

(1998) 03 KAR CK 0083

In the Karnataka High Court

Case No : Writ Petition No. 4150 of 1991

Wipro Information Technology Limited, Mysore and Another	APPELLANT
Vs	
The Collector of Customs, Karnataka Customs Collectorate, Bangalore and Others	RESPONDENT

Date of Decision : 25-03-1998

Acts Referred:

Constitution of India, 1950 — Article 14, 19 (1) (g), 265, 300A
Customs Act, 1962 — Section 12 s, 14 (1), 14 (1-A), 28 (1)
Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 — Rule 9

Citation : (1999) 114 ELT 814 : (1999) 4 KarLJ 90

Hon'ble Judges : V.K. Singhal, J

Bench : Single Bench

**Advocate : M/s. King and Partridge, for the Appellant; Sri Ashok Harnahalli,
Central Government Standing Counsel, for the Respondent**

Judgement

1. Validity of notice issued u/s 28(1) of the Customs Act, 1962, dated 21-12-1990 is assailed in this writ petition in respect of collection of duty on loading, unloading and handling charges. It is submitted that the provisions of Rule 9(2)(b) of the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988, as amended by notification dated 5th July, 1990, is violative of Article 265 of the Constitution of India and the respondents have no jurisdiction to realise the duties in excess of the actuals.

2. Petitioner is engaged in manufacturing and marketing of computer systems and peripherals for which large quantities of components are imported and the duty is paid on ad valorem basis. Provisions of Rule 9 were not in existence prior to 1988 and it was by Customs Valuation (Determination of Price of Imported Goods) Rules, 1988, the rules came into force on 16th August, 1988. Prior to framing of these rules, there was lot of litigation and it appears that in order to rationalise the procedure in the manner of determination of duty, the rules were framed. Rule 9(2) as added by rules of 1988 is as under.-

"(2) For the purposes of sub-section (1) and sub-section (1-A) of Section 14 of the Customs Act, 1962 (52 of 1962) and these rules, the value of 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 in the case of goods imported by air, the cost and charges referred to in clauses (a), (b) and (c) above,

- (i) where such cost and charges are ascertainable, shall not exceed twenty per cent of the free on board value of such goods;
- (ii) where such cost and charges are not ascertainable such cost and charges shall be twenty per cent of the free on board value of such goods:

Provided further that in the case of goods imported other than by air and the actual cost and charges referred to in clauses (a), (b) and (c) above are not ascertainable, such cost and charges shall be twenty-five per cent of the free on board value of such goods".

For the existing proviso, the following provisos were substituted by the Amendment Rules, 1990:

"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) 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. Customs Valuation Rules, 1963 provided that if the value of the imported goods cannot be determined under the Customs Valuation Rules, the proper officer shall after taking into consideration all the relevant material which he has gathered, determine the value to the best of his judgment. This position

continued till the above rules and amendments were made and thus the petitioner and the like were required to pay customs duty in respect of loading, unloading and handling and on the basis of actuals. The Amendment Rules of 1990 provided for payment of actuals in respect of cost of transport as well as the insurance charges, but for loading, unloading and handling charges it was fixed at 1% of the free on board value of the goods. Since the position prevailed prior to 5th of July, 1990, to determine value at actuals for loading, unloading and handling charges, the petitioner is aggrieved with such an amended provision as beyond competence of Section 14 of the Customs Act. The question of handling charges whether includable in assessable valuation of the goods u/s 14 of the Customs Act, 1962 was interpreted by Gujarat High Court in the case of Prabhat Cotton and Silk Mills Limited v Union of India, wherein it was held that in making computation of the assessable value of yarn for the purpose of payment of customs duty 3/4% of the CIF value was included in the computation in connection with the landing charges paid to the Port Authorities and in that context the action of the respondents was held justified. This Court in B.S. Kamath and Company and Others v Union of India and Others, also upheld the levy. The submission of Mr. Nataraj, learned Senior Counsel for the petitioner, is that the provisions of Section 14(1-A) are subject to Section 14(1) and u/s 14 the price which is the consideration for sale has to be taken into consideration. The provision of Section 14(1) have contemplated fiction for determining the value and the delegated authority has no jurisdiction to create further fiction in the matter. It is stated that the facts of the present case depict that the actual extent in respect of handling charges for two imports were Rs. 261/- and Rs. 26/- whereas by this notional computation the figure has been taken at Rs. 33,295/- and Rs. 16,125/- (Annexure-C). The levy is unreasonable and beyond the competence of the rule making power. The fiction which has been introduced by the amending rules is irrespective of the actual handling charges and notional handling charges have to take place of actuals. It is submitted that the Cargo handling services are rendered by Madras Port Trust, International Airports Authority of India or Mysore Sales International Limited for imports made at the Madras Port, Madras Air Cargo Complex and Bangalore Air Cargo Complex, respectively. The charges are nominal i.e., less than 0.2% and inclusion of 1% of handling charges has resulted in excess liability of duty on the petitioner. The handling charges on the basis of actuals have already been paid and it is the validity on the basis of the notional figure which is sought to be challenged, as illegal and without jurisdiction and void and contrary to the provisions of Articles 14 and 19(1)(g) of the Constitution. The rules are alleged to be highly discriminatory and in violation of the principles laid down under Article 265 of the Constitution. Even the provisions of Article 300-A of the Constitution has not been taken into consideration which provide that no person shall be deprived of his property without authority of law. The provisions of Section 14 of the Customs Act have not contemplated notional determination of the charges and they could only be contemplated when the actuals are not known. The power of determining on a notional basis or on a formula basis could not have been

effected. Entry 83 of List I of the Constitution which authorises the levy of customs duty cannot contemplate notional charges.

4. It is stated that Section 14(1) provides the measure for the charge u/s 12 of the Act. The measure is value. The value is deemed to be the price at which such goods or the like given are ordinarily sold or offered for purchase for delivery at the time and place of importation in the course of international trade where the price is the sole consideration for the sale. Therefore, the price of the goods landed at the place of importation is deemed to be the value. The focus is on price which is the consideration for the sale. Section 14(1-A) is "subject to sub-section (1)". The determination of price is in accordance with the rules. Section 14(1-A) is for determining by the authority of the value for the purpose of Section 14(1). However, the guideline for such determination is by the prescription u/s 156 of the Act, whereas Section 14(1-A) is subject to sub-section (1), the fixation of tariff value is u/s 14(2) and "notwithstanding anything contained in sub-section (1) or subsection (1-A)". The fixation of tariff value may depart from price. When Section 14(1) speaks about value which is deemed to be the price for the delivery at the place of importation, it considers a genuine transaction where the price is the sole consideration for delivery at the place of importation. In such a case, there is nothing else to depart from Section 14(1), because of the value being the price at the time and place of importation, landing charges get included for the purpose of value. Therefore, landing charge is nothing but a component of the price for sale and delivery at the place of importation. It makes no difference whether the sale by the international seller to the Indian importer is FOB or CIF price at the place of importation. In all situations, the several components are added to arrive at the price. "Price" has a definite legal connotation and nomen juris. That being so, Section 14(1-A) which is subject to Section 14(1) cannot add to the connotation of price or add notional components which inflate the price. The entire valuation rules provide legislative guidance to approximate the value as near the price as possible. That, Rule 3 directs transaction value to be adopted, and thereafter the value is sequentially reached is indicative that the rules are seeking to harmonise with Section 14(1). Only in Rule 9(2)(b) there has been a departure. The Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 after the enactment of Section 14(1-A) in 1988 and particularly Rule 9(2) were in conformity with Section 14(1) as well as GATT regulations. The interpretation of local laws may as far as may be in accordance with the international treaty. Rule 9(2) insofar as cost of transport or cost of insurance takes the actuals as ascertained. If not ascertainable, some notional percentage is added. But for the purpose of Section 9(2)(b) i.e., "landing charges", it is a flat one per cent, even if such charges are proved and ascertained. In this view, there is addition of amounts which do not represent the landing charges. This is not in accordance with Section 14(1). The fiction of Rule 9(2)(b) is to levy duty on what is not the price at the place of importation and what is not actually landing charges. The rule has introduced a fiction that one per cent of the FOB value shall be the landing charges. Fiction is

assuming a fact which is not true, for legal purpose. The fiction remains so even if the word "deemed" is not employed. Subordinate legislation cannot introduce fiction. It is a preserve of the plenary legislation. It is all the more so when in Section 14(1) fiction is employed and there cannot be a further fiction by the rule. Rule 9(2)(b) is clearly arbitrary since it operates independent of the value of the goods. The fixing of a percentage of the FOB value as landing charges operates unevenly whatever the nature of the goods imported, and whatever is the weight of the goods. It operates unevenly on different persons and goods. Such a flat rate is per se arbitrary and violative of Article 14 of the Constitution of India. Whatever the laudable motive or actuated by administrative convenience, it is estimated that the duty as arrived and imposed as per Rule 9(2)(b) is several times the very landing charges which is irrational and arbitrary. It is particularly so when actual charges are easily ascertained. Rule 9(2)(b) if construed as directory so that where the actuals are ascertainable and stand adopted, the rule is saved. If the expression, "shall" is construed as "may", the provision is rational and reasonable and is in accordance with the Act. u/s 156(2) (a), the rule is framed for the purpose of Section 14(1-A). The expression "manner" can only indicate the mode and there is no authority to legislate either for a fiction or for any substantial matter akin to imposition of a duty.

5. It is further submitted that the fiction is assuming a fact which is not for legal purposes and the subordinate legislation cannot introduce fiction. There cannot be a fiction out of fiction since Section 14(1) has already created a fiction and therefore the rule making authority cannot create further fiction. In respect of different persons and goods the provisions operate unevenly for the alleged convenience of administration. The provisions cannot be made too harsh in respect of goods which are costlier.

6. I have considered over the matter. It appears that the provisions of Section 14(1) of the Customs Act were amended keeping in view the GATT agreement as is evident from the object and reasons of Customs (Amendment) Act, 1988 which reads as under:-

"The Customs Act, 1962 (52 of 1962) deals with the law relating to levy of duties of customs. Section 14 thereof provides for the valuation of goods for the purposes of assessment of duties of customs chargeable on goods by reference to their value. Article VII of the General Agreement on Trade and Tariff (GATT), to which India is a contracting party, lays down general principles on customs valuation. The provisions of the said Section 14 are, therefore, based on Article VII of GATT.

During the Tokyo Round of Multilateral Trade Negotiations under the GATT (1973-1979), an agreement on implementation of Article VII of the GATT, also known as GATT Code of Valuation was adopted. This agreement lays down elaborate rules to provide for greater uniformity and certainty in the application of Article VII of the GATT for determining the value of imported goods. As India is a contracting party to this agreement also, we are required to implement the

said GATT Code of valuation... "

Article 8(2) and (3) reads as under;

"(2) In framing its legislation, each party shall provide for the inclusion in or the exclusion from the customs value, in whole or in part, of the following:

(a) the cost of transport of the imported goods to the port or place of importation;

(b) loading, unloading and handling charges associated with the transport of the imported goods to the port or place of importation; and

(c) the cost of insurance.

(3) Additions to the price actually paid or payable shall be made under this article only on the basis of objective and quantifiable data".

7. In respect of loading, unloading and handling charges associated with the transport of imported goods to the port or place of importation, addition to the price actually paid could be on the basis of objective and quantifiable data. It appears that the present Rule 9(2) was amended on 5th July, 1990 to bring in consonance with the GATT Agreement. Section 14 of the Customs Act, 1962 reads as under:

"Valuation of goods for purposes of assessment.-

Section 14(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 u/s 46, or a shipping bill or bill of export, as the case may be, is presented u/s 50".

(1-A) 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.

From the perusal of the Customs Act, it is evident that the charge has been created u/s 12 on importation of goods. The procedure for valuation of goods for the purpose of assessment has been given u/s 14. Section 14 has created a fiction in respect of value of goods which is deemed to be the price and for that purpose it is provided that the price at which such or like goods are ordinarily

sold or offered for sale is the basis. The price is to be taken as prevalent in the course of inter-State trade and not the local price. It is only the delivery at the time and place of importation of the goods which is relevant. It is also contemplated that the seller and buyer should not have any interest in respect of the business of each other. Price is the sole consideration for the sale or offer for the sale. Price has not been defined under the Act though market-price has been defined u/s 2(30) of the Act as in relation to any goods, means the wholesale price of the goods in the ordinary course of trade in India. The fact that the price at which the goods are ordinarily sold or offered for sale is taken into consideration which eliminates the possibility of any under-billing. Deeming fiction u/s 14(1) is the price at which the goods are ordinarily sold in the course of inter-State trade. If the price of such goods in international trade is more, then the authority can take into consideration that price. Regarding the expenses which also form part of price, Section 14(1-A) contemplated determination according to rules. Handling charges have been held to be component of the price. Section 14(1-A) is subject to Section 14(1) and the principles laid down for determination of the price u/s 14(1) have to be taken into consideration as the delegated authority had no power to frame the rules beyond the scope of Section 14.

8. Section 156 which empowers to frame the rules provides, the manner of determining the price of imported goods under sub-sections (1) and (1-A) of Section 14. The word "manner" used in the section refers to the mode of determination of the price of the goods. It is contended on behalf of the petitioner that the manner cannot extend the scope of section as was considered in the case of *Sales Tax Officer, Ponkunnam and Another v K.I Abraham*. In this case, the dispute was with regard to the time limit prescribed by the rule making authority while framing the rules which interpreted the words "in the prescribed manner". It was held that the expression "in the prescribed manner" confers power on the rule making authority to prescribe a rule stating what particulars are to be mentioned in the prescribed form, the nature and value of the goods sold, the parties to whom they are sold and to which authority the form is to be furnished. But it does not take in the time element. If the provisions of rule as are read with Section 14(1) and 14(1-A) it will be found that rule has not gone beyond the powers given by the Act. In the case of *Hari Vishnu Kamath v Ahmad Ishaque*, wherein it was observed that an enactment in form mandatory might in substance be directory and ascertaining the true intention of the legislature which is the determining factor and that must ultimately depend on the context. It may be observed that if the rule goes beyond the scope of the Act or the section under the authority of it is framed then it may be declared as ultra vires the Act.

9. It may be observed that basic elements for levy of tax/duty are nature of the tax i.e., object, rate, persons and the manner which have to be clearly specified by the legislature. The duty in the present case is a customs duty and the rates and persons have also been prescribed. The competence of the Parliament for

rule making power or the provisions of Section 14(1) are not in dispute. The method of collection or the manner may be prescribed under the Act or the delegated authority could have framed the rules. In the present case instead of realising the duty on the handling charges on actuals, rules have prescribed a fixed percentage which in some cases may be too harsh where the value of the goods imported is much more and the weight of the commodity is less. There may be number of other items where the value of the imported goods is less and weight of the commodity is very much. The question is as to whether the machinery provision for collection of duty taking into consideration the administrative convenience could be considered beyond the scope of the duty itself or could it be said levying the duty on amount which is not within the purview of the Customs Act itself or Section 14(1) simply because the rule making authority have prescribed a fixed percentage based on experience instead of actual.

10. On behalf of the respondents, it has also been pointed out that earlier the importer was required to include in the assessable value of goods, 3/4% of CIF value of goods on the basis of established practice. Central Board of Excise and Customs after collecting the material have now fixed it at 1% of F.O.B. value of the goods. The decision of Gujarat High Court in the case of Prabhat Cotton and Silk Mills Limited, *supra*, has considered inclusion of 3/4% since last more than 40 years when the Constitution of India came into force (though there is reference to the year 1878) and the charges were considered tiny/trifling compared to the total value of the goods. This Court in the case of B.S. Kamat and Company's case, *supra*, has upheld the inclusion of landing charges following the Gujarat High Court decision. In actual practice it was found impossible to ascertain actuals that are incurred towards landing charges while making the assessment as they vary depending on quantities and place of import and in order to achieve the certainty 1% of F.O.B. value are to be included in assessable value. The contention that the rule has created a disproportionate counter-mischief is also not proper. Much stress is laid on the provision that the word "shall" under Rule 9(2) be interpreted as "may" and the procedure should be made applicable only in those cases where the duty is not ascertainable from the documents the provisions would be made applicable. If the provisions of Rule 9(2) are considered as a whole the interpretation that "shall" should be taken as "may" is not appearing to me proper because that will be contrary to the very spirit under which the rules were framed. The GATT agreement have provided the addition with the actuals on the objective and quantifiable basis. The figure of percentage which has been specified in the rule may be because of the experience of the respondents which they have gained during all these years. As stated above, some persons would be getting the benefit even by fixing this particular percentage while the others will suffer. In the case of the petitioner, the amount of the duty has tremendously been increased because of the notional value which has been taken more than 100 times of the actuals. It is for the rule making authority to take into consideration the overall picture. If the rule in a

particular case is harsh then for that reason it cannot be declared as ultra vires. It is for the delegated authority to consider and for that reason the petitioner can make a representation to the delegated authority explaining the circumstances under which the provisions of Rule 9(2) have acted harshly on him.

11. In the case of *Lohia Machines Limited and Another v Union of India and Others*, the question of validity of rules were examined with reference to the provisions of the section. There also the provision of law for computation of capital employed excluding the borrowed capital continued for a number of years. It was observed that there can be no doubt that the expression "capital employed" is susceptible of more than one interpretation and it may include long term borrowings or it may not, depending on the context and the circumstances in which it is used. There is doubt even amongst lawyers and accountants whether short term borrowings can be regarded as forming part of the capital employed. It is observed that acquiescence in an earlier exercise of rule making power which was beyond the jurisdiction of the rule making authority cannot make such exercise of rule making power or a similar exercise of rule making power at a subsequent date valid. If a rule made by a rule making authority is outside the scope of its power, it is void and it is not at all relevant that its validity has not been questioned for a long period of time; if a rule is void it remains void whether it has been acquiesced or not. The decision of *Sita Ram Bishambhar Dayal v State of Uttar Pradesh and Sadhu Singh Mahendra Singh v Sales Tax Officer, Bareilly and Another*, was taken into consideration and it was observed.-

"It is true that the power to fix a rate of tax is a legislative power but if the legislature lays down the legislative policy and provides the necessary guidelines, that power can be delegated to the executive. Though a tax is levied primarily for the purpose of gathering revenue, in selecting the objects to be taxed and in determining the rate of tax, various economic and social aspects such as the availability of the goods, administrative convenience, the context of evasion, the impact of tax levied on the various sections of the society, etc., have to be considered. In a modern society taxation is an instrument of planning. It can be used to achieve the economic and social goals of the State. For that reason the power to tax must be a flexible power. It must be capable of being modulated to meet the exigencies of the situation. In a Cabinet form of Government, the executive is expected to reflect the views of the legislature. In fact in most matters it gives the lead to the legislature. However much one might deplore the "New Despotism" of the executive, the very complexity of the modern society and the demand it makes on its Government have set in motion forces which have made it absolutely necessary for the legislatures to entrust more and more powers to the executive. Textbook doctrine evolved in the 19th century have become out of date. Present position as regards delegation of legislative power may not be ideal, but in the absence of any better alternative, there is no escape from it. The legislatures have neither the time, nor the required detailed information nor even the mobility to deal with the innumerable problems arising

time and again. In certain matters they can only lay down the policy and guidelines in as clear a manner as possible".

12. On the point of delegated legislation whether it is excessive delegation reference was made to the case of *M/s. Hiralal Ratan Lal v Sales Tax Officer, Section III, Kanpur and Another*, wherein the following observations were made.-

"it is true that the legislature cannot delegate its legislative functions to any other body. But subject to that qualification, it is permissible for the legislature to delegate the power to select the persons on whom the tax is to be levied. In the very nature of things, it is impossible for the legislature to enumerate the goods, on dealings in which sales tax or purchase tax should be imposed. It is also impossible for the legislature to select the goods, which should be subjected to a single point sales or purchase tax. Before making such selections several aspects, such as the impact of the levy on the society, economic consequences and the administrative convenience will have to be considered. These factors may change from time to time. Hence, in the very nature of things, these details have got to be left to the executive".

13. In the case of *Union of India and Another v A. Sanyasi Rao and Others*, the validity of provisions of Section 44-AC was examined with reference to the collection of tax u/s 206-C with reference to the definition of "income" and it was held that these are the machinery provisions. It is a consistent view of the Apex Court that the machinery provision could not effect the charging section.

14. In *Khyerbari Tea Company Limited v State of Assam*, the Constitution Bench of the Supreme Court observed.-

"It is hardly necessary to emphasise that entries in three lists in the Seventh Schedule which confer legislative competence on the respective legislature to deal with the topics covered by them must receive the widest possible interpretation; and so it would be reasonable to read in the entry any limitation of the kind which Mr. Pathak's argument seems to postulate. Besides, it is well-settled that when a power is conferred on the legislature to levy a tax, that power itself must be widely construed; it must include the power to impose a tax and select the articles or commodities for the exercise of such power; it must likewise include the power to fix the rate and prescribe the machinery for the recovery of the tax. This power also gives jurisdiction to the legislature to make such provision as, in its opinion, would be necessary to prevent the evasion of the tax. In imposing taxes, the legislature can also appoint authorities for collecting taxes and may prescribe the procedure for determining the amount of taxes payable by any individual; all these provisions are subsidiary to the main power to levy a tax...".

15. The procedure for determining the amount of tax payable could be left to delegated authority. The jurisdiction of legislature i.e., Parliament is not in dispute and it is stated that the Parliament could have enacted such a provision u/s 14(1), but there being no guideline as such the delegated authority cannot

exercise its power. In this regard the decision of Agricultural Market Committee v Shalimar Chemical Works Limited, is relevant wherein it was observed.-

"The principle which, therefore, emerges out is that the essential legislative function consists of the determination of the legislative policy and the legislature cannot abdicate essential legislative function in favour of another. Power to make subsidiary legislation may be entrusted by the legislature to another body of its choice but the legislature should, before delegating, enunciate either expressly or by implication, the policy and the principles for the guidance of the delegates. These principles also apply to taxing statutes. The effect of these principles is that the delegate which has been authorised to make subsidiary rules and regulations have to work within the scope of its authority and cannot widen or construct the scope of the Act or the policy laid down thereunder. It cannot, in the garb of making rules, legislate on the field covered by the Act and has to restrict itself to the mode of implementation of the policy and purpose of the Act".

16. In this case legal fiction was created by the delegated authority of presuming sale or purchase in the area which was considered beyond Legislative Policy. The view was taken by the Apex Court that the liability or charge has to be created by the legislature and not by the delegated authority. In the case before me the charge is already fixed by Section 12 and it is the mode of calculation of price which is left to the delegated authority. Hence, this decision does not help the petitioner. The delegation for determining the mode or manner cannot be considered addition of essential legislative function. High Court of Australia in *Skanahan v Scott*, while interpreting the provisions of Section 22(1) of the Scaffolding and Lifts Act, 1912-1960 observed.-

"The result is to show that such a power does not enable the authority by regulations to extend the scope or general operation of the enactment but is strictly ancillary. It will authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provisions. But such a power will not support attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary its ends".

If the provisions of Rule 9(2) are considered in the light of Section 156 read with Section 14(1) it could not be considered beyond the power u/s 14(1-A) it neither widens the purpose of the Act nor goes beyond the scope.

17. A contention is raised that the fiction is created in a fiction, A deeming provision u/s 14 or Rule 9(2)(b) cannot be considered to be a fiction over fiction. A fiction is a legal artifice which admits factual assumptions into legal rules to secure lawful results. Fiction is a Germanic word, meaning embellishment, fabrication, invention; by it we understand in legal sense an assumption of the law which gives to a person or to a thing a certain quality which it does not possess by nature with the object of founding thereon a consequence of a certain kind, which would have been contrary to reason and truth without the

assumption as defined in *Woorden Tolk*, a Legal Dictionary published in Hague in 1773.

18. The contention that the rule has created a disproportional counter-mischief has also no substance as there is no wrong coming to the category of mischief in the enactment designed to remedy at the cost of setting up a disproportionate counter-mischief. The reasons for exclusion of discretion or fixing the percentage is uniformly irrespective of the weight of articles imported vis a vis the value is only to achieve certainty for proper determination in advance of the duty. In respect of heavy articles the amount may be more than 1%. The uniformity excluding actuals is stated to be on the basis of data collected and the experience of the respondents. In *Commissioner of Income Tax, West Bengal v Gangadhar Banerjee and Company (Private) Limited*, it was observed that "in arriving at the assessable profits the Income Tax Officer may disallow many expenses actually incurred by the assessee; and in computing his income, he may include many items on notional basis. But the commercial or accounting profits are the actual profits earned by an assessee calculated on commercial principles. . ." These observations of the Apex Court makes it clear that in taxation matter even notional figures can be taken for the purpose of liability of tax. The deeming fiction created by Rule 9(2) is for determining the manner of computation of price which power has been delegated by the legislature and cannot be considered as beyond the power conferred by Section 14(1) or delegated u/s 156. In *Union of India v Bombay Tyre International Limited*, the Supreme Court observed that even the power to levy duty on retail price in respect of sale by the wholesaler could be considered valid. If a deeming fiction is created by the rule for determining the value based on its long experience for proper and timely assessment for administrative convenience, such fiction cannot be considered beyond the power of the delegated authority. Before its amendment of rule w.e.f. 5-10-1990 even in a case where no figures are available, a best judgment assessment could be made. Certain element of guess or arbitrariness remains as the determination is not on actuals, but for that reason such determination cannot be said to be considered as arbitrary. Loading and handling charges are to be included in the assessable value. Section 14 of the Act has created the fiction for determining the value. This percentage would have been provided in the Act itself and simply because such a provision has been made under Rule 9 of the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988, it cannot be considered beyond the competence of delegated authority. Rule 9(2-B) of the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988, is a valid piece of legislation suffering from no vice of discrimination or conferring any arbitrary power on the respondents. The principles of *quid pro quo* are applicable for fees and cannot be made applicable for levy of duty.

The writ petition having no force is dismissed.