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CUSTOMS. EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
CUSTOMS APPEAL BRANCH

Appeal No. C/559 /2006 Date 26/06/2008

Assistant Registrar
C.E.S.T.A.T, New Delhi

To : M/S SEAGRAM INDIA PVT LTD
TOWER A, 5TH FLOOR, GLOBAL BUSINESS PARK,
MEHRAULI-GURGAON ROAD,
GURGAON-122002

M/S SEAGRAM INDIA PVT LTD Appellant

Vs

C.C.ICD N.DELHI. Respondent

I am directed to transmit herewith a certified copy of **Final order No. C/144/08-CUSTOMS DATED 25.06.08**

passed by the Tribunal under Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax

Assistant Registrar

(Customs Appeal Branch)

Copy to :
1. Respondent C.C.ICD N.DELHI.

COMMISSIONER OF CUSTOMS,
ICD,TUGLAKABAD.

2. Adv. / Consult MR.V. LAXMIKUMARAN, ADV.,
B-6/10, SAFDARJUNG ENCLAVE,
NEW DELHI-110029

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4. J.C.D.R.
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8. Excise & Customs cases. B-37, Sector -1. NOIDA - 201301 Gautam Budh Nagar, (U.P.)
9. Raghuraman's 44-B, Regal Flat.Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT, U.P.
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12. Commercial Laws of India Pvt Ltd Post Bag No. 1033, No.70(Old No. 88), Thyagaraya Road, T. Nagar,Chennai 60017
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Assistant Registrar
(Customs Appeal Branch)

CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, PRINCIPAL BENCH, WEST BLOCK-II, R.K. PURAM NEW DELHI, COURT NO.1

Custom Appeal No. 559 of 2006

[Arising out of order-in-original No. 26/06 dated 20.06.2006 passed by the Commissioner of Customs, ICD Tughlakabad, New Delhi]

Date of Hearings: 17/18/19/20.3.2008 & 24/25/26.3.2008
Date of decision 25 June 2008

Hon'ble Mr. Justice S.N. Jha, President
Hon'ble Mr. M. Veeraiyan, Member (Technical)

1. Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982. : Yes
2. Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? : Yes
3. Whether Their Lordships wish to see the fair copy of the Order? : Seen
4. Whether Order is to be circulated to the Departmental authorities? : Yes

M/s Seagram India Private Limited — Appellant
[Rep. by: Mr. V. Laxmikumaran, with Mr. R. Parthasarthy, Mr. Atul Sharma & Mr. L. Badrinarayanan, Advocates]

Versus

CC, ICD, Tughlakabad, New Delhi — Respondent
[Rep. Mr. B. Bhattacharya, Sr. Advocate with Mr. Ajai Singh, Mr. Devashish Mukherjee, Advocates, Mr.Sunil Kumar, I.O. & Mr. Deepankar Arora, Joint Director, DRI]

Coram: Hon'ble Mr. Justice S.N. Jha, President
Hon'ble Mr. M. Veeraiyan, Member (Technical)

Final Order No. C/144/08 dated 25/6/08

ORDER

Per: M. Veeraiyan

This is an appeal against the order of the Commissioner No. 26/06 dated 20.6.2006. This matter is before the Tribunal for the third time. It has a long and troubled history.

2. Heard the learned Advocate Mr. V. Lakshmikumaran, assisted by Mr. R. Parthasarthy, Mr. Atul Sharma & Mr. L. Badrinarayanan, Advocates for the appellant and Mr. B. Bhattacharya, Sr. Advocate assisted by Mr. Ajai Singh Advocate & Mr. Deepankar Arora, Joint Director, DRI for the Department. After the hearing was over both the sides filed written submissions.

3.1. The relevant facts, in brief, are as follows:-

(a) The appellant imported concentrates of alcoholic beverages (herein after referred to as CAB) from M/s Joseph Seagram and Sons Ltd., Scotland which is wholly owned subsidiary of Seagram Company Ltd., Canada. The strength of CAB imported was about 60%. The appellant is admittedly a related person to the supplier and the same fact was declared to the Customs authorities. The assessment was made provisional.

(b) The appellant imported CAB in four varieties one each meant for bottling of the four specific brands of whiskies namely; "100 Pipers", "Passport", "Something Special" and "International Malt".

(c) The appellant was importing the CAB in wooden barrels; they were declaring the wooden barrels and their value separately for assessment.

(d) The appellant diluted the imported CAB by addition of demineralized water and reduced the strength to 42.8%; packed them in bottles meant for customers under the respective brands; paid State excise duty; sold to their dealers for ultimate sales to the customers.

(e) In 1999, the Officers of Directorate of Revenue Intelligence (DRI) commenced investigation which resulted in issue of two show cause notices. First show cause notice dated 19.12.2000 was issued proposing demand of differential duty of Rs. 37,96,70,451/= in respect of imports relating to the period from January 1995 to June 2000 and penal action, and the second show cause notice dated 16.8.2001 was issued demanding differential duty of Rs. 12,08,42,462/= relating to imports during the period July 2000 to May 2001 and proposing penal action.

(f) Against the show cause notice dated 9-12-2000, the appellant filed writ petition before the Hon'ble High Court of Delhi and the High Court vide order dated 27-8-2001 directed that the notice issued under section 28 be treated as notice for finalization of the provisional assessment in terms of Section 18(2) of the Customs Act. The High Court also observed that the authorities were free to decide as to whether any notice in terms of Section 111/124 of the Customs Act was warranted or called for, and also gave liberty to the appellant seek remedy as per law in the event of issue of such show cause notice.

3.2 **First order of the Commissioner and the First Remand Order by the Tribunal:**

The Commissioner of Customs decided both the show cause notices by a common order dated 31.05.2002; finalized the assessments and confirmed a demand of about Rs. 40.37 crores as against proposed demand of Rs. 50.04 crores. By the said order, the Commissioner classified the imported CAB under Chapter heading 2808.30 as whisky as against the claim of the appellant under Chapter heading 2808.10. This dispute related only to imports in the initial period covered by ten bills of entries involving duty demand of Rs 3,65,99,350/=.

On appeal by the party, the Tribunal vide order dated 25.03.2003 set-aside the classification under 2808.30 and accepted the classification claimed by the appellant under 2808.10. However, the party's claim that in spite of relationship the value declared by them was acceptable in terms of Rule 4(3)(b) of the Customs Valuation Rules, 1988 was rejected. The Tribunal remanded the matter to the original authority to consider the applicability of rule 6 and to determine, in the event of his finding that the rule 6 was not applicable, the value under rule 7 or 8.

The appellant filed appeal against the order dated 31-5-2002 of the Tribunal before the Hon'ble Supreme Court which was dismissed vide order dated 21.11.2003.

3.3. Second Order of the Commissioner and second Remand order of the Tribunal

In pursuance of the order of the Tribunal dated 25.3.2003, the Commissioner passed order dated 29.8.2003; he held that rule 6 is applicable and confirmed the demand of duty amounting to Rs. 39.96 crores. Against this order, the party filed appeal to the Tribunal. In the appeal before the Tribunal, the appellant canvassed that rule 6 was not applicable; alternatively, it was submitted that even if application of rule 6 was upheld, there were serious flaws in the manner of applying rule 6.

Tribunal vide its second order dated 29.6.2005 again remanded the matter with certain directions (scope of the remand order is also in dispute before us.)

3.4 **Third Order of the Commissioner:**

Commissioner in pursuance of the Tribunal's order dated 29.6.2005 has passed the impugned order dated 20.6.2006 confirming a total differential duty of Rs. 40.37 crores. He has adopted valuation under rule 6; while doing so, he has compared 100 Pipers with Findlaters as directed by the Tribunal. In respect of some years he has adopted prices higher than what was adopted by the Commissioner in his second order dated 29.8.2003. Similar is the case in respect of other brands as well. As a result, the duty demand is more than the duty amount of Rs. 39.96 confirmed by the second adjudication order.

4. Learned Advocate for the appellant inter-alia made the following submissions:-

(a) The determination of value under Rule 6 by the first adjudication order was clearly beyond the show cause notice as the show cause notice explicitly rejected the application of rule 6.

(b) By the first order of remand the Tribunal gave directions to the adjudicating authority to consider the matter afresh and gave liberty to apply rule 6 after taking into account the reply on the proposal to invoke rule 6 or in the event of finding that rule 6 is not applicable, to consider application of rule 7 or rule 8 as the case may be.

(c) Since the applicability of rule 6 was left to the adjudicator to decide, the Tribunal had not decided the legality of applying the rule 6 in the first remand order.

(d) The Commissioner did not issue fresh show cause notice even after request for the same; still the appellant participated in the proceedings; the Commissioner by his second order confirmed the demand amounting to Rs 39,96,12,771 once again applying rule 6 disregarding several relevant submissions as to why rule 6 was not applicable.

(e) The matter was agitated before the Tribunal for the second time mainly on the ground that rule 6 was not applicable; alternative arguments were also made to the effect that even if rule 6 was applicable, the adjudicating authority had committed several serious mistakes in arriving at the assessable value. The Tribunal did not go into the applicability of rule 6 in its second order dated 29.6.95 either and disposed of the appeal only on the basis of the alternative pleas of the appellant.

(f) The Commissioner did not entertain any submissions relating to the applicability of rule 6 while passing the impugned order. The impugned order also suffers from several mistakes in applying rule 6, and while passing the said order the directions of the Tribunal have not been followed.

(g) Since the applicability of rule 6 was left to the adjudicator to decide, and the Tribunal did not decide the applicability of rule 6 in the first remand order. The issue of applicability of rule 6 was also not decided by the Tribunal in the second remand order, the third order of the original authority passed in pursuance of such remand order being against the interest of the assessee, they are entitled to raise the issue relating to applicability of rule 6 before the Tribunal in the present proceedings.

(h) Application of rule 6 involves first and foremost identification of similar goods. Such identification is a pre-requisite for applying the rule 6. Rule 2(1)(e) gives the definition of 'similar goods'. The definition has two major components. Similar goods need not be alike in all respects ; but the relevant factors like quality, reputation, existence of trade mark are required to be taken into account while choosing the similar goods. For consumer goods like perfumes or alcoholic beverages, the quality, reputation and trade mark are major influencing factors. Similarity of goods should be determined with reference to two or more imported goods and not with reference to the final products manufactured out of the imported goods. Even the brands owned by their own company namely, 100 Pipers, Passport, Something Special and International Malt are not alike and are not comparable. Therefore, comparison of 100 Pipers with the competitor brands like Vat 69 or Findlaters disregarding the value of brand name, trade mark is not correct. No two products with differing brand names can be compared and treated as similar goods especially in products like perfumes and alcoholic beverages.

(i) What had been imported by the appellant was CAB meant for different brands of Whiskies. For the purpose of comparison, therefore, similarity of goods should be with CAB imported by others. Comparison on the basis of retail prices of whiskies of different brands of appellant bottled in India, with the retail prices of similarly bottled whiskies of the competitors who also import concentrates and bottle them and sell in India, and finding on such comparison that CAB imported by the appellant and CAB imported by the competitors are similar goods, is not legally correct. Similarity should be between goods imported by the appellant and those imported by the competitors. It should not be based on goods manufactured by the appellant using imported goods and goods manufactured by the competitors using the imported goods. In other words, based on the final products, the imported concentrate of the appellant and the imported concentrate of the competitor can not be held to be similar.

(j) Assuming '100 Pipers' are comparable to 'Vat 69' and 'Findlaters', 'Passport' with 'Black and White', 'Something Special' with 'Black Dog' and 'International Malt' with 'Valted Malt Spirit', still there are several factors which require to be considered. Provisions of Rule 5 should be applied mutatis mutandis while determining the value under the provisions of rule 6.

(k) Appellant's imports are much higher in volume than imports by the competitors which were sought to be compared. When higher quantum of import spread over a long period is involved, the prices are commercially negotiated and a lower price is normally permissible. Therefore, while adopting rule 6, an adjustment for high quantity of import made by the appellant should be necessarily granted. The responsibility to grant such adjustment is on the officer. As the principles enshrined in rule 5 are applicable to rule 6 also, the officer has no choice but to give necessary adjustment. Such adjustment can be granted on the basis of demonstrated evidence. Valid price list of the supplier indicating the discount is only an illustrative document for grant of such adjustment. The appellant has demonstrated by providing the actual quantum of import by the appellant as well as the competitors, year wise and hence they are entitled to adjustment in view of their high volume of imports. If adjustments are not made available, the application of rule 6 is ruled out.

(l) While comparing the value of similar goods, it is mandatory that the Department should gather details of all contemporaneous imports and adopt the lowest of the available transaction value as rule 6 price. The Department has not gathered all details and made available the same to the appellant as could be seen by very high overall volume of import of whisky into the country.

(m) While comparing the value of different brands based on retail prices, the Department has chosen to rely on the retail prices applicable to Delhi on the ground that the goods were imported through Delhi. The retail prices of various brands in different States depend upon the State level taxes. The department should have conducted such studies extensively and should have given the benefit of the most beneficial comparison to them.

(n) Choice of similar goods cannot be based on actual sale price in India.

(o) In applying the residuary rule i.e. rule 8 of the Customs Valuation Rules the officer is prevented from relying on the sale price of goods produced and sold in India. In the present case, the department has chosen to rely on the retail sale price of goods produced out of imported goods and chose similar goods. What is not permissible under rule 8 cannot be used while applying the provisions of rule 5, 6 or rule 7.

(p) The intangibles like the quality, reputation of the product especially those of the special products like beverages and perfumes, make products different and the products as not similar. In such cases, the value of trade mark which is intangible is quite high. While applying rule 6, there is a need for giving adjustments by way of unbundling of the tangibles and the intangibles.

5. On behalf of the Department the following submissions were made.

(a) Show cause notice dated 19.12.2000 was issued invoking Sections 28, 111, 112 & 114A of the Customs Act. In view of the order of the Delhi High Court dated 27.8.2001, notice was treated as one for finalization of assessment in terms of Section 18(2) of the Customs Act. The second show cause notice dated 16.8.2001 was also treated as notice for finalization as the same was issued on the lines of the show cause notice dated 19.12.2000.

(b) The case was adjudicated by the Commissioner and on appeal the Tribunal vide its order dated 27.3.2003 held that that rule 4(3) (b) can not be applied in their case. It was also held "the appellant cannot be herd to contend that it was able to prove that the relationship has not influenced the price". Tribunal remanded the matter to the original authority to consider the applicability of rule 6 and in case the same is not found applicable, then, to consider applicability of rule 7 or 8. The Tribunal in the first remand order, thus emphatically rejected the applicability of rule 3 and rule 4..The Tribunal took note of the grievance of the assessee that comparison was not made with imports made at or about the same time.

(c) The first remand order was challenged by the appellant in the Supreme Court but with out success and hence became final in so far as the issues decided in the said order are concerned.

(d) The second remand order dated 29.6.2005 took note of the fact that Commissioner had applied rule 6. The findings of the Tribunal in paras 7, 13, 16 and 20 of the order, read together would show that the Tribunal had agreed with the decision of the Commissioner fixing the prices under rule 6. The finding that it was "not going into the submissions made by the appellant against valuation under rule 6" should not be treated as not giving decision on applicability of rule 6. Therefore, the second remand order which was not appealed against must be treated as final and the appellant can not be allowed to agitate the applicability of rule 6.

(e) If the appellant are held entitled to agitate the applicability of rule 6, it was submitted that in considering the similarity of imported goods, it is to be kept in mind that unlike 'identical' goods which are required to be "same in all respects", the 'similar' goods need not be alike in all respects.

(f) The decision of the Commissioner that the imported goods and the goods of the competitor are similar goods are well founded; both are imported goods; both are scotch whiskies; both originated from the same country ; both have like characteristics and like components; they are commercially interchangeable; and both have popular trade mark/ brand name.

(g) The subject goods and the goods which are compared should be of "substantially same quality". The comparison was made between whisky and whisky, Malt Whisky and Malt Whisky, product of maturity of twelve years with the product of maturity twelve years and based on these factors, the goods were found similar. Price was taken as an indicator/additional factor. On the above basis only 100 Pipers were treated as similar goods to Vat 69 and, later, to Findlaters in terms of Tribunal's order; Passport was treated as similar to Black and White; Something Special was treated as similar to Black Dog.

(h) The appellant themselves in the memo of appeal indicated that market prices in India of the competitive brands were taken as yardstick to negotiate the prices of CAB imported by them. Therefore, there was nothing wrong in considering the retail prices as one of the factors for determining the similarity of goods imported.

The Department has not relied on the retail sale price of the appellant's product vis-a-vis the competitor's product alone to arrive at a conclusion that they are similar goods. The price was taken as one of the important factors for identifying similar products. It is not correct to say that the price was taken as the only indicator.

(i) Undue importance should not be given to the trade mark being different between the imported goods and the goods sought to be compared. The appellant themselves have considered these are comparable brands. Rule 2(1)(e) of the Valuation Rules envisages that "the existence of trade mark should also be taken into account". Rule 2(1)(e) dealing with similar goods contains two yardsticks. The first relating to common characteristics and common components which are objective criteria stand on a higher pedestal. The second yardstick relating to quality, reputation and existence of trade mark stands on a lower pedestal as they are pre-fixed by words "having regard to", though they do mean that the same can not be ignored. The latter 'intangible' yardsticks should not be understood in the sense as understood by technically qualified people but as understood by the normal users.

(j) The import of whisky was subject to licensing under the Exim Policy; license was issued only for a year and it can not be said with certainty that for the next year also license will be issued. Under the circumstances, the appellant's attempt to club the imports over the years and to claim that they had imported substantially higher quantities when compared to their competitors' brands and, therefore, they are entitled to substantial adjustment in value to arrive at assessable value in terms of rule 6, is not correct.

(k) If the applicant wanted rule 7 to be applied, it should have produced evidence that the goods imported by them and the competitors' brands are not similar.

(l) In pursuance of Tribunal's order entire data of imports on the comparable goods had been given to the appellant and they were given opportunity to offer comments.

6. At the outset, we would like to place on records our appreciation on advocates on both sides for ably assisting us by taking us through the different stages of the case and the voluminous records to enable appreciation of the facts of the case, and making elaborate submissions on various legal issues involved in this case.

7. We may, before considering the issues, extract the relevant portions of the order of the Delhi High Court, first order of the Tribunal dated 25.3.2003 and second order of the Tribunal dated 29.6.2005 as below.

7.1. Extract from High Court's order

> "Notice issued under Section 28 and Section 111 of the Customs Act, 1962 (in short the Act) is assailed in this writ petition. Learned Solicitor General, on instructions, submits that the notice may be treated to be one for the purpose of finalization of the assessment in terms of Section 18(2) of the Act. It is further submitted that if it is so thought proper, notice in terms of Section 111 read with Section 124 shall be issued. Learned counsel for the petitioner, on the other hand, contends that the stage for initiation of action under Section 111/124 has not yet taken place. According to the petitioner Section 28 of the Act has no application to the facts of the case because a final assessment in terms of Section 18(2) has not yet been made. In view of the statement of the learned Solicitor General, we need not go into that question. Obviously the authorities are free to decide as to whether at the present juncture any notice in terms of Section 111/124 is warranted or is called for. In case the authority decides to initiate action under the said provisions, it shall be open to the petitioner to approach the appropriate forum for its remedy. It goes without saying that if such a notice is issued, the petitioner can, in the first instance, respond to that highlighting its objections, if any, to the issuance".

7.2. Extracts from first order of the Tribunal

"**13.** We appellant against the procedure find merit in the objection raised by the followed by the Commissioner in choosing Rule 6 for fixing the value and also in the manner in which Rule 6 was applied in this case. Admittedly, in the show cause a reference was made to Rule 6 and after giving certain reasons it was proposed not to apply Rule 6 to arrive at the value in this case. Thus the assessee was not put to notice in the show cause notice on the application of Rule 6. Therefore, if the Commissioner thought it fit to proceed under Rule 6 for fixing the value the assessee should have been given an opportunity to put forward its contention against the proposal to proceed under Rule 6. This is a requirement to satisfy the salutary principles of natural justice. On going through the decision of the Supreme Court in *N.B. Sanjana* v. *Elphinstone Spinning and Wvg. Mills Co. Ltd.* relied on by the Revenue we do not find any ratio laid down therein which would go against the above view. In the above case the Supreme Court took the view that if the Assistant Collector of Central Excise had power to issue notice either under Rule 10A or Rule 9(2) the fact that the notice refers specifically to a particular rule, which may not be applicable, will not make the notice invalid on that ground. In coming to the above conclusion the Apex Court placed reliance on its own earlier decision in *J.K. Steel Ltd.* v. *Union of India* - 1978 (2) E.L.T. (J 355) (S.C.) = AIR 1970 S.C. 1173. There it was held that if the exercise of a power can be traced to a legitimate source, the fact that the same was purported to have been exercised under different power does not vitiate the exercise of the power in question.

15. since the In the present case adjudicating authority took the view that the value can be arrived at under Rule 6, it is not necessary to go to Rule 7 or 8 as was proposed in the show cause notice. An opportunity should have been given to the appellant to put forward its case against the proposal to proceed under Rule 6. We are also of the view that while working out the provisions of Rule the Commissioner has not taken into consideration all the relevant 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 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 valued, especially in the case of the goods covered by the second show cause notice dated 16-9-2001. 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.

18. We find merit in the contention raised by the Revenue. Interpretative Notes to Rule 4(3)(b) say that the importer gets an opportunity to demonstrate that transaction value closely approximates to a 'test value previously accepted' by the proper officer of Customs and is, therefore, acceptable under the provisions of Rule 4. If the proper officer of Customs has already sufficient information to be satisfied, without further detailed enquiries that one of tests provided under Rule 4(3)(b) had been made, there is no necessity to require the importer to demonstrate that test can be met. In the present case, as rightly contended by the Revenue, there is no 'test value previously accepted' by the proper officer of Customs and therefore, by applying Rule 3(b) the appellant cannot be heard to contend that it was able to prove that the relationship had not influenced the price.

19. Something we will now refer to the issue whether Special imported during the period 1995-96 has to be treated on a par with Passport and 100 Pipers as far as its value is concerned. It was alleged in the show cause notice that during the period the appellant had bottled Something Special as deluxe whisky and sold the same in Indian market at a price of Rs. 1200/- to Rs. 1300/- as against Rs. 650/- to Rs. 800/- of Passport and 100 Pipers. The Commissioner has held in the assessment order that Something Special imported during 1995-96 i.e., before September 1996 was of the same quality of Something Special imported after September 1996. It is the case of the appellant that Something Special was imported during the relevant period without any claim that it was 12 years old and that the age certificate would show that Something Special concentrates were only 4 years old and not 12 years. The contention of the appellant that this fact was confirmed during the investigation by H.M. Customs and Excise U.K. does not seem to be correct. The documents relied on by the appellant in support of the above contention only go to show that Something Special was priced at the same rate of Passport and 100 Pipers before September 1966. No where it is mentioned or certified that Something Special imported before September 1996 was not 12 years old but only 4 years old. The letter dated 3-6-93 addressed to the exporter would also clearly show that the importer has treated both blend and age of the product as relevant considerations. The allegation that during the relevant period Something Special concentrate was bottled by the appellant as deluxe whisky and was being sold in Indian Market at a higher rate than 100 Pipers and Passport is not shown incorrect by the appellant. We are, therefore, inclined to hold that the Commissioner was correct in his finding on this issue.

27. We, therefore, set aside the order impugned and remand the matter to the Commissioner for fresh consideration in the light of the findings and observations in this order. The Commissioner will afford an opportunity to the appellants to submit its reply on the proposal to invoke Rule 6. We make it clear that it will be open to the Commissioner to proceed under Rule 7 to 8 in case he comes to a conclusion after taking into consideration the reply submitted by the appellant that Rule 6 is not liable to be invoked. An opportunity of fresh hearing will also be afforded to the appellant".

7.3 Extracts from second order of the Tribunal

"**13.** As already noted, we are not going into the submissions made by the appellant against valuation under 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.

14. The grievance of the appellant with regard to valuation of concentrate for '100 Pipers' is that the cheapest of similar goods, namely Findlaters, was excluded from consideration. The contention is that this action is clearly illegal inasmuch as sub-rule (3) of Rule 5 specifically stipulated that "lowest such value shall be used to determine the value of imported goods". The Commissioner rejected the appellant's request for supplying to them the complete data of imports in the following terms:-

"408. It is also the allegation of M/s Seagram that DRI had selectively taken invoices of comparable products. However, the case on record has established that during the entire period covered by the two show cause notices, the prices of impugned scotch whiskeys imported by M/s. Seagram remained constant or static. On the other hand, the prices for comparable U.D. products were seen to be fluctuating in a particular range. However, the lowest in the price range for comparable products is required to be and should be adopted in the subject case. If this is done, no further objection will sustain unless it is proved by M/s. Seagram that there was a lower than the said lowest price available of the same product, which has not been disclosed by the Department. Such allegation has not been made by M/s. Seagram. *It has also been alleged that the DRI ignored comparable product of whiskey marketed by others in India.* It is not the case of the department that there were comparable products of whiskey marketed by companies other than M/s U.D. *If it is the case of M/s. Seagram that there were indeed comparable brands of whiskeys marketed by companies other than M/s. U.D., it was for them to make specific submission in this regard, which they have not done. It would, therefore, stand to logic to infer that no other company, besides M/s. U.D, imported similar or comparable whiskey during the material period of the two show cause notices.* Surely, the department cannot be asked to discharge the onus which is un-realistic and *non est.* I have, therefore, no hesitation in holding that the above request made by M/s. Seagram is infructuous and irrelevant in the subject case"

However, during the hearing, learned Counsel for the Revenue has sought to justify the exclusion of Findlaters on other grounds also, like, according to the appellants themselves, the competition was with VAT 69 and the imports of Findlaters stopped in 1999, as the brand Special Reserve had failed.

15. The view taken in the impugned order is clearly illegal. The adjudication process related to valuation of imported goods. The relevant Rule specifically stipulated consideration of similar imported goods and utilising the lowest transaction value of similar goods for the determination of the price of the goods under import. Therefore, no data relating to similar goods could be excluded. That the show cause notice had excluded certain similar goods or failed to consider certain similar goods is no ground for their continued exclusion during adjudication. That cannot be the reason for the adjudicating authority not considering full data. The data disclosed during the appeal proceedings before us confirm that Findlaters was being imported. It is also seen that para 4.1 of the show cause notice specifically mentioned Findlaters as one of the comparable brands.

16. The explanation offered during the hearing that Findlaters was not an appropriate comparison also does not seem to be valid, inasmuch as similarity was determined in the present proceedings based on the retail prices of the various brands and not on other considerations like taste, reputation, trade mark even though they also find mention in a loose fashion. That retail price in the country of import is what has guided the Commissioner is clear from para 418 of the adjudication order.

In view of this, the appellant's submission that 100 Pipers should be valued based on the import price of Findlaters requires acceptance.

17. The general submissions made in support of the valuation based on broking value etc. cannot find acceptance in view of the specific requirements stipulated in Rule 6. That apart, those aspects, to the extent they are correct, would be satisfied since the transaction value of the similar goods which is used for valuation of the items under import, would be in terms of prevalent commercial prices.

18. The second major contention of the appellant is that adjustment in price is required to be made taking into account quantities under import of similar goods and goods under assessment. This claim is within the specific terms of rule 6. Sub rule (c) of Rule 5(1)(c) reads as under: -

" 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* 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, whether such adjustment leads to an increase or decrease in the value."

This sub-rule is equally applicable to determination of value under Rule 6 as made clear by sub-rule (2) of Rule 6. The quantity differences are large in the case of certain varieties. The appellant's claim for deduction based on quantity is required to be considered. The rule makes it clear that this is required to be done based on evidence relating to actual commercial practice in relation to quantity discount on the item under import.

19. The appellant also has a grievance that due adjustments have not been allowed in import prices taking into account the differences in the retail prices of the similar goods and assessed goods. In the present case, similar goods have been identified based on comparable retail prices. It is further clear from para 418 of the adjudication order (reproduced earlier at para 16 of this order) that there were differences in the retail prices of the compared and similar goods. Due adjustment is required to be made, as in the normal course, difference in import price would be an element contributing to difference in retail price. The difference in retail price is also not insignificant. The appellant points out a difference of Rs. 200/- per bottle in the case of 'Something Special'.

20. 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. In order to facilitate such re-valuation, 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.

8.1. **Limitations in remand proceedings.**

As already seen, this matter is before the Tribunal for the third time. The impugned order has been passed subject to the terms /conditions of the order of the Hon'ble High Court dated 27-8-2001 and the earlier orders dated 25-32003 and 29-6-2005 of the Tribunal. Some of the issues which have been decided are also sought to be agitated afresh which is not permissible. In the circumstances, taking into account various findings in the above orders and the detailed submissions made by both sides, it would be appropriate to fist determine the scope of the present proceedings.

8.2. Against the show cause notice dated 9-12-2000, the appellant filed writ petition before the Hon'ble High Court of Delhi and by order dated27-8-2001 it was directed that the notice issued under section 28 may be treated as notice for finalization of the provisional assessment in terms of Section

18(2) of the Customs Act. As per the order of the Delhi High Court penal action, if warranted, could be initiated subsequently after finalization of assessment. The scope of the show cause notices thus got modified/altered by the said order. The direction of the High Court, in our considered opinion, does not preclude use of the materials revealed in the show cause notice when the same has relevance for arriving at the value in finalization of the assessment.

8.3. First order of the Tribunal dated 27.3.2003 considered the arguments of both sides about the applicability of Rule 4(3) (b) of the Valuation Rules and rejected the contention of the appellant. It was also held, "the appellant cannot be herd to contend that it was able to prove that the relationship has not influenced the price". The claim that in spite of relationship the value declared by them was acceptable in terms of Rule 4(3)(b) of the Customs Valuation Rules, 1988 thus already stands rejected by the Tribunal. Therefore this issue is not to be considered again by the Tribunal in the present proceedings.

8.4. The submission at this stage that the determination of value under Rule 6 in the first order of the Commissioner is beyond the show cause notice as the show cause notice explicitly rejected the application of rule 6, does not deserve any consideration as the said submission did not find favour in the earlier orders of the Tribunal. In fact, the Tribunal , in spite of submissions of the appellant to the contrary, directed the Commissioner to consider the applicability of Rule 6 by its first remand order.

8.5. The contention that the Commissioner has not issued fresh show cause notice in pursuance of first remand order even after request for the same and hence there is a gross violation of principles of natural justice is not acceptable as no such show cause notice was envisaged by the said remand order. The appellant had also not moved any application before the Tribunal, at the relevant time, seeking directions in this regard. As the appellant participated in the proceedings pursuant to the remand order, this issue has lost its significance.

8.6. The second remand order dated 29.6.2005 disposed of the appeal only on the alternative plea of the appellant, and the Commissioner did not have the mandate to go into the applicability of rule 6 and therefore he was right in not entertaining any submissions relating to the applicability of rule 6.

8.7. In the first remand order, the applicability of rule 6 was left to the adjudicator to decide, the Tribunal did not decide the application rule 6. In the second order also the Tribunal did not go into the applicability of rule 6 and permit the commissioner to consider the same. The Tribunal allowed the appeal only on the basis of alternative pleas taken by the appellant. In other words, the Tribunal has not given its finding on this issue so far and hence the appellant is entitled to urge the same and ,in fact, the Tribunal is required to go into the same.

9. Having found that the applicability of Rule 6 has to be examined, it would be appropriate to reproduce the provisions of Rules 5, 6 and 7 of the Customs Valuations Rules, 1988.

> **Rule 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 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 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 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, whether such adjustment leads to an increase or decrease in the value.

(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.

(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.

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

(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.

Rule 7 Deductive 'Value - (1) Subject to the provisions of Rule 3 of these rules, if the goods being valued or identical or similar imported goods are sold in India, in the condition as imported at or about the time at which the declaration for determination of value is presented, the value of imported goods shall be based on the unit price at which the imported goods or identical or similar imported goods are sold in the greatest aggregate quantity to persons who are not related to the sellers in India, subject to the following deductions:-

(i) either the commission usually paid or agreed to be paid or the additions usually made for profits and general expenses in connection with sales in India of imported goods of the same class or kind;

(ii) the usual cost of transport and insurance and associated costs incurred within India;

(iii) the customs duties and other taxes payable in India by reason of importation or sale of the goods.

(2) If neither the imported goods nor identical nor similar imported goods are sold at or about the same time of importation of the goods being valued, the value of imported goods shall, subject otherwise to the provisions of sub-rule (1) of this rule, be based on the unit price at which the imported goods or identical or

similar imported goods are sold in India, at the earliest date after importation but before the expiry of ninety days after such importation.

(3)(a) If neither the imported goods nor identical nor similar imported goods are sold in India in the condition as imported, then, the value shall be based on the unit price at which the imported goods, after further processing, are sold in the greatest aggregate quantity to persons who are not related to the seller in India.

(b) In such determination, due allowance shall be made for the value added by processing and the deductions provided for in items (i) to (ii) of sub-rule (1) of this rule."

10.1. The Commissioner has confirmed the demand applying the provisions of Rule 6 of the Valuation Rules. According to Ld advocate for the appellant, Rule 6 is not applicable in the present case and the value requires to be determined in terms of Rule 7. The value as per Rule 7 shall be lower than the transaction value declared by them. Even if it is held that Rule 6 is applicable, adjustments as envisaged in the rules are required to be made. The submission of the learned Advocate that similarity of goods for the purpose of rule 6 has to be determined only by comparing two or more imported goods is definitely valid. In the present case, on a close scrutiny it is seen that what is being treated as similar goods are different categories of CABs imported by the appellant with goods imported by their competitors and for identifying similar goods, certain parameters have been adopted. What the law requires is to adopt parameters which are feasible and practicable to determine similarity of goods. The Commissioner has made comparison basically between concentrates imported by the appellant with concentrates imported by their competitors. The Commissioner has held that the imported goods and the goods of the competitor are similar goods adopting the following parameters; that both are imported goods; both are scotch whiskies; both originate from the same country; both have like characteristics and like components; that the imported goods are for manufacture of branded whiskey so also the goods sought to be compared with; that they are commercially interchangeable; both have popular trade mark/ brand name. We agree that the goods imported and the goods with which they were compared are of "substantially same quality". The comparison was made between whisky and whisky, malt whisky and malt whisky, product of twelve years maturity with the product of twelve years maturity and so on.

10.2. Based mainly on the above factors, the goods have been identified as similar. The Department has identified the CABs for each of the four brands imported by the appellant and CABs imported by the competitors. After ascertaining the broad similarity, the Department has used the retail price of the final product in India to identify corresponding retail brands and backwards arrived at the CAB. We find that the retail price of the final product has been taken only as an additional factor and that is not the only determining factor for comparing the different categories of CABs imported by the appellant with those of competitors. Reliance placed on the retail prices of the final product has been used to correlate and identify similar goods at the next level. The parameters adopted cannot be considered irrelevant. The price was taken as an indicator/additional factor. On the above basis only 100 Pipers were treated as similar goods to Vat 69 and later to Findlaters in terms of Tribunal order; Passport was treated as similar goods to Black and White; Something Special was treated as similar to Black Dog and so on.

10.3. The submission that no two different branded goods can be held to be similar goods is not acceptable. Rules 2(1)(e) of the Valuation Rules envisages that "the existence of trade mark should also be taken into account". Such stipulation does not lead to a conclusion that two branded goods of two different brands can never be compared. It only means that it would not be proper to compare non-branded goods with the branded goods. Similarity of goods should not be considered on same rigid parameters as applicable in the case of identical goods. The Valuation Rules and the Interpretative notes make a clear distinction between identical goods and similar goods. The comparison is for the purpose of valuation to determine the custom duty. For this purpose, no extensive market research into finer aspects of valuation of trade mark, brand names etc. is expected to be made by the Department. For determining similarity, no studies on consumer preferences, differing tastes based on cask used for the aging, the temperature during the heating process, water used for making the scotch etc. and ingredients used and details of blending formulae are expected to be made – as painstakingly argued by the Advocate. It is not only impossible but it is also not necessary. The observation in the Commentaries and the view expressed by Sh. Saul L. ~~Sharma~~ Sherwan that "similarity is likely to be found mainly with highly standardized goods" is not legally binding and may not have relevance in the present case. Such an approach would make the provisions Rule 5 unworkable. The submissions on behalf of the appellant in this regard therefore can not be accepted.

10.4. In these circumstances, the decision of the Commissioner holding the CAB meant for the four brands as similar to the CAB of contemporaneous imports for comparable brands deserves to be upheld.

10.5. It was submitted that value can not be determined under Rule 8 on the basis of the selling price in India of the goods produced in India and, therefore, what cannot be adopted under rule 8 cannot be adopted for the purpose of rule 6. Theoretically the submission may be correct. However, it is to be noted that, in the present case, the retail price of the final product in India has not been taken as the basis to determine the assessable value of imported CAB. The retail price has been adopted as an additional yardstick to determine similarity of products imported with those of the competitors.

11.1 It is admitted that the appellant is related to the supplier and the presumption, therefore, is that the price declared for imports is not acceptable on the face of it. In a transaction involving 'related persons', the value may not be arrived at on the basis of market forces, as in addition to sale transactions, there are other areas of co-operation and mutuality of interests. There are no strict norms whether certain expanses are to be incurred by the supplier or by the importer, and payments of dividends for the shares of one held by others amounts to sharing of profits. In other words, between related parties, there is a tendency to not really care for finer aspects of market conditions and determine the value of goods accordingly as there are sharing of expenditure, income and profits.

11.2 The Tribunal in its order dated 25.3.2003 had clearly held that "the appellant cannot be heard to contend that it was able to prove that the relationship has not influenced the price". Therefore the question before us is not whether the relationship has or has not influenced the price, but the question is as to the extent to which it has been influenced.

11.3 The Department's reasoning to deny adjustment claimed by the appellant on account of large volume of imports is as follows. It is submitted that, the comparison of the quantum of imports has to be considered on shipment to shipment basis and in such a case, the quantity of the goods imported by the appellant and by the contemporaneous importers is of the same magnitude. A comparison of quantity of imports for different years with that of the contemporaneous imports is not justified especially because the import of the CAB required import licence till 2001-2002. The appellant did not adduce any evidence whatsoever to justify quantity discount beyond a bald assertion. The appellant did not prove that they had any discount or a pricing policy; that did not have any objective and a quantifiable discount structure. In the present case, it cannot be said that the seller grants any quantity discount as no such quantity discount is disclosed in the contract and no other evidence has been produced to show that such a discount was given. Such adjustment cannot be made as the transaction is between related parties.

We are unable to agree with the above view of the Department. The finding of the Tribunal vide order dated 29.6.2005, on this issue, was as follows:

> "The quantity differences are large in the case of certain varieties. The appellant's claim for deduction based on quantity is required to be considered. The rule makes it clear that this is required to be done based on evidence relating to actual commercial practice in relation to quantity discount on the item under import."

Even when the transactions are between non-related parties, if large imports are made over a long period grant of a discount is a normal commercial practice. this can not be ignored in respect of transaction between related parties as in such a case, goods imported by a related person shall be assessed at a value higher that of price at which a non-related person imports. Therefore, we hold that in view of imports in higher quantities compared to the competitors, adjustment is warranted. This adjustment may not be treated on par with discount, as we are dealing with transactions between related persons. Normally we should have sent the matter to the Commissioner to decide the extent of adjustment to be made. Considering that the matter is before the Tribunal for the third time and considering that on this the appellant and the department have been taking diametrically opposite views and in view of the fact that we have spent several days hearing both sides, we propose to decide the extent of adjustment to be made.

11.4. Similarly, adjustment in respect of difference in retail sale price has to be extended. As already mentioned, the retail prices of the bottled whiskies of different brands has been taken as one of the factors to choose similar goods. A submission was made that the retail prices are bound to be different in different markets/ places especially in view of differences in rates of state excise duties. While this may be true, the differing rates apply not only to the brands of the appellant but also to the brands of competitors. Method adopted can not be considered unreasonable. Therefore, comparison of retail prices prevailing in Delhi to determine similar goods can not be assailed. No all- India survey on retail prices, as suggested by the Ld advocate is warranted. The direction of the Tribunal vide order dated 29.6.2005 on the issue of adjustment based on difference in retail prices was as follows:

> "Due adjustment is required to be made, as in the normal course, difference in import price would be an element contributing to difference in retail price."

Therefore, we hold that adjustment requires to be made on account of difference between the retail price of any brand of the appellant with the corresponding brand of similar goods being compared.

11.5. In this case, against the first order of the Commissioner the appellant alone came in appeal, the Department did not, nor did it file any cross-objection. Similarly, in respect of the second order of the Commissioner also, only the appellant filed appeal; the Department neither filed appeal nor filed any cross-objection. In the proceedings before the Tribunal, the appellant cannot be put in a position worse than they were before filing it as held in the case of Commissioner of Customs Bombay vs Vishal Chabbria 1996(81) ELT 295 (Tribunal.) Therefore, the adoption of prices in the impugned order of the Commissioner which are higher than those adopted by the Commissioner in his second order dated 28.09.2003 is not sustainable. The submissions of the learned Advocate in this regard merits acceptance.

12. We uphold the decision of the Commissioner in determining value under Rule 6. We hold that they are eligible for adjustments from the value of the similar goods as they have imported substantially higher volume. We also hold that they are eligible for adjustments from the value of the similar goods where their retail prices of bottled whisky are substantially lower than those of the comparable brands. It is clarified that once the assessable value was determined for any brand by following the above method, the assessable value shall not be enhanced till a higher import price of the similar goods was noticed.

13.1 As already decided adjustment requires to be given considering high volume of imports. This adjustment need not be treated on par with discount, as we are dealing with transactions between related persons. In this case, we are dealing with transaction on wholesale basis. The appellant has produced details on their volume of imports in support of the adjustment claimed from the value of similar goods. Taking the entire background into account, we direct that the adjustments on account of difference in volume of imports shall be made in the manner prescribed below. 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%.

13.2 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.

13.3 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.

14.1. We direct the appellant to determine the duty liability on the above lines and pay the differential duty. This should be done within 3 months from the date of receipt of this order and the payment details should be intimated to the department. The appellant is also directed to file the detailed work sheet determining the duty liability with the jurisdictional Assistant Commissioner/ Deputy Commissioner.

14.2. We direct the jurisdictional Assistant Commissioner/ Deputy Commissioner to verify the correctness of the duty liability worked out by the appellant on the above lines, and if any discrepancy is noticed, determine the duty liability by issuing a speaking order on the discrepancy, after hearing the party.

15. The appeal is disposed off on the above terms.

[Order pronounced in the open Court on 25/6/2008]

[Justice S.N. Jha]
President

[M. Veeraiyan]
Member (Technical)

[Pant]