M/S Associated Cement Companies Ltd vs Commissioner Of Customs on 25 January, 2001

Equivalent citations: AIR 2001 SUPREME COURT 862, 2001 AIR SCW 559, 2001 CLC 280 (SC), 2001 (3) SRJ 117, (2001) 2 JT 141 (SC), 2001 (1) SCALE 436, 2001 (1) LRI 779, 2001 (4) SCC 593, (2001) SC CR R 241, (2001) 128 ELT 21, (2001) 95 ECR 6, (2001) 2 SCJ 204, (2001) 124 STC 59, (2001) 1 SUPREME 380, (2001) 1 SCALE 436

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Bench: Doraswami Raju

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           CASE NO.:
Appeal (civil) 821  of  2000
Appeal (civil)  1021     of  2000
Appeal (civil)  1023     of  2000
Appeal (civil)  1027     of  2000
Appeal (civil)  1028     of  2000
Appeal (civil)  1029     of  2000
Appeal (civil)  1030     of  2000
Appeal (civil)  1031     of  2000
Appeal (civil)  1032     of  2000
Appeal (civil)  1033     of  2000
Appeal (civil)  1423     of  2000
Appeal (civil)  1493     of  2000
Appeal (civil)  1494     of  2000
Appeal (civil)  3250-3251        of  2000
Appeal (civil)  3632     of  2000



PETITIONER:
M/S ASSOCIATED CEMENT COMPANIES LTD.

        Vs.

RESPONDENT:
COMMISSIONER OF CUSTOMS

DATE OF JUDGMENT:       25/01/2001

BENCH:
K.G.Balakrishna, Doraswami Raju
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JUDGMENT:

1033, 1423, 1493, 1494, 3250-3251 and 3632 of 2000 J U D G M E N T L.....I.........T.......T.......T.......T.......T.......T..J KIRPAL, J.

These appeals have been filed against the common order dated 15th November, 1999 of the Customs, Excise and Gold (Control) Appellate Tribunal which, while confirming the order of the Commissioner of Customs held that drawings, designs etc. relating to machinery or industrial technology were goods which were leviable to duty of customs on their transaction value at the time of their import. As principal arguments on behalf of the appellants were addressed in the case of M/s Hotel Leela Ventures Limited by Mr. Ashok H. Desai, learned senior counsel, for the sake of convenience we will refer to the relevant facts in that case in greater detail.

Leela Ventures are engaged in the business of setting up, operating and maintaining Hotels and Resorts. For designing the Hotels and Resorts, it engaged a foreign company M/s Wimberly Allison Tong & Goo, USA (WAT for short) for providing architectural services including design development drawings. Leela Ventures had entered into four agreements with the said foreign company in respect of four different ventures in India. Apart from preparing the designs and drawings the scope of work under the said agreements included site visits and on site consultations with architects.

Leela Ventures paid WAT under the said agreements for the services rendered and the amount was remitted through bank by following the procedure of remittance under Form A-2 prescribed by the Reserve Bank of India which form is meant for foreign exchange remittances, other than for import of foreign goods, pursuant to the permission given by the Reserve Bank.

In terms of the said agreements entered into with WAT, the appellants received drawings and diskettes through couriers during the period 30th October, 1995 and 12th May, 1996. The drawings so received were part of technical collaboration and/or technical know-how and were accompanied by an airway bill and an invoice issued by the consignor. The courier, in all the cases, declared the drawings with various descriptions such as drawings, architectural designs etc. The value of these drawings and designs was declared at a nominal value of one dollar. According to Leela Ventures one dollar was the correct value because drawings by themselves have no value, since if the drawings are lost they could be replaced and the loss would merely be of the cost of paper. The value declared by the courier was bonafide and was based on the invoice carried by it. As per the appellants, the declaration by the courier was in accordance with the accepted practice at that time. At the time of the imports these designs and the diskettes were cleared at the nominal value declared.

The other appellants in these appeals are also public corporations engaged in the manufacture of excisable goods. Like Leela Ventures the other appellants also entered into technical collaboration with leading manufacturers in their own fields abroad. The agreements provided for exchange of technology in the form of supply of know-how, drawings and designs on media training by personnel staff and similar other activities. As a part of fulfillment of the contracts, the contracting parties abroad, from time to time, sent drawings, designs etc. In the case of M/s Videocon these drawings etc. were imported by hand through one Mr. Kato. In all other cases the drawings etc. were imported through Professional Courier or by post parcels. In each case only a nominal value was declared at the time of its importation.

According to the respondents, intelligence gathered by the Directorate of Revenue Intelligence and Special Valuation Branch, Bombay revealed that the appellants had imported drawings, designs and plans through couriers on remitting the consideration for the same but these had been cleared without proper declaration and without payment of correct amount of duty. In view of the omission on the part of the appellants to declare the correct transaction value, show-cause notices under Section 28(1) read with Section 24 of the Customs Act, 1962 were issued asking the appellants as to why (a) the sum remitted or declared during investigation as consideration for drawings, designs and plans supplied by their collaborators should not be taken as transaction value under Section 14 of the Customs Act read with the Customs Valuation Rules, 1988 as the basis for assessment of goods to customs duty; (b) Customs duty should not be demanded under the provisions to Section 28 (1) of the Customs Act, 1962 and the amount deposited towards customs duty should not be adjusted against the duty demanded; (c) The goods, i.e., drawings, designs and plans should not be held liable to confiscation under Section 111(m) of the Customs Act, 1962; and (d) Penalty should not be imposed under Section 112 (a) and 114A of the Customs Act, 1962.

In the case of Leela Ventures the show-cause notice dated 21st January, 1998/18th February 1998 valued the drawings and designs at Rs. 2,66,87,100/- being the transaction value and on that value the amount demanded under Section 28(1) of the said Act was Rs. 26,68,310/-.

In response to the show-cause notice, the appellants sent their replies, inter-alia, submitting that what was imported were not goods and there could be no excise duty on services since the remittances were in Form A-2 and tax at source under the Income-Tax Act was paid in respect of the said contracts. It was also the case of the appellants that the demand was barred by limitation since there was no suppression or wilful mis- statement as the appellants bonafide believed that no customs duty was payable in the case of contracted services represented by drawings, designs, etc. which were imported.

After giving an opportunity of representation being filed and hearing the learned counsel the Commissioner passed a consolidated order dated 26th March, 1999. The Commissioner demanded duty and imposed penalty. The appellants then filed appeal before the Tribunal but without success. During the course of pendency of the appeal barring three all other importers voluntarily deposited the duty as per the classification then suggested.

In these appeals, the learned counsel for the appellants urged four contentions which had been unsuccessfully raised before the Tribunal. These contentions were (i) Excise duty cannot be levied on the value of ideas as they are not goods; (ii) Even if what was imported were goods, the valuation of the same has to be nominal; (iii) the show-cause notices which were issued were barred by time inasmuch as the extended period of limitation of five years would not be available on the facts of the present case; (iv) the imports through the courier could not be governed by heading No. 98.03 of the Customs Tariff Act. The learned Additional Solicitor General, in his able manner, supported the Tribunals decision. Whether drawings, diskettes, manual etc. imported are goods on@@

JJJJJJJJJJJJJ which excise duty could be levied.@@ JJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJ The learned counsel submitted that in all these cases the transactions between the appellants and the foreign collaborators were for transfer of technology. The knowledge or know-how which is supplied, though valuable, was intangible. The media is only the vehicle of transmission and is only incidental to the main transaction, even if Government authorities regard this to be a contract for services and not for sale of goods. In support of this, reliance was placed on the fact that the Reserve Bank of India had required application for remission of foreign exchange on Form - A2 which is meant for foreign exchange remittance otherwise than for import of goods. On the remittances so made the appellants had deducted the income-tax at source. It was contended that if it was a case of sale of goods to the appellants then the question of deducting any income tax and paying the same would not have arisen and, on the contrary, the amount of excise duty which would have been payable would have been less than the income tax which was deducted.

In the alternative it was contended that even if the transactions are composite the court has to determine whether these relate to contract for service or goods. In this connection, it was submitted that when price is paid for photograph, the payment is not for paper which is developed but is for the skill of the photographer and the price of developing. Contract for architectural services was stated to be like a contract by a solicitor to give a legal opinion or for a doctor to give a medical diagnosis since the essence of the contract is the experts skill.

The learned counsel contended that the transaction between the appellants and their respective foreign collaborators was one for transfer of technology. This knowledge or know-how though valuable was intangible. The technology when transmitted to India on some media does not get converted from an intangible thing to tangible thing or chattel. Media is only vehicle for transmission and is wholly incidental to the main transaction. By way of analogy it was submitted that legal opinions or judgments of Courts when communicated on legal briefs or as certified copies do not constitute transfer of goods by the counsel to his clients or by a Court to a litigant. Reliance was placed on the decision of U.S. 9th Circuit Court of Appeals in Wilhelm Winter; Cynthia Zheng vs. G.P.Putnams Sons, 938 F.2nd 1033 (9th Cir. 1991). In that case, the plaintiffs had bought an encyclopaedia on mushroom, a book published by the defendants. On the basis of the information contained therein the plaintiffs became severely ill from cooking and eating mushrooms after relying on the information obtained from the said encyclopaedia. The plaintiffs sued the publishers and sought damages based on products liability, breach of warranty etc. The trial Court held that the information contained in a book is not a product for the purposes of strict liability under products liability law. Affirming the trial Court, the Circuit Court of appeals came to the conclusion that the products liability law reflects its focus on tangible items and does not take into consideration the unique characteristics of ideas and expressions. In other words, the quality of information contained in a book would not be regarded as a product for the purposes of product liability law. This would not detract from the fact that the encyclopaedia of mushroom would be regarded as goods containing information supplied by the author and published by the defendants. As we shall presently see this case can be of little assistance for deciding the point in issue.

Before we deal with the aforesaid contentions raised on behalf of the appellants, it is appropriate to first consider the relevant provisions applicable in the present case. Section 2(22) of the Customs

Act contains the definition of the word goods which is as follows: (a) vessels, aircrafts and vehicles; (b) stores; (c) baggage;

(d) currency and negotiable instruments; and (e) any other kind of movable property;

Section 156 of the Customs Act gives the Central Govt. power to make rules consistent with the Act and sub-section 2(a) thereof enables the framing of rules to provide for the manner of determining the price of imported goods under sub-section (1A) of Section 14. In exercise of the powers conferred by the aforesaid Section 156 of the Customs Act, the Central Govt. has framed Customs Valuation (Determination of Price of Imported Goods) Rules, 1988. For the purpose of this case, two Rules which are important are Rules 3 and 4 which read as follows:

> 3. Determination of the method of valuation.- For the purpose of these rules,-
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> (i) the value of imported goods shall be the transaction value; (ii) if the value cannot be determined under the provisions of clause (i) above, the value shall be determined by proceeding sequentially through Rules 5 to 8 of these rules.

4. Transaction value.- (1) The transaction value of imported goods shall be the price actually paid or payable for the goods when sold for export to India, adjusted in accordance with the provisions of Rule 9 of these rules.

(2) The transaction value of imported goods under sub-rule (1) above shall be accepted:

> Provided that-
>
> (a) there are no restrictions as to the disposition or use of the goods by the buyer other than restrictions which-
>
> (i) are imposed or required by law or by the public authorities in India; or (ii) limit the geographical area in which the goods may be resold; or (iii) do not substantially affect the value of the goods; (b) the sale or price is not subject to same condition or consideration for which a value cannot be determined in respect of the goods being valued; (c) no part of the proceeds of any subsequent resale, disposal or use of the goods by the buyer will accrue directly or indirectly to the seller, unless an appropriate adjustment can be made in accordance with the provisions of Rule 9 of these rules; and (d) the buyer and seller are not related, or where the buyer and seller are related, that transaction value is acceptable for customs purposes under the provisions of sub-rule (3) below.
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> (3) (a) Where the buyer and seller are related, the transaction value shall be accepted provided that the examination of the circumstances of the sale of the imported goods indicate that the relationship did not influence the price. (b) In a sale between related persons, the transaction value shall be accepted, whenever the importer

> demonstrates that the declared value of the goods being valued, closely approximates to one of the following values ascertained at or about the same time- (i) the transaction value of identical goods, or of similar goods, in sales to unrelated buyers in India; (ii) the deductive value for identical goods or similar goods; (iii) the computed value for identical goods or similar goods. Provided that in applying the values used for comparison, due account shall be taken of demonstrated difference in commercial levels, quantity levels, adjustments in accordance with the provisions of Rule 9 of these rules and cost incurred by the seller in sales in which he and the buyer are not related;
>
> (c) substitute values shall not be established under the provisions of clause (b) of this sub-rule.

Rule 10 provides for declaration by the importer and is as follows: 10. Declaration by the importer.- (1) The importer or his agent shall furnish

(a) a declaration disclosing full and accurate details relating to the value of imported goods; and (b) any other statement, information or document including an invoice of the manufacturer or producer of the imported goods where the goods are imported from or through a person other than the manufacturer or producer, as considered necessary by the proper officer for determination of the value of imported goods under these rules.

(2) Nothing contained in these rules shall be construed as restricting or calling into question the right of the proper officer of customs to satisfy himself as to the truth or accuracy of any statement, information, document or declaration presented for valuation purposes.

(3) The provisions of the Customs Act, 1962 (52 of 1962) relating to confiscation, penalty and prosecution shall apply to cases where wrong declaration, information, statement or documents are furnished under these rules.

Section 2 of the Customs Tariff Act provides for the rates at which the customs duty is levied under the Customs Act, 1962. As specified in First and the Second Schedule, Chapter 98 inter alia applies to passengers baggage and heading No. 98.03 states that on all dutiable articles, imported by a passenger or a member of a crew in his baggage, customs duty will be paid at the standard rate of duty of 150%.

Reliance was placed by Mr. Desai on a number of decisions of this Court, relating to levy of sales tax, in support of his contention that in contract by supply of services there is no sale of goods and, as such, no customs duty could be imposed on the intellectual property which was obtained. We will first refer to the decisions so cited.

This Court in The Assistant Sales Tax Officer and Others vs. B.C. Kame, Proprietor Kame Photo Studio (1977) 1 SCC 634 was called upon to decide the question that when a photographer undertakes a photograph and thereafter supplies prints to his clients whether it could be said that he had entered into a contract for sale of goods. The question which this Court posed was whether the contract is a contract of work and labour or a contract for sale. It held that a contract for sale is one whose main object is the transfer of property in, and the delivery of the possession of, a chattel as a chattel to the buyer where, however, the principle object of work undertaken by the payee of the price is not the transfer of a chattel qua chattel, the contract is one of work and labour. After referring to the earlier decisions of this Court in the case of State of Himachal Pradesh vs. Associated Hotels of India Ltd. (1972) 29 STC 474 and the State of Madras vs. Gannon Dunkerley & Co. (Madras) Ltd. (1958) 9 STC 353, in which case the Constitution Bench had held that in a building contract the property materials do not pass to the other party as in a contract for sale of movable property, it was concluded that when a photographer takes a photograph, develops the negative or does some other photographic work and thereafter supplies the prints to his clients then it could not be said that he had entered into a contract for sale of goods. The question of levy of sales-tax, therefore, did not arise.

In Kames case (supra) reference was made to the decision of Robinson vs. Graves (1935) KB 579 where it was held that a contract by an artist to paint a portrait of a lady was a contract for work and labour and not for the sale of goods as the substance of the contract was that skill and labour should be exercised upon the production of the portrait and that it was only ancillary to the contract that there would pass from the artist to his customer some material. In Robinsons case an earlier decision of Lee vs. Griffin (1861) 1 B & S 272 was attempted to be distinguished. Lee vs. Griffin was a case where the plaintiff had contracted to make a set of artificial denture to fit them into his patients mouth. The patient died after the denture was made without having accepted the denture though he had an opportunity of doing so. The plaintiff sued executor for the goods bargained and sold. It was held in that case that wherever a contract is entered into for the manufacture of chattel there the subject-matter of the contract is a sale and delivery of the chattel. Blackburn J, specifically observed as follows: If the contract be such that, when carried out, it would result in the sale of a chattel, the party cannot sue for work and labour but, if the result of the contract is that they party has done work and labour which ends in nothing that become the subject of a sale, the party cannot sue for goods sold and delivered. The case of an attorney employed to prepare a deed is an illustration of this latter proposition, it cannot be said that the paper and ink he uses in the preparation of the deed are goods sold and delivered I do not think that the test to apply these cases is whether the value of the work exceeds that of the material used in its execution for, if a sculptor were employed to execute a work of art, greatly as his skill and labour, supposing it to be of the highest description, might exceed the value of the marble in which he worked, the contract would in my opinion nevertheless be a contract for the sale of chattel.

Referring to the case of Robinson vs. Graves and Lee vs. Griffin in Contract for Sale of Goods, Benjamins Third Edition states at pages 39- 40 as follows: In Robinson v. Graves however, the Court of Appeal reintroduced, purportedly as a qualification to this rule, what is in effect the criterion of relative importance as between work and materials which had been rejected in Lee v. Griffin, although the court professed to be considering what was the substance of the contract rather than the more substantial component in the product ultimately delivered. In Robinson v. Graves, Greer L.J. said: If you find that the substance of the contract was the production of something to be sold... then that is a sale of goods. But if the substance of the contract, on the other hand, is that skill and labour have to be exercised for the production of the article and that it is only ancillary to that that there will pass from the artist to his client or customer some materials in addition to the skill involved in the production of the portrait, that does not make any difference to the result, because the substance of the contract is the skill and experience of the artist in producing the picture. This statement, with respect, overlooks the fact that what passes to the client is not the materials but the finished picture, of which both the work and the materials are components. Lee v. Griffin and Robinson vs. Graves cannot be reconciled: the reasoning in each case could have been applied to the facts of the other. It has yet to be appreciated that a decision of this problem can be reached only by adopting one or the other of these equally arbitrary rules. (Emphasis added) The test laid down in Lee vs. Griffin had been preferred by the Australian Courts. In Deta Nominees Pty. Ltd. vs. Viscount Plastic Products Pty. Ltd. 1979 VR 167 the Supreme Court of Victoria, Australia described Robinson vs. Graves as a hard case and rejected its test as illogical and unsatisfactory wrong in principle and too erratic to be useful.

The principle enunciated in Kames case was followed by this Court in State of Tamil Nadu vs. Anandam Viswanathan (1989) 1 SCC 613. In this case, this Court held that a contract for printing of question paper for educational institutions constituted a works contract and, therefore, exempted from tax. In Everest Copiers vs. State of Tamil Nadu (1996) 5 SCC 390 in respect of the Assessment Year 1978-79, this Court has held that making photostat copies on paper with xerox machine and delivering the same to the customer for payment was a contract for work or service and not a contract of sale. The transfer of paper was only incidental and hence such transaction was not exigible to sales tax.

In Hindustan Shipyard Ltd. vs. State of A.P. (2000) 6 SCC 579, this Court was called upon to decide whether the transaction of building of a ship after an order had been placed amounted to sale as defined under the A.P. General Sales Tax Act or was it a works contract. While coming to the conclusion that the transaction in question had amounted to a sale this Court observed that in order to decide whether such a transaction is a contract of sale or contract for works or service the same had to be culled out from the term of the contract.

All the aforesaid decisions related to the period prior to the Forty- sixth Amendment of the Constitution when Article 366 (29A) was inserted. At that time in the case of a works contract it was held that the same could not be split and State Legislature had no legislative right to seek to levy sales tax on a transaction which was not a sale simpliciter of goods. Rainbow Colour Lab & Anr. Vs. State of M.P. and Others (2000) 2 SCC 385 was, however, a case relating to the definition of the word sale in the M.P. General Sales Tax Act, 1958 after its amendment consequent to the insertion of Article 366 (29A). The question there was whether the job rendered by a photographer in taking photographs, developing and printing films would amount to works contract for the purpose of levy of sales tax. This Court held that the work done by the photographer was only a service contract and there was no element of sale involved. After referring to earlier decisions of this Court, it was observed at page 391 as follows:

> 15. Thus, it is clear that unless there is sale and purchase of goods, either in fact or deemed, and which sale is primarily intended and not incidental to the contract, the

> State cannot impose sales tax on a works contract simpliciter in the guise of the expanded definition found in Article 366(29-A)(b) read with Section 2(n) of the State Act. On facts as we have noticed that the work done by the photographer which as held by this Court in Kame case is only in the nature of a service contract not involving any sale of goods, we are of the opinion that the stand taken by the respondent State cannot be sustained.

Even though in our opinion the decisions relating to levy of sales tax would have, for reasons to which we shall presently mention, no application to the case of levy of customs duty, the decision in Rainbow Colour Lab case (supra) requires consideration. As a result of the Forty- sixth Amendment, sub-article 29A of Article 366 was inserted as a result whereof tax on the sale or purchase of goods was to include a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract. Taking note of this amendment this Court in Rainbow Colour Lab at page 388-389 observed as follows:

> 11. Prior to the amendment of Article 366, in view of the judgment of this Court in State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd. the States could not levy sales tax on sale of goods involved in a works contract because the contract was indivisible. All that has happened in law after the 46th Amendment and the judgment of this Court in Builders case is that it is now open to the States to divide the works contract into two separate contracts by a legal fiction: (i) contract for sale of goods involved in the said works contract, and (ii) for supply of labour and service. This division of contract under the amended law can be made only if the works contract involved a dominant intention to transfer the property in goods and not in contracts where the transfer in property takes place as an incident of contract of service. The amendment, referred to above, has not empowered the State to indulge in a microscopic division of contracts involving the value of materials used incidentally in such contracts. What is pertinent to ascertain in this connection is what was the dominant intention of the contract. Every contract, be it a service contract or otherwise, may involve the use of some material or the other in execution of the said contract.

The State is not empowered by the amended law to impose sales tax on such incidental materials used in such contracts In arriving at the aforesaid conclusion the Court referred to the decision of this Court in Hindustan Aeronautics Ltd. vs. State of Karnataka (1984) 1 SCC 706 and Everest Copier (supra). But both these cases related to pre-Forty-sixth Amendment era where in a works contract the State had no jurisdiction to bifurcate the contract and impose sales tax on the transfer of property in goods involved in the execution of a works contract. The Forty-sixth Amendment was made precisely with a view to empower the State to bifurcate the contract and to levy sales tax on the value of the material involved in the execution of the works contract, notwithstanding that the value may represent a small percentage of the amount paid for the execution of the works contract. Even if the dominant intention of the contract is the rendering of a service, which will amount to a works contract, after the Forty-sixth Amendment the State would now be empowered to levy sales tax on the material used in such contract. The conclusion arrived at in Rainbow Colour Lab case, in our opinion, runs counter to the express provision contained in Article 366 (29A) as also of the Constitution Bench decision of this Court in Builders Association of India and Others vs. Union of India and Others (1989) 2 SCC 645.

According to Section 12 of the Customs Act, duty is payable on goods imported into India. The word goods has been defined in Section 2(22) of the Customs Act and it includes in sub-clause (c) baggage and sub-clause (e) any other kind of movable property. It is clear from mere reading of the said provision that any immovable article brought into India by a passenger as part of his baggage can make him liable to pay customs duty as per the Customs Tariff Act. An item which does not fall within sub-clauses

(a), (b), (c) or (d) of Section 2(22) will be regarded as coming under Section 2(22) (e). Even though the definition of the goods purports to be an exclusive one, in effect it is so worded that all tangible movable articles will be the goods for the purposes of the Act by residuary clause 2(22)

(e). Whether movable article comes as a part of a baggage, or is imported into the country by any other manner, for the purpose of the Customs Act, the provision of Section 12 would be attracted. Any media whether in the form of books or computer disks or cassettes which contain information technology or ideas would necessarily be regarded as goods under the aforesaid provisions of the Customs Act. These items are moveable goods and would be covered by Section 2(22)(e) of the Customs Act.

The rate at which the customs duty is to be imposed has to be such as may be specified in the Customs Tariff Act. This is stipulated by Section 12 of the Customs Act. Thus the two Acts have to be read in conjunction with each other.

Section 2 of the Tariff Act states that the rate at which duties of customs shall be levied under the Customs Act are specified in the First and Second Schedule to the said Act. Chapter 49 of the First Schedule relates to printed books, newspapers, pictures and other products of the printing industry; manuscripts, typescripts and plans. Note 2 in Chapter 49 states that the term printed also means reproduced by means of a duplicating machine, produced under the control of a computer, embossed, photographed, photocopied, thermocopied or typewritten. Heading 49.05 pertains to maps and hydrographic or similar charts of all kinds, including atlases, wall maps, topographic plans and globes. Heading No. 49.06 specifies plans and drawings for architectural, engineering, industrial, commercial, topographical or similar purposes, being originals drawn by hand; handwritten texts; photographic reproductions on sensitised paper and carbon copies of the foregoing. The residuary heading No. 49.11 reads as follows:

> Other printed matter, including printed pictures and photographs Rate of duty Standard Preferential Areas 4911.10 Trade advertising 25% material, commercial catalogues and the like
>
> - Other:

4911.91 Pictures, designs 25% and photographs 4911.99 Other 25% Drawings, plans, manuals etc. specified in Chapter 49 of the Tariff Act are thus statutorily regarded as goods attracting a specified rate of customs duty on their import into India. There is no challenge to any of the statutory provisions and reading the two Acts together there can be no manner of doubt that what has been imported into India by the appellants, through the courier or otherwise, from their technical collaborators were goods even though the tangible articles so imported contained information or knowledge for use by the appellants.

In view of the clear provisions of the Customs Act and the Tariff Act, which have been referred to herein above, whenever any goods or moveables or tangible articles are imported into this country customs duty is payable. For the purpose of attracting levy it would be immaterial as to what are the types of goods imported or what is contained in them or recorded thereon. The contents will be relevant for the purpose of valuation. Therefore the decisions of this Court relating to the levy of sales tax in cases of works contracts will have no application here. In the sales tax cases referred to hereinabove no doubt the question which arose was whether, in a works contract, where there was a supply of materials and services in a indivisible contract, but there the question had arisen because the States power prior to the Forty-sixth Amendment to the Constitution, were not entitled to bifurcate or split up the contract for the purpose of levying sales tax on the element of moveable goods involved in the contract. Apart from the decision in Rainbow Colour Labs case, which does not appear to be correct, the other decisions cited related to pre-Forty-sixth Amendment period. Furthermore the provisions of the Customs Act and the Tariff Act are clear and unambiguous. Any moveable articles, irrespective of what they may be or may contain would be goods as defined in Section 2(22) of the Customs Act. It is true that what the appellants had wanted was technical advice or information technology. Payment was to be made for this intangible asset. But the moment the information or advice is put on a media, whether paper or diskettes or any other thing, that what is supplied becomes chattel. It is in respect of the drawings, designs etc. which are received that payment is made to the foreign collaborators. It is these papers or diskettes etc. containing the technological advice, which are paid for and used. The foreign collaborators part with them in lieu of money. It is, therefore, sold by them as chattel for use by the Indian importer. The drawings, designs, manuals etc. so received are goods on which customs duty could be levied. The decision of Winter vs. Putnams case (supra) is also of no help to the appellants as in that case, it was the quality of information regarding mushrooms which was not regarded as a product event though the encyclopaedia containing the information was regarded as goods. Here we are not concerned with the quality of information given to the appellants. The question is whether the papers or diskettes etc. containing advice and/or information are goods for the purpose of Customs Act. The answer, in our view, is in the affirmative. With regard to the submission on behalf of the appellants that the contracts in these cases were for services and it is on that basis that permission from Reserve Bank of India was obtained for release of foreign exchange. The submission of Mr. Rohatgi, in reply, was that the Reserve Bank does not adjudicate on the question whether the technical material being imported are goods or not for the purpose of imposition of customs duty. We agree with this submission. The appellants had represented to the Reserve Bank that the collaborators were rendering service and on this representation remittances were allowed. The Reserve Bank must have examined the applications from the point of view of release of foreign exchange. It was not an adjudicating authority under the Customs Act. Had there been any doubt about the question whether what was imported were goods or not then, perhaps, the grant of permission to remit money for services rendered and payment of taxes in respect thereof may have been relevant. But here, on the examination of the law applicable to the levy of customs duty the position is free from any ambiguity. As has already been observed hereinabove the drawings, designs, manuals etc. imported through couriers were goods on which customs duty was payable. The action of the Reserve Bank cannot result in negating the statutory provisions of the Customs Act and the Tariff Act applicable in the instant cases. The belief of the appellants that what was imported were not goods, as the Reserve Bank had also regarded the payment was being made for services and not goods, was clearly erroneous and misplaced.

Re: Valuation In support of the contention that even if what was imported were goods on which customs duty was payable the value thereof should be nominal, it was contended that the levy could only be on the media on which transfer was made and not on the whole of the intellectual content. While referring to Builders Association of India case (supra) it was submitted that there this Court had held that in the case of works contract levy of sales tax was permitted only on that component of the works contract which was relatable to goods. Similarly, in the case of M/s Gannon Dunkerley and Co. and Others vs. State of Rajasthan and Others (1993) 1 SCC 364 it was held that tax on sale of goods in works contract was based upon the value of goods as they relate to the entire project and charges for planning, designing and architect fee could be excluded. It was, therefore, argued that in the present cases only the media on which the know-how was transmitted could be subjected to duty and its value was only nominal.

In the case of Hotel Leela Ventures the Commissioner had taken the whole of the value of the contract for the purpose of levy of duty while in the case of Sterlite Industries, as also in some other cases, an adhoc percentage of about one-third of the total contract value was taken as the basis for levy of the tax. At the time of importation the couriers had, however, given the value of dollar one in respect of the media on which the information was stored.

Section 14 of the Customs Act deals with valuation of goods for purposes of assessment. The said section is as follows:

14. Valuation of goods for purposes of assessment.-

(1) For the purposes of the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force whereunder a duty of customs is chargeable on any goods by reference to their value, the value of such goods shall be deemed to be the price at which such or like goods are ordinarily sold, or offered for sale, for delivery at the time and place of importation or exportation, as the case may be, in the course of international trade, where the seller and the buyer have no interest in the business of each other and the price is the sole consideration for the sale or offer for sale:

Provided that such price shall be calculated with reference to the rate of exchange as in force on the date on which a bill of entry is presented under section 46, or a shipping bill or bill of export, as the case may be, is presented under section 50;

(1A) Subject to the provisions of sub-section (1), the price referred to in that sub-section in respect of imported goods shall be determined in accordance with the rules made in this behalf.

(2) Notwithstanding anything contained in sub-section (1) [or sub-section (1A)], if the Central Government is satisfied that it is necessary or expedient so to do it may, by notification in the Official Gazette, fix tariff values for any class of imported goods or export goods, having regard to the trend of value of such or like goods, and where any such tariff values are fixed, the duty shall be chargeable with reference to such tariff value.

(3) For the purposes of this section

(a) rate of exchange means the rate of exchange

(i) determined by the Central Government, or (ii) ascertained in such manner as the Central Government may direct, for the conversion of Indian currency into foreign currency or foreign currency into Indian currency;

(b) foreign currency and Indian currency have the meanings respectively assigned to them in the Foreign Exchange Regulation Act, 1973 (46 of 1973)."

In exercise of this power under the Customs Act, the Central Government promulgated Customs Valuation (Determination of Price of Imported Goods) Rules, 1988. Three Rules which are relevant are Rules 3,4 and 9. While Rules 3 and 4 have been quoted hereinabove Rule 9 reads as follows:

9. Cost and services.- (1) In determining the transaction value, there shall be added to the price actually paid or payable for the imported goods,-

(a) the following cost and services, to the extent they are incurred by the buyer but are not included in the price actually paid or payable for the imported goods, namely:- (i) commissions and brokerage, except buying commissions; (ii) the cost of containers which are treated as being one for customs purposes with the goods in question; (iii) the cost of packing whether for labour or materials;

(b) the value, apportioned as appropriate, of the following goods and services where supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale for export of imported goods, to the extent that such value has not been included in the price actually paid or payable, namely :- (i) materials, components, parts and similar items incorporated in the imported goods; (ii) tools, dies, moulds and similar items used in the production of the imported goods; (iii) materials consumed in the production of the imported goods; (iv) engineering, development, art work, design work, and plans and sketches undertaken elsewhere than in India and necessary for the production of the imported goods;

(c) royalties and licence fees related to the imported goods that the buyer is required to pay, directly or indirectly, as a condition of the sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable.

(d) The value of any part of the proceeds of any subsequent resale, disposal or use of the imported goods that accrues, directly or indirectly, to the seller;

(e) All other payments actually made or to be made as a condition of sale of the imported goods, by the buyer to the seller, or by the buyer to a third party to satisfy an obligation of the seller to the extent that such payments are not included in the price actually paid or payable.

(2) For the purposes of sub-section (1) and sub-section (1A) of Section 14 of the Customs Act, 1962 (52 of 1962) and these rules, the value of the imported goods shall be the value of such goods, for delivery at the time and place of importation and shall include- (a) the cost of transport of the imported goods to the place of importation;

(b) loading, unloading and handling charges associated with the delivery of the imported goods at the place of importation; and (c) the cost of insurance: Provided that

(i) where the cost of transport referred to in clause (a) is not ascertainable, such cost shall be twenty per cent of the free on board value of the goods; (ii) the charges referred to in clause (b) shall be one per cent of the free on board value of the goods plus the cost of transport referred to in clause (a) plus the cost of insurance referred to in clause (c); (iii) where the cost referred to in clause (c) is not ascertainable, such cost shall be 1.125% of free on board value of the goods;

Provided further that in the case of goods imported by air, where the cost referred to in clause (a) is ascertainable, such cost shall not exceed twenty per cent of free on board value of the goods :

> Provided also that where the free on board value of the goods is not ascertainable, the costs referred to in clause (a) shall be twenty per cent of the free on board value of the goods plus cost of insurance for clause (i) above and the cost referred to in clause (c) shall be 1.125% of the free on board value of the goods plus cost of transport for clause (iii) above.
>
> (3) Additions to the price actually paid or payable shall be made under this rule on the basis of objective and quantifiable data.
>
> (4) No addition shall be made to the price actually paid or payable in determining the value of the imported goods except as provided for in this rule.

As is evident from the perusal of the aforesaid provisions, namely, Sections 12 and 14 of the Customs Act and Rules 3,4 and 9 the value of the goods which are imported is deemed to be the price at which they are ordinarily sold. Sub-section (1A) provides that the price referred to in sub- section (1) of Section 14 shall be determined in accordance with the rules made in this behalf. As per Rules 3 and 4 the transaction value of the imported goods, subject to adjustment under Rule 9, is to be the price actually paid or payable for the goods when sold for export to India. Rule 9 (1) (b) (iv) is important for that shows that engineering, development, artwork, design work and plans and sketches would form part of the price of goods for the purpose of determining its value for levy of duty. In this connection, it will be useful to refer to the following passage from a decision of this Court in the case of Collector of Customs (Prev.), Ahmedabad vs. Essar Gujarat Ltd. 1996 (88) E.L.T. 609 (S.C.) at page 616 para 17:

> The entire purpose of Section 14 is to find out the value of the goods which are being imported. The EGL in this case was purchasing a Midrex Reduction Plant in order to produce sponge iron. In order to produce sponge iron, it was essential to have technical know-how from Midrex. It was also essential to have an operating licence from them. Without these, the plant would be of no value. That is why the pre-condition of a process licence of Midrex was placed in the agreement with TIL. It will not be proper to view that agreement with TIL in isolation in this case. The plant would be of no value if it could not be made functional. EGL wanted to buy the plant in working condition. This could only be achieved by paying not only the price of the plant, but also the fees for the licence and the technical know-how for making the plant operational. Therefore, the value of the plant will comprise of not only the price paid for the plant but also the price payable for the operation licence and the technical know-how. Rule 9 should be construed bearing this in mind. added) (Emphasis Significantly Chapter 49 also includes items which have substantial intellectual value as opposed to the value of the paper on which it is put. Newspapers, periodicals, journals, dictionaries etc. are to be found in Chapter 49 wherein maps, plans and other similar items are also included, while Chapter 97 talks about original

engravings. It is clear that intellectual property when put on a media would be regarded as an article on the total value of which customs duty is payable.

To put it differently, the legislative intent can easily be gathered by reference to the Customs Valuation Rules and the specific entries in the Customs Tariff Act. The value of an encyclopaedia or a dictionary or a magazine is not only the value of the paper. The value of the paper is in fact negligible as compared to the value or price of an encyclopaedia. Therefore, the intellectual input in such items greatly enhance the value of the papers and ink in the aforesaid examples. This means that the charge of a duty is on the final product whether it be the encyclopaedia or the engineering or architectural drawings or any manual.

Similar would be the position in the case of a programme of any kind loaded on a disc or a floppy. For example in the case of music the value of a popular music cassette is several times more than the value of the blank cassette. However, if a pre-recorded music cassette or a popular film or a musical score is imported into India duty will necessarily have to be charged on the value of the final product. In this behalf we may note that in State Bank of India vs. Collector of Customs, Bombay 2000 (1) Scale 72, the Bank had, under an agreement with the foreign company, imported a computer software and manuals, the total value of which was US $ 4,084,475. The bank filed an application for refund of customs duty on the ground that the basic cost of software was US $ 401.047. While the rest of the amount of US $ 3,683,428 was payable only as a licence fee for its right to use the software for the bank countrywide. The claim for the refund of the customs duty paid on the aforesaid amount of US $ 3,683,428 was not accepted by this Court as in its opinion, on a correct interpretation of Section 14 read with the rules, duty was payable on the transaction value determined therein and as per Rule 9 in determining the transaction value there has to be added to the price actually paid or payable for the imported goods, royalties and the licence fee for which the buyer is required to pay, directly or indirectly as a condition of sale of goods to the extent that such royalties and fees are not included in the price actually paid or payable. This clearly goes to show that when technical material is supplied whether in the form of drawings or manuals the same are goods liable to customs duty on the transaction value in respect thereof.

It is misconception to contend that what is being taxed is intellectual input. What is being taxed under the Customs Act read with Customs Tariff Act and the Customs Valuation Rules is not the input alone but goods whose value has been enhanced by the said inputs. The final product at the time of import is either the magazine or the encyclopaedia or the engineering drawings as the case may be. There is no scope for splitting the engineering drawing or the encyclopaedia into intellectual input on the one hand and the paper on which it is scribed on the other. For example, paintings are also to be taxed. Valuable paintings are worth millions. A painting or a portrait may be specially commissioned or an article may be tailor made. This aspect is irrelevant since what is taxed is the final product as defined and it will be an absurdity to contend that the value for the purposes of duty ought to be the cost of the canvas and the oil paint even though the composite product, i.e., the painting is worth millions.

It will be appropriate to note that the Customs Valuation Rules, 1988 are framed keeping in view the GATT protocol and the WTO agreement. In fact our Rules appear to be an exact copy of the GATT and WTO. For the purpose of valuation under the 1988 Rules the concept of transaction value which was introduced was based on the aforesaid GATT protocol and WTO agreement. The shift from the concept of price of goods, as was classically understood, is clearly discernible in the new principles. Transaction value may be entirely different from the classic concept of price of goods. Full meaning has to be given to the rules and the transaction value may include many items which may not classically have been understood to be part of the sale price.

The concept that it is only chattel sold as chattel, which can be regarded as goods has no role to play in the present statutory scheme as we have already observed that the words goods as defined under the Customs Act has an inclusive definition taking within its ambit an immovable property. The list of goods as prescribed by the law are different items mentioned in various chapters under the Customs Tariff Act, 1997 or 1999. Some of these items are clearly items containing intellectual property like designs, plans etc. In the case of St Albans City and District Council vs. International Computers Ltd. (1996) 4 All ER 481 Sir Iain Glidewell in relation to whether computer programme on a disc would be regarded as goods observed at page 493 as follows:

Suppose I buy an instruction manual on the maintenance and repair of a particular make of car. The instructions are wrong in an important respect. Anybody who follows them is likely to cause serious damage to the engine of his car. In my view, the instructions are an integral part of the manual. The manual including the instructions, whether in a book or a video cassette, would in my opinion be goods within the meaning of the 1979 Act, and the defective instructions would result in a breach of the implied terms in s 14.

If this is correct, I can see no logical reason why it should not also be correct in relation to a computer disk onto which a program designed and intended to instruct or enable a computer to achieve particular functions has been encoded. If the disk is sold or hired by the computer manufacturer, but the program is defective, in my opinion there would be prima facie be a breach of the terms as to quality and fitness for purpose implied by the 1979 Act or the 1982 Act.

The above view, in our view, appears to be logical and also in consonance with the Customs Act. Similarly in Advent Systems Limited vs. UNISYS Corporation 925 F 2d 670 (3d Cir 1991) it was contended before the Court in United States that software referred to in the agreement between the parties was a product and not a good but intellectual property outside the ambit of Uniform Commercial Code. In the said Code, goods were defined as all things (including specially manufactured goods) which are moveable at the time of the identification for sale. Holding that computer software was a good the court held as follows:

Computer programs are the product of an intellectual process, but once implanted in a medium are widely distributed to computer owners. An analogy can be drawn to a compact disc recording of an orchestral rendition. The music is produced by the artistry of musicians and in itself is not a good, but when transferred to a laser-readable disc becomes a readily merchantable commodity. Similarly, when a professor delivers a lecture, it is not a good, but, when transcribed as a book, it becomes a good.

That a computer program may be copyrightable as intellectual property does not alter the fact that once in the form of a floppy disc or other medium, the program is tangible, moveable and available in the marketplace. The fact that some programs may be tailored for specific purposes need not alter their status as goods because the Code definition includes specially manufactured goods.

We are in agreement with the aforesaid observations and hold that the value of the goods imported would depend upon the quality of the same and would be represented by the transaction value in respect of the goods imported.

It would not be correct, as was done in Leela Ventures case, to take the entire contract value as being the value of the imported goods. What is the transaction value in respect thereof has to be ascertained. In most of the other cases this has been done by adopting about one-third of the contract value as being the transaction value of the imported goods for the purpose of levy of customs duty.

In Leela Ventures case the Commissioner must re-determine the transaction value of the drawings etc. imported keeping in view the terms of the agreements and then impose the levy.

Re: Limitation:

The next submission on behalf of the appellants was that in the case of short levy or non-levy of duty the normal period for issuing a notice seeking to realise the difference in the duty levied and imposable is that of six months. This period is extendable to five years only if the proviso to Section 28 (1) can be validly invoked. It was the case of the appellants that there was never an intention on their part to evade duty. Agreements entered into with foreign collaborators had been disclosed to the Government of India who had approved the remittances as fees for technical services rendered. Payments had been made as directed by the Reserve Bank of India by resorting to Form A-2 and deducting tax at source on the remittances so made.

Service tax which was payable was also deposited and this clearly shows that the appellants bonafide believed that the value of the drawings and other technical material imported was only nominal.

While relying on various decisions of this Court, it was submitted that the proviso to Section 28 (1) of the Customs Act can only apply if there is a positive inaction or deliberate attempt to mislead the revenue. On the facts of the present case, it was submitted that none of the ingredients of the proviso would enable the enlargement of the limitation from six months to five years was present. Our attention was drawn to the cases of Collector of Central Excise, Hyderabad vs. M/s Chemphar Drugs and Liniments, Hyderabad (1989) 2 SCC 127 , Cosmic Dye Chemical vs. Collector of Central Excise, Bombay (1995) 6 SCC 117, M/s Padmini Products vs. Collector of Central Excise, Bangalore (1989) 4 SCC 275, Tamil Nadu Housing Board vs. Collector of Central Excise, Madras and Another 1995 Supp (1) SCC 50 and Collector of Central Excise vs. H.M.M. Limited 1995 (76) ELT 497. In all these cases the Court was concerned with the applicability of the proviso to Section 11-A of the Central Excise Act which, like in the case of Customs Act, contemplated the increase in period of limitation for issuing a show- cause notice in the case of non-levy or short-levy to five years from a normal period of six months.

The said Section 11A along with the proviso reads as under:

Section 11A. Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded.-

(1) When any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, a Central Excise Officer may, within six months from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

Provided that where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, by such person or his agent, the provisions of this sub-section shall have effect, as if, for the words six months, the words five years were substituted.

Explanation.- Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of six months or five years, as the case may be.

(2) The Central Excise Officer shall, after considering the representation, if any , made by the person on whom notice is served under sub-section (1), determine the amount of duty of excise due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined.

(3) For the purposes of this section,-

(i) refund includes rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(ii) relevant date means,-

(a) in the case of excisable goods on which duty of excise has not been levied or paid or has been short-levied or short-paid (A) where under the rules made under this Act a periodical return, showing particulars of the duty paid on the excisable goods removed during the period to which the said return relates, is to be filed by a manufacturer or a producer or a licensee of a warehouse, as the case may be, the date on which such return is so filed; (B) where no periodical return as aforesaid is filed, the last date on which such return is to be filed under the said rules; (C) in any other case, the date on which the duty is to be paid under this Act or the rules made thereunder;

(b) in a case where duty of excise is provisionally assessed under this Act or the rules made thereunder, the date of adjustment of duty after the final assessment thereof;

(c) in the case of excisable goods on which duty of excise has been erroneously refunded, the date of such refund.

While interpreting the said provision in each of the aforesaid cases, it was observed by this Court that for proviso to Section 11A can be invoked, the intention to evade payment of duty must be shown. This has been clearly brought out in Cosmic Dye Chemical case (supra) where the Tribunal had held that so far as fraud, suppression or mis-statement of facts was concerned the question of intent was immaterial. While dis- agreeing with the aforesaid interpretation this Court at page 119 observed as follows:

6. Now so far as fraud and collusion are concerned, it is evident that the requisite intent, i.e., intent to evade duty is built into these very words. So far as misstatement or suppression of facts are concerned, they are clearly qualified by the word wilful preceding the words misstatement or suppression of facts which means with intent to evade duty. The next set of words contravention of any of the provisions of this Act or rules are again qualified by the immediately following words with intent to evade payment of duty. It is, therefore, not correct to say that there can be a suppression or

> misstatement of fact, which is not wilful and yet constitutes a permissible ground for the purpose of the proviso to Section 11-A. Misstatement or suppression of fact must be wilful.

The aforesaid observations show that the words with intent to evade payment of duty were of utmost relevance while construing the earlier expression regarding the mis-statement or suppression of facts contained in the proviso. Reading the proviso as a whole the Court held that intent to evade duty was essentially before the proviso could be invoked.

Though it was sought to be contended that Section 28 of the Customs Act is in pari materia with Section 11A of the Excise Act, we find there is one material difference in the language of the two provisions and that is the words with intent to evade payment of duty occurring in proviso to Section 11A of the Excise Act are missing in Section 28 (1) of the Customs Act and the proviso in particular. The said sub-section 28(1) of the Customs Act reads as follows:-

> 28. Notice for payment of duties, interest etc.- (1) When any duty has not been levied or has been short-levied or erroneously refunded, or when any interest payable has not been paid, part paid or erroneously refunded, the proper officer may,-
>
> (a) in the case of any import made by any individual for his personal use or by Government or by any educational, research or charitable institution or hospital, within one year;
>
> (b) in any other case, within six months, from the relevant date, serve notice on the person chargeable with the duty or interest which has not been levied or charged or which has been so short-levied or part paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice.

Provided that where any duty has not been levied or has been short- levied or the interest has not been charged or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts by the importer or the exporter or the agent or employee of the importer or exporter, the provisions of this sub-section shall have effect as if for the words one year and six months, the words five years were substituted.

Explanation.- Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of one year or six months or five years, as the case may be.

The proviso to Section 28 can inter alia be invoked when any duty has not been levied or has been short-levied by reason of collusion or any wilful mis-statement or suppression of facts by the importer or the exporter, his agent or employee. Even if both the expressions mis- statement and suppression of facts are to be qualified by the word wilful, as was done in the Cosmic Dye Chemical case while construing the proviso to Section 11A, the making of such a wilful mis-statement or suppression of facts would attract the provisions of Section 28 of the Customs Act. In each of these appeals it will have to be seen as a fact whether there has been a non-levy or short-levy and whether that has been by reason of collusion or any wilful mis-statement or suppression of facts by the importer or his agent or employee.

In the present cases, the technical literature, drawings, manuals etc. were imported through courier and in one case through Mr. Kato. In each of these cases it is only a nominal value which was disclosed at the time of importation. All this technical literature, drawings etc. were brought and cleared as personal baggage. In our opinion, to examine whether the proviso to Section 28A (1) was validly invoked it is necessary to see the provisions relating to the clearance of the personal baggage.

Chapter XI contains special provisions regarding baggage, goods imported or exported by post, and stores. Section 77 of the Customs Act provides that the owner of any baggage shall, for the purpose of clearing it, make a declaration of its contents to the proper officer. Section 81 enables the Central Board of Excise and Customs to make regulations in respect of baggage and the said Section 81 reads as follows:

> Section 81. Regulations in respect of baggage.- The Board may make regulations,
>
> (a) providing for the manner of declaring the contents of any baggage; (b) providing for the custody, examination, assessment to duty and clearance of baggage; (c) providing for the transit or transhipment of baggage from one customs station to another or to a place outside India.

Under Rule 10 of the Customs Valuation (Determination of Price of Imported Goods) Rules 1988, the importers are required to furnish, inter alia, a declaration disclosing full and accurate details relating to the value of the imported goods and any other statement, any information or document etc. as considered necessary for determination of the value of imported goods.

Under the said Section baggage declaration forms have been prescribed which inter alia require the owner of the baggage to disclose the description of the goods as well as the value in respect thereof. It is as owner of the baggage containing the drawings and other technical literature and manual etc. that the couriers cleared the goods. They may not be the owners of the drawings etc. but for the purpose of clearance of the baggage, containing the said articles, the courier was the owner of the baggage. The Tribunal has held, and in our opinion correctly, that the sender as well as the receiver were aware of the value of the goods. The courier acted as the conduit or the agent and would only have declared such value in respect of the goods imported as must have been instructed by the sender and or receiver. The declaration by the courier of the value of the drawings in the Leela Ventures case and other technical material in the case of other appellants must have been done by the courier either at the behest of the sender or the receiver or at his own behest. In either case the declaration of the value of the drawings as being very nominal was clearly a mis-statement or a mis-representation of facts. According to the baggage declaration forms it is for the passenger to give value of the goods being brought in by him. When the value of the goods which were dutiable in the present cases was shown as only nominal, while in actual fact the correct value was much more, there was clearly an attempt on the part of the passenger, namely, the courier, to have the goods cleared through customs authorities by grossly undervaluing the value thereof. The courier gave a specific value of one dollar in respect of the drawings when both the sender and the appellants knew fully well as to how important and valuable these goods were. In the case of Leela Ventures it was on the basis of the architectural drawings that the renovation etc. was to take place whereas the technical material made available to the other appellants was necessary for their purpose. We have already held that the value of the goods so imported was not merely the cost of the price of the media but also the intellectual input on the media as represented by architectural drawings or users manuals etc. The value of architectural drawings was not merely the cost of the paper and the ink but would be much more. In some of the cases we were informed that the appellants had themselves volunteered that about one-third of the total amount payable to the collaborators should be taken as a figure representing the transaction value of the technical material so imported.

The Tribunal as well as the Commissioner were right in coming to the conclusion that there was a wilful suppression or mis-statement of the value of the goods imported and, therefore, the respondents were entitled to invoke the provisions of the proviso to Section 28 (1) of the Customs Act and issue show-cause notice even if period of six months importation had expired but before the expiry of five years thereof in the case of all the appellants except in the cases of M/s H&R Rolling Mill Engineers Pvt. Ltd. (C.A. No.1493 of 2000) and M/s Videocon VCR Ltd. (C.A. No.3632 of 2000).

Re: Whether heading No. 98.03 appliable Prior to 26th January, 1995 goods which were imported by the appellants through couriers were taxed under Chapter 98 of the Customs Tariff Act. Heading No. 98.03 provides that all dutiable articles, imported by a passenger or a member of a crew in his baggage was taxable at the standard rate of 150 per cent. This rate of duty was, of course, subject to such exemptions which were issued from time to time.

With effect from 26th May, 1995, when the President gave his assent to the Finance Bill, 1995, the Customs Tariff Act stood amended as a result whereof goods imported through courier services were exempted from the operation of Chapter 98. A circular dated 30th May, 1995 issued by the Ministry of Finance, Govt. Of India specifically provided that henceforth imports by couriers shall not be classified as baggage under heading No. 98.03. The practice of charging a uniform duty at the rate of 80 per cent ad valorem on articles imported through couriers in terms of exemption notification dated 1st March, 1994 was to be discontinued with immediate effect. Couriers Imports (Clearance) Regulations, 1995 were framed and notified on 26th May, 1995 as a result of which the imports through courier were to be classified as imports falling under the respective customs tariffs and headings. One of the results of the framing of the said Regulations was that the goods imported by couriers were to be divided into three categories which are (a) documents (b) samples and free gifts and (c) dutiable goods.

In connection with the imports made, prior to the promulgation of the Couriers Regulation, the learned counsel submitted that the respondents had erred in assuming that the disputed material had been brought into the country as passenger baggage. It was contended that the appellants had not specified the manner in which the material was to be sent by the foreign collaborators. It was submitted that Entry 98.03 was a special provision providing for special procedure and an omnibus rate of duty applicable to all goods imported by passengers or a crew member as their baggage. This provision, it was contended, was wholly inapplicable to corporate entities. The appellants were not natural persons and they were quite incapable of being treated as passengers. In any event, it was submitted, after clearance of the disputed items there was no scope for the respondents to initiate proceedings against the appellants or in respect of the material alleged to have been imported and the said proceedings, if any, could have been initiated only against the passenger from whom less duty than what was legitimate was recovered, namely, from the courier.

We are unable to agree with the aforesaid contentions. Heading of Chapter 98 clearly shows that the same is applicable to passengers baggage. As a matter of fact, in each of the present cases, the technical material which was received was cleared as part of passenger baggage. Whether the courier or the person bringing the technical material was a person nominated by the collaborator or by the appellants is of no consequence because the levy under Section 12 of the Customs Act is on the goods imported into India. In other words, the subject matter of the tax is not the person importing or exporting but the subject matter of the tax is the goods imported. If such goods are imported as a part of the baggage then by virtue of heading No. 98.03 rate of duty prescribed therein has to be paid. The underlying principle prior to May, 1995 in relation to taxing the passengers baggage was that the said baggage which contained dutiable articles was not to be taxed separately as articles but the baggage as a composite unit was to be taxed in its entirety, after giving a credit for the free allowance which was available to the passenger.

It cannot be denied that the imports were made by the appellants. The courier or any other passenger may be the mode or the manner of physical importation of the goods, just as the said goods may have been imported by post. Section 28 of the Customs Act, however, enables the Government to issue notice to the persons importing the articles into India. It is by reason of the collaborators agreements that the drawings, manuals, technical material etc. were sent by the foreign collaborators to the appellants and it is the appellants who were the importers who alone could be made liable in case of non-levy or short-levy of customs duty. The word importer in Section 2 (26) of the Customs Act includes the owner and as the appellants were the owners of the goods, certainly after these were received by them, it is only from them that the short-fall in duty levied could have been recovered. The parties took a chance in importing the articles through the courier. Initially they were successful in having the goods cleared by declaring a nominal value in respect thereof. They may not have been able to do this if the technical material and goods had been imported, not as a part of passengers baggage, but in the ordinary course of import either through post or by filing bill of entry.

We, therefore, concur with the conclusion of the Tribunal and the Commissioner that the provisions of Chapter 98 were rightly applied on the facts of these cases.

CIVIL APPEAL NO. 3632 OF 2000 [M/s. Videocon VCR Ltd. vs. Commissioner of Customs] The appellant had entered into a technical collaboration agreement with M/s. Toshiba Corporation, Japan on 13th October, 1989. The total contract value was hundred million Japanese Yen as fees which was settled at seventy million Japanese Yen. Apart from providing technical information, M/s. Toshiba Corporation was also to render consulting and training services and had permitted made use of Toshiba patent.

With the approval of Reserve Bank of India, remittance was made in Form A-2 and service tax paid.@@ JJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJ On 29th June, 1992 Mr. Kato, presumably a representative of M/s. Toshiba, brought with him to India drawings and designs as part of his personal baggage. This was cleared without payment of duty.

On 26th May 1997, a show cause notice was issued to M/s. Videocon alleging that duty was payable under Chapter 98 heading No. 98.03 and the appellant was charged with mis-declaration and suppression which entitled the invocation of extended period of limitation of five years.

Reply to show cause notice was filed in which it was, inter alia, stated that there was no mis-declaration or suppression and that the drawings and designs were classifiable under heading No. 49.06 of Chapter 49 and in 1992-93 tariff, import of such drawings and designs was free.

On 26th March, 1999, an order was passed against the appellant classifying the drawings and designs under sub-heading No. 4911.99 and diagrams and films under sub-heading 3705.90. No reason was given as to why these drawings and designs were not classifiable under heading No. 49.06. The entire contract value was taken as a valuation of technical information received and duty and penalty was imposed.

On appeal to the Tribunal, the appellant met with partial success to the extent that the valuation was determined at one-third of the contract value of hundred million Yen, even though the settled value was seventy million Yen. The case of the appellant that import in 1992-93 was free was not considered as the Tribunal proceeded on the basis that all imports were during the period 1993-96 when under Chapter 49, import was dutiable but by notification the tariff rate was less or nil.

It was contended by Mr. Bulchandani on behalf of appellant that at the time when the drawings were imported into India, the import of the same was free and even if the drawings were to be regarded as part of the baggage of Mr. Kato, thereby applying the provisions of heading No. 98.03, even then no duty could be imposed.

It was further contended that in any case the extended period of limitation of five years could not be attracted in the present case.

We find force in the contention of the appellant. Heading No. 98.03 of Chapter 98 of the Schedule in the Tariff Act imposes a prescribed duty of 150 per cent on dutiable articles imported by a passenger or a member of a crew in his baggage. What is, therefore, to be seen is whether the drawings and designs were dutiable articles. Heading No. 49.06 under Chapter 49 of the Customs Tariff for the year 1992-93 provides as follows:

> Plans and drawings for architectural, engineering, industrial, commercial, topographical or similar purposes, being originals drawn by hand; hand-written

> texts; photographic reproductions on sensitised paper and carbon copies of the foregoing The rate of duty specified therein in Column (4) was free. According to Section 78 of the Customs Act, the rate of duty and tariff value applicable to baggage shall be the rate and valuation in force on the date on which a declaration is made for clearing the baggage. It was the contention of the learned counsel for the appellant that as articles in question would fall under heading No. 49.06 they were free of duty. Therefore, they could not be regarded as dutiable articles and its value could not be included in the baggage of the passenger for the purpose of levy of customs duty.
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> While dealing with the provisions of the Excise Act, this Court in Collector of Central Excise, Hyderabad Vs. Vazir Sultan Tobacco Co. Ltd. 1996(83) ELT 3 (SC) referring to an earlier decision in the case of Wallace Flour Mills Company Vs. Collector of Central Excise 1989 (44) ELT 598 had observed that if by virtue of an exemption notification the rate of duty was reduced to nil, the goods specified in the Tariff Act would still be regarded as excisable goods on which nil rate of duty was payable.

It appears to us that the aforesaid decisions, which were sought to be invoked by the respondent in an effort to submit that the drawings and designs, which came as a part of passenger baggage were dutiable goods, would not be applicable. In Vazir Sultan and Wallace Flour Mills cases (supra), this Court considered the definition of excisable goods in Section 2(d) of the Central Excise Act, 1944 which was as follows:

> 'Excisable goods' means goods specified in the [the First Schedule and the Second Schedule] to the Central Excise Tariff Act, 1985 (5 of 1986) as being subject to a duty of excise and includes salt".
>
> Under the Customs Act, there are two definitions which are relevant. Section 2(22) defines goods as follows:@@ JJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJ Goods includes- (a) vessels, aircrafts and vehicles;
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> (b) stores; (c) baggage; (d) currency and negotiable instruments; and (e) any other kind of movable property.

In addition thereto, Section 2(14) defines dutiable goods as follows:

> dutiable goods means any goods which are chargeable to duty and on which duty has not been paid.
>
> Under the Central Excise Act, 1944 in definition of words excisable goods under Section 2(d), the very specification or inclusion of goods in the First and Second Schedule of the Central Excise Tariff Act would make them excisable goods subject to duty. Under the Customs Act, the provisions seem to be somewhat different. While by virtue of Section 2(22) all kinds of movable property would be goods but it is only

> those goods which would be regarded as dutiable goods under Section 2(14) which are chargeable to duty and on which duty has not been paid. The expression chargeable to duty on which duty has not been paid indicates that goods on which duty has been paid or on which no duty is leviable, and therefore no duty is payable, will not be regarded as dutiable goods. It is only if payment of duty is outstanding or leviable that goods will be regarded as dutiable goods.
>
> Section 12 of Customs Act provides that the duties of customs shall be levied at such rates as may be specified under the Customs Tariff Act. When the Customs Tariff Act itself provides that the import of drawings and designs under heading No. 49.06 is free, it must follow that these drawings and designs, though goods, were not chargeable to duty. In view of the difference in the language of the Excise and Customs Acts, the decisions in the cases of Vazir Sultan and Wallace Flour Mills (supra) may not be very apposite and if no customs duty is chargeable either by reason of tariff not providing for it or because of the exemption notification, those goods will not be regarded as dutiable goods on which duty has not been paid. It is sufficient in the present case to observe that the drawings and designs which were imported by the appellant were correctly classifiable under heading No. 49.06 and the tariff itself providing that the import of the same is free, the said drawings and designs were not dutiable articles and, therefore, no customs duty was leviable thereon even as a part of the passenger baggage.

On this short ground alone the appeal of Videocon has to be allowed.

C.A. No. 1493 of 2000 [M/s H & K Rolling Mill Engineers Pvt. Ltd. Vs. The Commissioner of Customs] The appellant is a joint venture company. Sixty per cent of its shareholders are Indians while forty per cent of the shares are held by H & K, Germany. The appellant supplies technology to Bhilai Steel Plant and it is required to pay to the German company licence fee of DM 2,40,000 and engineering fee of DM 60,000.

The appellant prepared designs and drawings which were sent to H & K, Germany for the limited purpose of getting it checked and approved. It is stated that the appellant received a fax message from the German company approving the designs and drawings. Copy of the designs and drawings which had been prepared and sent by the appellant came back to India through courier containing the stamp and approval of the German company. Like in the case of M/s Leela Ventures income tax was deducted at source for the payments made to the German company after permission of the Reserve Bank of India had been obtained.

In the show cause notice which was issued it was proposed to regard the drawings which had come through the courier at DM 60,000 equivalent to Rs. 11,03,800/- as being subject to levy of duty. In the show cause notice it was stated that these technical drawings were supplied by the German company and being goods imported through courier services were classifiable under heading No. 98.03 and duty and penalty was payable in respect thereof.

Unlike other cases, we find that these drawings in respect of which customs duty had been levied were not something which had originated from Germany. These drawings were prepared by the Indian company of which the German company was a shareholder. These drawings were no doubt sent to Germany for approval but the agreement between the parties does not show that the payment of DM 60,000 was directly relatable or attributable to the approval and despatch of the said drawings to India. Under the agreements between the parties apart from the licence fee payable by the Indian company, for the use of the name of the German company and engineering fee, money was payable in terms of the agreement. As we have already observed there is nothing to show that this amount of DM 60,000 was relatable only to the approval of the said designs and drawings.

Be that as it may the value of these drawings which belong to the Indian company were merely approved by the German company could only be nominal and under no circumstances the said value could be regarded as DM 60,000. The nominal value disclosed by the courier, on the facts and circumstances of this case, could not, therefore, be said to be incorrect. The order passed against the appellant levying the customs duty and penalty is, therefore, to be set aside. Ordered accordingly.

Conclusion:

> As a result of the aforesaid discussion, Civil Appeal No. 1493 of 2000 of M/s H & K Rolling Mill Engineers Pvt. Ltd. and Civil Appeal No. 3632 of 2000 of M/s Videocon VCR Ltd. are allowed and the orders of the Commissioner and Customs, Excise & Gold (Control) Appellate Tribunal in their cases are set aside. The other appeals are dismissed but in the case of Leela Ventures, out of the total contract value, the Commissioner will determine the transaction value of the drawings, designs, etc. imported through the courier and then impose the levy thereon. There will be no order as to costs.
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> ..J. [B.N. Kirpal]