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PERNOD RICARD INDIA (P) LTD.

v.

COMMISSIONER OF CUSTOMS, ICD TUGHLAKABAD

(Civil Appeal No. 5840 of 2008)

B

JULY 26, 2010

[D.K. JAIN AND T.S. THAKUR, JJ.]

C *Customs Act, 1962: s.130E – Statutory appeal filed before Supreme Court u/s.130E against the order of tribunal – Challenging the applicability of rule 6 of 1988 Rules – Dismissal of appeal by Supreme Court by a non-speaking order – Held: Dismissal of appeal by Supreme Court was in exercise of appellate jurisdiction – Doctrine of merger would* D *be attracted and the appellant is estopped from raising the issue of applicability of Rule 6 – Doctrine of merger – Estoppel – Appeal before Supreme Court.*

Customs Valuation (Determination of Prices of Imported E *Goods) Rules, 1988 – Rule 5(1)(c) – Transaction value – "adjustment" in terms of Rule 5(1)(c) for determination of value of goods imported – Tribunal's direction with regard to the adjustment on account of volume of the goods imported by the importer @ 20% in the price difference between each* F *variety of its imported goods and the corresponding import of the competitor – Held: Not justified – Adjustment can be granted only on production of evidence which establishes the reasonableness and accuracy of adjustment and higher volumes of goods imported would not be sufficient to justify* G *an adjustment – A commercial practice is not a conclusive evidence for determining real price of a consignment – In the absence of some documentary evidence indicating that any rebate/discount was given to the importer by the supplier, adjustments under Rule 5(1)(c) cannot be justified.*

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Appeal: Dismissal of statutory appeal vis-à-vis dismissal of special leave petition by non speaking order – Distinction between.

Appellant, a manufacturer of spirits, imported Concentrate of Alcoholic Beverages (CAB). The appellant was a related person to the supplier. Two show cause notices were issued against the appellant proposing demand of differential custom duty in respect of imports for the period January 1995 to June 2000 and July 2000 to May 2001. Against the first show cause notice, the appellant filed a writ petition before High Court. The High Court directed that the notice issued under Section 28 of the Customs Act, 1962 should be treated as notice for finalisation of the provisional assessment. The Commissioner of Customs adjudicated upon both the show cause notices and confirmed the demand of Rs.40.37 crores as against the proposed demand of Rs.50.04 crores. Appellant filed appeal before tribunal.

By order dated 25th March 2003, while accepting the claim of the appellant that CAB should be classified under heading 2808.10, the Tribunal rejected the plea of the appellant that in spite of the fact that the supplier was a "related person", the value declared by them should be accepted in terms of Rule 4(3)(b) of the Customs Valuation (Determination of Prices of Imported Goods) Rules, 1988. The Tribunal remanded the matter to the adjudicating authority for a fresh consideration on the question of applicability of Rule 6.

The appellant challenged the order before Supreme Court by way of appeal under Section 130E of the Act which was dismissed on 21st November, 2003.

Pursuant to the order of the Tribunal, dated 25th March 2003, the Commissioner passed a fresh order

3. (1988) 4 SCC 409.

A dated 29th August 2003 and held that Rule 6 was applicable on the facts of the instant case. He accordingly, confirmed the demand of duty of customs amounting to Rs.39.96 crores. The said order was again challenged by the appellant in the tribunal, mainly on the B ground that the value of imported CAB could not be determined under Rule 6. In the alternative, it was pleaded that even the quantification of the value under Rule 6 was seriously flawed. The tribunal observed that the applicability of Rule 6 was left to the adjudicator in C the remand order and no appeal was filed thereagainst. The Tribunal again set aside the order of adjudication by the Commissioner and remanded the matter to him with certain directions by order dated 29th June, 2005. Pursuant thereto, the Commissioner passed a fresh D adjudication order on 20th June 2006, confirming a total differential duty of Rs.40.37 crores.

The appellant challenged the said order by preferring yet another appeal to the Tribunal. The Tribunal upheld the decision of the Commissioner in determining the E value of the imports under Rule 6. However, partly accepting the appeal, the tribunal directed adjustment @ 20% in the price difference between each variety of CAB of the appellant and the corresponding CAB of the competitor on account of higher volume of imports by the F appellant for determining the value of import of CAB. Dissatisfied with the direction/order of Tribunal both the parties filed the appeals.

Disposing of the appeals, the Court

G HELD: 1. Having carefully perused the orders of remand passed by the Tribunal on 25th March 2003 and 29th June 2005 the issue with regard to the applicability of Rule 6 of the Customs Valuation (Determination of Prices of Imported Goods) Rules, 1988 for valuation of

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CAB had attained finality on the summary dismissal of the appellant's appeal by this Court by order dated 21st November 2003. It is clear from a bare reading of the observations of the Tribunal in its order dated 25th March 2003, that remand to the Commissioner for fresh adjudication was confined only to the errors committed while determining the assessable values based on the transaction value of "similar goods". Thus, in principle, the Tribunal proceeded on the premise that the valuation was to be done as per the procedure laid down in Rule 6. This was also evident from appellant's pleadings when they challenged the order of remand contending in their appeal under Section 130E of the Act that Rule 6 had no application on the facts of their case and the value of imported CAB by them had to be determined as per Rule 4(3)(b) of the 1988 Rules. The appeal was, however, dismissed *in limine.* Once a statutory right of appeal is invoked, dismissal of appeal by the Supreme Court, whether by a speaking order or non speaking order, the doctrine of merger does apply, unlike in the case of dismissal of special leave to appeal under Article 136 of the Constitution by a non-speaking order.In the present case, the appellant preferred statutory appeal under Section 130E of the Act against order of the Tribunal dated 25th March 2003 and, therefore, the dismissal of appeal by this Court though by a non-speaking order, was in exercise of appellate jurisdiction, wherein the merits of the order impugned were subjected to judicial scrutiny. In the instant case, the doctrine of merger would be attracted and the appellant is estopped from raising the issue of applicability of Rule 6 in their case. Moreover, the issue with regard to the applicability of Rule 6 had attained finality for yet another reason. It is manifest from the Tribunal's order dated 29th June 2005, that the scope and purpose of remand to the Commissioner was limited. The Tribunal categorically declined to go into the issue of the appropriateness of Rule 6, with the result that the

A finding of the Commissioner in his order passed pursuant to Tribunal's earlier order dated 29th August 2003, regarding applicability of Rule 6 remained undisturbed and in fact attained finality, in as much as, the appellant did not question the correctness of the B remand order passed by the Tribunal on 29th June 2005. The Tribunal erred in re-opening and examining afresh the question as to whether or not the value of CAB could be determined by applying Rule 6 and, therefore, the objection of the revenue in that regard is accepted. C [Paras 22, 24, 26] [1013-F-G; 1014-A-D; 1017-B-D]

2.1. Rule 6 (2) provides that the provisions of clauses (b) and (c) of sub-rules (1) to (3) of Rule 5 of these rules shall *mutatis mutandis* also apply in respect of similar goods. A similar stipulation appears in Interpretative note D (2) to Rule 6. Rule 5(1)(c) provides that where no sale referred to in clause (b) of sub-rule (1) of this rule, is found, the transaction value of identical goods sold at different commercial level or in different quantities or both, adjusted to take account of the difference E attributable to commercial level or to the quantity or both shall be used, provided that such adjustments shall be made on the basis of 'demonstrated evidence', which clearly establishes the reasonableness and accuracy of the adjustments. Interpretative Note 4 to Rule 5 reiterates F that such adjustment, whether it leads to an increase or a decrease in the value, be made only on the basis of 'demonstrated evidence' that clearly establishes the reasonableness and accuracy of the adjustment. One such evidence could be a valid price list containing G prices referring to different levels or different quantities. [Para 31] [1021-F-H; 1022-A-B]

Commissioner of Central Excise, Jaipur v. Rajasthan SPG. & WVG. Mills Ltd. & Anr. (2007) 13 SCC 129; *Mirah Exports Pvt. Ltd. v. Collector of Customs* (1998) 3 SCC 292;

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Basant Industries Nunhai, Agra v. Additional Collector of Customs, Bombay **1995 Supp (3) 320 – referred to.** A

2.2. Bearing in mind the object behind the provision for "adjustment" in terms of Rule 5(1)(c), the fine distinction between the words "adjustment" and 'discount' sought to be brought out by the appellant is of no relevance to the controversy at hand. The provision is clear and unambiguous, meant to provide some adjustment in the price of identical goods, imported by two or more persons but in different quantities. It is plain that such "adjustment" may not necessarily lead to a decrease in the value. It may result in an increase as well. Reference to the word 'discount' in the interpretative note is by way of an illustration to indicate that a seller's price list is one of the relevant pieces of evidence to establish the factum of quantity discount by the seller. It is manifest that "adjustment" in terms of Rule 5(1)(c) of 1988 Rules, for the purpose of determination of value of an import, can be granted only on production of evidence which establishes the reasonableness and accuracy of adjustment and higher volumes of imports per se, would not be sufficient to justify an adjustment, though it may be one of the relevant considerations. Therefore, in so far as the question of "adjustment" in terms of Rule 5(1)(c) is concerned, the revenue having accepted the order of remand dated 29th June 2005, cannot turn around and contend that no adjustment whatsoever is warranted. Similarly, there may also be some substance in the observation of the Tribunal that generally when the transactions are in large volumes over a long period, grant of discount is a normal commercial practice but again a commercial practice, per se, cannot be treated as conclusive evidence for determining real price of a consignment. Therefore, in the absence of some documentary evidence indicating that any rebate/ discount was given to the appellant by the supplier, B C D E F G H

A **adjustments under Rule 5(1)(c) cannot be justified. In the present case, it is evident from the impugned order that though the Tribunal had felt that requisite evidence to establish the range of adjustment was lacking and for that purpose, according to it, the matter was required to be**
B **remanded to the Commissioner but being influenced by the fact that there had already been three rounds of appeals to the Tribunal, it undertook the exercise itself. This approach of the Tribunal was not in order and therefore, in the absence of any demonstrated evidence,**
C **its direction for ad-hoc adjustment @ 20%, cannot be sustained. The order of the Tribunal under appeal, in so far as it pertains to the applicability of Rule 6 of 1988 Rules, is affirmed, however, the direction with regard to the adjustment on account of volume of imports of CAB**
D **by the appellant @ 20% in the price difference between each variety of CAB imported by the appellant and the corresponding CAB of the competitor, is set aside. [Paras 33-36] [1023-D-H; 1024-A-G]**

E *Metal Box India Ltd. v. Collector of Central Excise, Madras* **(1995) 2 SCC 90;** *Kunhayammed & Ors. v. State of Kerala & Anr.* **(2000) 6 SCC 359.** *V.M. Salgaocar & Bros. Pvt. Ltd. v. Commissioner of Income Tax* **(2000) 5 SCC 373;** *Supreme Court Employees' Welfare Association v. Union of India & Anr.* **(1989) 4 SCC 187;** *Commissioner of Central*
F *Excise, Jaipur v. Rajasthan SPG. & WVG. Mills Ltd. & Anr.* **(2007) 13 SCC 129,** *Mirah Exports Pvt. Ltd. v. Collector of Customs* **(1998) 3 SCC 292;** *Basant Industries Nunhai, Agra Vs. Additional Collector of Customs, Bombay* **1995 Supp (3) 320 – referred to.**

G **Case Law Reference:**

(1995) 2 SCC 90	referred to	Para 17
(2000) 6 SCC 359	referred to	Para 23
H (2000) 5 SCC 373	referred to	Para 25

(1989) 4 SCC 187	**referred to**	**Para 25**
(2007) 13 SCC 129	**referred to**	**Para 32**
(1998) 3 SCC 292	**referred to**	**Para 32**
1995 Supp (3) 320	**referred to**	**Para 32**
(2007) 13 SCC 129	**referred to**	**Para 32**
(1998) 3 SCC 292	**referred to**	**Para 32**
1995 Supp (3) 320	**referred to**	**Para 32**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5840 of 2008.

From the Judgment & Order dated 25.06.2008 of the Customs, Excise & Service Tax Appellant Tribunal (CESTAT), New Delhi in Custom Appeal No. 559/2006.

WITH

C.A. No. 1110 of 2009.

B. Bhattacharya, ASG, V. Lakshmi Kumaran, R. Parthasarthy, L. Badri Narayan, Alok Yadav, M.P. Devanath, Rupesh Kumar, Arijit Prasad, Debashis Mukherjee, Satish Agarwal, Ajay Singh, Nishant Patil, B.K. Prasad, Anil Katiyar, R. Parthasarthy for the appearing parties.

The Judgment of the Court was delivered by

D.K. JAIN, J. 1. These two appeals under Section 130E of the Customs Act, 1962 (for short "the Act") by the importer (hereinafter referred to as "the appellant") (C.A. No. 5840 of 2008) as well as by the revenue (C.A. No. 1110 of 2009) arise from the final order dated 25th June 2008, passed by the Customs, Excise and Service Tax Appellate Tribunal, Principal Bench, New Delhi (for short "the Tribunal"), in Custom Appeal No.559 of 2006. By the impugned order, while upholding the

A decision of the Commissioner of Customs in determining the value of the "Concentrate of Alcoholic Beverages" ("CAB" for short), imported by the appellant, under Rule 6 of the Customs Valuation (Determination of Prices of Imported Goods) Rules, 1988 (for short "the 1988 Rules"), the Tribunal has directed the B jurisdictional Commissioner to redetermine the customs duty liability of the appellant after making certain adjustments in the manner indicated in the order.

2. As both the appeals call in question the same order, these are being disposed of by this common order. C

3. The case has had a chequered history and, therefore, in order to appreciate the controversy, it would be necessary to narrate the facts in detail.

D The appellant (formerly named and styled as Seagrams India Pvt. Ltd.) is a wholly-owned subsidiary of the Seagram Company Ltd., Canada, established for manufacturing/blending of non-molasses based spirits. The appellant imported CAB from M/s Joseph E Seagram and Sons Ltd., Scotland, a wholly-E owned subsidiary of Seagram Company Ltd., Canada. The strength of CAB imported was about 60%. It is not in dispute that the appellant is a "related person" to the supplier and this fact was disclosed to the Customs Authorities. The import of CAB was of four varieties, each one meant for manufacturing four brands of scotch whiskies, namely "100 Pipers", F "Passport", "Something Special" and "International Malts" (Royal Stag; Oaken Glow; Blenders Pride and Imperial Blue). The import of CAB was in wooden barrels and their value was declared separately for assessment. The appellant diluted the imported CAB by adding demineralised water and reduced the G strength to 42.8% v/v; packed them in bottles under respective brands; paid State excise duty and sold these to the dealers for ultimate sales to the consumers.

4. In the year 1999, the Directorate of Revenue Intelligence H commenced investigation into the imports of CAB by the

appellant, which resulted in the issuance of two show cause notices. The first show cause notice dated 19th December 2000 was issued proposing demand of differential duty of customs amounting to Rs.37,96,70,451/- in respect of imports relating to the period from January 1995 to June 2000 and the second show cause notice dated 16th August 2001 was issued demanding differential duty of customs of Rs.12,08,42,462/- relating to imports during the period July 2000 to May 2001. Penal action was also proposed in both the show-cause notices.

5. Against show-cause notice dated 19th December 2000, the appellant filed a writ petition before the High Court of Delhi. Vide its order dated 27th August 2001, the High Court directed that the notice issued under Section 28 of the Act be treated as notice for finalization of the provisional assessment in terms of Section 18(2) of the Act. While disposing of the petition, the High Court observed that the authorities were free to decide as to whether any notice in terms of Section 111/124 of the Act was warranted. At the same time, the High Court granted liberty to the appellant to seek its remedy as per law in the event of issuance of such a show cause notice.

6. The Commissioner of Customs adjudicated upon both the show cause notices by a common order dated 31st May 2002, finalizing the assessments and confirming the demand of Rs.40.37 crores as against proposed demand of Rs.50.04 crores. The Commissioner classified the imported CAB under the Chapter heading 2808.30 as whisky as against the claim of the appellant under the Chapter heading 2808.10.

7. Being aggrieved by the order of adjudication, the appellant filed an appeal before the Tribunal. Vide order dated 25th March 2003, while accepting the claim of the appellant that CAB should be classified under heading 2808.10, the Tribunal rejected the plea of the appellant that in spite of the fact that the supplier was a "related person", the value declared by them should be accepted in terms of Rule 4(3)(b) of the 1988 Rules.

A Nevertheless, the Tribunal remanded the matter to the adjudicating authority for a fresh consideration on the question of applicability of Rule 6 as it felt that the appellant had not been granted adequate opportunity to put forth their case against the proposal to apply Rule 6. The Tribunal, however, permitted the
B Commissioner to proceed under Rule 7 or 8 in the event of his accepting the appellant's plea that Rule 6 could not be applied. Relevant portion of the order is extracted be"...We are also of the view that while working out the provisions of Rule the Commissioner has not taken into consideration all the relevant
C factors. While fixing the value under Rule 6, the authority has to look into the definition of the term 'similar goods' under Rule 2(e) and that the conditions contained therein are satisfied. Clauses (b) and (c) of sub-rule (1), sub-rule(2) and sub-rule(3) of Rule 5 are made applicable to Rule 6 also. We find that there
D is no proper consideration of the above provisions by the Commissioner while arriving at the value under Rule 6. The appellant is justified in complaining that comparison was not made with the transaction of similar goods sold for export to India and imported at or about the time as the goods being
E valued, especially in the case of the goods covered by the second show cause notice dated 16th September, 2001. Comparison is made with imports which had taken place in January 1999, May 1999 and December 1998 for valuing the goods imported during the period July 2000 to May 2001."

F 8. The appellant challenged the said order before this Court by way of an appeal under Section 130E of the Act, which was dismissed on 21st November 2003. The appellant pleaded that invocation of Rule 6 by the Commissioner in the final adjudication order was beyond the scope of the show cause
G notice, in as much as, in the show cause notice itself it was observed that Rule 6 could not be applied because of non-availability of requisite data for adjustments required to be made under the said Rule. It was asserted that the value of CAB imported had to be determined as per Rule 4(3)(b) of 1988
H Rules.

9. Pursuant to the order of the Tribunal, dated 25th March 2003, the Commissioner passed a fresh order dated 29th August 2003 and held that Rule 6 was applicable on the facts of the instant case. He accordingly, confirmed the demand of duty of customs amounting to Rs.39.96 crores. The said order was again challenged by the appellant in the Tribunal, mainly on the ground that the value of imported CAB could not be determined under Rule 6. In the alternative, it was pleaded that even the quantification of the value under Rule 6 was seriously flawed.

10. Accepting the alternative submission of the appellant relating to the errors committed by the Commissioner while determining the assessable value of CAB on the basis of the transaction value of "similar goods", by its order dated 29th June 2005, the Tribunal again set aside the order of adjudication by the Commissioner and remanded the matter back to him with certain directions. Since the observations of the Tribunal contained in paragraphs 7 and 13 have some bearing on the merits of the rival stands on behalf of the parties, these are extracted hereunder:

> "**7.** We are not going into the above mentioned issue about the appropriateness of Rule 6 for two reasons. Firstly, we had left this Rule open to the adjudicator in our remand order and no appeal had been filed against that order. Secondly, the present appeal can be disposed of after considering the appellant's contentions in terms of Rule 6."

> "**13.** As already noted we are not going into the submissions made by the appellant against valuation under (sic) Rule 6. Instead, the appeal is being disposed of after considering the alternate submissions relating to errors committed while determining the assessable values based on the transaction value of similar goods."

The final direction by the Tribunal reads as follows:

A "From the above, it is clear that the valuation of the items in question should be re-done by using lowest transaction value of Findlaters for determining the price of 100 Pipers. Further, due adjustments towards quantity difference and retail price difference should be made wherever warranted. B In order to facilitate such revaluation, we set aside the impugned order and remit the case to the Commissioner for fresh adjudication. Both sides would be at liberty to present data relevant to the above issues."

C 11. This decision of the Tribunal was not put in issue by the appellant before a higher forum. Pursuant to and in furtherance of the directions issued by the Tribunal in the said order, the Commissioner passed a fresh adjudication order on 20th June 2006, confirming a total differential duty of Rs.40.37 crores, which happened to be more than the duty amount of D Rs.39.96 crores as confirmed in the second adjudication order.

12. As expected, the appellant challenged the said order by preferring yet another appeal to the Tribunal. Inter-alia, observing that in the first remand order the question of E applicability of Rule 6 was left to be decided by the adjudicator and in the second remand order, dated 29th June 2005, the Tribunal did not go into the applicability of the said rule and allowed the appeal on the basis of alternative pleas of the appellant, the Tribunal decided to go into the question of F applicability of Rule 6. Upon re-consideration of the issue, the Tribunal upheld the decision of the Commissioner in determining the value of the imports under Rule 6. However, partly accepting the appeal, the Tribunal held that the appellant will be entitled to further adjustments in the value of CAB determined on the basis of the value of similar goods, on account of: (i) imports G of substantially higher volumes of CAB; and (ii) where the retail price of bottled whisky was substantially lower than those of the comparable brands. It was, however, clarified that once the assessable value was determined for any brand by following the above method, the assessable value shall not be enhanced H

till a higher import price of the similar goods was noticed. The Tribunal also laid down the following methodology for making the adjustments on account of difference in volume of imports and the retail price:-

> "The price difference between each variety of CAB of the importer (say PI – Price of Import) and the corresponding CAB of competitor (say PC – Price of Comparable goods) shall be arrived at first as PC-PI; thereafter value of the import of CAB of each brand shall be determined as PI+80% of (PC-PI). In other words, instead of adding the entire difference it shall be restricted to 80% i.e. by reducing the difference by 20%.
>
> We direct that the adjustments on account of difference in retail prices shall be made in the manner prescribed below. The percentage of difference between the retail price of any brand of the appellant with the corresponding brand being compared shall be arrived at and to that extent the value of CAB of the competitor's import shall be reduced to arrive at the assessable value for CAB imported by the appellant.
>
> The above determination is subject to the following conditions:-
>
> (a) The value of any brand to be adopted shall not be higher than the value adopted by the Commissioner in his second order dated 28.09.2003.
>
> (b) The value of any brand to be adopted shall not be lower than the value declared by the importer."

13. Being dissatisfied with the order/directions of the Tribunal, as stated above, both the parties are before us in this appeal.

A 14. We have heard Mr. V. Lakshmikumaran, learned counsel appearing for the appellant and Mr. B. Bhattacharya, learned Additional Solicitor General for the revenue.

15. Learned counsel for the appellant strenuously urged
B that both the authorities below have committed a serious error of law by holding that the value of the imported CAB is to be determined as per the procedure prescribed in Rule 6 of the 1988 Rules. It was argued that having regard to the fact that scotch whisky is a specialty goods and is not commercially
C interchangeable, the CAB imported by the appellant and by others cannot be said to be 'similar goods' as defined in Rule 2(1)(e) of the 1988 Rules. It was submitted that determination of similarity in terms of Rule 2(1)(e) by the Commissioner and affirmed by the Tribunal is fallacious for the reasons: — (i) in specialty goods, the comparison of goods on the basis that
D such goods broadly contain the same components is misleading in as much as while all scotch whiskies are made from malt, have an age of at least three years and sold at the same concentration at the retail level yet such comparisons obliterate the inherent differences on the basis of which
E consumer preferences are decided. Different scotch whiskies have different tastes depending on the casks in which the scotch whisky is aged, the temperature during the ageing process, water used for making the scotch, the ingredients used etc. Additionally, blended scotch whiskies are blends of other
F scotch whiskies and blending formulae are kept secret, making each blended scotch whisky a unique product in the market; (ii) the CAB imported do not have the same quality, reputation and trademark. The concentrate imported by the appellant has a particular trademark i.e. 100 Pipers, Passport and
G Something Special 12 Years Old, which have certain quality and very little reputation in the Indian market whereas the concentrate imported by their competitors, having the trademark of Black Dog 12 Years Old, Black & White and VAT 69 have different quality and reputation as they are relatively very well
H known brands being sold in India for several decades and (iii)

the variation in price is largely due to the branding and individual preferences and, therefore, some goods command a premium price as compared to others, which is the case with regard to scotch whisky market also. The appellant and their competitors spend significantly on branding for differentiating their products and such branding, coupled with individual preferences, render such goods as not similar. Similarity cannot be determined on the basis of similarity in the prices at which the goods manufactured out of the imported goods are sold in the retail market in as much as retail price of the same brand can, in fact, be more or less in different States when compared with competitors' brand.

16. Learned counsel then submitted that even if the goods in question are treated as similar goods, Rule 6 cannot be applied because no suitable adjustments can be made for quantity difference. According to the learned counsel, apart from the fact that any goods, such as scotch whiskies, which are specialty goods, the variations in consumer preferences and the value of trademark and reputation are difficult to ascertain and adjust, there cannot be "demonstrated evidence" for quantifying such differences and, therefore, Rule 6 cannot be applied.

17. Learned counsel for the appellant also urged that the formula devised by the Tribunal, directing loading of the price of imports with 80% of the price differential owing to the differential in quantity imported is arbitrary. It was urged that since the quantity imported by the appellant is 500% to 1500% of the quantity imported by the identified brands, an adjustment of at least 40% from the price of such identified brands should have been allowed by the Tribunal. In support of the proposition that deduction to the extent of 50% in cases of whole sales were allowed, reliance was placed on a decision of this Court in *Metal Box India Ltd. Vs. Collector of Central Excise, Madras*[1]. It was, thus, pleaded that the order of the Tribunal, approving

1. (1995) 2 SCC 90.

A the application of Rule 6 deserves to be set aside. In the alternative, it was urged that if this Court comes to the conclusion that Rule 6 is to be applied for determining the value of CAB, comparison should be made for each year with the lowest price of other imports during the year with at least 40% B reduction from the list price to take care of quantity differences.

18. *Per contra,* Mr. Bhattacharya, while supporting the decision of the Tribunal, in so far as the question of applicability of Rule 6 was concerned, submitted that the Tribunal committed a serious error of law in re-examining the said question. It was C contended that apart from the fact that second remand order dated 29th June 2005, whereby the Tribunal had directed the Commissioner to apply Rule 6 and re-determine the value of CAB after making adjustments wherever warranted, was not questioned by the appellant, in view of the dismissal of their D appeal by this Court against Tribunal's order dated 25th March 2003, the said issue had attained finality and the appellant was estopped from raising it before any forum.

19. In support of revenue's appeal, learned counsel E submitted that the direction by the Tribunal to the Commissioner to give adjustment of 20% while determining the value of the imported CAB is vitiated because no evidence in this behalf was produced by the appellant before the Commissioner. Referring to para 4 of the interpretative note to Rule 5 of the F 1988 Rules, learned counsel asserted that no adjustment on account of difference in quantity can be granted unless there is "demonstrated evidence" on the basis whereof reasonableness and accuracy of the adjustment could be established.

G 20. In rejoinder, Mr. V. Lakshmikumaran argued that the appellant was fully justified in agitating before the Tribunal the issue with regard to the applicability of Rule 6. It was submitted that since the applicability of Rule 6 had been left to the adjudicator to decide in the first remand order, the question of H applicability of Rule 6 arose before the Tribunal only in the

second round. In second round again, appellant's appeal having been disposed of on their alternative submissions regarding Rule 6, the appellant's submission on applicability of Rule 6, in fact, came up for consideration before the Tribunal for the first time in the third round of appellant's appeal before the Tribunal. It was, thus, argued that filing or non filing of an appeal against the two earlier orders of the Tribunal is irrelevant.

21. The questions arising for determination are:-

(i) Whether the Tribunal was justified in re-examining the question of applicability of Rule 6?

(ii) If the answer to question (i) is in the affirmative, then whether the value of the CAB for the purpose of levying duty of customs is to be determined as per the procedure prescribed in Rule 6 or in terms of some other Rule?

(iii) Whether the direction by the Tribunal regarding adjustment to the tune of 20% in the price difference between CAB of the appellant and the corresponding CAB of the competitor, on account of volume of imports, is justified?

22. Having carefully perused the orders of remand passed by the Tribunal on 25th March 2003 and 29th June 2005, we are of the opinion that the issue with regard to the applicability of Rule 6 of the 1988 Rules for valuation of CAB had attained finality on the summary dismissal of the appellant's appeal by this Court vide order dated 21st November 2003. It is clear from a bare reading of the observations of the Tribunal in its

A order dated 25th March 2003, extracted in para 11 supra that remand to the Commissioner for fresh adjudication was confined only to the errors committed while determining the assessable values based on the transaction value of "similar goods". Thus, in principle, the Tribunal proceeded on the B premise that the valuation had to be done as per the procedure laid down in Rule 6. This is also evident from appellant's pleadings when they challenged the order of remand *inter-alia*, contending in their appeal under Section 130E of the Act that Rule 6 had no application on the facts of their case and the C value of imported CAB by them had to be determined as per Rule 4(3)(b)of the 1988 Rules. The appeal was, however, dismissed *in limine*. In our opinion, once a statutory right of appeal is invoked, dismissal of appeal by the Supreme Court, whether by a speaking order or non speaking order, the D doctrine of merger does apply, unlike in the case of dismissal of special leave to appeal under Article 136 of the Constitution by a non-speaking order.

23. The nature, concept and logic of doctrine of merger was explained elaborately in *Kunhayammed & Ors. Vs. State* E *of Kerala & Anr.*[2]. Speaking for a bench of three learned Judges, R.C. Lahoti, J. (as His Lordship then was) observed: (SCC p. 370, para 12)

> "**12.** The logic underlying the doctrine of merger is that F there cannot be more than one decree or operative orders governing the same subject-matter at a given point of time. When a decree or order passed by an inferior court, tribunal or authority was subjected to a remedy available under the law before a superior forum then, though the G decree or order under challenge continues to be effective and binding, nevertheless its finality is put in jeopardy. Once the superior court has disposed of the lis before it either way — whether the decree or order under appeal is set aside or modified or simply confirmed, it is the decree or

H 2. (2000) 6 SCC 359.

order of the superior court, tribunal or authority which is the final, binding and operative decree or order wherein merges the decree or order passed by the court, tribunal or the authority below. However, the doctrine is not of universal or unlimited application. The nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or which could have been laid shall have to be kept in view."

The Court further observed:

"**41.** Once a special leave petition has been granted, the doors for the exercise of appellate jurisdiction of this Court have been let open. The order impugned before the Supreme Court becomes an order appealed against. Any order passed thereafter would be an appellate order and would attract the applicability of doctrine of merger. It would not make a difference whether the order is one of reversal or of modification or of dismissal affirming the order appealed against. It would also not make any difference if the order is a speaking or non-speaking one. Whenever this Court has felt inclined to apply its mind to the merits of the order put in issue before it though it may be inclined to affirm the same, it is customary with this Court to grant leave to appeal and thereafter dismiss the appeal itself (and not merely the petition for special leave) though at times the orders granting leave to appeal and dismissing the appeal are contained in the same order and at times the orders are quite brief. Nevertheless, the order shows the exercise of appellate jurisdiction and therein the merits of the order impugned having been subjected to judicial scrutiny of this Court."

24. In the present case, the appellant preferred statutory appeal under Section 130E of the Act against order of the Tribunal dated 25th March 2003 and, therefore, the dismissal of appeal by this Court though by a non-speaking order, was in exercise of appellate jurisdiction, wherein the merits of the

A order impugned were subjected to judicial scrutiny. In our opinion, in the instant case, the doctrine of merger would be attracted and the appellant is estopped from raising the issue of applicability of Rule 6 in their case.

B 25. In the view we have taken, we are fortified by a decision of this Court in *V.M. Salgaocar & Bros. Pvt. Ltd. Vs. Commissioner of Income Tax*,[3] wherein the Court was called upon to consider the effect of dismissal of an appeal under Section 261 of the Income Tax Act, 1961 by a non speaking order. Speaking for the Bench, D.P. Wadhwa, J. while drawing C distinction between an order dismissing *in limine* a special leave petition under Article 136 of the Constitution and an appeal under Article 133, and drawing support from the decision of this Court in *Supreme Court Employees' Welfare Association Vs. Union of India & Anr.*,[4] held that former case does not but the latter does attract the doctrine of merger. The Court observed thus:-

> "Different considerations apply when a special leave petition under Article 136 of the Constitution is simply E dismissed by saying 'dismissed' and an appeal provided under Article 133 is dismissed also with the words 'the appeal is dismissed'. In the former case it has been laid by this Court that when a special leave petition is dismissed this Court does not comment on the F correctness or otherwise of the order from which leave to appeal is sought. But what the court means is that it does not consider it to be a fit case for exercise of its jurisdiction under Article 136 of the Constitution. That certainly could not be so when appeal is dismissed though by a non-G speaking order. Here the doctrine of merger applies. In that case, the Supreme Court upholds the decision of the High Court or of the Tribunal from which the appeal is provided under clause (3) of Article 133. This doctrine of merger

3. (2000) 5 SCC 373.

H 4. (1989) 4 SCC 187.

does not apply in the case of dismissal of special leave petition under Article 136. When an appeal is dismissed the order of the High Court is merged with that of the Supreme Court." A

26. Moreover, in the instant case the issue with regard to the applicability of Rule 6 had attained finality for yet another reason. It is manifest from the Tribunal's order dated 29th June 2005, that the scope and purpose of remand to the Commissioner was limited. As it is evident from the afore-extracted paragraphs of the said order of the Tribunal, that the Tribunal categorically declined to go into the issue about the appropriateness of Rule 6, with the result that the finding of the Commissioner in his order passed pursuant to Tribunal's earlier order dated 29th August 2003, regarding applicability of Rule 6 remained undisturbed and in fact attained finality, in as much as, the appellant did not question the correctness of the remand order passed by the Tribunal on 29th June 2005. Keeping in mind the factual scenario, we are of the opinion that the Tribunal erred in re-opening and examining afresh the question as to whether or not the value of CAB could be determined by applying Rule 6 and, therefore, the objection of the revenue in that regard deserves to be accepted. We order accordingly. B C D E

27. In the light of our opinion on the first question, we deem it unnecessary to assess the merits of the submissions made by learned counsel for the parties on the question of applicability of Rule 6 of the 1988 Rules. F

28. This takes us to the last question, viz. whether or not the direction of the Tribunal to the Commissioner to grant adjustment @ 20% in the price difference between each variety of CAB of the appellant and the corresponding CAB of the competitor on account of higher volume of imports by the appellant, for determining the value of the CAB is justified? G

29. The appellant as well as the revenue are both dissatisfied with the said direction. The former claims that they H

A should get discount of at least 40%. The stand of the latter, to the contrary, is that no demonstrated evidence, establishing the reasonableness and accuracy of the adjustment, having been adduced, the appellant is not entitled to any adjustment.

B Rules 3, 5 and 6 of the 1988 Rules are relevant for our purpose and they read as follows:-

"**3. Determination of the method of valuation.**—For the purpose of these rules,-

C (i) the value of imported goods shall be the transaction value;

(ii) if the value cannot be determined under the provisions of clause (i) above, the value shall be determined by proceeding sequentially through Rules 5 to 8 of these
D Rules."

"**5. Transaction value of identical goods.-** (1)(a) Subject to the provisions of Rule 3 of these rules, the value of imported goods shall be the transaction value of identical
E goods sold for export to India and imported at or about the same time as the goods being valued.

(b) In applying this rule, the transaction value of identical goods in a sale at the same commercial level and in substantially the same quantity as the goods being valued
F shall be used to determine the value of imported goods.

(c) Where no sale referred to in clause (b) of sub-rule (1) of this rule, is found, the transaction value of identical goods sold at a different commercial level or in different quantities
G or both, adjusted to take account of the difference attributable to commercial level or to the quantity or both, shall be used, provided that such adjustments shall be made on the basis of demonstrated evidence which clearly establishes the reasonableness and accuracy of the

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adjustments, whether such adjustment leads to an increase or decrease in the value. A

(2) Where the costs and charges referred to in sub-rule (2) of Rule 9 of these rules are included in the transaction value of identical goods, an adjustment shall be made, if there are significant differences in such costs and charges between the goods being valued and the identical goods in question arising from differences in distances and means of transport. B

(3) In applying this rule, if more than one transaction value of identical goods is found; the lowest such value shall be used to determine the value of imported goods." C

"6. Transaction value of similar goods.- (1) Subject to the provisions of Rule 3 of these rules, the value of imported goods shall be the transaction value of similar goods sold for export to India and imported at or about the same time as the goods being valued. D

(2) The provisions of clauses (b) and (c) of sub-rule (1), sub-rule (2) and sub-rule (3), of Rule 5 of these rules shall, *mutatis mutandis*, also apply in respect of similar goods." E

30. Rule 12 of the 1988 Rules provides that the interpretative notes specified in the Schedule to these rules shall apply for the interpretation of the rules. Notes to Rule 5 read as under:- F

"**Notes to Rule 5**

1. In applying rule 5, the proper officer of customs shall, wherever possible, use a sale of identical goods at the same commercial level and in substantially the same quantities as the goods being valued. Where no such sale is found, a sale of identical goods that takes place under any one of the following three conditions may be used : G

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A (a) a sale at the same commercial level but in different quantities;

(b) a sale at a different commercial level but in substantially the same quantities; or

B (c) a sale at a different commercial level and in different quantities.

2. Having found a sale under any one of these three conditions adjustments will then be made, as the case may C be, for :

(a) quantity factors only;

(b) commercial level factors only; or

D (c) both commercial level and quantity factors.

3. For the purposes of rule 5, the transaction value of identical imported goods means a value, adjusted as provided for in rule 5(1) (b) and (c) and rule 5(2), which has already been accepted under rule 4.

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4. A condition for adjustment because of different commercial levels or different quantities is that such adjustment, whether it leads to an increase or a decrease in the value, be made only on the basis of demonstrated F evidence that clearly establishes the reasonableness and accuracy of the adjustment, e.g. valid price lists containing prices referring to different levels or different quantities. As an example of this, if the imported goods being valued consist of a shipment of 10 units and the only identical G imported goods for which a transaction value exists involved a sale of 500 units, and it is recognised that the seller grants quantity discounts, the required adjustment may be accomplished by resorting to the seller's price list and using that price applicable to a sale of 10 units. This H does not require that a sale had to have been made in

quantities of 10 as long as the price list has been established as being bona fide through sales at other quantities. In the absence of such an objective measure, however, the determination of a value under the provisions of rule 5 is not appropriate." A

Notes to Rule 6 are also relevant for our purpose and read as follows: B

"**Note to Rule 6**

1. In applying rule 6, the proper officer of customs shall, wherever possible, use a sale of similar goods at the same commercial level and in substantially the same quantities as the goods being valued. For the purpose of rule 6, the transaction value of similar imported goods means the value of imported goods, adjusted as provided for in rule 6(2) which has already been accepted under rule 4. C D

2. All other provisions contained in note to rule 5 shall *mutatis mutandis* also apply in respect of similar goods." E

31. Rule 6 (2) provides that the provisions of clauses (b) and (c) of sub-rules (1) to (3) of Rule 5 of these rules shall *mutatis mutandis* also apply in respect of similar goods. A similar stipulation appears in note (2) to Rule 6. Rule 5(1)(c) provides that where no sale referred to in clause (b) of sub-rule (1) of this rule, is found, the transaction value of identical goods sold at different commercial level or in different quantities or both, adjusted to take account of the difference attributable to commercial level or to the quantity or both shall be used, provided that such adjustments shall be made on the basis of 'demonstrated evidence', which clearly establishes the reasonableness and accuracy of the adjustments. Interpretative F G H

A Note 4 to Rule 5 reiterates that such adjustment, whether it leads to an increase or a decrease in the value, be made only on the basis of 'demonstrated evidence' that clearly establishes the reasonableness and accuracy of the adjustment. One of such evidence could be a valid price list containing prices
B referring to different levels or different quantities.

32. The case of the revenue is that the term 'demonstrated evidence' means some evidence to establish that the seller had agreed to give some discount to the importer on the listed price of the product on account of high volume of purchase, which in
C common parlance is termed as bulk discount and the production of such evidence is a pre-requisite for any adjustment under the Rule. The stand of the appellant, on the contrary, is that Rule 5(1)(c) and the interpretative note (4) to Rule 5 only seek to clarify that where identical goods are sold to two or more buyers
D at a time but are not at the same commercial level or quantity, an "adjustment" shall be made to take account of the difference attributable to commercial level or to quantity or both. Their plea is that since the rule itself recognizes that prices differ when quantity differs, reference to 'discount' in the interpretative note
E needs to be viewed in a wider context because according to the appellant, the expression "demonstrated evidence" is broader in scope than the term 'discount', which is used only as an example of such evidence for adjustment. It is also pleaded that tying the concept of "adjustment" to 'discount'
F would severely restrict the application of Rule 5 or 6 as a clear evidence of 'discount' may not be available in all cases though on the facts of a particular case adjustment may be needed. In support of the proposition that there is a difference between the concept of "adjustment" and 'discount', reliance was placed
G on the decision of this Court in *Commissioner of Central Excise, Jaipur Vs. Rajasthan SPG. & WVG. Mills Ltd. & Anr.*[5], wherein it was observed that the concept of 'discount' and 'abatement' are different. It was also argued on behalf of the appellant that it is a well accepted norm that higher quantity of

H 5. (2007) 13 SCC 129.

goods attract lower prices, which fact has received judicial recognition by this Court in *Mirah Exports Pvt. Ltd. Vs. Collector of Customs*[6], *Metal Box India Ltd.* (supra) and *Basant Industries Nunhai, Agra Vs. Additional Collector of Customs, Bombay*[7]. Responding to the stand of the revenue that on the facts of the case, no adjustment was warranted, the appellant asserts that the issue of adjustment has reached finality as the correctness of the second remand order, whereby the Tribunal had remanded the matter to the Commissioner in view of the mistake in the application of Rule 6, had not been questioned by the revenue. In the said order, the Tribunal had held that due adjustments towards quantity differences and retail prices difference should be made wherever warranted. Thus, recognizing that in the present case some "adjustments" were called for.

33. We are of the considered opinion, that bearing in mind the object behind the provision for "adjustment" in terms of Rule 5(1)(c), the fine distinction between the words "adjustment" and 'discount' sought to be brought out by the appellant is of no relevance to the controversy at hand. The provision is clear and unambiguous meant to provide some adjustment in the price of identical goods, imported by two or more persons but in different quantities. It is plain that such "adjustment" may not necessarily lead to a decrease in the value. It may result in an increase as well. Reference to the word 'discount' in the interpretative note is by way of an illustration to indicate that a seller's price list is one of the relevant pieces' of evidence to establish the factum of quantity discount by the seller. It is manifest that "adjustment" in terms of Rule 5(1)(c) of 1988 Rules, for the purpose of determination of value of an import, can be granted only on production of evidence which establishes the reasonableness and accuracy of adjustment and higher volumes of imports per se, would not be sufficient to justify an adjustment, though it may be one of the relevant considerations.

6. (1998) 3 SCC 292.

7. 1995 Supp (3) 320.

34. Therefore, in so far as the question of "adjustment" in terms of Rule 5(1)(c) is concerned, we are in agreement with the Tribunal that the revenue having accepted the order of remand dated 29th June 2005, cannot now turn around and contend that no adjustment whatsoever is warranted. Similarly, there may also be some substance in the observation of the Tribunal that generally when the transactions are in large volumes over a long period, grant of discount is a normal commercial practice but again a commercial practice, per se, cannot be treated as conclusive evidence for determining real price of a consignment. In our opinion, therefore, in the absence of some documentary evidence indicating that any rebate/ discount was given to the appellant by the supplier, adjustments under Rule 5(1)(c) cannot be justified.

35. In the present case, it is evident from the impugned order that though the Tribunal had felt that requisite evidence to establish the range of adjustment was lacking and for that purpose, according to it, the matter was required to be remanded to the Commissioner but being influenced by the fact that there had already been three rounds of appeals to the Tribunal, it undertook the exercise itself. We are convinced that this approach of the Tribunal was not in order and therefore, in the absence of any demonstrated evidence, its direction for ad-hoc adjustment @ 20%, cannot be sustained.

36. In the result, the appeal preferred by the importer-appellant is dismissed and the revenue's appeal is allowed. The order of the Tribunal under appeal, in so far as it pertains to the applicability of Rule 6 of 1988 Rules, is affirmed, however, the direction with regard to the adjustment on account of volume of imports of CAB by the appellant @ 20% in the price difference between each variety of CAB imported by the appellant and the corresponding CAB of the competitor, is set aside.

37. In the circumstances, there will be no order as to costs.

D.G. Appeals disposed of.