumps long before the above period. The Department by show-cause notice dated 31-3-1999 proposed to recover duty of excise on the above clearances by invoking the extended period of limitation, alleging that M/s. Fine Industries were not eligible for the SSI exemption under Notification Nos. 1/93-C.E. (as amended) and 16/97-C.E. on account of the bar contained in Paragraph 4 of Notification No. 1/93 and the corresponding provision of Notification No. 16/97. The show cause notice was contested by the party. The Adjudicating Authority ruled out the applicability of Para 4 ibid and allowed the benefit of SSI exemption to the assessee in respect of Diesel Engine Parts cleared under 'BHALLA FINE' brand name by taking the view that the said brand name was different from 'BHALLA' brand name of M/s. United Foundry and Engineering Works and that the assessee's goods affixed with the former brand name were different from the goods (Lubricating Pumps) in respect of which the latter brand name stood registered in favour of M/s.

United Foundry & Engg. Works (UFEW). However, the Adjudicating Authority held that the assessee was not eligible for SSI exemption in respect of the lubricating pumps cleared by them under 'BHALLA' brand name, on the ground that this brand name belonged to another person (M/s. UFEW) and, therefore, the bar contained in para ibid was applicable. The appeal preferred by the Department against the decision of the Original Authority was rejected by the Commissioner (Appeals) who affirmed the said decision and held that the benefit of exemption under the notification was available to the assessee in respect of the Diesel Engine parts cleared under "BHALLA FINE" brand name during the material period. Hence the appeal of the Revenue before the Tribunal.

3. The respondents in Appeal No. 2272/2001, M/s. Sputnik Switch Gears Pvt. Ltd., manufactured 'electrical apparatus for protecting electrical circuits for voltage not exceeding 1000 Volts' (falling under Chapter 85 of the Schedule to the CETA) and cleared the same without payment of duty under the brand name 'Sputnik' which belonged to M/s. Sarvjit Electric Works during 1994-95. To be precise, the goods so cleared were Miniature Circuit Breakers (MCBs). The Department by show

cause notice dated 4-6-1998 raised a demand of duty on the respondents for the said period alleging that they were not eligible for SSI exemption in respect of the MCBs under Notification No. 1/93-C.E. (as amended) on account of the bar of para 4 thereof. The original authority accepted the Department's view and confirmed the demand of duty but the lower Appellate authority set aside the decision of the original authority and held that para 4 of the notification was not attracted in the case and hence the assessee was eligible for the exemption under the notification. The lower Appellate authority held so after finding that there was no evidence on record to show that 'Sputnik' brand name was registered in respect of MCB in favour of any other person. The lower Appellate authority also took note of the fact that the assessee had applied for registration of the said brand name in their favour in respect of MCB on 28-4-1994. The appeal of the Revenue is against this decision of the Commissioner (Appeals).

4. M/s. Swadesh Enterprises, M/s. V.K. Enterprises, M/s. Sumir Engineers and M/s. Swadesh Auto Industries (respondents in Appeal Nos.

1292, 1293, 1295 and 1296 respectively) manufactured Auto parts and cleared the same under the brand name 'SI' belonging to M/s. Swadesh Industries, without payment of duty, during the period 1996-97. The Department by show cause notices demanded duty on the said clearances and, inter alia proposed to impose penalties under Rule 209A on M/s.

Randev Brothers, Shri Varinder Randev, Shri Narinder Randev and Shri Sunil Kumar Randev (respondents in Appeal Nos. 1290, 1291, 1294 and 1297 respectively). The original authority held that the assessees' goods attracted the mischief of para 4 of Notification No. 1/93-C.E. and hence they were not eligible for the SSI exemption under the Notification. The appeals preferred by the aggrieved parties against the order of the original authority were allowed by the Commissioner (Appeals) by a common order wherein the learned Commissioner (Appeals) followed Final Order Nos. 85-90/2001-B, dated 7-2-2001 of this Tribunal [since reported in 2001 (129) E.L.T. 730] and held that though the goods in question were branded with 'SI' brand name belonging to another person (M/s. Swadesh Industries), the assessees could not be denied the benefit of exemption

under Notification No. 1/93-C.E. as the brand name owner was using it on goods different from those (auto parts) manufactured and cleared by the assessee. The cited appeals of the Revenue are against this decision of the Commissioner (Appeals).

5. After examining the records and hearing both the sides, we find that Appeal No. 2272/2001 relating to M/s. Sputnik Switchgears Pvt. Ltd., is liable to be kept out of the purview of the reference and to be disposed of. In this case, a certificate issued to the respondents by the Registrar of Trade Marks on 15-2-2002 is on record. Its authenticity is not in dispute. The document shows that the brand name 'Sputnik' stands registered in respect of MCBs and certain other products in favour of the respondents under Section 23(2) of the Trade Marks Act w.e.f. 28-4-1994. It appears from the record that the period of dispute in this case will be covered by this document. The respondents in this appeal can legitimately claim the benefit of SSI exemption under Notification No. 1/93-C.E. unaffected by para 4 thereof in respect of MCBs cleared under the brand name 'Sputnik' during such period because they were clearing the goods under their own brand name.

None of the referred issues is relevant insofar as this appeal is concerned. We reject this appeal after holding that the respondents are entitled to the benefit of exemption under the above notification for the period of dispute in respect of 'Sputnik' branded MCBs.

6. The first issue referred to us is relevant only to Appeal No. 2383/2001 and the same pertains to similarity of the brand name affixed by the assessee on his product and the brand name owned by another person. One of the issues before the referring Bench was whether the Diesel Engine parts manufactured and cleared by the assessee under 'BHALLA FINE' brand name during the material period were eligible for the benefit of the SSI exemption notifications. We are called upon to decide whether the benefit of SSI exemption was available to a manufacturer in respect of specified excisable goods affixed with a brand name not belonging to him but similar to certain brand name belonging to another person. This is a question of law involving interpretation of para 4 of Notification No. 1/93-C.E., which has to arise from settled facts. The brand name used by the

assessee is 'BHALLA FINE' and the one owned by another person is 'BHALLA'. It is a question of fact as to whether the former is similar to the latter. We note that the referring Bench has not recorded any finding on this question of fact to pave the way for the above question of law. We observe that the above question of law would have arisen only if it had been found that the two brand names were similar. The regular Bench can first settle the aforesaid question of fact and then proceed to decide the eligibility of M/s. Fine Industries for exemption in respect of their "BHALLA FINE" branded goods, in the light of what we are going to hold on the second issue.

7. The second issue referred to us is whether the mischief of para 4 of the SSI exemption notification would be applicable to a manufacturer manufacturing and clearing goods affixed with a brand name belonging to another person and used by the latter on different goods. Both the sides have argued extensively on this issue.

8. The learned SDR argued that any exemption notification should be strictly construed and, therefore, para 4 of Notification No. 1/93-C.E.requires strict interpretation. The learned SDR submitted that if a manufacturer manufactured and cleared specified goods affixed with a brand name belonging to another person who manufactured and cleared identical goods under his brand name, the former manufacturer would not be eligible for the benefit of exemption on account of the bar of para 4 of the Notification. Relying on the Board's Circular F. No.213/41/88-CX.6 dated 30-12-88 and a line of decisions of this Tribunal, she argued that even if the latter manufacturer (brand name owner) used his brand name on goods different from those manufactured and cleared under that brand name by the former, the bar of para 4 *ibid* was still attracted. In this connection, the learned SDR relied on the definition of brand name contained in Explanation IX to the notification. She argued that what was required under Explanation IX for the purpose of applying para 4 of the notification to the branded goods of a small scale manufacturer was to establish a connection between the goods and the brand name owner and not to the latter's goods. According to the learned SDR, the connection to be shown need not be in relation to any particular goods, let alone identical goods, of the brand name owner.

The learned DR sought to draw support from the decision of the Hon'ble Supreme Court in the case of UOI v. Paliwal Electricals (P) Ltd. reported in 1996 (83) E.L.T. 241 (S.C.). She also relied on the Tribunal's decisions in the cases of Intercity Cable System (P) Ltd. reported in 1995 (80) E.L.T. 445 and Super Delicacies reported in 2000 (89) ECR 538 as also on the decision of the Madras High Court (Single Judge) in Bell Products Co. v. Union of India reported in 1995 (78) E.L.T. 404 (Mad).

9. Reverting to the facts of the case, the learned SDR submitted that the lubricating pumps manufactured and cleared by the brand name owners M/s. United Foundry & Engg. Works were in the same class as that of the diesel engine parts manufactured and cleared by M/s. Fine Industries under the brand name and, therefore, the mischief of para 4 of the notification hit the impugned goods cleared under the brand name by M/s. Fine Industries. Similarly, she submitted, the auto parts on which 'SI' brand name was used by the brand name owners viz. M/s. Swadesh Industries were in the same class as that of the different items of auto parts cleared under the brand name by M/s. Swadesh Enterprises and others. The DR in this connection referred to the Fourth Schedule to the Trade Marks Act read with Section 18(2) of the Act and Rule 26(1) of the Trade Marks Rules. The learned SDR argued that the reasoning of the learned Commissioner (Appeals) - that the branded goods of the assessee were different from the goods of the brand name owner - for allowing SSI exemption to the goods of the assessee (M/s. Fine Industries) was not correct as it did not satisfy the requirement of Explanation IX to Notification No. 1/93-CE. She also did not accept the view taken by the Tribunal in Swadesh Industries v. CCE [2001 (129) E.L.T. 730] which was followed by the Commissioner (Appeals) in the case of M/s. Swadesh Enterprises & Others (respondents in A. No.E/1292/2001 etc). The learned SDR argued that where the branded goods of small scale manufacturer and those of the brand name owner were not identical but belonged to the same class or category as in the case of the auto parts involved in this case, the former goods attracted the bar contained in para 4 of Notification No. 1 /93-C.E. In this context, the learned SDR relied on Order No. 2397/97, dated 1-9-97 passed by the South Zonal Bench (Madras) of the Tribunal in A. No. E/164/92 (M/s.

Kumar Power Products Ltd. v. CCE, Hyderabad) in which case it was held that the benefit of exemption under Notification No. 175/86-CE. was not available, on account of the bar contained in para 7 thereof, to enamelled copper wires of a certain size cleared by the assessee under the brand name 'ARPEE' which belonged to M/s. Arpee Electricals Pvt.

Ltd who were using the brand name on enamelled copper wires of a different size. In the cited case, the Bench found a connection in the course of trade between the branded copper wires of the assessee and the brand name owners viz. M/s. Arpee Electricals Pvt. Ltd. It was also pointed out that the Tribunal's decision in Kumar Power Products case was approved by the Supreme Court as reported in 1999 (111) E.L.T.A198.

10. The learned Advocate, Shri V. Lakshmi Kumaran appearing for M/s.

Fine Industries was mainly on the purport of para 4 of Notification No.1/93-C.E. (as amended). According to him, for attracting the mischief of para 4 of the Notification, it was necessary that the specified goods on which the small scale manufacturer used brand name belonging to another person should be identical to the goods of such other person. He sought to buttress his point by pressing into service the definition of brand name/trade name under Explanation IX to the notification. The learned Counsel also sought to draw support from the Board's Circular dated 30-12-1988, the Apex Court's judgment in Paliwal Electricals (supra) as also the Madras High Court's decision (Division Bench) in Kali Aerated Water Works v. Union of India [2001 (132) E.L.T.544 (Mad.)]. The learned Counsel also relied on a line of other decisions of the Tribunal as under :-Precise Electronics v. CCE [1993 (65) E.L.T. 69]CCE v. Gopal Soap Industries [1999 (111) E.L.T. 876]Taj Serpent Engg. Factory v. CCE [1996 (85) E.L.T. 78]Suvik Electronics Pvt. Ltd. v. CCE [1999 (107) E.L.T. 457]Rukmani Pakkwell Traders v. CCE [1999 (109) E.L.T. 204]Swadesh Industries v. CCE 11. The learned Advocate, Shri B.L. Narsimhan, for M/s. Fine Industries, referred to the provisions of the Trade Marks Act as also to the Fourth Schedule to the Act and pointed out that the same brand name could be registered under the Trade Marks Act in respect of goods falling under different classes under the Fourth Schedule to the

Act.

To illustrate the point, the learned Advocate brought on record extracts from the Trade Marks Journal which showed inter alia that the brand name 'SIROCCO' was registered in favour of a trader in respect of machine tools and parts thereof falling under class 7 while the same brand name was registered in favour of another party in respect of goods of class 11 and in favour of a third party in respect of goods of class 25. The Advocate was endeavouring to counter the learned SDR's plea that the mischief of para 4 of the notification was attracted even where the branded goods of the SSI unit belonged to the same class as that of the brand name owner's goods. The learned Advocate further argued that para 4 of Notification No. 1/93 contained an exception to the benefits conferred by the general provisions of the notification on small scale manufacturers and, therefore, it was the burden of the department to show that any excisable goods manufactured by such manufacturer was covered by such exception. In this connection, the Advocate relied on the Supreme Court's decision in C.C. v. K. Mohan & Co. Exports [1989 (43) E.L.T. 811 (S.C.)] as also some decisions of the Tribunal.

12. We have examined the submissions. We observe at the outset that both sides have, in their respective lines of arguments and perspectives, relied on the following common materials while addressing the second referred issue before us :- While the DR has relied on the judgment of the learned Single Judge of the Madras High Court, the Counsel has sought to draw support from the Division Bench of the Court.

In the case of Paliwal Electricals (P) Ltd. (supra), the Apex Court had to interpret para 7 of Notification No. 175/86-C.E. (predecessor to Notification No. 1/93-C.E.) which reads as under :- "The exemption contained in this notification shall not apply to the specified goods where a manufacturer affixed 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." Para 4 of Notification No. 1/93-C.E. (as amended) which requires to be interpreted by us for the purpose of answering the referred issue is *pari materia* to para 7 of Notification No. 175/86

short of the words "who is not eligible for the grant of exemption under the Notification". It reads as under :- "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." 13. The question before us is whether, in terms of para 4 *ibid*, the benefit of exemption under Notification 1/93-C.E. (as amended) could be denied to specified goods manufactured and cleared by an SSI unit after affixing the goods with the brand name or trade name of another person who used the brand name/trade name on goods different from the specified goods of the SSI unit. In order to resolve this issue, we think, we have to read together Explanation IX and Explanation X to the notification. Explanation IX defines brand name/trade name as under :- "Brand name" or "trade name" shall mean a brand name or trade name, whether registered or not, that is to say a name or a mark (x x x) such as symbol, monogram, label, signature or invented word 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." According to the above Explanation, either of the terms 'brand name' and 'trade name' used in para 4 of the notification should be one used in relation to the specified goods of the SSI unit for the purpose of indicating a connection in the course of trade between such specified goods and some person using such name or mark. It is not in dispute that the words "some person using such name or mark" stand for "another person" in para 4. Explanation IX, of course, does not read "... some person using such name or mark on like goods (or identical goods)....".

It is obviously the absence of these italicized words or equivalent expressions in Explanation IX that has prompted the learned SDR to argue that the 'connection' envisaged under Explanation IX is one in the course of trade between the specified goods manufactured by the SSI unit and the brand name owner without reference to the nature of the goods of the latter. The learned SDR has endeavoured to press the point that the identity or the nature of the goods manufactured by the brand name owner and cleared under his brand name is immaterial to the 'connection in the course of trade' to be established between the goods of the SSI unit and the brand name owner, for attracting para 4 of the notification. The learned Counsel has, on the other hand, maintained that the

learned SDR's interpretation does not subserve the intended purpose of para, 4. It has been argued that the 'connection in the course of trade' can only be a connection through the specified goods referred to in para 4 and goods identical therewith in the market. We are of the view that this argument has great force as it appears to be well supported not only by the Hon'ble Supreme Court's judgment in Paliwal Electricals (supra) but also by Explanation X to Notification 1 /93-C.E., which reads thus :- "For the purpose of this notification, where the specified goods manufactured by a manufacturer, bear 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." Explanation X says that, where the specified goods manufactured by an SSI unit bear a brand name or trade name of another manufacturer/trader, such specified goods shall not, merely by reason of that fact, be deemed to have been manufactured by such other manufacturer/trader. In our view, Explanation X casts a burden of proof on the Revenue. As held by the Apex Court [vide CC v. K. Mohan & Co.

Exports (supra)], the burden is on the Revenue to show that an assessee's claim for exemption from payment of duty under any notification is hit by any exclusionary clause in the notification. In the instant case, the burden of the Revenue was to show that the small scale manufacturer's branded goods fell within the net of para 4 ibid which contained the exclusionary clause. The Revenue had to show that the said goods were bearing the brand name of another person, which burden was discharged by it. The Revenue had a further burden to discharge in terms of Explanation X which said that the mere fact that a small scale manufacturer's goods bore the brand name/trade name of another manufacturer/trader shall not be a reason for the Revenue (whose burden it was to bring such goods within the net of para 4 so as to deny the benefit of exemption to the small scale manufacturer) to deem that such other manufacturer/trader was also manufacturing the specified goods. The Revenue had to show that the brand name/trade name owner was also manufacturing the specified goods and clearing the same under his brand name/trade name.

14. The above position appears to be well supported by the Apex Court's decision in the case of Paliwal Electricals wherein their Lordships explained the object of para 7 of Notification No. 175/86 as under :- "Now what does para 7 provide and why? It provides that the benefit of Notification No. 175 shall not 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 expressions "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 I 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. It must be remembered that by extending the benefit of exemption, the State is forgoing public revenue to which it is entitled under the Act. The loss to public revenue is supposed to be compensated by helping along the small manufacturers to survive in the market and continue to produce.

Once he becomes one with his competitor, the need for supporting crutches disappears. There is no reason why in such a case the State should forego the revenue due to it under the Act.

The highlighted observations of the Apex Court clearly lay down that, to attract the mischief of para 7, the goods manufactured by the SSI unit and cleared under the brand name of another person should be identical to that manufactured by the brand name owner, in which event only the goods could become indistinguishable in the market from those manufactured by the brand name owner. We have already noted that para 7 of Notification No. 175/86-C.E. considered by the Apex Court is *pari materia* to para 4 of Notification No. 1/93-C.E., which is not disputed also. The reasoning of the Apex Court will, therefore, be equally applicable to para 4 *ibid*. We have no doubt in our mind that, to attract the mischief of para 4, the specified goods manufactured by SSI unit should have been cleared under the brand name of another person who used the same brand name on identical goods.

15. We have also perused the CBEC's circular. The case examined by the Board was one in which the jurisdictional Assistant Collector had denied the benefit of exemption under Notification No. 175/86-C.E. to an SSI unit in respect of gas stoves cleared under the brand name 'HOTLINE', on the ground that the brand name was owned by another company not eligible for exemption under the notification. The view taken by the Assistant Collector was that the above branded product was hit by the bar in para 7 of the notification. The Board took note of the fact that both the SSI unit and the other company were registered owners of 'HOTLINE' brand name but in respect of different goods - the former in respect of gas stove and the latter in respect of television set. The Board, after referring to Section 8 of the Trade Marks Act, further noted that it was permissible to have the same trade mark/brand name registered in favour of different persons for different classes of goods. Accordingly, it was clarified that the bar of para 7 of the notification was not applicable to the gas stoves manufactured by the SSI unit and cleared under 'HOTLINE' brand name which was owned by them in respect of the said product and not owned by the other company in respect of the same goods.

The Board, in the cited circular, appears to have taken a view that the bar of para 7 could be applied to the branded goods of an SSI unit only if the brand name belonged to another person who used it on identical goods. Conversely, there was no bar of para 7 where the brand name owner used it on goods different from the

goods cleared under the brand name by the SSI unit. This view appears to be based on a correct understanding of the purport of Para 7 of Notification No. 175/86-C.E. and the same has been examined and correctly approved by this Tribunal in the Rukmani Pakkwell Traders case (supra). The view taken, with or without reference to the Board's circular, by different co-ordinate benches of this Tribunal is no different vide cases of Precise Electronics, Taj Serpent Engg. Factory, Gopal Soap Industries, Sivadesh Industries and Suvik Electronics (supra) each involving interpretation of either para 7 of Notification No. 175/86 or para 4 of Notification No. 1/93.

16. In Kali Aerated Water Works [2001 (132) E.L.T. 544], a Division Bench of the Madras High Court was considering appeals which had arisen from judgments of a learned Single Judge vide 1995 (76) E.L.T. 265 (Kali Aerated Water Works v. UOI) and 1995 (78) E.L.T. 404 (Bell Products Company v. UOI). In Kali Aerated Water Works, the learned Single Judge had upheld the constitutional validity of para 4 ibid while in Bell Products his lordship had dealt with as additional issue and decided thereon against the writ petitioners. The additional issue as stated by the learned Single Judge in para (10) of his judgment was :- "The further issue raised for consideration in these cases is that the petitioners in these cases cannot be said to be using the brand or trade name of some other person since they have themselves acquired a right to use the name 'BELL' apart from the fact that there is no identity of use in respect of similar or identical goods." Dealing with the above issue, the learned Judge further examined para 4 of the notification and held :- "The notification, apart from stipulating the mere user of the brand or trade name of another person, does not carry any further limitation on the said user that it should be in respect of similar or identical goods also." The Division Bench, in the writ appeals, did not entertain the challenge as to the constitutional validity of para 4 ibid which had since been upheld by the Hon'ble Supreme Court. On the aforesaid (additional) issue, however, the Division Bench of the High Court vacated the findings of the learned Single Judge and remanded the issue to the adjudicating authority. Paragraphs (5) and (6) of the Division Bench judgment, extracted below, are relevant :- "5. It is the contention of the learned Counsel for the appellants that the clause (4) of the said Notification can be made applicable only if the users of the same brand name manufacture the identical goods and not

otherwise. We are of the opinion that this is a matter to be decided only by the adjudicating authority. As stated already, since the adjudicating authority had not decided this issue, it is for him to take up the issue after giving an opportunity to the appellants herein. On this short ground, we are of the opinion that the matter has to go back to the adjudicating authority the Assistant Collector of Customs to determine the classification of the goods manufactured by the appellants as well as their claim regarding the exemption of excise duty.

"6. Though the learned Single Judge had decided the issue on merits and had given a finding, since the adjudicating authority had not applied his mind, and decided the question, and also we having found that the matter has to go back to the adjudicating authority for proper consideration as to the disputed question of facts, it is necessary that the findings of the learned Single Judge on this aspect alone have to be set aside." Before us, the two sides have struggled to draw support to the rival positions from the above DB judgment of the High Court. According to the Counsel, the Division Bench has come to the conclusion that if the goods of the assessee and the brand name owner are not identical, the bar of para 4 of the notification will not apply to the assessee's goods. The SDR has argued to the contra. Neither of these arguments is sustainable inasmuch as the High Court (DB) was remanding the outstanding issue in toto to the adjudicating authority without expressing any view thereon. The remand stemmed from a finding that the assessee had filed the writ petitions before adjudication proceedings were initiated against them by the department. It covered the issue (whether para 4 of the notification could be made applicable to the branded goods of SSI unit only if the brand name owner manufactured identical goods and not otherwise) which is now being agitated before the Tribunal in these appeals. We have not found any ruling on the issue in the Division Bench judgment. However, we note, the learned Single Judge's decision on the issue was set aside by the Division Bench. Neither side in these appeals can claim any support from any of the cited judgments of the High Court. On the other hand, we note, the decisions rendered by different coordinate Benches of this Tribunal in the cases of Intercity Cable Systems (supra), Super Delicacies (supra) and Elymer Havells Electrics [2000 (119) E.L.T. 574 (T) (supra) by following the view taken on the relevant issue by the learned Single Judge of the High Court have lost their judicial support

and, thereby, their precedent value. However, the minority view in *Super Delicacies* will be approved as it is consistent with the view taken by this Bench.

17. Having answered the second issue referred to us, in the affirmative, we send the records of all the appeals except Appeal No.E/2272/2001 to the regular Bench for final disposal in the light of our decision on the said issue. Appeal No. 2272/2001 stands dismissed.

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