

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.08.2016

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MR.JUSTICE D.KRISHNA KUMAR

C.M.A.No.700 of 2012

Commissioner of Central Excise and
Service Tax Large Taxpayer Unit,
Chennai. ... Appellant

versus

M/s.Chemplast Sanmar Ltd.,
No.9, Cathedral Road,
Chennai 600 086. ... Respondent

Prayer: Civil Miscellaneous Appeal is filed under Section 35(G) of Central Excise Act, 1944, against the Final Order No.515 of 2010, dated 04.05.2010, read with Miscellaneous Order No.371 of 2011, dated 25.07.2011, passed in Application for Rectification of Mistake E/ROM/62/2010, filed against the Final Order No.515 of 2010, dated 04.05.2010, passed by the Customs, Excise and Service Tax Appellate Tribunal, Chennai.

For Appellant : Mr.A.P.Srinivas

For respondent : Mrs.L.Maithili

JUDGMENT

(made by S.MANIKUMAR, J.)

Civil Miscellaneous Appeal is directed against the Final Order No.515 of 2010, dated 04.05.2010, read with Miscellaneous Order No.371 of 2011, dated 25.07.2011, passed in the Application for Rectification of Mistake E/ROM/62/2010, filed against the Final Order No.515 of 2010, dated 04.05.2010, passed by the Customs, Excise and Service Tax Appellate Tribunal, Chennai.

2. Facts leading to the appeal are that M/s.Chemplast Sanmar Ltd, PVC Division, respondent herein, are manufacturers of denatured ethyl alcohol, falling under Chapter sub-heading

2204.00 of the first schedule to the Central Excise Tariff Act, 1985, as it stood at the material time. Denatured ethyl alcohol manufactured was cleared to their own unit at Mettur dam, for further use in the manufacture of other products. As the value of the product was provisional, the Assistant Commissioner of Central Excise, Pondicherry, vide letter C.No.V/Ch-22/17/31/94-VC, dated 17.10.1994, ordered for provisional assessment, on the grounds that price of comparable goods should be adopted and further details were required, for arriving at the manufacturing cost of the product. The respondent was issued with notices dated 16.03.1995, 13.02.1996, 17.02.1997 and 21.05.1997 respectively, proposing finalisation of the provisional assessment for clearances made during various periods, on the basis of comparable goods manufactured and sold by M/s EID Parry (I) Ltd.

3. After due process, the Assistant Commissioner of Central Excise, Cuddalore Central Excise Division, vide Order-in-Original No.30/1998 dated 22.05.1998, dropped the proposal to adopt the price of comparable goods, under Rule 6b(i) of the Central Excise (Valuation) Rules, 1975 and ordered that the value should be arrived at, in terms of Rule 6b(ii) of the Rules. The Assistant Commissioner also observed that,

"In this connection I also peruse the copies of the CA certificate and I find that there was no indication as to the inclusion of duty elements on the raw materials used. In case the same is not added so far, it may be added to arrive at the assessable value, as cost of the product includes duty suffered on the raw materials as well as other expenses like transportation cost of the same."

He then ordered the value to be arrived "in terms of the Rule 6b (ii) of the Central Excise (Valuation) Rules, 1975 and the assessments of RT 12s be finalised in line with the conclusion of this order." The respondent did not challenge the order of the Assistant Commissioner. It has reached finality.

4. The Superintendent of Central Excise, Range I Cuddalore, quantified the differential duty payable by the respondent, in terms of the Order-in-Original No.30 of 1998, dated 22.05.1998, while arriving at the costs, in terms of Rule 6(b)(ii) of the Central Excise (Valuation) Rules, 1975, by including the duty element on the inputs and communicated the same, vide letter O.C.No.1251/98, dated 20.11.1998. Then, the respondent has filed an appeal in A.No.80 of 1999, against the Superintendent's letter, dated 20.11.1998, before the Commissioner of Central Excise (Appeals), Tiruchirapalli. Due to re-organisation of the jurisdictions in November 2002, the appeal was subsequently, transferred to the Commissioner of

Central Excise (Appeals), Chennai. The appeal was renumbered as Appeal No.249/2002-(P) and disposed of the same, vide Order-in-Appeal No.216 of 2003(P), dated 12.06.2003.

5. In the appeal, the Commissioner (Appeals) found that the Order-in-Original passed by the Assistant Commissioner, had attained finality, as the same had not been challenged by the respondent. He also held that the appeal against the Superintendent's letter, being an indirect challenge to the Assistant Commissioner's Order, would not be sustainable, in view of the decision of the Hon'ble Supreme Court in Flock India Pvt. Ltd., reported in 2000 (120) ELT 285.

6. Aggrieved by the order of the Commissioner (Appeals), the respondent has filed Appeal.No.E/695/2003, before the CESTAT, South Zonal Bench Chennai. The said appeal came to be disposed of, by the Tribunal, vide Final Order No.515/2010, dated 04.05.2010, by which, the Tribunal remanded the matter to the jurisdictional Superintendent to consider the submissions of the respondent, and the judgment rendered in Dai Ichi Karkaria Ltd., reported in 1996 (81) ELT 676.

7. The Tribunal remanded the matter, on the ground that the Superintendent has not given the respondent, an opportunity of hearing, before directing them to pay the differential duty and also directed the Superintendent to consider the submission of the assessee and the decision made in Dai Ichi Karkaria Ltd., reported in 1996 (81) ELT 676.

8. According to the appellant, the Tribunal, while remanding the matter, failed to consider the fact that the Superintendent was not the proper authority to finalise provisional assessment, under Rule 9(B) of the erstwhile Central Excise Rules, 1944 and that the Tribunal has not addressed the question, as to whether, an appeal against the Superintendent's letter is maintainable or not, in the absence of any challenge to the Assistant Commissioner's order. Therefore, an application for rectification of mistake, in terms of sub-section (2) of section 35C of the Central Excise Act, 1944, was filed in E/ROM/62/2010. However, the said application came to be disposed of, vide Misc Order No.371/2011, dated 25.07.2011, observing that there was no mistake apparent from the record.

9. Being aggrieved by the orders, passed both in the appeal and the rectification application, the present appeal has been filed. Record of proceedings shows that on 09.04.2012, while admitting the Civil Miscellaneous Appeal, this Court has framed the following substantial questions of law,

"(1) Whether the Hon'ble Tribunal in Final Order No.515 of 2010, dated 04.05.2010, was correct in remanding the issue to the Superintendent, who is not

empowered under the statute to issue orders for finalization of provisional assessment?

(2) Whether the Hon'ble Tribunal, while passing Miscellaneous Order No.371/2011, dated 25.07.2011, was correct in dismissing the department's application was Rectification of Mistake E/ROM/62/2010, in Final Order No.515 of 2010, dated 04.05.2010, wherein, grounds for rectification of mistake had been raised on the lines of the foregoing questions of law?

(3) Whether the appeal filed against the Superintendents letter O.C.No.1251 of 1998, dated 20.11.1998 issued in pursuance of and in execution of the Assistant Commissioner's Order-in-Original 30/1998, dated 22.05.1998, is maintainable, in view of the Hon'ble Supreme Court judgments in the case of Flock India Pvt. Ltd., reported in 2000 (120) ELT 285 and Priya Blue Industries Ltd., reported in 2004 (172) ELT 145?"

10. Referring to Rule 9B(6) of the erstwhile Central Excise rules, 1944, which states that, "In cases of provisional assessment, the final assessment shall be made by the proper officer.", the appellant has contended that proper officer has been designated as the Deputy or Assistant Commissioner of Central Excise and therefore, the Superintendent is not the proper officer, to finalise the provisional assessment.

11. Referring to Rule 7(3) of the abovesaid Rules, the appellant has further submitted that the Superintendent's letter, dated 20.11.1998, is not an order of final assessment, but issued only to implement the finalisation order passed by the Assistant Commissioner, under Rule 9B of the erstwhile Central Excise Rules, 1944 and therefore, the appeal filed by the respondent against the letter, implementing the finalisation order, is not maintainable.

12. The appellant has further submitted that the Commissioner (Appeals) had dismissed the respondent's appeal, on the ground that, the Assistant Commissioner's order, finalising provisional assessment, had not been challenged and consequently, the same has attained finality. Though the Tribunal has set aside the Order of the Commissioner (Appeals), it does not have the effect of setting aside the order of the Assistant Commissioner, as the Assistant Commissioner's order, not being the subject matter of appeal, has not merged with the Commissioner (Appeals) order. Further, as the Assistant Commissioner's order has neither been challenged nor set aside by any judicial / quasi judicial authority, and therefore it is still operative.

13. The appellant further submitted that the Tribunal has remanded the matter to an authority, who is not empowered to issue any orders for finalisation of the provisional assessment and he is also bound by the directions, passed by the Assistant Commissioner. Unless the Assistant Commissioner's order is challenged and set aside, the Superintendent cannot be directed to consider the judgment in Dai Ichi Karkaria's case. Directions given in the Assistant Commissioner's order, is still valid and operative, and therefore, there is an error apparent from the record, and in such circumstances, the Tribunal ought to have entertained the appeal.

14. Placing reliance on CCE Vs Flock India Pvt. Ltd. reported in 2000 (120) ELT 285 SC, the appellant has further submitted that when an order, which is appealable under the Act is not challenged, then the order is not liable to be questioned, the matter should not be reopened in any other proceeding.

15. Per contra, the respondent has submitted that they are the manufactures, inter alia, denatured ethyl alcohol, at its plant at Kadampuliyur, in Cuddalore District and clears the same to its own factories for manufacture of other Final Products. Assessments were subjected to provisional assessment, in terms of Rule 9B of the Central Excise Rules, 1944, by an order dated 17.10.1994. The Assistant Commissioner ordered for provisional assessment, on account of a dispute, on the method of valuation to be adopted for the de-natured ethyl alcohol cleared for captive consumption. However, the Department's stand was that valuation was required to be done in terms of Rule 6b(i) of the erstwhile Central Excise Valuation Rules, 1975, on the basis of the value of comparable goods. On the other hand, the assessee's case was that since no comparable goods were being cleared by other manufacturers, the methodology provided under Rule 6b(i) of the said Valuation Rules, would alone be applicable. In terms of Rule 6b(ii), value is required to be determined the basis of cost of production plus notional profit.

16. The respondent has further submitted that four Show Cause Notices dated 16.03.95, 13.02.96, 02.97, 25.05.97 respectively, were issued seeking to adopt a value on the basis of the value of denatured spirit sold by M/s.EID Parry India Ltd., in terms of Rule 6b(i) of the Valuation Rules. These Show Cause Notices were adjudicated, by a common order, dated 22.05.98, whereby, the jurisdictional Assistant Commissioner of Central Excise, Cuddalore, accepted the respondent's case that the valuation was required to be done in terms of Rule 6b(ii) and to drop the show cause proceedings initiated against the respondent. However, the Assistant Commissioner observed that

the duty element on the raw materials used did not appear to be included in the value and directed the Superintendent of Central Excise, Range-1, Cuddalore, to quantify the differential duty, if any, on the raw material and finalize the Assessment.

17. Thereafter, the Superintendent of Central Excise has passed an order dated 20.11.98, determining the differential duty by including the duty element in the cost of raw materials. Since the Assessee/respondent was not put on notice before the demand was made by the Superintendent, on 25.12.98, the respondent wrote to the Superintendent of Central Excise stating that the duty element on the raw materials, availed as MODVAT credit had wrongly been included, while arriving at the cost of raw material. The Superintendent of Central Excise responded to this letter by way of an endorsement to the same letter, calling for reasons for non-inclusion of input duty in the cost of denatured spirit. In response to this query of the superintendent, the respondent clarified, by letter, dated 22.01.1999, that as per the CEGAT larger bench decision in the Dai Ichi Karkaria case, the duty element on the inputs is not required to be taken as a part of the cost of raw material and if the department did not agree to this, due process of law should be followed. However, the Superintendent of Central Excise passed an order dated 05.02.1999, communicating that the decision of the Assistant Commissioner with respect to the letter dated 22.01.1999 and that the respondent should either pay the balance amount or challenge the order.

18. Thus, the respondent carried the matter in appeal, before the Commissioner of Central Excise, Appeals, challenging the order dated 20.11.98 issued by the Superintendent of Central Excise, demanding differential duty. The Commissioner Appeals, without going into the merits of the case dismissed the appeal, on the ground that the Order in Original, dated 22.05.98, had not been challenged by the respondent. On Appeal to CESTAT against this Order, the Tribunal, after taking into account the valuation dispute, passed an order, dated 04.05.2010, and noticing that the Superintendent has not given an opportunity of hearing before directing the respondent to pay the differential duty, remitted the case for fresh decision on merits, after taking into account the judgment in Dai Ichi Karkaria's case. The Revenue filed an application for rectification of mistake, wherein, it was admitted that the issue on merits was settled by the Hon'ble Supreme Court in favour of the respondent in the case of Dai Ichi Karkaria, reported in 1999 (112) ELT 353. The rectification of mistake petition came to be dismissed. The respondent has submitted that the decision of the Tribunal is in accordance with Dai Ichi Karkaria's case, and therefore, there is no need to interfere. It is also submitted that when there is a violation of the principles of natural justice, there is nothing wrong in directing the Superintendent, to give an

opportunity of hearing. For the above said reasons, respondent has prayed to sustain the order impugned.

Heard the learned counsel for the parties and perused the materials available on record.

19. Appellant is a manufacturer of denatured ethyl alcohol at its plant, Kadampuliyur, Cuddalore District. Case of the appellant is that it had cleared denatured ethyl alcohol to its own factory for manufacture of other final products. On 17.10.1994, Assistant Collector of Central Excise, Central Excise Division, Pondicherry ordered provisional assessment. Thereafter, on 16.03.2005, 13.02.1996, 17.02.1996 and 21.05.1997 respectively, notices have been issued to show cause, as to why they should not be directed to adopt the price Rs.19.50/ltr adopted by M/s.E.I.D Parry India Ltd., Nellikuppam for sales at any given point of time for payment of Central Excise duty payable on denatured ethyl alcohol cleared by them for captive consumption, being the value of comparable goods in terms of Rule 6(b)(i) of Central Excise (Valuation) Rules, 1975 and consequently, to reassess the duty on goods cleared and pay the difference, if any in terms of Rule 173(4) of Central Excise Rules, 1944. Subsequently, vide Order-in-Original No.30/98 dated 22.05.1998 has been passed by the Assistant Commissioner of Central Excise, Cuddalore Division, whereupon, the proposal to adopt the price of comparable goods under Rule 6(b)(i) of Central Excise (Valuation) Rules, 1975 has been dropped. Setting out the reasons for dropping the proposals to adopt the price of comparable goods, the Assistant Commissioner of Central Excise, Cuddalore Division vide order dated 22.05.1998 ordered as here under:

" In view of the above facts and circumstances of the case, I hold that the DNS manufactured and cleared by the assessee to their own unit at Mettur Dam and the DNS manufactured and cleared by M/s.EID Parry (I) Ltd., Nellikuppam to IMFL and others are not comparable goods of same kind and quality so as to arrive at the assessable value in terms of Rule 6 (b)(i) of Central Excise (Valuation) Rules, 1975. Alternatively, the value is therefore to be determined under Rule 6(b)(ii) of the Central Excise (Valuation) Rules, 1975 on the basis of manufacturing cost plus manufacturing profit.

In this connection, I also peruse the copies of the CA Certificate and I find that there is no indication as to the inclusion of duty elements on the raw materials used. In case, the same is not added so far, it may be added in the value to arrive at assessable value, as cost of the product includes duty suffered on the raw materials as well as other expenses like transportation cost of the same.

ORDER

I hereby order that in all the cases covered by the show cause notices issued in C.No.V/Ch 72/17/31/94 VC dt.16.3.95 & 13.2.96 and C.No.V/R.II and 17/20/97 VC dt. -.2.97 and C.No.V/RI and 17/20/97 VC dt.21.5.97, the proceedings initiated for adoption of the value of the DNS sold by M/s.EID Pary (I) Ltd. in the assessee's case are dropped.

2. The value is ordered to be arrived at in terms of the Rule 6 b(ii) of the Central Excise (Val) Rules, 1975 and the assessments of RTI2s be finalised in line with the conclusion of this order.

3. Duty if any short paid is ordered to be paid in terms of Rule 9B(5) of the Central Excise Rules 1944 immediately."

While doing so, the Assistant Commissioner of Central Excise, Cuddalore Division has directed the Superintendent (Tech), Central Excise Division, Cuddalore, to quantify the differential duty, if any, due to the inclusion duty element on the raw material and finalise the RTI2 assessment accordingly, and report compliance.

20. At this juncture, this court deems it fit to extract Rule 6(b)(i) and (ii) of the Central Excise (Valuation) Rules, 1975:

(b) Where the excisable goods are not sold by the assessee but are used or consumed by him or on his behalf in the production or manufacture of other articles, the value shall be based -

(i) on the value of the comparable goods produced or manufactured by the assessee or by any other assessee:

Provided that in determining the value under the sub-clause, the proper officer shall make such adjustments as appear to him reasonable, taking into consideration all relevant factors and, in particular, the difference, if any, in the material characteristics of the goods to be assessed and of the comparable goods;

(ii) If the value cannot be determined under sub-clause (i), on the cost of production or manufacture including profits, if any, which the assessee would have normally earned on the sale of such goods;

21. Pursuant to the directions of the adjudicating authority, namely, the Assistant Commissioner of Central Excise, and by observing that as per the details available in the findings and discussions, and in working out the cost of duty element on the inputs used is not included, and the same should be included for the purpose of arriving at the cost, and taking note of the declared cost/KL, Final cost/KL for the years 1994-95, 1995-96, 1996-97, 1997-98, the Superintendent has computed the differential cost at Rs.1,14,29,086/-. The Superintendent, vide letter dated 20.11.1998 has requested the respondent to pay the above said differential duty for the Financial Year 1997-98 within one week. Along with the letter dated 20.11.1998, he has also enclosed the working sheets.

22. Material on record further discloses that being aggrieved by the same, the respondent has filed an appeal to the Commissioner of Central Excise, Puducherry. After hearing the learned counsel for the appellant, the appellate authority has passed an order in Appeal No.216/2003, as hereunder:

" From the case records it transpires that the Assistant Commissioner, Cuddalore in File No.c.No.V/RI Cud/17/20/97 VC daed 22.05.98 - issued Order -in-Original No.30/98 finalising Provisional Assessment for the financial year 1997-98. No appeal was preferred against this order by the Appellants. Thus this order has attained finality. Based on this order, the Superintendent of Central Excise, Range I, Cuddalore issued a letter bearing OC No.1251/98 dated 20.11.98 directing the Appellant to pay differential duty of Rs.1,14,29,086/-. This impugned Appeal has been filed against this letter of the Superintendent, and thereby indirectly challenges the Order-in-Original No.30/98 which was not appealed against.

I am unable to accept the plea of the Appellant. Order-in-Original No.30/98 has attained finality by reason of it not being challenged before any higher appellate forum. The Hon'ble Supreme Court in CCE Vs Flock India Pvt. Ltd. reported in 2000 (120) ELT 285 SC has held "Non challenge of an appealable order - attains finality - cannot be challenged by refund claim". This ratio is directly applicable to the facts of the present case.

Appeal rejected."

23. Being aggrieved by the same, the respondent M/s.Chemplast Sanmar Ltd., Chennai has filed Appeal No.E/695/03 before the CESTAT, Chennai. Adverting to the rival submissions, and accepting the contentions of the assessee/respondent that they were not heard by the Superintendent, before a direction was issued to pay differential duty of Rs.1,14,29,086/-, the Tribunal vide order dated 04.05.2010, set aside the order of the Commissioner of Central Excise (Appeals), Chennai made in Appeal No.216/2003 (Pondicherry) and remitted the matter for fresh decision on merits by the Jurisdictional Range Superintendent, to consider the submission of the assessee and also the decision of Dai Ichi Karkaria Ltd. vs. Collector of Central Excise, Pune, reported in 1996 (81) E.L.T. 676 (Tribunal) and to pass fresh orders after extending a reasonable opportunity of the assessee being heard.

24. It is the submission of Mr.A.P.Srinivas, learned senior standing counsel for Central Excise and Service Tax departments that reasonable opportunity had already been given to the respondent/assessee, by the Assistant Commissioner of Central Excise, Pondicherry, by issuing show cause notices and that the assessee has also given opportunity to produce all the evidences intended to rely, in support of the defence, in the adjudication. The assessee was also informed to indicate as to whether they should be heard in person also. Responding to the above, written submissions were made and personal hearing was also given on 18.02.1998, and in such circumstances, no opportunity of hearing by the Superintendent is required.

25. Perusal of the order in original shows that the respondent/assessee has also pleaded for accepting the cost construction declined by them under Rule 6(b)(ii) of the Central Excise (Valuation) Rules, 1975 and pleaded dropping of further proceedings. After extracting the summary of the reply, and the material on record, the Assistant Commissioner of Central Excise, Cuddalore, vide order in Original No.30/98 dated 22.05.1998 has ordered as hereunder:

" On transfer of files consequent on bifurcation of Central Excise division, Pondicherry, a personal hearing was held on 18.2.98 Shri. R.Seshadri, Executive Manager (Accounts) of M/s.Chemplast Sanmar Ltd., appeared before me and submitted a written submission. In which, in addition to their earlier contentions, it is stated that EID Parry India (I) Ltd produces and sells alcohol mainly for IMFL manufacture and their product is potable whereas DNS manufactured by the assessee is consumed for PVC manufacture and is not consumable. In view of the above facts, they pleaded for accepting the cost

construction declared by them under Rule 6(b)(ii) of Valuation Rules, 1975 and for dropping further proceedings."

26. Accordingly, the Assistant Commissioner of Central Excise, Cuddalore, has passed Order-in-Original in No.30/98 dated 22.05.1998 dropping proceedings under Rule 6(b)(i) of the Central Excise (Valuation) Rules, 1975 and ordered as hereunder:

1. The value is ordered to be arrived at in terms of the Rule 6 b(ii) of the Central Excise (Val) Rules, 1975 and the assessments of RTI2s be finalised in line with the conclusion of this order.

2. Duty if any short paid is ordered to be paid in terms of Rule 9B(5) of the Central Excise Rules 1944 immediately."

While doing so, the Assistant Commissioner of Central Excise, Cuddalore Division has also directed the Superintendent (Tech), Central Excise Division, Cuddalore, to quantify the differential duty, if any, due to the inclusion duty element on the raw material and finalise the RTI2 assessment accordingly and report compliance."

27. As rightly contended by the learned senior standing counsel for the Central Excise and Service Tax Department, reasonable opportunity and personal hearing, have been given to the respondent/assessee, when adjudication was done.

28. Rule 6 of the Central Excise (Valuation) Rules, 1975 reads as hereunder:

6. If the value of the excisable goods under assessment cannot be determined under rule 4 or rule 5, and -

(a) where such goods are sold by the assessee in retail, the value shall be based on the retail price of such goods reduced by such amount as is necessary and reasonable in the opinion of the proper officer to arrive at the price at which the assessee would have sold such goods in the course of wholesale trade to a person other than a related person:

Provided that in determining the amount of reduction, due regard shall be had to the nature of the excisable goods, the trade practice in that commodity and other relevant factors.

(b) Where the excisable goods are not sold by the assessee but are used or consumed by him or on his behalf in the production or manufacture of other articles, the value shall be based -

(i) on the value of the comparable goods produced or manufactured by the assessee or by any other assessee:

Provided that in determining the value under the sub-clause, the proper officer shall make such adjustments as appear to him reasonable, taking into consideration all relevant factors and, in particular, the difference, if any, in the material characteristics of the goods to be assessed and of the comparable goods;

(ii) If the value cannot be determined under sub-clause (i), on the cost of production or manufacture including profits, if any, which the assessee would have normally earned on the sale of such goods;

(c) Where the assessee so arranges that the excisable goods are generally not sold by him in the course of wholesale trade except to or through a related person and the value cannot be determined under the clause (iii) of the proviso to clause (a) of sub-section (1) of section 4 of the Act, the value of the goods so sold shall be determined-

(i) in a case where the assessee sells the goods to a related person who sells such goods in retail, in the manner specified in clause (a) of this rule;

(ii) in a case where a related person does not sell the goods but uses or consumes such goods in the production or manufacture of other articles, in the manner specified in clause (b) of this rule;

(iii) in a case where a related person sell the goods in the course of wholesale trade to buyers, other than dealers and related persons, and the class to which such buyers belong is known at the time of removal, on the basis of the price at which the goods are ordinarily sold by the related person to such class of buyers.

29. Rule 6 deals with the details to be taken note of and the methodology to be adopted, in determining the value of excisable goods under assessment. Reading of the Order-in-Original is also indicative, as to how it has to be done, by taking note of the manufacturing cost, manufacturing profit and inasmuch as copies of the certificates produced by the respondent did not indicate, as to the inclusion of duty element

on the raw materials used, the Assistant Commissioner of Central Excise, Cuddalore has observed that in case the same is not added so far, it may be added in the value to be arrive at assessable value as cost of the products includes duty as well as other expenses like transportation cost of the same. He has also directed the Superintendent (Tech), Central Excise Division, Cuddalore to quantify the differential duty, if any, and to finalise the RTI2 assessment, and accordingly report compliance.

30. Admittedly, the respondent/ assessee has accepted that the cost of construction delcared by them under Rule 6(b)(ii) of the Central Excise (Valuation) Rules, 1975 can be applied and prayed for further proceeding, which exactly, the Assistant Commissioner of Central Excise, has done, while passing the order-in-original dated 22.05.1998. As rightly contended, the order-in-original had attained finality and therefore by following the decision in CCE vs Flock India Pvt. Ltd. reported in 2000 (120) ELT 285 SC, the Commissioner of Central Excise has, passed an order in Appeal No.216/2003 (Pondicherry) dated 12.06.2003, stating that there cannot be any indirect challenge to the order-in-original No.30/1998.

31. On the first issue, as to whether the Jurisdictional Superintendent has to provide an opportunity of hearing, this court deems it fit to consider few decisions on the principles of natural justice.

31.1 In Madhya Pradesh Industries Ltd., v. Union of India reported in AIR 1966 SC 671, question considered was whether, under Rule 54 of the Mineral Concession Rules, 1960, framed under the Mines and Minerals Regulation (II) Act, 1957, while deciding the revision application, the revision petitioner, as a matter of right, is entitled to personal hearing. Rejecting the said contention, at Paragraph 10, the Court held as follows:

"As regards the second contention, I do not think that the appellant is entitled, as of right, to a personal hearing. It is no doubt a principle of natural justice that a quasi judicial tribunal cannot make any decision adverse to a party without giving him an effective opportunity of meeting any relevant allegations against him. Indeed, Rules 55 of the rules, quoted supra, recognizes the said principle and states that no order shall be passed against any applicant unless he has been given an opportunity to make his representations against the comments, if any, received from the State Government or other authority. The said opportunity need not necessarily be by personal hearing. It can be by written representation. Whether the said opportunity should be by written

representation or by personal hearing, depends upon the facts of each case and ordinarily it is in the discretion of the tribunal."

31.2. In *Union of India v. Jyoti Prakash Mitter* reported in AIR 1971 SC 1093, in the matter of determining the age of a High Court Judge, in accordance with Article 217 of the Constitution of India, at Paragraph 25, the Hon'ble Apex Court, held as follows:

"Article 217(3) does not guarantee a right of personal hearing. In a proceeding of a judicial nature, the basic rules of natural justice must be followed. The respondent was on that account entitled to make a representation. But it is not necessarily an incident of the rules of natural justice that personal hearing must be given to a party likely to be affected by the order. Except in proceeding in courts a mere denial of opportunity of making an oral representation will not without more vitiate the proceedings. A party likely to be effected by a decision is entitled to know the evidence against him, and to have an opportunity of making a representation. He, however, cannot claim that an order made without affording him an opportunity of a personal hearing is invalid."

31.3. In *Swadeshi Cotton Mills etc., v. Union of India* reported in AIR 1981 SC 818, the Hon'ble Apex Court, at Paragraph 42, held as follows:

"In short, the general principle-as distinguished from an absolute rule of uniform application-seems to be that where a statute does not, in terms, exclude this rule of prior hearing but contemplates a post decisional hearing amounting to a full review of the original order on merits, then such a statute would be construed as excluding the audi alteram partem rule at the pre-decisional stage. Conversely, if the statute conferring the power is silent with regard to the giving of a pre-decisional hearing to the person affected and the administrative decision taken by the authority involves civil consequences of a grave nature and no full review or appeal on merits against that decision is provided, courts will be extremely reluctant to construe such a statute as excluding the duty of affording even a minimal hearing shorn of all its formal trappings and dilatory features at pre-decisional stage, unless, viewed pragmatically, it would paralyse the administrative process or frustrate the need for utmost promptitude. In short this rule of fairplay "must not be jettisoned save in very

exceptional circumstances where compulsive necessity so demands."

31.4. In *Union of India v. Tulsiram Patel* reported in AIR 1985 SC 1416, a Constitutional Bench of the Apex Court considered the scope and extent of applicability of the principles of natural justice to administrative action. The Hon'ble Apex Court observed thus,

"So far as the audi alteram partem rule is concerned both in England and in India, it is well established that where a right to a prior notice and an opportunity to be heard before an order is passed would obstruct the taking of prompt action such a right can be excluded. This right can also be excluded where the nature of the action to be taken its objects and purpose and the scheme of the relevant statutory provisions warrant its exclusion, nor can the audi alteram partem rule be invoked if importing it would have the effect of paralysing the administrative process or where the need for promptitude or the urgency of taking action so demands, as pointed out in *Maneka Gandhi's case*."

32. The direction that has been issued to the Superintendent is only to quantify the differential duty, if any, due to the inclusion duty element on the raw material and finalise RTI2 assessment in terms of Rule 6(b)(ii) of the Central Excise (Valuation) Rules, 1975. In the light of the directions issued by the adjudicating authority, computation of differential duty on the basis of the cost of denatured ethyl alcohol worked out for the financial years 1994-95, 1995-96, 1996-97, 1997-98, while including the input duty paid, cannot be said to be an adjudicatory function, to be discharged by the Superintendent and therefore, an opportunity of hearing is not required. If the arguments of the learned counsel for the respondent/assessee have to be accepted, thus terming computation of the differential duty, to be arrived at by a jurisdictional superintendent of Central Excise, as adjudicatory and therefore opportunity of hearing to all the cases to be given, then, in our considered view, there is no end and it would produce disastrous results of issuing show cause notices by the Superintendents of the Central Excise Department to all the assessees, who submit their returns, hear and determine the value of excisable goods under assessment. In the case on hand, directions have been given by the Adjudicating authority, as to how the valuation and computation of differential duty, if any, has to be done.

33. Functions of an adjudicating authority is quasi judicial and thus while issuing a show cause notice, besides, requiring the assessee to submit a reply within a time frame, the

adjudicating authority has directed the assessee to produce all evidences on which they intend to rely in support of the defence to indicate in the written reply as to whether they wish to be heard in person before the issues adjudicated and in the case on hand, while finalising the provisional assessment on valuation of excisable goods under assessment. The adjudicating authority has provided an opportunity of hearing, which we have recorded in the foregoing paragraphs.

34. Legislature in the statutes has used the expression, 'personal hearing', 'opportunity of being heard', or 'consider the representation' etc. Right if any under an Act to be decided, by the competent authority, may or may not, require an opportunity of being heard. It depends upon the nature of the right. Infringement and consequence thereof, may require the court to interpret a provision and to arrive at a conclusion as to whether an opportunity of being heard or personal hearing, should be provided and read into a provision. Reading of Rule 6 (b)(i) of the Central Excise (Valuation) Rules, 1975, in our considered view does not mandate the Jurisdictional Superintendent, Central Excise to provide an opportunity of hearing, for computation of duty to be paid by an assessee. In the light of the above discussion and decisions, we are of the considered view that the directions of the Tribunal, to the Jurisdictional Range officer to provide an opportunity of hearing, is not in accordance with the scheme of the Act and the rules framed thereunder, and hence the directions are liable to be set aside and accordingly set aside.

35. The second aspect of the case is whether the directions issued by the Tribunal to the Jurisdictional Superintendent to consider the submission of the assessee, in the light of the decision in Dai Ichi Karkaria Ltd. vs. Collector of Central Excise, Pune, reported in 1996 (81) E.L.T. 676 (Tribunal) has to be followed or not?

36. In the case on hand, provisional assessment has been directed to be finalised as per the order-in-original No.30/98 dated 22.05.1998 passed by the Assistant Commissioner of Central Excise, Central Excise Division, Cuddalore. Dai Ichi Karkaria's case has been decided on 11.08.1999. Perusal of the order-in-original dated 22.05.1998 does not indicate, any reference to the above said judgment. As observed earlier, there was no challenge to the order-in-original and therefore, when the appeal was filed against the letter of the Superintendent of Central Excise, Range 1, Cuddalore directing the respondent/assessee to pay the differential duty of Rs.1,14,29,086/-, the appellate authority has rejected the same, stating that the assessment had attained finality. The Appellate authority has passed the order on 12.06.2013, by which time, the Hon'ble court in Collector of Central Excise, Pune vs. Dai Ichi

Karkaria Ltd reported in 1999 (112) ELT 353 SC has approved the decision of the Tribunal, and at paragraph Nos.16 to 19 and 24 to 26, the Hon'ble Apex Court discussed and ordered, as hereunder:

16. The Central Excise Rules, in Chapter V AA, deal with "The credit of duty paid on excisable goods used as inputs". The relevant Rules are Rule 57A to Rule 57J. Sub rule (1) of Rule 57A reads thus :

(1) The provisions of this section shall apply to such finished excisable goods (hereinafter referred to as the final products), as the Central Government may, by notification in the Official Gazette, specify in this behalf, for the purpose of allowing credit of any duty of excise or the additional duty under Section 3 of the Customs Tariff Act, 1975 (51 of 1975), as may be specified in the said notification (hereinafter referred to as the specified duty) paid on the goods used in or in relation to the manufacture of the said final products [whether directly or indirectly and whether contained in the final product or not] (hereinafter referred to as the input) and for utilising the credit so allowed towards payment of duty of excise leviable on the final products, whether under the Act or under any other Act, as may be specified in the said notification, subject to the provisions of this section and the conditions and restrictions that may be specified in the notification:

Provided that the Central Government may specify the goods or classes of goods in respect of which the credit of specified duty may be restricted."

Rule 57C states that no credit of duty paid on a final product may be allowed if the final product is exempt from the whole of the excise duty leviable thereon or is chargeable to a nil rate of duty. Rule 57D says that the credit of duty allowed in respect of any inputs shall not be denied or varied on the ground that part of the inputs is contained in any waste, refuse, or by-product arising from the manufacture of the final product or on the ground that any intermediate product has come into existence during the course of the production of the final product. Rule 57E says that if the duty paid on any inputs on which credit has been allowed is varied subsequently, the credit allowed shall be varied accordingly by adjustment of the credit account or, if adjustment is not possible for any reason, by cash recovery from or, as the case may be, by refund to the manufacturer availing of the credit. Rule 57F(1) reads thus : The

inputs in respect of which a credit of duty has been allowed under rule 57A -

(i) may be used in, or in relation to, the manufacture of final products for which such inputs have been brought into the factory; or

(ii) shall be removed, after intimating the Assistant Commissioner of Central Excise having jurisdiction over factory and obtaining a dated acknowledgement of the same from the factory for home consumption or for export under bond.

Provided that where the inputs are removed from the factory for home consumption on payment of duty of excise, such duty excise shall be the amount of credit that has been availed in respect of such inputs under rule 57A.

Rule 57G provides that the manufacturer intending to take credit of duty paid on inputs must file a declaration with the concerned excise officer indicating what the final products are that are manufactured in its factory and the inputs intended to be used therein and obtain an acknowledgment thereof. The manufacturer, having filed the declaration and obtained the acknowledgement, can take credit for the duty on the inputs received by him. Rule 57I provides for the recovery of credit wrongly availed of or utilised in an irregular manner. The manufacturer is then required to show cause why he should not be disallowed such credit, or, if it has utilised it, why its value should not be recovered from him. After considering the reply, the concerned excise officer is empowered to make the appropriate order in such terms.

17. It is clear from these Rules, as we read them, that a manufacturer obtains credit for the excise duty paid on raw material to be used by him in the production of an excisable product immediately it makes the requisite declaration and obtains an acknowledgement thereof. It is entitled to use the credit at any time thereafter when making payment of excise duty on the excisable product. There is no provision in the Rules which provides for a reversal of the credit by the excise authorities except where it has been illegally or irregularly taken, in which event it stands cancelled or, if utilised, has to be paid for. We are here really concerned with credit that has been validly taken, and its benefit is available to the manufacturer without any limitation in time or otherwise unless the manufacturer itself chooses not to use the raw material in its excisable

product. The credit is, therefore, indefeasible. It should also be noted that there is no co-relation of the raw material and the final product; that is to say, it is not as if credit can be taken only on a final product that is manufactured out of the particular raw material to which the credit is related. The credit may be taken against the excise duty on a final product manufactured on the very day that it becomes available.

18. It is, therefore, that in the case of Eicher Motors Ltd. vs. Union of India [1999(106) ELT 3] this Court said that a credit under the MODVAT scheme was as good as tax paid.

19. With this in mind, we must now determine whether the excise duty paid on the raw material should form part of the cost of the excisable product for the purposes of Section 4(1)(b) of the Act read with Rule 6 of the Valuation Rules?

.....

.....

24. We think it is appropriate that the cost of the excisable product for the purposes of assessment of excise duty under Section 4(1)(b) of the Act read with Rule 6 of the Valuation Rules should be reckoned as it would be reckoned by a man of commerce. We think that such realism must inform the meaning that the Courts give to words of a commercial nature, like cost, which are not defined in the statutes which use them. A man of commerce would, in our view, look at the matter thus : I paid Rs.100/- to the seller of the raw material as the price thereof. The seller of the raw material had paid Rs.10/- as the excise duty thereon. Consequent upon purchasing the raw material and by virtue of the MODVAT scheme, I have become entitled to the credit of Rs.10/- with the excise authorities and can utilise this credit when I pay excise duty on my finished product. The real cost of the raw material (exclusive of freight, insurance and the like) to me is, therefore, Rs.90/-. In reckoning the cost of the final product I would include Rs.90/- on this account. This, in real terms, is the cost of the raw material (exclusive of freight, insurance and the like) and it is this, in our view, which should properly be included in computing the cost of the excisable product.

25. The view we take about the cost of the raw material is borne out by the Guidance Note of the Indian Institute of Chartered Accountants, and there

can be no doubt that this Institute is an authoritative body in the matter of laying down accountancy standards.

26. To answer the question involved in these appeals, in determining the cost of an excisable product covered by the MODVAT scheme under Section 4 (1)(b) of the Act read with Rule 6 of the Valuation Rules the excise duty paid on raw material also covered by the MODVAT scheme is not to be included."

At paragraph 24, the Hon'ble Apex Court has ordered, as to how the real cost of the raw material (exclusive of freight, insurance and the like) should be reckoned, for which, Their Lordships have taken guidance notes of the Indian Chartered Accountants. Dai Ichi Karkaria has been rendered on 11.08.1999.

37. Perusal of the order in Appeal No.1251/98 dated 20.11.1998 of the Commissioner of Central Excise (Appeals) against the letter No.1251/98 dated 20.11.1998 also shows that, Dai Ichi Karkaria's case was not placed before the appellate authority. But, before the Tribunal, submissions have been made by the respondent on the basis of Dai Ichi Karkaria's case and taking note of the same, directions have been issued to the jurisdictional range officer to consider the said decision, and the submission of the respondent. Order passed in the rectification petition shows that the Commissioner of Central Excise, Large Taxpayer Unit, Chennai, the appellant herein has also admitted that the issue on merits has been settled in favour of the Tax Payer, by the Hon'ble Apex Court, in Collector of Central Excise, Pune vs. Dai Ichi Karkaria Ltd reported in 1999 (112) ELT 353 SC and the only issue according to the appellant before the Tribunal to be considered was on technical grounds stating that, the action of the Superintendent, in including the averment of cost specifically mentioned as includible in the Assistant Commissioner's order, is not an appealable order of assessment and therefore, no appeal against his letter dated 20.11.1998, is not maintainable. By observing that there was no mistake in the order, Rectification Application E/ROM/62/10 IN E/695/2003 has been disposed of on 25.03.2011. While doing so, the Tribunal has observed that, it is apparent from the record, the issue has to be decided afresh, and the Range Superintendent is free to consider all the submission and pass orders in accordance with law. As stated supra, decision of the Hon'ble Supreme Court dated 11.08.1999 was not placed before the appellate authority and considered. Had it been placed before the Commissioner of Central Excise, Cuddalore, it would have been considered and appropriate orders would have been passed, though the assessment order had reached finality. Directions to compute the differential duty, in terms of the said rule and Dai Ichi Karkaria would have been issued. Needless to state that judgment

of the Hon'ble Supreme Court, is binding on all courts/tribunals/authorities, with reference to matters, pending on file.

38. In light of the above discussion and decisions, we are of the view that the range jurisdictional officer is bound to take note of the decision of the Hon'ble Apex Court and compute the value of excisable goods under assessment. We make it clear that while doing so, the jurisdictional officer is under no obligation in law to provide an opportunity of hearing to the assessee. He is required to only compute the value and the differential duty, as per the rule and decision of the Hon'ble Apex Court.

39. Civil miscellaneous appeal has been admitted on 09.04.2012, on the substantial questions of law, extracted supra. On the first substantial question of law, we are of the view that the directions of the Tribunal is only to consider the submissions of the respondent/assessee, for arriving at the value, and computation of differential duty. Inasmuch, provisional assessment had reached finality by the order of the adjudicatory authority, in which the respondent/assessee itself had agreed for application of Rule 6(b)(ii) of the Central Excise (Valuation) Rules, 1975, working out the valuation and the differential duty, if any, to be paid by the assessee, the letter of the Superintendent will not partake the character of adjudication. However, amount arrived at by the Superintendent, should be in accordance with the judgment of the Apex Court, and Rule 6(b)(ii) of the Central Excise (Valuation) Rules, 1975 and in such circumstances, the Tribunal is right in remanding the matter, to the limited extent. Substantial question of law No.1 is answered as indicated.

40. On the second substantial question of law, as to whether the Hon'ble Tribunal, while passing Miscellaneous Order 371/2011 dated 25.7.2011, was correct in dismissing the department's application for Rectification of Mistake E/ROM/62/2010 in Final Order No.515/2010 dated 4.5.2010 wherein, grounds for rectification of mistake had been raised on the lines of the foregoing questions of law?, It could be seen from the averments made in the rectification petition filed by the department, there is a clear admission on the part of the appellant, that the case of the respondent is covered by the decision of the Hon'ble Apex Court, in Dai Ichi Karkaria's case, on merits, which the Tribunal is bound to take note of and pass suitable orders and the same has been done in this case. Therefore, the Tribunal cannot be said to have committed an error. In the light of the discussion on the applicability of the judgment of the Hon'ble Apex Court, to the facts on hand, and the answer to substantial question of law No.1 as indicated, substantial

question of law No.2 is answered, in the negative, against the Revenue.

41. On the third substantial question of law is Whether the appeal filed against the Superintendent's letter O.C.No.1251/98 dated 20.11.1998 issued in pursuance of and in execution of the Assistant Commissioner's Order-in-Original No.30/1998 dated 22.5.1998 is maintainable in view of the Hon'ble Supreme Court judgments in the case of Flock India Pvt. Ltd. reported in 2000 [120] ELT 285 and Priya Blue Industries Ltd., reported in 2004 [172] ELT 145?, we deem it fit to extract Section 35 of the Central Excise Act, 1944,

'(1) Any person aggrieved by any decision or order passed under this Act by a Central Excise Officer, lower in rank than a Principal Commissioner of Central Excise or Commissioner of Central Excise, may appeal to the Commissioner of Central Excise (Appeals) hereafter in this Chapter referred to as the Commissioner (Appeals) within sixty days from the date of the communication to him of such decision or order :

Provided that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of thirty days.

(1-A) The Commissioner (Appeals) may, if sufficient cause is shown, at any stage of hearing of an appeal, grant time, from time to time, to the parties or any of them and adjourn the hearing of the appeal for reasons to be recorded in writing :

Provided that no such adjournment shall be granted more than three times to a party during hearing of the appeal.

(2) Every appeal under this section shall be in the prescribed form and shall be verified in the prescribed manner.'

42. Adverting to the above question, it is required to consider the letter, dated 20/11/98 of the Range Jurisdictional Superintendent and, it is extracted hereunder:

OFFICE OF THE SUPERINTENDENT OF CENTRAL EXCISE,
RANGE-I, CUDDALORE.

O.C.No.1251/98

20/11/98

To
M/s CHEMPLAST SANMAR LTD.,
KADAMPULIYUR
PANRUTI.

Gentlemen,

Sub: CEX - Valuation - M/s.Chemplast Sanmar
Ltd., Kadampuliyur - Finalisation of
Provisional Assessment Order - Reg.

Please refer to C.No.V/RI Cud/17/20/97 VC dated
22/5/98 (Order in Original No.30/98 dt 22/5/98 passed by
the Asst. Commissioner of Central Excise, Cuddalore
Division).

In the above cited order it has been ordered

1. To arrive at the value in terms of Rule 6(b)(ii)
of Central Excise (Valuation) Rules, 1975 (that is the
cost of the product viz. Denatured Ethyl Alcohol)

2. Duty short paid, if any, is ordered to be paid in
terms of Rule 9B(5) of Central Excise Rules, 1944.

Further, as per details available in the findings and
discussions, in working out the cost if duty element on
the inputs used is not included, the same should be
included for the purpose of arriving at the cost.

In the light of the above, the cost of the Denatured
Ethyl Alcohol has been worked out for the financial years
1994-95, 1995-96, 1996-97 & 1997-98 which includes the
input duty paid. A comparative chart of the assessable
value adopted and the assessable value arrived at on
finalisation of the provisional assessment, yearwise, as
per Worksheet, it is furnished below:

Year	Declared Cost / KL	Final Cost / KL
1994-95	Rs.16486	Rs.14967.21
1995-96	Rs.16486 & (operative in 13746 different spells)	Rs.10441.91
1996-97	Rs.13746 -do-	Rs. 7201.10
1997-98	Rs. 9656	Rs. 14286.61

It may be seen from the above chart that during the financial years, 1994-95, 1995-96, 1996-97, the declared cost which was adopted for the purpose of payment of Central Excise duty while clearing the DNS was more than the Actual cost which includes the duty paid on the inputs and as such no differential duty is payable by yourself for those years, for the reasons stated in the Worksheet III (enclosed).

As regard 1997-98, the actual cost which includes input duty paid works out to Rs.14286.61 per KL as against the Declared cost of Rs.9656 per KL of DNS, and therefore you are required to pay the differential duty of Rs.1,14,29,086/- as per details given under Worksheet III.

Therefore in full compliance with the Order of the Asst. Commissioner of Central Excise, Cuddalore Division, you are requested to pay the differential duty of Rs.1,14,29,086.00 (Rupees One Crore Fourteen lakhs Twenty Nine Thousand and Eighty Six only) relating to the finalisation of Assessment for the Financial Year 1997-98, within one week from the date of receipt of this letter and to furnish the particulars of the duty remittance to this office.

The copies of Worksheets I, II & III are enclosed herewith for reference and necessary action.

Yours faithfully,

(R.DHANDAPANI.)

Encl : As above

SUPERINTENDENT OF CENTRAL EXCISE,
RANGE-I, CUDDALORE.

Copy Submitted to
The Assistant Commissioner, Central Excise Division,
Cuddalore. (with enclosures) W.R.T.C.No.V/RI Cud/17/20/97
VC dated 22/5/98 Order-in-Original No.38/98.

43. The Range Jurisdictional Superintendent has valued the excisable goods, under assessment and arrived at the differential duty to be paid. He has further directed the assessee to pay the duty, within one week, from the date of receipt of the said letter.

44. Section 35 of the above said Act, starts with an opening sentence, ' Any person aggrieved by any decision or order passed under this Act by a Central Excise Officer, lower in rank than a Principal Commissioner of Central Excise or Commissioner of Central Excise, may appeal to the Commissioner of Central Excise (Appeals) hereafter in this Chapter referred to as the Commissioner (Appeals) within sixty days from the date of the communication to him of such decision or order.'

45. Adjudicating authority as per section 2(a) of the Central Excise Act, 1944, is

(a) "adjudicating authority" means any

authority competent to pass any order or decision under this Act, but does not include the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963), Commissioner of Central Excise (Appeals) or Appellate Tribunal.

46. Central Excise Officer, as defined in Section 2(b) of the Central Excise Act, 1944 reads as under:

(b) "Central Excise Officer" means the Principal Chief Commissioner of Central Excise, Chief Commissioner of Central Excise, Principal Commissioner of Central Excise, Commissioner of Central Excise, Commissioner of Central Excise (Appeals), Additional Commissioner of Central Excise, Joint Commissioner of Central Excise, Deputy Commissioner of Central Excise, Assistant Commissioner of Central Excise or any other officer of the Central Excise Department, or any person (including an officer of the State Government) invested by the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963) with any of the powers of a Central Excise Officer under this Act."

47. In the case on hand, it is the decision of the Range Jurisdictional Superintendent, in arriving at the value of the excisable goods, under assessment and differential duty, if any, paid by the assessee, which is put to challenge, by way of an appeal. Adjudicating authority has directed the Superintendent to report compliance. But even before the Adjudicating authority could pass a final order, the assessee has filed the appeal, against the letter of the Superintendent. Valuation has to be done, only in accordance with Rule 6(2) of the Central Excise Valuation Rules, 2004 and the judgment of the Hon'ble Apex Court *Dai Ichi Karkaria's case* (cited supra).

48. Whether it is in the form of a letter or an order of the competent authority, which is put to challenge on the facts and circumstances of the case, what is required to be considered is whether, it affects the interests of the assessee. It cannot be said that the assessee would not be prejudiced, if valuation is not done as per the decision of the Hon'ble Apex Court. Admittedly, the judgment of the Hon'ble Supreme Court, was not placed before the authorities. Adjudicating authority has directed the Superintendent to finalise the RTI2 assessment and report compliance. Perusal of the letter dated 20.11.1998, also shows that after computation, the Superintendent has marked a copy of the same to the adjudicating authority. In ordinary circumstances, this court would hold that an appeal against the letter of the Superintendent is not maintainable, in the light of *Flock India Pvt Ltd.'s case* reported in 2000 (120) ELT 285. But inasmuch the assessment has been directed to be finalised as per the directions of the adjudicating authority, we are not inclined to accept the contentions of the appellant, on the third question of law. We make it clear that this judgment shall not be treated as a precedent.

In the light of the above discussions and decisions, civil miscellaneous appeal is disposed of as indicated above. No costs.

सत्यमेव जयते

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

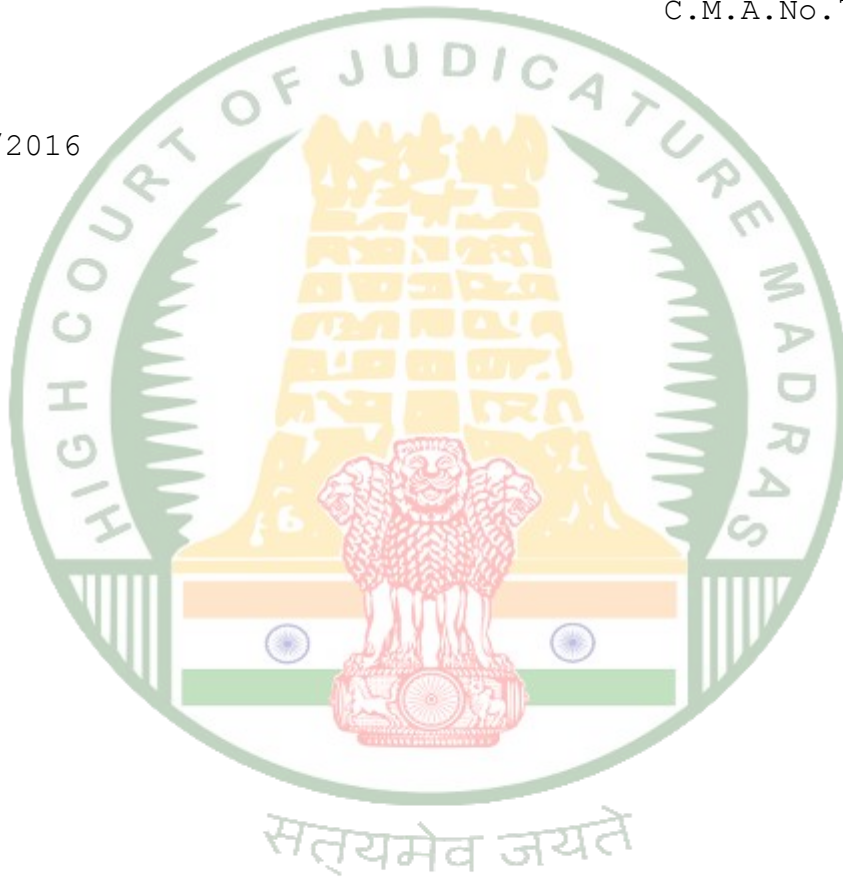
To

The Customs,
Excise and Service Tax Appellate Tribunal,
Chennai.

+1cc to Mr.A.P.Srinivas, Senior Counsel, Sr.48349
+1cc to M/S.N.Maithili, Advocate Sr.47921

C.M.A.No.700 of 2012

rsk[co]
srg 22/09/2016



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