CASE NO.:
Appeal (civil) 2342-2362 of 2001

PETITIONER:
Commissioner of Customs, Calcutta etc. etc.

RESPONDENT:
M/s Indian Oil Corporation Ltd. & Anr.

DATE OF JUDGMENT: 17/02/2004

BENCH:
Ruma Pal

JUDGMENT:
J U D G M E N T

RUMA PAL, J.

Between 1994 and 1999, M/s Indian Oil Corporation Ltd., the respondent herein, imported various petroleum products and crude oil into India. These goods were carried to different ports in India by vessels chartered for this purpose. Throughout this period, the respondent had cleared the imported goods upon payment of customs duty without protest by the custom authorities.

On 15th March 2000, the respondent received a show cause notice sent by the Commissioner of Customs, Calcutta, the appellant before us, alleging that the respondent had wilfully misdeclared the value of the goods while making entries under Section 46 of the Customs Act, 1962 by deliberately suppressing that the demurrage charges had been paid to the ship owners under the charter party agreements. Since, according to the show cause notice payment for the demurrage had been made through the negotiating bank, the bank charges and the demurrage paid were includible in the customs value of the goods. On this basis, the assessable value was alleged to be Rs.6026,05,71,604/-. The respondent was therefore asked to show cause why extra duty to the tune of Rs.9,75,98,31,199/- should not be realised and why penalty should not be levied against the respondent and its officers.

According to the respondent, the 17th to 20th March 2000 were holidays. On 21st March, the respondent asked for time to file a written reply to the show cause notice. This was rejected by the appellant and the demand was confirmed on 30th March 2000. Penalty equivalent to the amount of the duty determined was also levied. In addition, interest @20 per cent per annum was imposed.

The respondent filed appeals before the Commissioner of Customs (Appeals). The appeals were rejected. The respondent preferred a further appeal before the Customs Excise and Gold (Control) Appellate Tribunal (CEGAT). The Tribunal allowed the appeal of the respondent on grounds which are briefly summarized:

(1) The Central Board of Excise and Customs (CBEC) had issued a circular on 14th August 1991in which it was said that the demurrage did not form part of the assessable value of the goods imported; the circular was binding on the Revenue and the Department could not contend otherwise;

(2) The decision of this Court in Garden Silk Ltd. V. Union of India 1999 (113) ELT 358 relied upon by the Revenue was not an authority for the proposition that demurrage payable on account of delay in discharging goods from a vessel was includible in the value of goods while assessing the customs duty payable thereon.
(3) Under Section 14 of the Customs Act, 1962 the assessable value of the imported goods must be the price at which the goods are ordinarily sold. The payment of demurrage was not an incident of an ordinary sale. An extraordinary expenditure, like demurrage, could not be included in the assessable value of the imported goods.

According to the appellant, the value of the imported goods was assessable under Section 14 of the Act read with the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988. The Rules require that the transaction value had to be accepted unless the adjudicating authority has valid reasons to reject it. In that event the value would have to be determined in terms of Rule 5 to Rule 8 proceeding sequentially. The adjudicating authority had accepted the transaction value which was inclusive of cost, insurance and freight (CIF). The demurrage was a component of the cost of freight. Second, it was submitted that although Section 14 of the Customs Act provided for the valuation of goods for purposes of assessment on the price at which such or like goods are ordinarily sold, the word 'ordinary' meant nothing more than that the seller and the buyer should have conducted the transaction at arms length. The appellant relied upon the decision of this Court in M/s Eicher Tractors. Ltd. 2000 (122) ELT 321 to contend that demurrage was not, in this sense, an extraordinary payment. It is paid in terms of the agreement between the respondent and the vessel owner. Third, it is submitted that by virtue of Section 14 (1-A) read with Rule 9 (2)(a) of the 1988 Rules the actual cost of freight was includible in the assessable value of the imported goods. It is contended that since the 1988 Valuation Rules incorporated the GATT Valuation Principles, this country should adopt the international understanding of the concept of demurrage. A decision of the European Court indicated that the demurrage charges payable to a transport company are part of the cost of transport. In the United States the courts had held that demurrage is only an extended freight. (U.S. v. Attantic Refining Co., DCNJ, 112 F Supp 76,80) Fourth, it is submitted that the circular issued in 1991 was not binding on the Revenue in view of the decision of this Court in Garden Silk Mills Ltd. (supra). In fact the circular had been withdrawn with effect from 2nd March 2001. Finally, it was submitted that the Tribunal had itself in the case of Panchmahal Steel Ltd. V. Collector of Customs, Rajkot 1998 (101) ELT 399 held that demurrage charges were includible in the assessable value of imported goods. The judgment was delivered on 4th December 1996 and "eclipsed" the 1991 circular.
The respondent has submitted that the circular had been issued under Section 151A of the Customs Act which was in para materia with Section 37B of the Central Excise Act and that it was well settled that the Revenue was bound by the instructions issued by CBEC. It is submitted that the Commissioner ought not to have raised

or confirmed the demand in violation of the instructions of the CBEC nor was it open to the Revenue to file an appeal before this Court seeking relief contrary to the circular. On the merits, it is submitted that the 1988 Rules were subject to the provisions of Section 14 which provides that the assessable value had to be arrived on the basis of the ordinary sale price at the price of importation. It is submitted that apart from the fact that demurrage did not form part of the ordinary sale price, even Rule 9(2)(a) did not include demurrage as a component of the assessable value. The decisions in Garden Silk and Panchmahal as also the decision of the European Court have been distinguished as inapplicable. It was submitted that the order of the Commissioner was passed with undue haste, with a closed mind and in violation of the principles of natural justice.

Section 151-A of the Customs Act, 1961 in so far as it is relevant provides:

"Instructions to officers of customs. - The Board may, if it considers it necessary or expedient so to do for the purpose of uniformity in the classification of goods or with respect to the levy of duty thereon, issue such orders, instructions and directions to officers of customs as it may deem fit and such officers of Customs and all the other persons employed in the execution of this Act shall observe and follow such orders, instructions and directions of the Board".

Materially identical provisions are contained in Section 119 of the Income Tax Act, 1961 and Section 37B of the Central Excise Act.

This Court has, in a series of decisions, held that circulars issued under Section 119 of the Income Tax Act, 1961 and 37B of Central Excise Act are binding on the Revenue .

The somewhat different approach in M/s. Hindustan Aeroneutics V. Commissioner of Income Tax, Karnataka, Bangalore 2000 (5) SCC 365 by two learned Judges of this Court, apart from being contrary to the stream of authority cannot be taken to have laid down good law in view of the subsequent decision of the Constitution Bench in Collector of Central Excise, Vadodara V. Dhiren Chemical Industries. After this Court had construed an exemption notification in a particular manner, it said:

"We need to make it clear that, regardless of the interpretation that we have placed on the said phrase, if there are circulars which have been issued by the Central Board of Excise and Customs which place a different interpretation upon the said phrase, that interpretation will be binding upon the Revenue".

Despite the categorical language of the clarification by the Constitution Bench, the issue was again sought to be raised before a Bench of three Judges in Central Board of Central Excise, Vadodara v. Dhiren Chemicals Industries: 2002 (143) ELT 19 where the view of the Constitution Bench regarding the binding nature of circulars issued under Section 37B of the Central Excise Act, 1944 was reiterated after it was drawn to the attention of the Court by the Revenue that there

were in fact circulars issued by the Central Board of Excise and Customs which gave a different interpretation to the phrase as interpreted by the Constitution Bench. The same view has also been taken in Simplex Castings Ltd. v. Commissioner of Customs, Vishakhapatnam 2003 (5) SCC 528.

The principles laid down by all these decisions are :

(1) Although a circular is not binding on a Court or an assessee, It is not open to the Revenue to raise the contention that is contrary to a binding circular by the Board. When a circular remains in operation, the Revenue is bound by it and cannot be allowed to plead that it is not valid nor that it is contrary to the terms of the statute.

(2) Despite the decision of this Court, the Department cannot be permitted to take a stand contrary to the instructions issued by the Board.

(3) A show cause notice and demand contrary to existing circulars of the Board are ab initio bad

(4) It is not open to the Revenue to advance an argument or file an appeal contrary to the circulars.

As we have noted the provisions of Section 151A are in pari materia with the provisions of S. 119 of the Income Tax Act 1961 and Section 37B of the Central Excise Act. Parliament introduced Section 151A by an amendment to the Customs Act, 1962 in 1995 but with effect from 27th December, 1985 (Act 80 of 1995), when this Court had already construed identical language in the manner indicated. It may be assumed that Parliament had legislatively approved the construction by using the exact words so construed again in the Customs Act. There is, therefore, no reason why the principles enunciated by this Court under the two earlier Acts should not also be determinative of the construction put on the later in respect of a materially similar statutory provision. This was also not argued by the appellant.

During the period in question, the following circular had been issued by the Central Board of Excise and Customs with regard, inter alia to demurrage charges:

"Subject : Demurrage charges and dispatch money not to form part of the assessable value \026 Regarding.

The Kandla Custom House had raised the issue relating to the inclusion of demurrage charges and exclusion of dispatch money for computing the assessable value ascertainable under Section 14 of the Customs Act, 1962. Pursuant to the decision taken in the Tariff Conference of Collector held in August 1981, the issue was further discussed in the Tariff Conference of February 1989. The Conference had desired that the matter may be re-examined in its totality especially in the context of current valuation principles based on the GATT Valuation at Goa on 4th and 5th April, 1991 examined the problem posed in entirety. The Conference came to the conclusion that in the past-despatch money and demurrage would not constitute element of value since it is not an element for the carriage. These moneys are in the nature of penalties or rewards

by virtue of a contract of charter agreement between the carrier and the charter and this in no way could be conceived as being part of the freight or for that matter part of the price actually paid or payable for the goods.

Having regard to the above and the fact that in no other Custom House there was a practice to include or deduct such moneys, it has been decided that 'demurrage' and 'despatch' money may not form a part of assessable value".

The Circular in no uncertain terms excludes demurrage from the assessable value. In the light of the judicial principles enunciated earlier, it was not open to the appellant to either issue the show cause notice or contend otherwise. The demand based on an assessable value inclusive of demurrage cannot be sustained as long as the circular remained operative and as long as the decisions cited earlier remain good law.

The submission of the appellant in this context is that the respondent had not acted on the basis of the circular and therefore the principle of promissory estoppel did not apply. The submission is misconceived. The circulars issued by the CBDT under the Income Tax Act, 1961 and the CBEC under Section 37(B) of the Central Excise Act, 1944 have been held to be binding primarily on the basis of the language of the statutory provisions buttressed by the need of the adjudicating officers to maintain uniformity in the levy of tax/duty throughout the country.

It is then submitted that the CEGAT had itself held that the demurrage charges were pre-landing charges and hence includible in the assessable value in Panch Mahal v. Collector of Customs Rajkot 1998 (101) ELT 399 . It is submitted that the law laid down by the Tribunal which became final for want of appeal would have to be followed otherwise there would be a chaotic situation. Reliance has also been made on the decision of this Court in Hindustan Aeronautics (supra).

We have already noted that Hindustan Aeronautics does not represent the correct law. The submission of the appellant is directly contradictory to the principles laid down by the series of decisions noted earlier and the attempt on the part of the appellant to distinguish the long line of authority is unacceptable.

The decision in Panch Mahal Steel (supra) does not allow an adjudicating officer to act in violation of the Circular issued under Section 151A. Incidentally the decision in Panch Mahal (supra) was an ex-parte one in the sense that the importer was not represented when the matter was argued. Its failure to prefer an appeal could not in the circumstances mean that the issue had become final as far as all other importers are concerned. Moreover, there was no reference to the Circular nor any reason for coming to the conclusion that demurrage was includible in the value of the imported goods.

We may mention here that the stand of the appellant that this Court had taken the view that demurrage was includible in Garden Silks (supra) both in the adjudication order and before the Tribunal appears to have been abandoned, in our opinion rightly, in the written notes of submission. Apart from the decision of the Constitution Bench in Dhiren Chemicals (supra), Garden Silks (supra) was a decision on landing charges. It did not construe the 1988 Rules. The circular on the other hand was issued on a re-examination of the issue in the light of the GATT Valuation principles as incorporated in the 1988 Rules.

In this view it is not necessary for us to determine the further issue whether in the absence of Board circulars, demurrage would still be includible in the assessable value of the imported goods. For the purposes of these appeals, it is sufficient to hold, as we do, that demurrage was wrongly included by the adjudicating officer in the assessable value contrary to the directive of the CBEC at a time when the circular had not been withdrawn.

For the reasons aforesaid, the appeals are dismissed with costs.