IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 9892 OF 2013

UltraTech Cement Limited, a public limited]
company having its registered office at]
Ahura Centre, 2nd Floor, B Wing, Mahakali]
Caves Road, Andheri (East), Mumbai-93]... Petitioner

Versus

1. The Union of India,through the Secretary]
Ministry of Finance, Department of]
Revenue, North Block, New Delhi-1]

2. The Commissioner of Central Excise,]
Pune-III, 41A, ICE House, Sassoon Road]
Pune – 411 001.]

3. Directorate General of Central Excise,]
Intelligence, Regional Unit, 6th Floor,]
Vora Kothari Building, 1025, Sadashiv]
Peth, Pune – 411 030.]

4. The Central Board of Excise & Customs]
North Block, New Delhi – 110 001.] ... Respondents

ALONGWITH

WRIT PETITION NO. 1121 OF 2014

UltraTech Cement Limited, a public limited]
company having its registered office at]
Ahura Centre, 2nd Floor, B Wing, Mahakali]
Caves Road, Andheri (East), Mumbai-93]... Petitioner

Versus

1. The Union of India,through the Secretary]
   Ministry of Finance, Department of]
   Revenue, North Block, New Delhi-1]

2. The Commissioner of Central Excise,]
   Pune-III, 41A, ICE House, Sassoon Road]
   Pune – 411 001.]

3. Directorate General of Central Excise,]
   Intelligence, Regional Unit, 6th Floor,]
   Vora Kothari Building, 1025, Sadashiv]
   Peth, Pune – 411 030.]

4. The Central Board of Excise & Customs]
   North Block, New Delhi – 110 001.]

5. The Additional Commissioner of Central]
   Excise, Nagpur Civil Lines, Telankhedi]
   Road, Nagpur – 440 001.]

6. Central Board of Excise & Customs,]
   North Block, New Delhi – 110 001.] ... Respondents

Mr. V. Sreedharan, senior counsel with Mr. Prakash Shah, Shri Jas Sanghavi and Ms. Niyati Hakani i/b PDS Legal for the Petitioner.

Mr. Vijay Kantharia with Mr. J.B. Mishra for the Respondents.

CORAM : S.C. DHARMADHIKARI &
N.W. SAMBRE, JJ.

WEDNESDAY, 11TH FEBRUARY, 2015

<u>ORAL JUDGMENT :</u> [S.C. Dharmadhikari, J.]

1. The petitioners in these writ petitions under Article 226 of the Constitution of India have sought the following reliefs :

> *"(a) that this Hon'ble Court be pleased to issue a writ of Certiorari or a writ in the nature of Certiorari under Article 226 of the Constitution of India, calling for the records pertaining to the impugned Show Cause cum Demand Notices mentioned in table at paragraph 3 of the present Petition and after going into the validity and legality thereof to quash and set aside the same being contrary to the Circular dated 30.6.2000 and Circular dated 1.7.2002 issued by the Respondents No.4?*
>
> *(b) that this Hon'ble Court be pleased to issue writ of prohibition or any appropriate writ in the nature of prohibition prohibiting the Respondents their subordinates, servants and agents from taking any further steps or proceedings pursuant to or in furtherance of Show Cause cum Demand Notices mentioned in table at paragraph 3 of the present Petition."*

2. In prayer clause (d) of the writ petition, a writ of mandamus or any writ, order or direction in the nature thereof has been sought to

direct the respondents to apply a larger bench decision of the Tribunal in the case of *Ispat Industries Limited vs. Commissioner of Central Excise 2007 (209) Excise Law Times, Pg. 185*.

3. When this writ petition was called out for admission, Mr. Kantharia appearing on behalf of the Revenue / respondents raised a preliminary objection and submitted that the writ petition may not be entertained as it challenges a show cause-cum-demand notice. Since the matter has been brought at the stage of a show cause notice, this Court should not interfere in writ jurisdiction. More so, when there are disputed questions of fact. Mr. Kantharia was fair to submit that the writ petition proceeds on certain conjectures and surmises, particularly that the show cause notice would be necessity and is bound to be adjudicated against the petitioners, meaning thereby the demand would be confirmed. The show cause notice is based on certain understanding of the department / Revenue of a position in law, but according to Shri Kantharia, that does not mean that the contentions of the petitioners and based on the grounds in this writ petition will not be fairly considered and adjudicated. There is

absolutely no basis for a general assumption. More so, when in the case of an adverse adjudication as well, there are multiple remedies under The Central Excise Act, 1944. At this stage, therefore, this Court should refrain from interfering in writ jurisdiction. More so, in the light of the clarification given on behalf of the Revenue.

4. Mr. Kantharia has placed heavy reliance on the judgments rendered by the Hon'ble Supreme Court, firstly in the case of *Union of India vs. Guwahati Carbon Limited (2012) 11 SCC Pg. 561*. Mr. Kantharia then relies upon the two Division Bench judgments of this Court which follow a Supreme Court decision and particularly on the point of availability of alternate and equally efficacious remedy.

5. To be fair to Mr. Kantharia, he has also attempted to deal with other contentions raised on behalf of the petitioners. These contentions have been summarized during oral arguments and in a brief synopsis by the petitioners. For the view that we propose to take and the final order that is to follow thereafter, we do not deem it fit to refer to other contentions of Mr. Kantharia.

6. On the other hand, while meeting this preliminary objection, Mr. Sreedharan, learned senior counsel appearing for the petitioners submits that the show cause notices, and about 14 in number, have been issued in the backdrop of certain clearances and of cement. The petitioners manufacture cement of various grades and certain clearances are to their own factory. The petitioners have pointed out as to how they manufacture the products and which are cleared to their own ready-mix concrete units for captive consumption in the manufacture of ready-mix concrete. The petitioners have cleared the cement to these units viz. the ready-mix concrete units, packing plants on payment of duty on the value determined under Rule 8 of The Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, at 100% of the cost of production.

7. According to the Revenue, the assessable value of cement cleared to these ready-mix concrete units, packing plants is required to be determined in terms of Rule 4. Inviting our attention and extensively to the scheme of the Central Excise Act, particularly

section 4 sub-section (1), clauses (a) and (b), and the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, Mr. Sreedharan would submit that Rule 8 is very specific and applies to captive consumption of goods in the manufacture of other articles. In the present case, all conditions of Rule 8 are fulfilled. If the Rules which are in place for determining assessable value and particularly Rule 8 falling therein have been understood by the department by a circular issued on 30th June, 2000 and by a further circular dated 1st July, 2002, then, nothing contrary thereto can be urged by the Revenue. The law on the point is very clear according to Mr. Sreedharan viz. that department circulars are binding on the department or Revenue. They may not bind the Court because it is the Court's duty and obligation to interpret the law. However, and so far as the department is concerned, it cannot devise anything contrary to the rules and the circulars in valuing the goods which have been sold, or are captively consumed.

8. Mr. Sreedharan, therefore, submits that this is not a case where there is any factual dispute. This is not a case where the court is

called upon to adjudicate on disputed questions of fact. This Court can proceed on the assumption that all allegations in the show cause notice and at this stage are true and correct and assuming them to be true, the department cannot act and proceed contrary to the aforementioned circulars and Rule 8 of the Rules. Therefore, the attempt in issuing the show cause notice and raising the demand is to get over these circular and the clear language of Rule 8. That is issued with the aid and assistance of an order passed by a larger Bench of the Tribunal and which Mr. Sreedharan submits has been rendered in the case of *Ispat Industries Limited* (supra). Mr. Sreedharan would submit that the decision of the larger Bench of the Tribunal is completely contrary to the judgment of this Court in the case of *Indian Drugs Manufacturers Association vs. Union of India 2008 (222) Excise Law Times, Pg. 22.*

9. Mr. Sreedharan would submit that this Court did not in the decision rendered in *Indian Drugs Manufacturers Association* in any way hold that the language of rule 8 admits of a construction as has been placed by the larger Bench of the Tribunal on it. The larger Bench has read into this judgment and the Rule something which is

apparently not there. There is no requirement of the entire production being captively consumed and that is how Rule 8 must be read and restricted to that situation. In the circumstances, Mr. Sreedharan would submit that it is only this Court which can clarify the legal position and proceeding on the assumption as noted above. In other words, assuming the allegations in the show cause notice to be true and correct and only on demur this Court can grant the reliefs prayed in the writ petition.

10. Mr. Sreedharan has placed heavy reliance on the circulars and the judgment of the Hon'ble Supreme Court in the case of *Commissioner of Central Excise vs. Dhiren Chemical Industries 2002 (139) Excise Law Times, Pg.3*, the Decision in the case of *Dabur India Limited v. Commissioner of Central Excise 2003 (157) Excise Law Times, Pg.129* and another judgment in the case of *Commissioner of Central Excise vs. Ratan Melting & Wire Industries 2008 (12) Sales Tax Reporter, Pg. 416*.

11. With the assistance of the counsel appearing for both sides, we have perused the writ petition and the annexures. Once Mr. Kantharia

has clarified that irrespective of what has been alleged in the show cause notice and the understanding of the department of the legal position, the Adjudicating Authority will hear the petitioners and at such hearing, allow it to raise all objections, including relying on the circulars of the department, then, we need not express anything with regard to the rival contentions. Suffice it to state that Mr. Kantharia's fair concession even extends to the petitioners being allowed to argue that the larger Bench decision of the Tribunal in the case of *Ispat Industries Limited* (supra) will not assist the Revenue in any manner. That decision apart, the case of the present petitioners must be considered in the light of the legal provision viz. Rule 8 and the circulars which bind the department.

12. If above contentions can be raised in the adjudication, then we have no doubt in our mind that the Adjudicating Authority will duly consider them and render its findings and conclusions uninfluenced by the allegations in the show cause notice, but in the light thereof. While rendering its findings and conclusions, the Adjudicating Authority will not completely bind itself by the Tribunal's view, but

also note and consider duly, the arguments that the said decision has either no application to the present case or that the said decision cannot override the circulars which bind the department.

13. We are of the view that the allegations in the show cause notice are that the petitioners are engaged in the manufacture of cement and ready-mix concrete. The allegations are founded on the position that the petitioners are having plants and units located at various places all over India. The cement and ready-mix concrete manufacturing plants are not located in the same premises. They are independent of each other for operation and accounting purposes. The ready-mix concrete plants of M/s. UltraTech Cement Limited procured cement only from the UltraTech Cement manufacturing plant. All these plants are registered with the department and have been availing of all the benefits and also paying duty in terms of the Act.

14. The allegations then proceed by stating that an intelligence was received which indicated that M/s. Ultra Tech Cement Limited having undervalued the cement cleared by plants to the ready-mix concrete plants and, therefore, in pursuance thereof, some of these

manufacturing plants were searched. The officers then seized documents and recorded statements of various officials. These are extensively referred to in the show cause notices and thereafter the allegations are that the petitioners have not assessed the clearance of their final product to their own ready-mix concrete plants and why that should not be in terms of Rule 4 read with Rule 11. There are other allegations and which have been summarized in paragraph 25 of the show cause notice at running pages 88 and 89.

15. We are not in any way required to refer to all the defences which the petitioners can raise and have rather raised. Suffice it to note that the legal provisions have been brought to our notice. Section 4 of The Central Excise Act, 1944 deals with valuation of excisable goods for purposes of charging of duty of excise. The duty of excise is chargeable on excisable goods with reference to their value then on each removal of the goods the value shall be determined. In a case where the goods are sold by the assessee for delivery at the time and place of the removal, the assessee and the buyer of the goods are not related and the price is the sole consideration for sale, it would be the

transaction value for the purposes of computation of duty chargeable on the excisable goods. In any other case, including where the goods are not sold, the value has to be determined in accordance with the manner prescribed. The word "prescribed" means prescribed by the Rules. Therefore, The Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, have been issued. They define the term "normal transaction value" in Rule 2 clause (b). They define the value to mean the value referred to in section 4 of the Act and they clarify that words and expressions used in these Rules and not defined in the Act shall have the meanings respectively assigned to them in the Act.

16. Chapter II of the Rules provide for determination of value and by Rule 3 itself it has been clarified that value of any excisable goods for purpose of clause (b) of sub-section (1) of section 4 be determined in accordance with these Rules. Thus, the goods which are not sold and cases which are not dealt with by section 4(1) clause (a) and covered by clause (b) the value shall be determined in terms of these Rules. Thereafter, there are Rules which provide for the value being

determined. Rule 4 provides for the value of excisable goods and to be based on value of such goods sold by the assessee for delivery at any other time nearest to the time of removal of the goods under assessment, subject, if necessary to such adjustments on account of difference in the date of delivery of such goods and of the excisable goods under assessment as may appear reasonable.

17. Thereafter, cases of valuation based on the transaction value, excluding the cost of transportation in a situation where the excisable goods are sold for delivery at a place other than the place of removal are covered by Rule 5. Then comes Rule 6 where for the purposes of valuation one more instance or guide is provided.

18. Rule 7 then takes into consideration a case where the goods are not sold by the assessee at the time and place of removal but transferred to a depot premises of a consignment agent or any other place or premises (such other place from where the excisable goods are to be sold after their clearance from the place of removal). Rule 8 covers a case of excisable goods which are not sold but are used for consumption by the assessee or on his behalf in the production or

manufacture of other articles and in that case, the value shall be in terms of this Rule, but on the cost of production or manufacture of such goods.

19. We have no doubt in our mind that the Adjudicating Authority will bear in mind the clear language of these Rules and the sub-rules, if any. There is nothing and after the clarification by Mr. Kantharia, by which the petitioners cannot expect a fair adjudication. Once there are circulars in place which also take into consideration the situation which may have to be dealt with and for guiding the Revenue officials and particularly clauses like clause 29 of the circular dated 30th June, 2000, devise some scheme, then that is bound to be taken note of. In the circumstances, we do not think that the respondents will be only guided by the view taken in the larger Bench decision of the Tribunal. That may have been referred to in the show cause notice, but it is always open for the petitioners to contend that the Tribunal decision cannot have any application to their case. Further, it can be urged that the Tribunal decision cannot be said to be running contrary to or overriding any circulars which, according to the petitioners, bind the

department or Revenue. All contentions of the petitioners, including based on the grounds in the writ petition are, therefore, kept open and for being raised. Equally all contentions of the Revenue to the contrary are kept open.

20. Once we have clarified as above and additionally that we express no opinion on the rival contentions, then the writ petition need not be kept pending. It is, accordingly, disposed of.

N.W. SAMBRE, J. ***S.C. DHARMADHIKARI , J.***