to DGIT (Investigation) and submitted that said account outside India was as per FEMA Regulations. Revenue issued notice summons u/s 131 and also initiated proceedings for levy of penalty u/s 271. Further, prosecution proceedings were initiated against assessee.

The assessee challenged the prosecution on the grounds of age and appeal pendency.

The assessee submitted that Instruction No. 5051/1991 dated 07.02.1991 mandates that no prosecution could be initiated against a person who is above the age of 70 years, conveniently leaving out the expression *'at the time of commission of offence'.* Revenue argued that the said instruction refers to the age at the time of commission of offence and since assessee filed return in 2006 & 2007, his age were 63 years and 64 years respectively for AY 2006-07 and 2007-08.

HC distinguished assessee's reliance on co-ordinate bench ruling in Arun Kumar Bhatia [Criminal Revision Petition No.36/2011]. In that case, Revenue's counsel conceded that no prosecution could be initiated against a person who is above the age of 70 years. Thus, that said order was not passed on merits but was based on the precise statement made by Revenue's counsel and thus benefit of the same cannot be given to assessee. HC noted that at the time of commission of alleged offence assessee had not reached the age of 70 years and therefore the concerned instruction was not applicable to the assessee.

The assessee had further submitted that an appeal against AO's order was pending and thus prosecution could not be initated. Revenue submitted that at the time of filing of Complaint No. 70/04, the assessee had not filed any appeal and that the same had been filed as an afterthought with a view to thwart the criminal proceedings pending against him. Revenue also contended that pendency of appeal cannot be ground for stay of the proceedings if the same had no bearing on the complaint.

HC noted that the appeal had been filed challenging the AO and consequential outcome of imposition of penalty U/s 271(1)(c), Income-tax Act. Thus, at any count, the outcome of the appeal filed on behalf of the petitioner will have no bearing on the present complaint at least in respect of offence U/s 276D Income-tax Act. Moreover, no prayer for quashing of the proceedings was made by the petitioner in the application.

Relying on rulings in Sasi Enterprises [(2014) 5 SCC 139] and *B. Premanand & Ors* [(2011) 4 SCC 266], HC stated that pendency of appellate proceedings has no bearing in initiation of prosecution under the Income-tax Act.

HC noted that proceedings once initiated in a warrant trial case, there is no provision under the Code of Criminal Procedure, 1973, except U/s 258 Cr.P.C., where the proceedings of the case can be stayed by the Magistrate *suo moto* or upon the application filed on behalf of the accused.

HC thus ruled in favour of the Revenue.

Service Tax

LD/64/92

Kailash Chawla.

vs.

Commissioner of Service Tax, Delhi

6th November, 2015 (DEL)

Section 35F of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994.

Civil work undertaken for Airports Authority of India-Tax computed on cost of materials supplied-service component involved of 25% to 44%- Tribunal order directing pre-deposit of ₹17.5 lakhs with interest modified-Appellant to make pre-deposit of ₹5 lakhs by 30.11.2015 consequent upon which Tribunal to hear appeal on merits-Appeal/applications disposed of.

The assessee is a contractor engaged in undertaking civil work primarily for the Airports Authority of India [AAI]. The assessee contended that works undertaken for the airports, road, railways *etc.* were excluded from service tax liability as they formed part of the infrastructure development of the country. A notice was issued by Revenue proposing to levy service tax on all contracts executed by the Assessee, which included the contracts undertaken for the AAI. The adjudicating authority upheld the demand categorising the service under "management, maintenance or repair service". Before CESTAT, the assessee pointed out that the adjudicating authority had computed the demand by taking the entire turnover of the Assessee which included the cost of the materials supplied. According to the Assessee the service component was between 25% and 44% of the turnover during the period in question.

The assessee submitted that in real terms the highest possible service tax demand worked out was ₹26.8 lakh whereas the CESTAT had asked the Assessee to deposit ₹17.5 lakh (along with

proportionate interest) which was about 65% of the highest possible service tax demand. Assessee had already deposited a sum of ₹4.17 lakh.

Delhi HC modified the impugned order of the CESTAT and directed the assessee to deposit a sum of ₹5 lakh before the CESTAT, after which CESTAT would consider assessee's appeal on merits.

Excise

LD/64/93

Commissioner of Central Excise.
vs.
M/s Nestle India Ltd.
24th November, 2015 (SC)

Rule 8 of Central Excise Valuation Rules.

Excise duty for purpose of application of exemption Notification Nos. 8/97-CE & 23/2003-CE should be arrived at in accordance with Rule 8 of Central Excise Valuation Rules, and not FOB export price of similar goods; Goods were captively consumed and not sold to sister units or actually sold in wholesale market, and thus Rule 8 of Excise Valuation Rules would have to be followed to determine amount equal to excise duty leviable on like goods.

The Assessee is a 100% EOU engaged in the manufacture of instant tea which falls under Chapter 2101.20 of 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.

A show cause notice was issued dated 23.09.2005 stating that ordinarily Rule 8 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 would apply and that 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. The Additional Commissioner upheld the show cause notice and confirmed duty amount, interest and penalty. Commissioner (Appeals) confirmed the demand stating that Sec 3(1) *proviso* (ii) of Central Excise Act would apply to facts of the case and that being so, it was clear that basis for valuation had to be the FOB value of export of similar goods and not the cost of production under Rule 8 of Central Excise Rules.

However, CESTAT set aside the appellate order by reasoning that since the exemption Notifications applied and since what had to be determined was excise duty payable, such duty could only be arrived at by applying Rule 8 in cases of captive consumption and therefore the basis of show cause notice and the decisions by original and appellate authority were incorrect.

Notification No. 8/97-CE exempts finished goods and rejects and waste/scrap produced wholly from indigenous raw materials by EOU and allowed to be sold in India, from so much of excise duty leviable u/s 3 of Central Excise Act, as is in excess of amount equal to excise duty leviable on like goods, produced/manufactured in India other than in EOU or FTWZ, if sold in India.

SC observed 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.

SC observed that 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, and the Customs Tariff act. 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. Thus the basis of show cause notice itself was flawed.

According to SC, the expression "settled law" used by Revenue in the show-cause notice referred to CBEC Circular No. 268/85-CX.8 dated September 29, 1994 dealing with valuation of goods manufactured by units working under 100% EOU scheme. The said Circular referred to Rule 8 of

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Customs Valuation Rules and not Central Excise Valuation Rule. SC observed that *"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."*

Sc observed that the test to be applied under notification 8/97-CE was whether goods in question were "allowed to be sold" in India, which expression was different from the term "sold". Hence, to attract the Notification, actual sale was not required. It is clear that the said notification attempts 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.

SC thus ruled in favour of the assessee.

Customs

LD/64/94

GMR Energy Ltd

vs.

Commissioner of Customs, Bangalore.

27th October, 2015 (SC)

Rule 4 and Rule 9 of Customs Valuation Rules

Customs duty demand quashed on import of replacement/refurbished parts of Gas Turbine Hot Section of a naphtha based power plant, under Long Term Assured Parts Supply Agreement (LTAPSA) with associated foreign entity; Rule 4 r/w Rule 9 of Customs Valuation Rules inapplicable since there was no "sale" of goods for export to India or direct/indirect accrual of proceeds to seller from subsequent re-sale, disposal or use of the very goods imported by buyer; Once State Govt. authorities are satisfied that goods are required for renovation, Customs Dept. need not go deep into the matter and deny the benefit of exemption Notification.

The assessee is aggrieved by the valuation of import of parts of Gas Turbine Hot Section of a naphtha based power plant, whereas the Revenue is aggrieved whether assessee was entitled to benefit of Notification No. 21/2002 dated March 1, 2002 in respect of goods imported under 2 bills of entry (BOE) dated June 25, 2003.

Assessee, GMR Energy Ltd., had imported a naphtha based power plant with 5 Gas Turbines, which was mounted on a barge which floated in a river at a village near Mangalore for purposes of power generation. The capacity of the said power plant is 220 MW and entire power generated is uploaded into the grid of the Karnataka Power Transmission Corporation Limited (KPTCL).

Assessee entered into an agreement for service and supply of parts with GE, USA being a Long Term Assured Parts Supply Agreement (LTAPSA) dated December 12, 2000. As per the said agreement, assessee was to make payments based on either fired hour charges or maintenance charges. Various parts of Gas Turbine Hot Section of the said plant, which had to be imported under LTAPSA, were imported under 2 BOE dated June 25, 2003 after 12,500 fired hours had come to an end. The parts that were identified as having to be replaced were re-exported back to GE, USA under cover of shipping bills of May, 2003, before the 2 BOE were presented for import of the replaced parts to Customs authorities. Assessee-appellant paid customs duty based on the value declared in said bills of entry but did not make any payment to GE, USA based on these invoices since their payments had already been made based on fired hour charges. The assessment of the said import was completed by Customs Dept. after due verification of the documents produced at the time of import.

A show cause notice (SCN) was issued on the taking reference of Rule 4 and Rule 9 of the valuation rules and it was sought that 1/3rd of the value of imported items be added to the invoice value as that was said to represent the amount of parts that were replaced and re-exported back to GE, USA. A demand ₹4.20 crore and proposed confiscation of goods was made vide the notice.

The ld. Commissioner specifically found that as per the LTAPSA since the assessee has declared only the differential value of the returned parts and the parts imported, 1/3rd of the invoice value of the imported parts needs to be added to arrive at the correct assessable value. Thus, it confirmed the demand made in the show cause notice. CESTAT confirmed the order of the commissioner.

CESTAT dismissed assessee's appeal, thus confirming the order of Commissioner. In addition, CESTAT additionally found that there is no transaction value at all and, therefore, Rule 8 will have to be referred to and relied upon and a best judgment assessment was to be made.

SC perused the relevant provisions and observed that Rules 4 & 9 would apply only in case imported goods are "sold" for export to India. The expression "shall be the price actually paid or payable for the goods when sold for export to India" would necessarily postulate that transaction value would be based upon goods that are sold in the course of export from a foreign country to India. Admittedly there was no sale. All that happened under LTAPSA was that parts were replaced without any further charge after a certain number of hours of running of the power plant. SC accepted assessee's contention that neither Rule 4 nor Rule 9 applied.

SC further noted that Rule 4(2)(g) and Rule 9(1)(d) refer only to the very goods that are imported and not to goods which may have been imported much earlier to the imported goods. Therefore, what would be necessary is that there should be proceeds which arise from re-sale, disposal, or use of the very imported goods by the buyer, which in the instant case did not occur.

Equally, SC stated that Rule 9(1)(e) would not apply as there was no other payment actually made or to be made as a condition of sale of imported goods by the buyer to the seller.

Based on facts, SC concluded that Rule 5 would have no application in the facts of present case. Consequently, SC proceeded on the footing that Rule 8 alone applies and best judgment assessment made by Commissioner would have to be reasonable and not arbitrary.

SC accepted assessee's contention that in terms of clause 2.8, seller was only to furnish the buyer with "information" regarding the incremental value of each refurbished part so that customs duty may be limited to the incremental value of each such refurbished part. SC found that the assessee had made it more than clear that the price of imported goods was a rotable exchange programme price, which was common uniform price for supplies by GE, USA worldwide. Thus, SC stated, SC observed that prices stated in the invoices accompanying the bills of entry in the present case were list unit prices or catalogue prices and so by no stretch of imagination can they be said to be prices after re-exported items' value has been taken into account. Thus, both Commissioner and CESTAT were wrong in arriving at a conclusion that invoice price was only an incremental value price and not the price of articles supplied by GE, USA.

SC noted that conjoint reading of Section 46(4) of Customs Act & Rule 10(1)(a) of the Rules makes it incumbent on the importer while presenting a BOE to subscribe to a declaration as to the truth of its contents and in addition, to produce to the proper officer the invoice relating to imported goods. There was no doubt that assessee had fulfilled this condition. According to SC, LTAPSA would be a document which would fall within Rule 10(1)(b) r/w Sec 17(3) of the Act as it then stood. A conjoint reading of of Section 17(3) and Rule 10(1)(b) made it clear that the proper officer may require the importer to produce any contract with reference to the imported goods consequent upon which the importer shall produce such contract. In the instant case, the proper officer had not called upon the assessee to produce any contract in relation to the imported goods, and thus there was no infraction of Rule 10.

As regards Revenue appeal, SC observed that both the requisite certificates as well as recommendation of Principal Secretary, Govt. of Karnataka, had been dealt with in the proper perspective. The CESTAT was correct in its finding that once the authorities were satisfied that the impugned goods were required for renovation, the Customs Dept need not go deep into the matter and by hair-splitting and semantic niceties, deny the benefit of exemption Notification. SC thus dismissed Revenue appeal.

LD/64/95

Cargill India Pvt. Ltd

vs.

Commissioner of Customs and Central Excise

28th October, 2015 (SC)

Section 50 and 113 of the Customs Act.

Conversion of free shipping bills into drawback shipping bills–Conversion permissible only

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when claim for duty drawback was beyond the control of the exporter; Drawback on All industry rates can be considered without converting the Shipping Bill.

The assessee is an exporter of a variety of food and agriculture related products. During the period 08.11.2007 to 23.01.2008, the appellant had filed as many as 14 shipping bills for export of Soyabean meal through Visakhapatnam Port to Vietnam and Japan. While filing the shipping bills, the appellant did not claim any duty drawback and instead free shipping bills for export were filed. The appellant submitted an application to the Commissioner (Customs) for conversion of the said free shipping bills into drawback shipping bills under Rule 12(1)(a) of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995. The Commissioner rejected the request of conversion on the ground that under Rule 12(1)(a) of the Rules, the request could be made for change/conversion only for the reasons because of which the shipping bills filed earlier were beyond the control of the exporter and since the appellant could not satisfy this requirement, it was not permissible for him to seek conversion of the free shipping bills into duty drawback bills under the aforesaid Rules. Further the Commissioner noted that that at the time when the appellant had sought the duty drawback, the goods could not be physically examined. CESTAT reversed the order of the Commissioner, however HC ruled in favour of the assessee.

Issue before the SC was that whether the appellant is entitled to claim conversion of free shipping bills into drawback shipping bills on the basis of Rule 12(1)(a) of the Rules?; If no, whether the appellant is entitled to the benefit of duty drawback on the strength of Circular No. 04/2004 dated 16.01.2004 even without seeking conversion?

SC analysed the provisions of Rule 12 and observed that a bare reading of the aforesaid Rule demonstrates that such conversion is permissible only when the exporter is able to satisfy the Commissioner that "for reasons beyond his control" drawback was not claimed. Merely because the appellant was not aware of the correct legal position would not afford any such ground that it was beyond his control.

With respect to Circular No. 04/2004, SC observed that this Circular referred to the discussion that was held in the Conference of Chief Commissioner on Tariffs and allied matters held on 25th/26th September, 2003 and notes that in the said conference it was felt that in cases where the exporters had filed free shipping bills on their own, it would not be advisable to permit such conversion. This view of the Commissioner's Conference was deliberated by the Central Board of Excise & Customs and the issue was re-examined, which resulted in the issuance of the aforesaid circular. After taking note of the provisions contained in Rule 12(1)(a) of the Rules which undoubtedly state that *"no provision exists for permitting conversion of free shipping bills into drawback shipping bills"*, the Board was still of the opinion that it was permissible for the Commissioner to examine and consider individual requests on merits and facts in terms of the aforesaid provisions and the relaxation shall only apply in respect of drawback claims pertaining to All Industry Rates of drawback and it would not apply to brand rate of duty drawback, where rate is claimed in terms of Rule 6 or Rule 7 of the Customs & Central Excise Duties Drawback Rules.

SC perused Section 50 and 113 of the Customs Act and observed that the proper officer is to satisfy itself only to the extent that the goods which are entered for export are not prohibited goods and the exporter has paid the duty at the time of clearance of the goods meant for export and therefore, the inspection is confined to the aforesaid aspect viz. the goods are not prohibited. Since in the present case, goods are not dutiable, no duty has to be paid. Therefore, there was no reason for denying the benefit only on the ground that at the time when the appellant had sought the duty drawback, the goods could not be physically examined.

SC concluded that provisions of Circular No. 04/2004 dated 16.01.2004 would be applicable in the instant case. SC remitted the matter back to Commissioner directing him to examine and consider the request of the appellant on merits as per the stipulation contained in Circular No. 04/2004 dated 16.01.2004

International Taxation

LD/64/96

Columbia Sportswear Company

vs.

DIT (Karnataka HC)