2025 INSC 578

**REPORTABLE**

**IN THE SUPREME COURT OF INDIA**
**CIVIL APPELLATE JURISDICTION**

**CIVIL APPEAL NOS. 129-130 OF 2011**

**M/S OSWAL PETROCHEMICALS LTD. APPELLANT(S)**

**VERSUS**

**COMMISSIONER OF CENTRAL EXCISE, MUMBAI - II RESPONDENT(S)**

**WITH**

**CIVIL APPEAL NO. 131 OF 2011**

**J U D G M E N T**

**UJJAL BHUYAN, J.**

The above three appeals have been filed by the appellant under Section 35L(b) of the Central Excise Act, 1944.

2. Since the three appeals arise out of the common order dated 21.05.2010 passed by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench at Mumbai

and are inter-related with parties being the same, those were heard together and are being disposed of by this common judgment and order.

3. Be it stated that by the judgment and order dated 21.05.2010 (impugned order), Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench at Mumbai ('CESTAT' hereinafter) disposed of appeal Nos. E/2380/06-MUM, E/3816/03-MUM and E/40/02-NB-C. It may be mentioned that appeal No. E/2380/06-MUM was filed by the respondent whereas the other two appeals were filed by the appellant.

4. By the impugned order dated 21.05.2010, CESTAT dismissed the appeals filed by the appellant and partly allowed the appeal filed by the respondent. The differential duty demand in respect of the two products Benzene and Toluene for the period September, 1990 to December, 1992 amounting to Rs. 1,97,17,015.00 and for the period January and February, 1993 of Rs. 18,16,304.00 have been upheld. In respect of the aforesaid two products, CESTAT has also held that contents of the test reports on the basis of which tariff classification of the

above two products were changed leading to higher duty and hence differential duty were duly communicated to the appellant. CESTAT has also held that the assessments covering the said period were not provisional except for the months of January and February, 1993.

5. This Court *vide* the order dated 03.01.2011 had condoned the delay in filing of the appeals and had issued notice.

6. Relevant facts may be briefly noted.

7. Appellant is a manufacturer of excisable goods falling under Chapters 27, 28, 29, 32, 38 and 39 of the Central Excise Tariff Act, 1985 (briefly 'the Tariff Act' hereinafter)

8. Appellant had filed classification list bearing No. 1/89-90 effective from 03.11.1989 for various excisable products manufactured by it in terms of Rule 173B of the Central Excise Rules, 1944 (referred to hereinafter as 'the Central Excise Rules')

8.1. In the said classification list, appellant had classified the various products manufactured by it as under:

(i) Dripolene 'C' - chapter sub-heading 2713.90 and claimed concessional rate of duty under Notification No. 75/84.

(ii) Cyclo Hydro Carbons viz. (a) BTX and (b) BVR - chapter sub-heading 2902.00

(iii) Benzene and Toluene - chapter sub-heading 2902.00 claiming exemption under various notifications

(iv) Ethylene and Propylene - chapter sub-heading 2901.90 claiming exemption under various notifications.

8.2. The said classification list filed by the appellant was approved by the Assistant Collector of Central Excise, Division-I, Mumbai II Collectorate ('Assistant Collector' hereinafter) on 26.04.1990.

9. On 04.10.1990, department drew samples of Benzene and Toluene from the appellant for chemical testing. The chemical analysis as indicated *vide* the Deputy Chief Chemist's letter dated 29.01.1991 reportedly revealed that

purity of the two products was less than 96 percent, thus, warranting classification under heading 2707.10 and 2707.20 respectively.

10. Collector of Central Excise, Mumbai II then directed the Assistant Collector to file an appeal before the Collector of Central Excise (Appeals), Mumbai (for short 'Collector (Appeals)' hereinafter) against the approval granted on 26.04.1990. Accordingly, department challenged the approval of the classification list by filing an appeal before the Collector (Appeals), Mumbai on the ground that appellant had wrongly classified its products.

11. Collector (Appeals) *vide* the order dated 28.10.1991 allowed the appeal filed by the department and remanded the matter back to the Assistant Collector for re-determination of the classification of the subject goods after obtaining necessary material evidence to establish the essential chemical characteristics of the said goods.

12. In the meanwhile, despite the fact that appellant had cleared the two products Benzene and Toluene under the tariff

heading which was approved by the Assistant Collector, a show-cause notice dated 26.03.1991 was issued to the appellant by the Superintendent of Central Excise in respect of Benzene and Toluene cleared during the period September, 1990 to January, 1991 seeking to re-classify the two products under chapter sub-heading 2707.10 and 2707.20 respectively and proposing to recover differential excise duty alongwith penalty and interest. It was acknowledged in the show-cause notice that if the purity of Benzene and Toluene was 96 percent or more, those two products would be classifiable under chapter 29 as declared by the appellant but if the two products had purity of less than 96 percent, those would be classifiable under the heading 2707 resulting in higher excise duty leading to demand of differential excise duty i.e. actual duty leviable less the duty paid. Thereafter, similarly worded show-cause notices were issued covering the period from February, 1991 to December, 1992 proposing a total excise duty of Rs. 1,75,30,861.00 alongwith penalty and interest for wrong classification of the two products Benzene and Toluene.

13. Appellant filed replies to the show-cause notices. Contention of the appellant was that the issue of classification was already decided in its favour by the Assistant Collector on 26.04.1990 while accepting the classification of Benzene and Toluene under chapter sub-heading 2902.00. Further contention of the appellant was that it was not supplied with copies of the test reports relied upon in the show-cause notices to re-classify the two products.

14. Reverting back to the remand order dated 28.10.1991 passed by the Collector (Appeals), it appears that the Assistant Collector had passed an order dated 18.10.1993 directing provisional assessments of certain products mentioned in Annexure-A to the said order for the years 1990-91, 1991-92, 1992-93 and 1993-94. This included the products of the appellant. The aforesaid order directed the appellant to execute a bond and to furnish a bank guarantee equivalent to 25 percent of the differential duty.

15. Aggrieved by the remand order dated 28.10.1991, appellant filed an appeal before the then Customs and Excise

and Gold (Control) Appellate Tribunal. Primary contention of the appellant was that the appeal was heard and decided by the Collector of Central Excise (Judicial) who was not the competent authority under Section 35E of the Central Excise Act, 1944 (briefly 'the Central Excise Act' hereinafter). That apart, it was also contended that the appellate proceedings were barred by time as the time limit of one year provided under Section 35E of the Central Excise Act had expired.

16. The Customs, Excise and Gold (Control) Appellate Tribunal *vide* order dated 04.08.1997 allowed the appeal of the appellant and remanded the matter back to the Commissioner of Central Excise (Appeals) as in the meanwhile, the Office of Collector (Appeals) was renamed as Commissioner of Central Excise (Appeals) (for short, 'Commissioner (Appeals), hereinafter) to decide afresh the issue of limitation.

17. Reverting back to the show-cause notices issued by the respondent to the appellant for the products Benzene and Toluene, it appears that there was a personal hearing in which a specific contention was raised on behalf of the appellant that

copies of the test reports relied upon in the show-cause notices were not provided to the appellant, thus violating provisions of Rule 56(2) of the Central Excise Rules as well as the principles of natural justice. It was also contended that no samples were drawn by the department for any of the periods covered by the show-cause notices and that appellant had upgraded its manufacturing process in the meanwhile. Appellant also placed on record copies of test reports of the two products for the period from September, 1990 to November, 1990 which indicated that purity of the two products was above 96 percent.

18. All the show-cause notices were adjudicated by the Assistant Commissioner. *Vide* the order dated 27.02.2001, Assistant Commissioner held that the two products Benzene and Toluene manufactured by the appellant were indeed classifiable under chapter sub-heading 2707.10 and 2707.20 respectively and consequently levied duty demand of Rs. 1,97,17,015.00 alongwith equivalent amount of penalty. While so adjudicating, Assistant Commissioner relied upon the test reports in respect of the samples drawn on 04.10.1990 and

report of the Deputy Chief Chemist dated 17.01.1991 but declined to rely upon the test reports of the sample test done in the laboratory of the appellant.

19. Aggrieved by the aforesaid order, appellant filed an appeal before the Commissioner (Appeals) which was dismissed by order dated 28.09.2001. Thereafter, appellant filed further appeal before the CESTAT which was registered as appeal No. E/40/02-NB-C.

20. In the meanwhile, pursuant to the remand order dated 04.08.1997 passed by the Customs, Excise and Gold (Control) Appellate Tribunal, Commissioner (Appeals) passed an order dated 29.08.2003 holding that its earlier order was passed within the stipulated period of one year from the date of approval of the classification list as the appellant could not place on record any material evidence to the contrary. Commissioner (Appeals) also decided the issue of classification in favour of the department.

21. Aggrieved by the aforesaid order dated 29.08.2003, appellant preferred appeal before the CESTAT, which was registered as appeal No. E/3816/03-MUM.

22. In the meanwhile, the Deputy Commissioner took up the matter regarding finalization of the provisional assessments. It is contended that before adjudication, no show-cause notice was issued. Deputy Commissioner *vide* his order-in-original dated 03.03.2004 decided the issue of classification in favour of the department further holding that the assessments for the period subsequent to filing of classification list bearing No. 1/89-90 with effect from 03.11.1989 upto 1998-99 were provisional. *Vide* the aforesaid order-in-original dated 03.03.2004, Deputy Commissioner calculated the differential duty as under i.e. (i) Benzene, Toluene, Ethylene and Propylene – Rs. 5,40,50,427.00 and (ii) Dripolene 'C' – Rs. 8,92,86,214.00, thus, totalling Rs. 14,33,36,641.00 under Rule 9B of the Central Excise Rules as it then existed

23. Aggrieved by the said order-in-original dated 03.03.2004, appellant challenged the same before the

Commissioner (Appeals). Contention of the appellant was that the order-in-original was passed without issuance of any show-cause notice; the said order covered even prior periods; and that there was double demand of duty to the extent of Rs. 2,72,56,175.63. Commissioner (Appeals) *vide* the order-in-appeal dated 31.01.2005 partially allowed the appeal by reducing the demand of duty to Rs. 11,60,80,465.37 on the ground of duplication of demand.

24. Appellant filed further appeal against the aforesaid order in appeal dated 31.01.2005 before the CESTAT. By order dated 31.05.2005, CESTAT allowed the appeal and remanded the matter back to the Commissioner (Appeals) for considering afresh the issue of provisionality of assessments after furnishing to the appellant, copies of re-classification and RT-12 returns for the disputed period.

25. On remand, Commissioner (Appeals) allowed the appeal filed by the appellant *vide* the order-in-appeal dated 31.03.2006 holding that the disputed products were not under

provisional assessment during the period of dispute i.e. 1989-90 to1998-99.

26. This order in appeal dated 31.03.2006 came to be challenged by the department before the CESTAT by filing an appeal which was registered as appeal No. E/2380/06-MUM.

27. As noted above, all the three appeals were heard together by the CESTAT and were disposed of *vide* the common order dated 21.05.2010. While the CESTAT dismissed the two appeals filed by the appellant, it partially allowed the appeal filed by the department. The demand of duty for the period September, 1990 to December, 1992 (Rs. 1,97,17,015.00) and January and February, 1993 (Rs. 18,16,304.00) were upheld. CESTAT further held that the contents of the test reports relating to the two products Benzene and Toluene were intimated to the appellant. That apart, the assessments carried out were not provisional during the disputed period except for the months of January and February, 1993.

27.1. Regarding classification of Cyclo Hydro Carbons viz. (a) BTX and (b) BVR, CESTAT confirmed the order of

Commissioner (Appeals). Contention of the appellant that confirmation of demand of differential duty of the two products on the ground that the classification was wrong, was held not sustainable. As regards Ethylene and Propylene, CESTAT declined to consider the classification issue as there was no revenue implication.

28. Learned counsel for the appellant submits that CESTAT has committed a manifest error in upholding the order of Commissioner (Appeals) whereby the latter had confirmed the re-classification of Benzene and Toluene on the basis of test reports, the samples of which were drawn subsequent to the approval of the classification list bearing No.1/89-90. He submits that the said classification list was made effective from 03.11.1989 and was approved by the Assistant Collector on 26.04.1990. It was much thereafter that the purported samples were drawn in October, 1990. The test reports are dated 29.01.1991 which allegedly revealed that purity of the two products was less than 96 percent. It was on the basis of such test reports that Benzene and Toluene were re-classified under

the heading 2707.10 and 2707.20 as against the approved classification of 2902.00, thus warranting higher levy of duty resulting in differential duty demand.

28.1. Learned counsel submits that once the classification of the above two products under chapter sub-heading 2902 was approved, the same could not have been erroneously and arbitrarily unsettled by the Collector (Appeals).

28.2. It is submitted that the test reports of the samples of the two products drawn in October, 1990 were never communicated to the appellant. Thus appellant was deprived of challenging the same and invoking its right for a re-test.

28.3. Referring to the impugned order, learned counsel submits that even CESTAT admitted that copies of the test reports were not communicated. But ironically, CESTAT placed the burden on the appellant by holding that no claim was made in any of the letters written by the appellant that the results of the chemical tests which were intimated to the appellant were incorrect. CESTAT endorsed the view of the department that by intimating the results of the chemical tests, department had

fulfilled the obligation cast on it to communicate the results of the tests. This approach of the CESTAT is wholly incorrect. Learned counsel further submits that CESTAT was not at all justified to brush aside the contention of the appellant that because of non-communication of the test reports, appellant was denied the right to demand re-test. On the contrary, CESTAT put the burden on the appellant by posing the question as to why appellant did not ask for a re-test. Thereafter, CESTAT erroneously held that appellant was not deprived of its right to re-test as per Rule 56 of the Central Excise Rules as no such request was made. Further, CESTAT wondered as to why appellant did not seek re-test when it claimed that it had upgraded the facilities and its own test reports indicated that the two products had purity of more than 96 percent.

28.4. Learned counsel vehemently submits that non-communication of the test reports dated 29.01.1991 to the appellant is clearly in violation of the principles of natural justice. The same has vitiated the impugned order.

28.5. Learned counsel submits that the aforesaid test reports are part of the proceedings as those were relied upon in the show-cause notices. Therefore, non-furnishing of the same to the appellant was in clear violation of Rule 56 of the Central Excise Rules as well as of the principles of natural justice.

28.6. Learned counsel also submits that CESTAT failed to consider the contention of the appellant that appellant had upgraded its manufacturing process and thereby had achieved more than 96 percent purity.

28.7. On the question of preliminary assessments, learned counsel submits that merely because some RT-12 returns were marked as provisional, it cannot be said that the assessments were provisional. CESTAT erroneously held that there were provisional assessments only in respect of two products, i.e. Benzene and Toluene for the months of January and February, 1993. Assessments cannot be provisional for one or two products when the manufacturer is manufacturing a number of other products.

28.8. Learned counsel after referring to the materials on record submits that it was the department's own case that assessments of various products manufactured by the appellant were not provisional at all. No order under Rule 9B of the Central Excise Rules was passed; that apart, appellant had also not executed any B-13 bond. Therefore, the assessments could not be treated as provisional. Learned counsel has referred to the provisional assessment order dated 18.10.1993 passed by the Assistant Commissioner giving retrospective effect. However, no bond was executed by the appellant and hence the said assessments never became provisional. If the assessments were provisional for the months of January and February, 1993, there could not have arisen any occasion for the Assistant Commissioner to again pass provisional assessment order dated 18.10.1993 which also did not have any effect as the conditions necessary for making the assessments provisional were not fulfilled. This factum was acknowledged by the adjudicating authority in the order-in-original dated 15.10.2003 wherein he had referred to the provisional

assessment order dated 18.10.1993 and recorded a specific finding that the appellant had not resorted to provisional assessments. CESTAT failed to consider the above orders dated 18.10.1993 and 15.10.2003 though these two orders were very much on record. As a matter of fact, Commissioner (Appeals) had taken note of the aforesaid two orders and in the order-in-appeal dated 31.03.2006 held that the assessments were not provisional.

28.9. Learned counsel asserts that for an assessment to be a provisional assessment, a provisional assessment order under Rule 9B of the Central Excise Rules was required to be passed; the assessee was required to execute a bond and to follow the procedure for provisional assessment. The aforesaid requirements were not at all complied with. Therefore, the assessments could not be termed as provisional. In support of the above contention, learned counsel for the appellant has placed reliance on the following decisions:

1. *Coastal Gases and Chemicals Pvt. Ltd Vs. Assistant Collector of Central Excise, Visakhapatnam*[1]
2. *Metal Forgings Vs. Union of India*[2]
3. *Commissioner of Central Excise, Calcutta Vs. Hindustan National Glass & Industries Ltd*[3]

28.10. Adverting to the above decisions, learned counsel submits that this Court has made it clear that in order to establish that the clearances were on a provisional basis an order under Rule 9B of Central Excise Rules and payment of duty on provisional basis are mandatory requirements.

29. Learned counsel for the respondent on the other hand submits that there is no bar to re-classification on the basis of fresh facts. In the present case, after approval of the classification list, samples were drawn and sent for test. By the time Commissioner (Appeals) could pass the order-in-appeal, the test reports were available. On 26.03.1991, department issued a show-cause notice followed by similarly worded show-

[1] (1997) 7 SCC 223
[2] (2003) 2 SCC 36
[3] (2005) 3 SCC 489

cause notices contending that the two products Benzene and Toluene should have been classified under chapter sub-heading 2707.10 and 2707.20 respectively on the basis of the chemical tests conducted by the Deputy Chief Chemist which indicated that purity of the two products was less than 96 percent.

29.1. Refuting the contention of learned counsel for the appellant that the test reports were not communicated to the appellant, learned counsel for the respondent submits that the concerned Superintendent had communicated the gist of the test reports to the appellant on 29.01.1991. Though appellant had made several correspondences stating that test reports were not communicated, appellant did not claim that the gist of the test reports communicated to the appellant was not correct. Appellant did not take the stand that communication of the test result was inadequate and it also did not ask for a re-test. Therefore, it cannot be said that appellant was deprived of the right to challenge the test reports or seek re-test.

29.2. Learned counsel submits that appellant did not write a single letter after receipt of the test reports that it had

upgraded the facility and that the test conducted in its laboratory indicated that purity of Benzene and Toluene was more than 96 percent.

29.3. Adverting to the impugned order, learned counsel submits that CESTAT had rightly observed that RT-12 returns were assessed provisionally for the months of January, 1993 and February, 1993 since from March, 1993 onwards there was no endorsement by the Superintendent on such returns that the assessments were provisional. Therefore, CESTAT was justified in holding that the claim of the appellant that the assessments were not provisional is not based on facts.

29.4. Appellant also did not challenge the endorsements made by the Superintendent on the RT-12 returns that the assessments were provisional.

29.5. Finally, learned counsel for the respondent submits that there is no merit in the three appeals. Therefore, all the appeals should be dismissed.

30. Submissions made by learned counsel for the parties have received the due consideration of the Court.

31. Upon considering the materials on record and after hearing learned counsel for the parties, the following two issues emerge for our reconsideration:

1. Whether a duty demand based on re-classification of the products Benzene and Toluene from chapter 29 to chapter 27 is sustainable when such re-classification is based on test reports dated 29.01.1991 on samples drawn in October, 1990 of which only a gist was provided to the appellant by the respondent *vide* letter dated 29.01.1991?

1A. Corollary to the above question is the consequential question as to whether such test reports can legally form the basis for re-classification of the above products manufactured and cleared during 1991 and 1992?

2. Whether CESTAT was justified in treating the assessments provisional for the two products

Benzene and Toluene for the months of January and February, 1993 in the absence of any order passed under Rule 9B of the Central Excise Rules, 1944 and without executing any B-13 bond?

32. Let us take up the issue relating to re-classification first.

33. As noted, the primary issue pertains to re-classification of the products Benzene and Toluene cleared by the appellant during the years 1991 and 1992. Appellant had classified the two products under chapter sub-heading 2902.00 whereas the department proposed re-classification of the two products under chapter sub-heading 2707.10 and 2707.20 respectively.

34. It is an admitted position that classification list bearing No.1/89-90 effective from 03.11.1989 for various excisable products manufactured by the appellant including Benzene and Toluene was filed by the appellant in terms of Rule 173B of the Central Excise Rules. We have already noted the classification of the various products manufactured by the

appellant. In respect of Benzene and Toluene, appellant had classified the two products under chapter sub-heading 2902.00 and claimed exemption under various notifications. This classification list filed by the appellant was approved by the Assistant Collector on 26.04.1990. More than five months thereafter, the department drew samples of Benzene and Toluene on 04.10.1990 for chemical testing. The chemical analysis *vide* the Deputy Chief Chemist's letter dated 29.01.1991 reportedly revealed that purity of the two products was less than 96 percent, thus warranting re-classification under chapter sub-heading 2707.10 and 2707.20 respectively.

35. The above test reports though formed the basis of the department's stand that the two products would warrant re-classification thereby a higher duty demand, were not furnished to the appellant. On the basis of such test reports department had issued identically worded show-cause notices covering the period from September, 1990 to December, 1992. The chemical test reports were neither annexed to the show-cause notices nor were furnished to the appellant. According to the department,

gist of the test reports were mentioned in the show-cause notices. In its replies to the show-cause notices appellant stated that it was not supplied with copies of the test reports relied upon in the show-cause notices to re-classify the two products which prevented it from challenging the test reports and to seek a re-test.

36. CESTAT brushed aside such contention holding that furnishing of gist of the test reports amounted to substantial compliance to the requirements of Rule 56 of the Central Excise Rules as well as the principles of natural justice. That apart, according to CESTAT, appellant did not seek re-test. Therefore, CESTAT was of the opinion that there was compliance to Rule 56 of the Central Excise Rules and consequently the re-classification was justified.

37. We are afraid we cannot subscribe to such sweeping generalizations made by CESTAT. There is no dispute that the test reports formed the basis for re-classification of the two products Benzene and Toluene. Department had entirely relied upon the test reports to alter the classification from 2902.00 to

2707.10 and 2707.20, thereby necessitating a higher duty demand resulting in levy of differential duty demand. Therefore, principles of natural justice required that copies of such test reports ought to have been furnished to the appellant. Informing the appellant only the gist of the test reports cannot be said to be in compliance with the principles of natural justice as the test reports formed the sub-stratum of higher duty demand raised by the department thus entailing adverse civil consequences on the appellant. It is axiomatic that documents relied upon by the authority to take a view different from the one existing and which would have adverse civil consequences upon the affected party should be furnished to the affected party. Otherwise, it will be a clear case of breach of the principles of natural justice.

38. We may also refer to Rule 56 of the Central Excise Rules which reads thus:

**Rule 56. Taking of samples for excise purposes. –**

(1) The manufacturer shall permit any officer to take samples of any manufactured or partly manufactured

goods or of any intermediate or residual products resulting from the manufacture thereof, in his factory.

(2) The officer referred to in sub-rule (1) shall conduct the test from the samples taken under that sub-rule and communicate to the manufacturer the result of such test.

(3) (a) Where the officer is of the opinion that the samples after completion of the test can be restored to the manufacturer, the officer shall send a notice in writing to the manufacturer requesting him to collect the samples within such period as may be specified in the notice.

(b) If the manufacturer fails to take delivery of the samples within the period specified in the notice referred to in clause (a), the samples shall be disposed of in such manner as the Commissioner of Central Excise may direct.

(4) Where a manufacturer is aggrieved by the result of the test, he may within ninety days of the date on which the result of the test is received by him, request the Assistant Commissioner of Central Excise that the samples be re-tested.

38.1. Sub-rule (1) of Rule 56 says that the manufacturer is under an obligation to permit any officer to take samples of any product manufactured in his factory. Sub-rule (2) says that

such an officer shall conduct a test from the samples so taken and communicate the result of such test to the manufacturer. Sub-rule (3) is not relevant for the present discourse. However, sub-rule (4) is relevant. According to sub-rule (4) where the manufacturer is aggrieved by the result of the test, he may within 90 days of the date on which the result of the test is received by him, request the Assistant Commissioner that the samples be re-tested.

39. The use of the word *shall* in sub-rule (2) is indicative of the mandatory nature of the provision. The officer who has taken the samples for testing has to communicate the result of such test to the manufacturer. Therefore, the officer is under a positive mandate to communicate to the manufacturer the result of such test. On the other hand, what sub-rule (4) contemplates is that upon receipt of the test result if a manufacturer is aggrieved by the same, he may within 90 days of the date on which the result of the test is received by him, request the Assistant Commissioner that the samples be re-tested. Unless a copy of the test report is furnished to the

manufacturer, he would not be in a position to seek re-test within the specified period, if he is aggrieved by the result of the test. Therefore, a copy of the test report has to be furnished to the manufacturer. In such circumstances, extracting the gist of the test reports, that too in the show-cause notices, would clearly be in breach of Rule 56 (2) and Rule 56 (4) of the Central Excise Rules. Such a procedure is not contemplated under Rule 56. That apart, it will defeat the right of a manufacturer to seek re-test if he is aggrieved by the result of the test. CESTAT has missed the point when it says that appellant was aware of the test report as gist of the same was communicated to it through the medium of the show-cause notices but it never sought for any re-test. Even at the cost of repetition, we say that the manufacturer can seek re-test within the stipulated period only if he is furnished with a copy of the test report. View taken by the CESTAT is thus clearly contrary to the mandate of Rule 56 of the Central Excise Rules. It is also in violation of the principles of natural justice.

40. We may also mention that long after approval of the classification list, department had taken samples of the two products. If at all the department wanted to inquire into the correctness of the classification submitted by the appellant, it could have taken samples of the two products prior to the approval at the stage of Rule 173B itself. Approval of classification list under Rule 173B is not an empty formality. The proper officer has to apply his mind and if he considers it necessary, he may conduct further inquiry to ascertain the correctness of classification. Therefore, such belated sampling and still further belated test reports cast a shadow of doubt about the entire procedure adopted by the respondent. This is further compounded by non-furnishing of the test reports to the appellant. Therefore, we are of the considered opinion that orders re-classifying the products Benzene and Toluene under chapter sub-heading 2707.10 and 2707.20 respectively and levying consequential differential duty demand cannot be sustained in law.

Impugned order of CESTAT justifying such re-classification cannot also be sustained.

41. Questions Nos. 1 and 1A are thus answered accordingly.

42. Let us now deal with the second issue i.e. whether CESTAT was justified in holding that assessments of the two products Benzene and Toluene for the months of January and February, 1993 were provisional.

43. This question is crucial in as much as the demand raised by the Deputy Commissioner *vide* the order-in-original dated 03.03.2004 can only be sustained if the assessments covered by the said order-in-original were provisional. Consequence of a provisional assessment is that the period of limitation would not operate; limitation stands frozen. On the other hand, if the assessments are held as regular, the demand raised *vide* the order-in-original dated 03.03.2004 would be barred by limitation. It may be mentioned that the order-in-original dated 03.03.2004 covered the period from 03.11.1989 to 1998-99.

44. For proper appreciation Rule 9B of the Central Excise Rules, as it then existed, may be examined. For easy reference Rule 9B is extracted hereunder:

> **9B. Provisional assessment to duty**
>
> (1) Notwithstanding anything contained in these rules,-
>
> (a) where the assessee is unable to determine the value of excisable goods in terms of section 4 of the Act on account of non-availability of any document or any information; or
>
> (b)where the assessee is unable to determine the correct classification of the goods while filing the declaration under rule 173B;
>
> the said assessee may request the proper officer in writing giving the reasons for provisional assessment to duty, and the proper officer may direct after such inquiry as he deems fit, that the duty leviable on such goods shall be assessed provisionally at such rate or such value (which may not necessarily be the rate or price declared by the assessee) as may be indicated by him, if such assessee executes a bond in the proper form with such surety or sufficient security in such amount, or under such conditions as the proper officer deems fit, binding himself for payment of difference between the amount of duty as provisionally assessed and as finally assessed;

Provided that all clearances in respect of excisable goods covered under such request by the assessee submitted with the proper officer under the dated acknowledgement shall be deemed to be cleared as provisionally assessed to duty at such rate or at such value as declared by the assessee, till the date when the direction of the proper officer is issued and communicated to the assessee:

Provided further that the proper officer where he is satisfied that the self-assessment made by the assessee is not in order, he may direct him to resort to provisional assessment and on receipt of such directions the assessee shall comply with such directions.

(2) * * * * *

(3) The Commissioner may permit the assessee to enter into a general bond in the proper form with such surety or sufficient security in such amount or under such conditions as the Commissioner approves for assessment of any goods provisionally from time to time:

Provided that, in the event of death, insolvency or insufficiency of the surety or where the amount of the bond is inadequate, the Commissioner may, in his discretion, demand a fresh bond and may, if the security furnished

for a bond is not adequate, demand additional security.

(4) The goods provisionally assessed under sub-rule (1) may be cleared for home consumption or export in the same manner as the goods which are not so assessed.

(5) When the duty leviable on the goods is assessed finally in accordance with the provisions of these rules, the duty provisionally assessed shall be adjusted against the duty finally assessed, and if the duty provisionally assessed falls short of, or is in excess of the duty finally assessed, the assessee shall pay the deficiency or be entitled to a refund, as the case may be.

(6) Notwithstanding the provisions of self-assessment in this rule, in case of provisional assessment, the final assessment shall be made by the proper officer.

44.1. Rule 9B is the relevant provision dealing with provisional assessment. As per sub-rule (1), where the assessee is unable to determine the value of excisable goods or the correct classification of the goods, he may request the proper officer in writing giving reasons for provisional assessment to duty. The proper officer may direct after making such inquiry as may be considered necessary that the duty leviable on such

goods shall be assessed provisionally at such rate or value as may be indicated by him. Such provisional assessment is subject to the assessee executing a bond in proper form binding the assessee for payment of the differential amount of duty as provisionally assessed and as may be finally assessed. The goods provisionally assessed under sub-rule (1) may be cleared for home consumption or for export in the same manner as the goods which are not provisionally assessed. When the duty is finally levied, the duty provisionally assessed shall be adjusted against the duty finally assessed.

45. Thus, the first and foremost requirement of Rule 9B is that it is the assessee who has to request in writing the proper officer for provisional assessment in the event the assessee is unable to determine the value of excisable goods or the correct classification of goods. This is the first requirement. The second requirement is that the proper officer competent to make provisional assessment may direct after making necessary inquiry that duty leviable on such goods shall be assessed provisionally. Such directions the proper officer can issue only

by passing a written order and not otherwise. Thirdly, the assessee must execute a bond in the proper form binding the assessee to pay the differential amount of duty as provisionally assessed and as may be finally assessed. However, Rule 9B also provides for an exception. If the proper officer is satisfied that the self-assessment made by the assessee is not in order, he may direct the assessee to resort to provisional assessment. In any event, for an assessment to be provisional in terms of Rule 9B, an order is required to be passed.

46. This Court in *Coastal Gases and Chemicals Pvt. Ltd.* (supra) and in *Hindustan National Glass & Industries Ltd.* (supra) held that in order to establish that the clearances were of provisional basis, an order under Rule 9B and payment of duty on provisional basis are essential.

47. This view was endorsed and reiterated by this Court in *Metal Forgings* (supra) in the following manner:

> **14.** From the above, it is clear that to establish that the clearances were made on a provisional basis, there should be first of all an order under Rule 9-B of the Rules, and then material to show that the goods were cleared on the

basis of the said provisional basis, and payment of duty was also made on the basis of the said provisional classification. These facts in the instant case are missing, therefore, in our opinion there is no material in the instant case to establish the fact that either there was a provisional classification or there was an order made under Rule 9-B empowering the clearance on the basis of such provisional classification. In the absence of the same, we cannot accept the argument of the Revenue that in fact the order of the Assistant Collector dated 22-1-1976 is a provisional order based on which clearance was made by the appellants or that they paid duty on that basis. On the contrary, as held by the judicial member the said order of classification was a final order, therefore, the Revenue cannot contend that the limitation prescribed under Section 11-A does not apply.

48. In the present case, appellant had filed the classification list under Rule 173B effective from 03.11.1989 which was approved by the Assistant Collector on 26.04.1990. In this classification list, the two products of Benzene and Toluene were classified under chapter sub-heading 2902.00. This approval was challenged by the department before the Collector (Appeals) on the basis of the subsequent test reports dated 29.01.1991. *Vide* order dated 28.10.1991, Collector

(Appeals) remanded the matter back to the Assistant Collector for re-determination of the classification of the subject goods. Pursuant to such remand order, Assistant Collector had passed an order dated 18.10.1993 directing provisional assessment of certain products mentioned in Annexure-A to the said order including products of the appellant for the years 1990-91, 1991-92, 1992-93 and 1993-94. By the aforesaid order, Assistant Collector had directed the appellant to execute a bond and to furnish a bank guarantee equivalent to 25 percent of the differential duty. No evidence could be adduced by the department that such a bond was executed or bank guarantee furnished by the appellant. That apart, the said order dated 18.10.1993 could not render assessments prior thereto i.e. from 1989-90 to 17.10.1993 provisional. In any case, there is no basis for the CESTAT to hold that assessments in respect of the products Benzene and Toluene for the months of January and February, 1993 were provisional. Only the order dated 18.10.1993 was available but it could not have had retrospective effect. Moreover, the essential requirements of

Rule 9B were not complied with. There is no order of the proper officer under Rule 9B directing that assessments for the months of January and February, 1993 for the two products Benzene and Toluene were provisional. Neither any bond in proper format was directed nor executed by the appellant. Mere endorsement by the concerned Superintendent on two RT-12 returns cannot make an assessment provisional. On the contrary, the department had issued a number of show cause notices covering the period from September, 1990 to December, 1992. Appellant had contested the show cause notices. All the show cause notices were adjudicated upon by the Assistant Commissioner. It is implausible that assessments which were regular till December, 1992 could become provisional from January, 1993. CESTAT has rightly held that assessments for the period from September, 1990 to December, 1992 were regular but inexplicably held that assessments for the months of January and February, 1993 *qua* the products Benzene and Toluene were provisional. Such findings of CESTAT cannot be sustained.

49. Question No. 2 is thus answered accordingly.

50. We are, therefore, of the considered opinion that the appeals filed by the appellant are liable to be allowed. Accordingly, the three appeals are allowed in the following manner:

(i) Appeal No. E/40/02-NB-C and appeal No. E/3816/03-MUM filed by the appellant before CESTAT are allowed. Consequently, order of CESTAT dated 21.05.2010 in respect of the above two appeals are hereby set aside.

(ii) Order of Assistant Commissioner dated 27.02.2001 and of Commissioner (Appeals) dated 28.09.2001 which were subject matter of appeal No. E/40/02-NB-C before CESTAT are hereby set aside.

(iii) Order dated 29.08.2003 of Commissioner (Appeals) which was the subject matter of appeal No. E/3816/03-MUM before CESTAT is set aside.

(iv) That portion of order dated 21.05.2010 of CESTAT in respect of appeal No. E/2380/06-MUM holding that assessment in respect of Benzene and Toluene for the months of January and February, 1993 were provisional, is set aside.

51. However, there shall be no order as to cost.

**.....J.**
**[ABHAY S. OKA]**

**.....J.**
**[UJJAL BHUYAN]**

**NEW DELHI;**
**APRIL 28, 2025.**