REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.951 of 2008

COMMISSIONER OF CENTRAL EXCISE …APPELLANT

VERSUS

M/S NESTLE INDIA LIMITED …RESPONDENT

J U D G M E N T

R.F. Nariman, J.

1. The respondent herein is a 100% EOU engaged in the manufacture of instant tea falling under Chapter 2101.20 of schedule to the Central Excise Tariff Act, 1985. The present appeal is concerned with clearances of their product to two sister units on payment of duty in terms of Notification No.8/97 - CE dated 1.3.1997 and Notification No.23/2003 CE dated 31.3.2003. The first notification would cover the period 1.11.2000 to 30.3.2003 and the second notification would cover

the period 31.3.2003 to 31.5.2005. Inasmuch as the instant tea was manufactured wholly out of indigenous raw materials, the notifications aforesaid applied and whatever was in excess of what is chargeable by way of excise duty on the said tea is exempted. It is not in dispute that the said notifications applied in the facts of the instant case.

2. A show cause notice dated 23.9.2005 was issued by the Department stating that ordinarily Rule 8 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 would apply and that the tea being captively consumed and not sold should be valued at 115% of the cost of production or manufacture of such goods. However, the show cause notice then goes on to say that as the said tea is transferred only to two sister concerns and no sale is involved, the assessable value of instant tea removed to the respondent's own units would be determined on the basis of the export price of similar goods and not 115% of the cost of production.

3. The order in original dated 31.5.2006 passed by the Additional Commissioner upheld the show cause notice and confirmed the duty amount, interest, and penalty as follows:-

"**ORDER**

(1) I confirm the duty amount of Rs. 42,86,079/- (Rupees Forty two lakhs, eighty six thousand and seventy nine only) (Centvat: Rs.42,62,545/- and Education Cess Rs.23,534/-) under Section 11A (1) of the Central Excise Act, 1944.

(2) I demand appropriate interest on the above amount confirmed under Section 11AB(1) of the Central Excise Act, 1944.

(3) I impose a penalty of Rs.42,86,079/- (Rupees Forty two lakhs, eighty six thousand and seventy nine only) under Section 11A (1) of the Central Excise Act, 1944.

(4) As I have imposed penalty on them under Section 11AC of Central Excise Act, 1944, I do not impose a separate penalty under Rule 173Q or 209 of erstwhile Central Excise Rules 1944 and Rule 25 of erstwhile Central Excise (No2) Rules, 2001 read with Section 38A of Central Excise Act, 1944 and Rule 25 of Central Excise Rules, 2002."

4. The appeal by the assessee was also dismissed by an order dated 26.9.2006 passed by the Commissioner (Appeals) upholding the show cause notice and stating that Section 3 (1) Proviso (ii) of the Central Excise Act would apply to the facts of

the case and that being so, it is clear that the basis for valuation had to be on the FOB value of export of similar goods and not on the basis of cost of production under Rule 8 of the Central Excise Rules.

5. By the impugned judgment dated 16.5.2007, CESTAT set aside the judgment of the Commissioner (Appeals) by reasoning that since the exemption notifications would apply and since what has to be determined under the said notifications is excise duty payable in India, such duty could only be arrived at by applying Rule 8 in cases of captive consumption and that therefore the basis of the show cause notice and the decisions by the original and appellate authorities was incorrect. It accordingly set aside the order of the Commissioner (Appeals).

6. Shri A.K. Sanghi, argued before us that since the case was covered by Section 3 (1) Proviso (ii) of the Central Excise Act, the Customs Act alone was to be looked at and if the Customs Act was so looked at, the test as to value of goods would be the test of similar goods of a like value that are exported. Hence, according to him, the original authority and

the appellate authority were correct in applying the said Section and the Tribunal was wrong in ignoring the said Section and applying exemption notifications to the facts of the case instead.

7. Ms. L. Charnaya, learned counsel appearing on behalf of the assessee on the other hand, supported the decision of the tribunal and read to us in some detail not only the Central Excise Valuation Rules but also the notifications aforementioned. It is her case that the show cause notice itself was flawed in that the basis of the said notice is that since no sale had taken place on the facts of the present case, the FOB value of export of similar goods has to be taken into account. She laid great stress on the fact that in the notification dated 1.3.1997 the language used is not “sold” but “allowed to be sold” and that if this were kept in mind it is clear that the very basis of the show cause notice being incorrect would lead to incorrect orders that were passed by the original and first appellate authority.

8. Having heard learned counsel for the parties we think it is necessary to first extract the relevant statutory provisions and the notifications insofar as they have a bearing on the facts of the present case.

9. Section 3(1) proviso as it stood at the relevant time is extracted hereinbelow:-

> **"SECTION 3. Duties specified in First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 to be levied.**
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> Provided that the duties of excise which shall be levied and collected on any excisable goods which are produced or manufactured, -
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> (i) In a free trade zone or a special economic zone and brought to any other place in India; or
>
> (ii) By a hundred per cent export-oriented undertaking and brought to any other place in India,
>
> shall be an amount equal to the aggregate of the duties of customs which would be leviable under the Customs Act, 1962 (52 of 1962) or any other law for the time being in force, 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, 1963 (52 of 1962) and the Customs Tariff Act, 1975 (51 of 1975)."

10. Section 5A being the Section under which the two notifications in the present case were issued is also of some relevance and reads as follows:-

"SECTION 5A. Power to grant exemption from duty of excise. -

(1) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by notification in the Official Gazette exempt generally either absolutely or subject to such conditions (to be fulfilled before or after removal) as may be specified in the notification, excisable goods of any specified description from the whole or any part of the duty of excise leviable thereon :

Provided that, unless specifically provided in such notification, no exemption therein shall apply to excisable goods which are produced or manufactured-

(i) In a free trade zone or a special economic zone and brought to any other place in India; or

(ii) By a hundred per cent export-oriented undertakings and brought to any place in India."

11. Rule 8 of the Central Excise Rules, 2000 as it stood at the relevant time reads as follows:-

> **"RULE 8.** Where the excisable goods are not sold by the assessee but are used for consumption by him or on his behalf in the production or manufacture of other articles, the value shall be one hundred and fifteen per cent of the cost of production or manufacture of such goods."

12. Inasmuch as a great deal turns on the two notifications that we are concerned with on the facts of the present case, it is necessary to quote in full the first of the two notifications.

> "Notification: 8/97-CE dated 01-Mar-1997
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> Exemption to finished products, rejects and waste or scrap produced in a 100% EOU or FTZ In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excise Act, 1944 (1 of 1944), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the finished products, rejects and waste or scrap specified in the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) and produced or manufactured, in a hundred per cent export-oriented undertaking or a free trade zone wholly from the raw materials produced or manufactured in India, and allowed to be sold in India under and in accordance with the provisions of paragraphs 102 and 114 of the Export and Import Policy 1 April 1992 – 31 March 1997, from so much of the duty of excise leviable thereon under section 3 of the Central Excise Act, 1944 (1 of 1944), as is in excess of an amount equal to the duty of excise leviable under the said section 3 of the Central Excise Act, on like goods, produced or manufactured in India other

than in a hundred per cent export-oriented undertaking or a free trade zone, if sold in India."

13. To similar effect for the subsequent period is the notification No.23 of 2003 dated 31.3.2003.

14. The first thing to be noticed is that Section 5A under which the exemption notifications are issued states in the proviso that no exemption shall apply to excisable goods which are produced or manufactured by a 100% Export Oriented Undertaking and brought to any place in India unless specifically provided in such exemption notification. When we turn to the notification dated 1.3.1997, we find that there is specific provision for exemption of certain goods produced in a 100% EOU wholly from raw materials produced or manufactured in India. It is not disputed by the revenue that the instant tea manufactured by the respondent would be covered being a finished product specified in the schedule to the Central Excise Tariff Act. Further, the notification goes on to state that

the said tea should be "allowed to be sold" in India in accordance with the relevant EXIM policy. It further goes on to state that the exemption from payment of the duty of excise that is leviable thereunder under Section 3 is what is payable in excess of an amount equal to the duty of excise leviable on like goods produced or manufactured in India produced in an undertaking other than in a 100% Export Oriented Undertaking, if sold in India.

15. It is clear that the object of the notification is that so far as the product in question is concerned, so long as it is manufactured by a 100% EOU out of wholly indigenous raw materials and so long as it is allowed to be sold in India, the duty payable should only be the duty of excise that is payable on like goods manufactured or produced and sold in India by undertakings which are not 100% EOUs.

16. There is no doubt whatsoever that the duty of excise leviable under Section 3 would be on the basis of the value of like goods produced or manufactured outside India as determinable in accordance with the provisions of the Customs Act, 1962 and the Customs Tariff act, 1975. However, the notification states that duty calculated on the said basis would only be payable to the extent of like goods manufactured in India by persons other than 100% EOUs. This being the case, it is clear that in the absence of actual sales in the wholesale market, when goods are captively consumed and not sold, Rule 8 of the Central Excise Rules would have to be followed to determine what would be the amount equal to the duty of excise leviable on like goods. This being so, it is clear that learned counsel for the assessee is right in her contention that the basis of the show cause notice is itself flawed. The show cause notice in the present case, as has been noticed above, refers to Rule 8 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, but then goes on to state that:

"It is settled law that the value shall be determined keeping in view the following factors:

a. sale price of goods under assessment

b. sale price of other consignments of identical/ similar goods

c. export price of identical/similar goods

d. nature of sale transactions etc."

The "settled law" spoken of would refer to a CBEC circular No.268/85-CX.8 dated 29.9.1994 which deals with valuation of goods manufactured by units working under the 100% EOU scheme. The said circular refers to Rule 8 of the Customs Valuation Rules and not the Central Excise Valuation Rules. The four factors laid down in the said circular have relevance only qua goods that are cleared in the DTA and how their valuation is to be arrived at. We have already seen that the manner of valuation of such goods would not be relevant for the simple reason that what has to be determined in the facts of the present case is the valuation of the duty of excise leviable under Section 3 of the Central Excise Act on like goods

produced or manufactured in India by undertakings other than 100% EOUs. The application of this circular and consequently any FOB export price would be wholly irrelevant for the purpose of this case and as has been held above, is only for arriving at the duty of excise leviable under Section 3(1) Proviso (ii) of the Central Excise Act. On the facts of the present case, it is clear that the said duty of excise arrived at based on Section 3(1) Proviso (ii) is more than the duty determinable for like goods produced or manufactured in India in other than 100% EOUs. Since the notification exempts anything that is in excess of what is determined as excise duty on such like goods, and considering that for the entire period under question the duty arrived at under Section 3(1) proviso (ii) is in excess of the duty arrived at on like goods manufactured in India by non 100% EOUs, it is clear that the whole basis of the show cause notice is indeed flawed. Further, the show cause notice is based on one solitary circumstance – the fact that goods captively consumed by the two sister units of the unit in question are not "sold". We are afraid this approach flies in the face of the language of the notification dated 1.3.1997. The test to be

applied under the said notification is whether the goods in question are “allowed to be sold” in India. The aforesaid expression is obviously different from the expression “sold” and does not require any actual sale for the notification to be attracted. In fact revenue’s case is also that even though the said notification is attracted, yet because there is no sale somehow the FOB export price of like goods alone is to be looked at. If this were to be so, not only would the object of the notification not be sub-served but even its plain language would be violated. It is clear that the said notification has been framed by the Central Government, in its wisdom, to levy only what is levied by way of excise duty on similar goods manufactured in India, on goods produced and sold by 100% EOUs in the domestic tariff area if they are produced from indigenous raw materials. If the revenue were right, logically they ought to have contended that the notification does not apply, in which event the test laid down under Section 3(1) proviso (ii) would then apply. This not being the case, we are of the view that the Tribunal’s judgment is correct and requires no interference. The appeal is, accordingly, dismissed.

……J.

(A.K. Sikri)

……J.

New Delhi; **(R.F. Nariman)**

November 24, 2015.