IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 8182-8185 OF 2003

Commnr. Of Central Excise, Nagpur **Appellant(s)**

VERSUS

Morarjee Brembana Ltd. **Respondent(s)**

WITH

CIVIL APPEAL NO. 9178 OF 2003 AND CIVIL APPEAL NO. 288 OF 2007

O R D E R

In C.A.No. 8182-8185/2003

The respondent/assessee herein is engaged in the manufacturing of cotton fabrics falling under Chapter Heading 52.07 of the Schedule to the central Excise Tariff Act, 1985. It is hundred per cent Export Oriented Unit (EOU). The respondent had been clearing the goods i.e. cotton fabric in Domestic Tariff Area (DTA) taking benefit of Notification No.8/97-CE dated 1.3.1997 which gives certain exemptions from the payment of excise duty.

The Department perceived that the aforesaid Notification No.8/97 dated 1.3.1997 is not applicable in the instant case and instead of that, Notification no.2/95-CE

dated 4.1.95 is the Notification which would be applicable. On this basis show cause notices were issued to the respondent demanding excise duty in a sum of Rs.2,36,22,334/- and levy of penalty was also proposed. After adjudication Order-in-Original dated 13.10.2000 was passed by the CCE confirming the aforesaid demand and imposing the penalty of Rs.48 lakhs. We may mention here that the period involved was from May 1998 to February 2000 and 3rd December 1998 to 22nd August 2000 in the show cause notices. The respondent filed appeal against the aforesaid order of the Commissioner before the CEGAT, Mumbai. It is clear from the above that issue pertained to the applicability of Notification nos. 2/95 or 8/97. As noted above, as per the respondent/assessee it is Notification no. 8/97 which is applicable whereas the Revenue took the position that Notification no.2/95 is applicable in the instant case. The Order-in-Original also decided that the Notification No.2/95 would be applicable. Therefore, in the appeal filed by the respondent, it took the plea that Notification 8/97 is applicable and the finding of the Commissioner that Notification 2/95 was applicable was erroneous.

Pertinently, during the pendency of the said appeals, the respondent filed miscellaneous application wherein it sought to raise certain additional grounds. One of the

grounds was that even if Notification 8/97 is applicable, valuation of the goods should be worked out under Rule 7 of the Customs Valuation Rules, 1988. This miscellaneous application was opposed by the Department by filing its objections, inter alia, stating that it was not the issue raised in reply to the show cause notices and was not the subject matter of the Order-in-Original. Further, it was not a pure question of law and therefore, the respondent should not be allowed to raise this additional ground.

It appears that the aforesaid miscellaneous application was heard along with the main appeal, inasmuch as it is decided in the impugned order itself passed by the CEGAT. The CEGAT has allowed the respondent to raise the aforesaid ground and thereafter recorded its finding/opinion thereupon as well. In this manner, vide impugned judgment dated 14.2.200 rendered by the Tribunal, it has decided two issues. The first issue was as to which Notification would be applicable. That issue has been decided against the respondent and the Order-in-Original of the Commissioner holding that Notification No.2/95 is applicable, is upheld.

Thereafter, the Tribunal discussed the issue of valuation and recorded a finding that in the present case it was not possible to determine the transaction value in terms of Rule 4. Rule 3 of the Customs Valuation Rules provides

that if the transaction value would be determined under Rule 4 then the valuation has to be determined in accordance with Rules 5 to 8 sequentially. Going by the aforesaid provision the Tribunal discussed the applicability of Rules 5 and 6 and opined that even these rules would not apply in the given situation, it is Rule 7 which is attracted for the purpose of valuation. The discussion of the Tribunal in this behalf reads as under:

> **"We have considered the submission made by the appellants and find considerable force in their submission. The circular of the Board also realized the fact that the value is required to be determined in terms of Rule 8 i.e. best judgment rule. The sales price charged to customer in India of the goods under assessment can not be considered as a price in the course of international trade. The appellants contention that the FOB price of the export of goods or similar nature various from country to country also has considerable force. It is well known that the manufacturer is able to realize higher amount for sales made to developed countries like America, UK, France etc. and the same amount can not be realized for identical goods when the exports are made to underdeveloped countries like Bangladesh, Malaysia. Similarly the value under Rule 5 and 6 can not be determined in view of the peculiar nature of the product. The value of the fabric not only depend upon the quality of yarn, count of yarn, but also on the design of fabric, colour etc. therefore it is very difficult to establish the similarity of the imported fabrics and the fabrics manufactured by the appellants. Rule 7 is meant for computing the value when the imported goods are sold in India. As per the provisions of the said rule from the sales price certain expenses and profit is required to be deducted. Further the duty and taxes payable by any importer in normal course of importation is required to be deducted."**

It is clear from the above that insofar as second contention of the respondent on Rule 7 is concerned, the Tribunal has accepted the plea of the respondent herein. Challenging this part of the order the present appeal is preferred by the Revenue.

At the outset Mr. K. Radhakrishnan, learned senior counsel for the appellant argued that the aforesaid additional ground raised for the first time in the miscellaneous application should not have been allowed by the Tribunal, more so, when it was not a pure question of law but mixed question of law & fact. He read out the portion extracted above where the Tribunal itself has made certain factual observations, namely, the manufacturer is able to realize higher amount for sales made to developed countries like America, U.K, France, etc. and the price which is realized from the export made to underdeveloped countries like Bangladesh, Malaysia is less. It is also observed by the Tribunal that the value of fabric not only depends upon the quality of yarn, count of yarn, but also on the design of fabric, colour etc. and it is, therefore, difficult to establish the similarity of the imported fabric and the fabrics manufactured by the appellants and on this basis the application of Rules 5 and 6 in the aforesaid Rules. The plea of Mr. Radhakrishnan is that there was no material/evidence on record on the basis of which the

aforesaid factual findings should be attracted by the Tribunal. He submitted that in such a situation, in order to decide as to which Rule would be applicable for the purpose of arriving at the valuation of the goods, matter should have been remanded back to the adjudicating authority for this purpose.

We find force in the aforesaid submission of learned counsel for the Revenue. We may like to observe here that the Tribunal was not entirely wrong in allowing the respondent to raise the issue of valuation. It is because of the reason that in the Order-in-Original passed by the Commissioner, after holding that the Notification no.2/95 would be applicable and the respondent is not entitled for exemption under Notification no. 8/97, while determining the duty payable, the valuation which is taken is on the basis of clearance of cotton fabrics to the DTA. Therefore, it was within the domain of the Tribunal to decide as to whether the aforesaid basis at which the cotton fabric was cleared to the DTP was rightly taken or not. The order of the Tribunal, insofar as this aspect is concerned, namely, applicability of Rule 4 of the Valuation Rules, appears to be correct. While undertaking this limited enquiry into the said question, the Tribunal decided a pure question of law.

Mr. Radhakrishnan has,however questioned the aforesaid

view of the Tribunal and argued that since the respondent is hundred per cent export oriented unit, any sale or clearance of cotton fabric by the respondent to DTP should be treated as transaction sale and therefore Rule 4 would be applicable. However, this argument has to be rejected in view of proviso to Section 3 of the Central Excise Act, 1944 which reads as under:

> **"Section 3. Duties specified in the [Schedule to the Central Excise Tariff Act, 1985] to be levied.-(1) There shall be levied and collected in such manner as may be prescribed duties of excise on all excisable goods other than salt which are produced or manufactured in India and a duty on salt manufactured in, or imported by land into, any part of India as, and at the rates, set forth in the Schedule to the Central Excise Tariff Act, 1985:**
>
> **Provided that the duties of excise which shall be levied and collected on any excisable goods which are produced or manufactured,--**
>
> **(i) In a free trade zone and brought to any other place in India; or**
>
> **(ii) By a hundred per cent export-oriented undertaking and allowed to be sold in India;**
>
> **Shall be an amount equal to the aggregate of the duties of customs which would be leviable under section 12 of the Customs Act, 1962 (52 of 1962), on like goods produced or manufactured outside India if imported into India, and where the said duties of customs are chargeable by reference to their value; the value of such excisable goods shall, notwithstanding anything contained in any other provision of this Act, be determined in accordance with the provisions of the Customs act, 1962 (52 of 1962) and the Customs Tariff Act, 1975 (51 of 1975)."**

As is clear from the bare reading of the aforesaid proviso, in those cases where excisable goods are produced or manufactured by hundred per cent export oriented undertaking are allowed to be sold in India, the duty of excise has to be the amount equal to the aggregate of the duties of customs which would be leviable under Section 12 of the Customs Act, on like goods produced or manufactured outside India if imported into India and where the said duties of custom are chargeable by reference to their value, the value of such excisable goods shall be determined, in accordance with the provisions of the Customs Act and Customs Tariff Act, 1975.

Keeping in view the aforesaid proviso to Section 3 of the Central Excise Act, in our opinion the Tribunal has rightly held that the sale price charged to customer in India of the goods under assessment cannot be considered as a price in the course of International trade. To this extent we do not find fault with the view taken by the Tribunal.

As pointed out above, if Rule 4 is not applicable, the valuation of the goods has to be arrived at by applying Rules 5 and 8 in sequential order. It is here, as noted

above, the Tribunal fell in error as applicability of Rules 5 and 6 depended on certain factual aspects which had to be gone into. The Tribunal has made certain observations on facts but without any material before it.

The appropriate course of action for the Tribunal, in such a given situation was to remit the case back to the Commissioner to decide the issue after allowing the appellant to produce evidence in this behalf.

We, therefore, set aside that portion of the order whereby the Tribunal has held that Rule 7 of the Valuation Rules shall be applicable to arrive at the transaction value. The matter to this limited extent is remitted back to the Commissioner who shall decide as to which Rule of the Valuation Rules, 1988 shall be applicable, after giving opportunity of hearing to the respondent and also to produce whatever material it wants to produce in support of its contention that Rule 7 is applicable. The appeals are disposed of in the aforesaid terms.

<u>In CA Nos. 9178/2003 and 288/2007</u>

In C.A.Nos. 8182-8185/2003 we have upheld the order of the CEGAT holding that Rule 4 of the Customs Valuation Rules, 1988 would not be applicable in the given situation.

In these appeals, since this is the only issue that arises for consideration, that too is identical circumstances, in view of our decision in the said appeals, these appeals are also dismissed.

….....J.
(A.K.SIKRI)

….....J.
(ROHINTON FALI NARIMAN)

New Delhi;
Date: 1.4.2015.

ITEM NO.101 COURT NO.13 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(s). 8182-8185/2003

COMMNR. OF CENTRAL EXCISE, NAGPUR Appellant(s)

VERSUS

M/S. MORARJEE BREMBANA LTD. Respondent(s)

(with appln. (s) for stay and office report)
WITH
C.A. No. 9178/2003
(with appln. (s) for stay and office report)
C.A. No. 288/2007
(with appln. (s) for stay and office report)

Date : 01/04/2015 These appeals were called on for hearing today.

CORAM :
HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE ROHINTON FALI NARIMAN

For Appellant(s) **Mr. K.Radhakrishnan,Sr.Adv.**
Mrs. B.Sunita Rao,Adv.
Ms. Sadhana Sandhu,Adv.
Mr. Anurag,Adv.
Mr. B. Krishna Prasad,Adv.

For Respondent(s) **Mr. V.Lakshmikumaran,Adv.**
Mr. M.P.Devanath,Adv.
Mr. Vivek Sharma,Adv.
Ms. L.Charanaya,Adv.
Mr. Aditya Bhattacharya,Adv.
Mr. R.Ramachandran,Adv.
Mr. Hemant Bajaj,Adv.
Mr. Ambarish Pandey,Adv.
Mr. Anandh K.,Adv.
Mr. Rajesh Kumar,Adv.

Mr. Harish N.Salve,Sr.Adv.
Mr. S.Ganesh,Sr.Adv.
Mr. Mohan M.Myakar,adv.
Mr. Javed Muzaffar,Adv.
Mr. Karan Adik,Adv.
Mr. S.A.Desai,Adv.
Mr. Akash Kakad,Adv.
Ms. Anagha S. Desai,Adv.

UPON hearing the counsel the Court made the following

O R D E R

Civil Appeal Nos. 8182-8185/2003 are disposed of in terms of the signed order.

Civil Appeal Nos. 9178/2003 and 288 of 2007 are dismissed.

(SUMAN WADHWA)
AR-cum-PS

(SUMAN JAIN)
COURT MASTER

Signed order is placed on the file.