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C.A.No. 2288-2289 OF 1999
ITEM NO.105

COURT NO.5

SECTION III

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

CIVIL APPEAL NO. 2288-2289 OF 1999

COMMNR. OF CENT.EXCISE,JAMSHEDPUR

Appellant (s)

VERSUS

M/S.ASHOK ARC, DHANBAD
(With appln(s) for stay and office report)

Respondent(s)

WITH
Civil Appeal NO. 3635-3636 of 1999
(With appln. for ex-Parte stay and office report)

Date: 01/12/2004 These Appeals were called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE S.N. VARIAVA
HON'BLE DR. JUSTICE AR. LAKSHMANAN

HON'BLE MR. JUSTICE S.H.KAPADIA

For Appellant(s) Mr. G.E.Vahanvati, SG
Mr. A.Subba Rao, Adv.
Mr. Devadatt Kamat, Adv.
Mr. Hemant Sharma, Adv.
Mr. P.Parmeswaran, Adv.
Mr. B. Krishna Prasad,Adv.

For Respondents Mr. V.Lakshmikumaran, Adv.
Mr. Alok Yadav, Adv.
Mr. Rajesh Kumar, Adv.
Mr. V. Balachandran,Adv.

UPON hearing counsel the Court made the following
O R D E R

Heard learned counsel for the parties.

The Appeals are allowed in terms of the signed order.

There shall be no order as to costs.

Anita

(Jasbir Singh)
Court Master

(Signed order is placed on the file.)

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 2288-2289 of 1999

COMMISSIONER OF CENTRAL EXCISE, JAMSHEDPUR

...
Appellant (s)

Versus

M/S. ASHOK ARC, DHANBAD

...

Respondent(s)

WITH

CIVIL APPEAL NOS. 3635-3636 OF 1999

O R D E R

These Appeals are filed against the Judgments of the Customs, Excise and Gold (Control) Appellate Tribunal (in short "CEGAT"), Calcutta dated 22nd December, 1998 and 19th May, 1998.

Briefly stated the facts are as follows:-

The Respondents (herein) manufactured Electric Welding Electrodes. They cleared the goods under Rule 173C(11) of the Central Excise Rules, 1944. It is not disputed that Rule 173 C(11) would apply to the Respondents' case. The said Rule, as it then stood, reads as follows:-

"Rule 173C - Assessee to file price list of goods assessable ad valorem. - (1) Every assessee who produces, manufactures or warehouses goods which are chargeable with duty at a rate dependent on the value of the goods, shall file with the proper officer a price-list, in such form and in such manner and at such intervals as the Collector may require, showing the price of each of such goods and the trade discount, if any, allowed in respect thereof to the buyers along with such other particulars as the Central Board of Excise and Customs or the Collector may specify.

.....

(11) Notwithstanding the provisions of sub-rules (1) to (6), the Collector may, having regard to the nature of goods manufactured or the frequent fluctuations of market price of such goods, allow an assessee or a class of assessee to declare the price of goods transacted by the said assessee or assesseees for the particular wholesale consignment on the gate pass or accompanying challan or advice note and to determine the duty payable on such goods intended to be removed on the basis of the said declared price:

Provided that where the price thus declared on the gate-pass or accompanying challan or advice note does not represent the value as determined under Section 4 of the Act, the proper officer may, after such further inquiry, as he may consider necessary, re-assess the duty due and the assessee shall pay the deficiency, if any, by a debit in his account-current or in case of excess payment take credit of the amount paid in excess in the manner prescribed in sub-rule (2) of rule 173I."

Two show cause notices were issued on 30th October, 1993 and 11th December, 1992 in Civil Appeal Nos. 2288-2289 of 1999 and one show cause notice was issued on 22/23rd March, 1991 in Civil Appeal Nos. 3635-3636 of 1999 specifying that even though price lists had been provisionally approved, the wholesale price at the factory gate existed and therefore that would be the assessable value for the goods.

The Respondents filed a reply wherein they claimed that they were an SSI unit and that their customers were mostly from Calcutta and other places within the State of West Bengal. They stated that a very negligible quantity was sold at factory gate and for trading purposes they were running a Sales Depot in Calcutta. It was claimed that the goods were cleared from the factory to the Depot at provisional price shown in the gate price and that duty was paid and payable on the basis of value finally shown at the time of sale from Sales Depot. In other words, they claimed that they were entitled to value the goods on the basis of challan and advice notes by virtue of Rule 173C(11). But there was no denial that the price at the factory gate was ascertainable and fixed.

The assessing authority held that the assessable value must be the value at the factory gate. In the Appeal filed by the Respondents, the Tribunal has held that once Rule 173C(11) applies then the assessee is entitled to have its value fixed as per the invoices.

We are unable to agree with the view expressed by the Tribunal. The Tribunal has ignored the proviso to Rule 173C(11). It is true that in cases where, having regard to the nature of the goods and frequent fluctuations of the price of the goods, an assessee or class of assessee may be allowed to declare price of goods on the basis of the challan and advice note. But those are cases where it is not possible to determine the value in accordance with Section 4. Under

Section 4, as it then read, the value of the goods is the normal price i.e. the price at which the goods are ordinarily sold by an assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal where the buyer is not a related person and the price is the sole consideration for the sale. Thus, if it is found that there is a normal price at which goods are sold at the factory gate then even though earlier the assessee was permitted to clear under Rule 173C(11) the re-assessment would be on the basis of the normal price as determined under Section 4.

We are unable to accept the submission that such an interpretation would negate Rule 173C(11).

A rule cannot override or be contrary to a Section. Under Section 4 the normal price has to be the value at which the goods are ordinarily sold. Thus clearly Rule 173C(11) only provides for cases where the normal price cannot be ascertained. In those cases goods are allowed to be removed on basis of price shown on the challan or advise note. But the framers of the Rule were careful enough to provide, in the proviso, that if the price on the challan or advise note does not represent the value as determined under Section 4 then there can be reassessment. In this case it could not be shown that the price at the factory gate could not be determined or that the price at the factory gate was varying. Thus the assessing authority was right in holding that the value would have to be determined as per that price. The Tribunal was clearly in error in ignoring the proviso.

We are thus unable to sustain the Order of the Tribunal. It is accordingly set aside. The Appeals stand allowed. There shall be no order as to costs.

.....J.

(S.N.Variava)

.....J.

(Dr.AR.Lakshmanan)]

.....J.

(S.H.Kapadia)

New Delhi,
December 01, 2004.