A COMMNR. OF CUSTOMS EXCISE, NEW DELHI

v.

M/S. LIVING MEDIA (INDIA) LTD.

(Civil Appeal Nos. 8627-8628 of 2002)

B AUGUST 17, 2011

[DR. MUKUNDAKAM SHARMA AND ANIL R. DAVE, JJ.]

Customs Valuation (Determination of Value of Imported C *Goods) Rules, 2007 – rr. 2(f),3,4 and 9(1)(c) – Determination of value of imported goods – Method of valuation – Valuation of recorded audio cassettes/CDs imported by respondents-assessees – Whether the value of the royalty required to be paid by the respondents-assessees for the imported goods* D *was to be included in the transaction value of the imported goods for the purpose of customs duty assessment – Held: In determining the transaction value there has to be added to the price actually paid or payable for the imported goods, royalties and the license fees related to the imported goods* E *that the buyer is required to pay, directly or indirectly, as a condition of sale of goods – In all the cases in consideration, there is no dispute that the cassettes under question were brought to India as pre-recorded cassettes which carried the music or song of an artist – There was an agreement existing* F *in all the matters that royalty payment was towards money to be paid to artists and producers who had produced such cassettes – Such royalty became due and payable as soon as cassettes were distributed and sold and therefore, such royalty became payable on the entire records shipped less* G *records returned – It could therefore, be concluded that the payment of royalty was a condition of sale – When pre-recorded music cassette is imported as against the blank cassette, definitely its value goes up in the market which is in addition to its value and therefore duty shall have to be charged on the value of the final product – Therefore, value*

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of the royalty paid is to be included in the transaction value – Customs Act, 1962 – s.14.

The valuation of the recorded audio cassettes/CDs imported by respondents-assessees was the subject matter of the instant appeals. The question which arose for consideration was whether the value of the royalty required to be paid by the respondents-assessees for the imported goods was to be included in the transaction value of the imported goods for the purpose of customs duty assessment.

Disposing of the appeals, the Court

HELD: 1. Section 14 of the Customs Act, 1962 deals with valuation of goods for the purpose of assessment. In exercise of the power vested under the Customs Act, the Central Government made Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. Rule 2(f) of the Rules defines "transaction value" where it says that it means the value determined in accordance with rule 4 of the Rules whereas Rule 3 of the Rules deals with the determination of the method of valuation. [Paras 24, 25 and 26] [781-B; 782-F-H]

2. The issue for consideration herein appears to be answered by the decision in *Associated Cements Companies Ltd. In the said decision the Supreme Court had stated clearly that if a pre-recorded music cassette or a popular film or musical score is imported into India, duty will necessarily have to be charged on the value of the final product. 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 license fees related to the imported goods that the buyer is required to pay, directly or indirectly, as a condition of sale of goods. Therefore, when pre-recorded music cassette is imported as against the blank cassette,**

A **definitely its value goes up in the market which is in addition to its value and therefore duty shall have to be charged on the value of the final product. Therefore, there can be no dispute with regard to the fact that value of the royalty paid is to be included in the transaction value. In**
B **all the cases in consideration, there is no dispute that the cassettes under question were brought to India as pre-recorded cassettes which carried the music or song of an artist. There was an agreement existing in all the matters that royalty payment was towards money to be**
C **paid to artists and producers who had produced such cassettes. Such royalty became due and payable as soon as cassettes were distributed and sold and therefore, such royalty became payable on the entire records shipped less records returned. It could therefore, be**
D **concluded that the payment of royalty was a condition of sale. [Paras 32, 33] [787-B-G]**

Associated Cement Companies Ltd. v. Commissioner of Customs **(2001) 4 SCC 593: 2001 (1) SCR 608 – relied on.**

E *Commissioner of Customs v. Ferodo India Pvt. Ltd.* **2008 (4) SCC 563: 2008 (3) SCR 147;** *Collector of Customs (Prev.), Ahmedabad v. Essar Gujarat Ltd.,* **1996 88 ELT 609 (S.C.) – referred to.**

F **Case Law Reference:**

2008 (3) SCR 147	**referred to**	**Para 29**
1996 88 ELT 609 (S.C.)	**referred to**	**Para 30**
2001 (1) SCR 608	**relied on**	**Para 31, 32, 34**

G CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8627-8628 of 2002.

From the Judgment & Order dated 23.01.2002 of the Customs Excise and Gold Control Appellate Tribunal, New
H Delhi in Appeal No. C/405 & C/414/2001-A.

WITH

C.A. Nos. 2959 of 2008, 4751, 2832 of 2006 & 1 of 2009.

Mukul Gupta, Shalini Kumar, Arun Krishnan, B.K. Prasad, Anil Katiyar, Balbir Singh, Abhishek Singh Baghal, Rupender Sinhmar, Rajesh Kumar, B.V. Balram Das, Alok Yadav, Krishna Mohan, V. Balachandran, E.C. Agrawala for the appearing parties.

The Judgment of the Court was delivered by

DR. MUKUNDAKAM SHARMA, J. 1. The Civil Appeal Nos. 8627-8628 of 2002 are filed against the judgment and order passed by the Customs, Excise & Gold (Control) Appellate Tribunal (hereinafter for short referred to as "CEGAT") on 23.1.2002, however, Civil Appeal No. 2959 of 2008, Civil Appeal No. 4751 of 2006, Civil Appeal No. 2832 of 2006 and Civil Appeal No. 1 of 2009 are filed against the judgment and order passed by the Customs Excise and Service Tax Appellate Tribunal (hereinafter for short referred to as "CESTAT") on 21.9.2007, 2.2.2006, 2.9.2005 and 16.10.2008 respectively.

CIVIL APPEAL NOS. 8627-8628 of 2002

2. The facts leading to the filing of the present appeals are that the Respondent-company undertakes various music projects in India and under these projects it enters into agreements with reputed artists for composing and recording musical works. The music thus recorded is converted into DAT [Digital Audio Tape] Master which is then sent to Singapore for replicating the musical work on compact discs. Apart from this, the Respondent also renders service for quality production/ duplication of various music titles on compact discs.

3. The Respondent has entered into an agreement for rendering services with M/s. World Media India Ltd., New Delhi, which provides masters to the Respondent and Respondent in

A turn sends these masters to Australia for replicating the musical work on compact discs (CDs).

4. The Respondent imported a consignment of Audio Compact Discs from Singapore vide Bill of Entry No. 659308 dated 27.05.1998 for home consumption. Customs duty was B paid on the invoice value of the replicator in Singapore and the declared value of each CD was USD 0.6. The Respondent had similar import of Audio Compact Discs from Australia under Bill of Entry No. 659289 dated 27.05.1998 for home consumption and the declared value of each CD was @ 1.62 C Australian Dollar. The dispute regarding the valuation of these consignments imported by the Respondent herein is the subject matter of these appeals.

5. The Assistant Commissioner vide order dated D 23.06.1998, while assessing the value of CDs imported from Singapore allowed all deductions except expenses incurred under advertisement and publicity and fixed the assessable value at Rs.100 per CD. For the CDs imported from Australia, the assessing authority granted deductions except to the extent E of those claimed towards expenses on royalty and advertisement and publicity and the assessable value was determined as Rs.199 per CD.

6. Aggrieved by the aforesaid order of the Assistant Commissioner, the Respondent – assessee filed appeals F before the Commissioner (Appeals). The Commissioner (Appeals), vide order dated 12.06.2001, confirmed the order of the assessing authority. Aggrieved thereby, the Respondent – assessee appealed to the CEGAT. The CEGAT, vide order dated 23.01.2002, allowed the appeals and set aside the order G of the Commissioner (Appeals) dated 12.06.2001.

CIVIL APPEAL NO. 2959 of 2008

7. The present appeal is filed against the judgment and order of **CESTAT** passed on 21.09.2007 whereby the appeal H

filed by the Revenue was rejected and the order of the Commissioner of Customs (Appeals) dated 18.09.2006, was upheld.

8. The facts leading to the filing of the present appeal are that the case of import of goods by respondent M/s Sony BMG Music Entertainment (I) Pvt. Ltd. from supplier M/s Sony Music Entertainment (Hong Kong) Ltd. was examined by GATT Valuation Cell, Mumbai. The Deputy Commissioner of Customs vide order dated 10.02.2006 held that the Respondent and the supplier were related under Rule 2(2) of Customs Valuation Rules, 1988 and rejected the transaction value of goods imported and ordered that the royalty at the note indicated in clause 4 read with Schedule A to the International Repertorise License Agreement entered into between the importer and M/s Sony BMG Music Entertainment, New York, was to be added to the declared value in addition to 50% for the purpose of Customs Duty assessment. Payment of royalty was held to be condition for sale at some subsequent stage in the commercial history of the CDs.

9. Being aggrieved by the said order, the Respondent preferred an appeal before the Commissioner of Customs (Appeals). The Commissioner (Appeals) vide order dated 18.09.2006 set aside the order of the adjudicating authority dated 10.02.2006 and held that the inclusion of royalty in the invoice value was not permissible. Aggrieved thereby, the Revenue filed an appeal before the CESTAT. The CESTAT vide order dated 21.09.2007 rejected the appeal of the Revenue and upheld the order of Commissioner (Appeals) dated 18.09.2006.

CIVIL APPEAL NO. 4751 of 2006

10. The present appeal is filed against the judgment and order of **CESTAT** passed on 02.02.2006 whereby the appeal filed by the Respondent was allowed and the order of the Commissioner (Appeals) dated 24.09.2004 was set aside.

A 11. The facts leading to the filing of the present appeal are that the case of imports of CDs from M/s EMI Compact Disc, Holland by M/s Virgin Records (I) Pvt. Ltd. was taken up for examination. The Deputy Commissioner of Customs vide order dated 17.08.2000 held that the Respondent and the Supplier B are related to each other by virtue of 2(2) of Customs Valuation Rules, 1988. The relationship has not in any way affected the prices and the value of the imports can be taken to be on the transaction value and therefore did not propose the loading of the invoice bill.

C 12. Aggrieved thereby, the Revenue preferred an appeal to the Commissioner (Appeals). The Commissioner (Appeals), vide order dated 24.09.2004 rejected the order of the assessing authority and held that the assessable value of the CDs should be assessed on the basis of the invoice price plus D the copyright fees payable on the resale of records. Aggrieved by the aforesaid order of the Commissioner (Appeals), the Respondent filed an appeal before the CESTAT. The CESTAT vide order dated 02.02.2006 set aside the order of the Commissioner (Appeals) dated 24.09.2004 and restored the E order of the assessing authority dated 17.08.2000.

CIVIL APPEAL NO. 2832 of 2006

13. The present appeal is filed against the judgment and order of **CESTAT** passed on 02.09.2005 whereby the appeal F filed by the Respondent - assessee was allowed and the order of the Commissioner of Customs (Appeals) dated 20.11.2002, was set aside.

14. The facts leading to the filing of the present appeal are G that the Respondent herein - M/s. Sony Music Entertainment (India) Ltd., is a wholly owned subsidiary of Sony Music Entertainment (India) Inc., USA. They have a Licensing Agreement with Sony Corporation of America, New York, U.S.A. The Indian Company has entered into various

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agreements (licensing etc.) with their foreign collaborator and associates. A

15. The issue for determination in the said appeal is of royalty at the rate of 20% of MRP minus Sales Tax minus 6.5% packaging deduction payable by the Respondent herein on the sale of imported recorded compact disc in India. The Adjudicating Authority, vide order dated 31.10.2000, accepted the transaction value declared in the invoice, holding that the payment of royalty is not the condition of sale of goods and that there is no distraction on the Respondents sourcing CDs from any manufacturer/supplier. The Commissioner (Appeals), however, vide order dated 20.11.2002, set aside the Adjudication order dated 31.10.2000, on appeal by the Revenue, holding that the royalty payment is a condition of sale of imported goods. B C D

16. The CESTAT vide order dated 02.09.05, set aside the order of the Commissioner (Appeals) dated 20.11.2002 on appeal by the Respondent and held that the Respondents are correct in their contention based upon the interpretative notes to Rules 9(1)(c) that the payment of royalty by them to Sony Corporation of America cannot be included in the price of the imported goods. Hence, this civil appeal by the Department. E

CIVIL APPEAL NO. 1 of 2009

17. The present appeal is filed against the judgment and order of **CESTAT** passed on 16.10.2008 whereby the appeal filed by the Appellant - assessee was rejected and the order of the Commissioner of Customs (Appeals) dated 09.04.2002, was upheld. F G

18. The facts leading to the filing of the present appeal are that the Appellant in this case are engaged in the marketing of audio cassettes and CDs imported inter alia from M/s Universal Manufacturing and Logistics, Germany and associated H

companies. Their company is a 100% subsidiary of Universal Music Holding, Netherlands.

19. The issue for determination in the said appeal is whether the royalty paid by the Appellant to Universal Music Holding, Netherlands on net sales in India can be added to the transaction value of Audio Compact Disc imported from Universal Manufacturing and Logistics, Germany.

20. As per the agreement entered into with the foreign collaborator the Indian company was required to pay royalty at the rate of 15% at the retail sale price of the goods to the foreign supplier. Since the importer was a 100% subsidiary company, it was considered as a related person and the royalty payable by it to the supplier was considered to be as a condition of sale and therefore required to be included in the declared invoice value to the extent of royalty amount for which a show cause notice was issued to the Appellant and adjudicated by the Deputy Commissioner, who vide order dated 16.10.2001, held that the value of the goods imported by the Appellant is to be loaded by 15% as per Rule 9(1)(c) of Customs Valuation Rules, 1988.

21. Aggrieved thereby, the Appellant preferred an appeal to the Commissioner (Appeals), who vide order dated 09.04.2002 rejected the same and upheld the order of the assessing authority. Aggrieved by the aforesaid order of the Commissioner (Appeals), the Appellant filed an appeal before the CESTAT which was rejected vide order dated 16.10.2008 and the order of the Commissioner (Appeals) dated 09.04.2002 was upheld.

22. Since all these appeals involve almost similar facts and the issues raised therein also being similar, we propose to dispose of all these appeals by this common judgment and order.

23. The learned counsel appearing for the parties made

extensive arguments and drawn our attention to the relevant materials on record also. On the basis of the same, we proceed to answer the issue that arises for our consideration. A

24. In order to appreciate the contentions of the parties, we propose to extract the provisions of Section 14 of the Customs Act, 1962 which deals with valuation of goods for the purpose of assessment. The said section reads as follows:- B

> "14. **Valuation of goods.** – (1) For the purposes of the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, the value of the imported goods and export goods shall be the transaction value of such goods, that is to say, the price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation, or as the case may be, for export from India for delivery at the time and place of exportation where the buyer and seller of the goods are not related and price is the sole consideration for the sale subject to such other conditions as may be specified in the rules made in this behalf; C D
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> Provided that such transaction value in the case of imported goods shall include, in addition to the price as aforesaid, any amount paid or payable for costs and services, including commissions and brokerage, engineering, design work, royalties and licence fees, costs of transportation to the place of importation, insurance, loading, unloading and handling charges to the extent and in the manner specified in the rules made in this behalf: E F
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> Provided further that the rules made in this behalf may provide for, - G
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> (i) the circumstances in which the buyer and the seller shall be deemed to be related;
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> (ii) the manner of determination of value in respect of H

A goods when there is no sale, or the buyer and the seller are related, or price is not the sole consideration for the sale or in any other case;

(iii) the manner of acceptance or rejection of value declared by the importer or exporter, as the case B may be, where the proper officer has reason to doubt the truth or accuracy of such value, and determination of value for the purposes of this section:

C Provided also 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 of export, as the case may be, is presented under section 50.

D *(2) Notwithstanding anything contained in sub-section (1), if the Board is satisfied that it is necessary or expedient so to do, it may, by notification in the Official Gazette, fix tariff values* E *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."*

F 25. In exercise of the power vested under the Customs Act, the Central Government has made Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 (hereinafter for short called "the Rules").

G 26. Rule 2(f) of the Rules defines "transaction value" where it says that it means the value determined in accordance with rule 4 of the Rules. Rule 3 of the Rules deals with the determination of the method of valuation where it states as follows:-

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"Determination of the method of valuation.- For the purpose of these rules – A

(i) subject to rules 9 and 10-A the value of imported goods shall be the transaction value;

(ii) if the value cannot be determined under the provisions of Cl. (i) above, the value shall be determined by proceeding sequentially through rule 5 to 8 of these rules." B

27. What is transaction value is stated in Rule 4 in the following manner:- C

"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." D

28. Rule 9(1)(c) of the Rules states as follows:-

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

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(c) – royalties and license 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." G

29. In the case of *Commissioner of Customs Vs. Ferodo India Pvt. Ltd.* reported in 2008 (4) SCC 563 this Court had occasion to analyze the aforesaid relevant provision of Rule 9(1)(c) with which we are also concerned in the present H

A appeals. The relevant portion of which is extracted herebelow:

"16. Under Rule 9(1)(c), the cost of technical know-how and payment of royalty is includible in the price of the imported goods if the said payment constitutes a condition prerequisite for the supply of the imported goods by the foreign supplier. If such a condition exists then the payment made towards technical know-how and royalties has to be included in the price of the imported goods. On the other hand, if such payment has no nexus with the working of the imported goods then such payment was not includible in the price of the imported goods.

17. In Essar Gujarat Ltd. the condition prerequisite, referred to above, had direct nexus with the functioning of the imported plant and, therefore, it had to be loaded to the price thereof.

18. Royalties and license fees related to the imported goods is the cost which is incurred by the buyer in addition to the price which the buyer has to pay as consideration for the purchase of the imported goods. *In other words, in addition to the price for the imported goods the buyer incurs costs on account of royalty and license fee which the buyer pays to the foreign supplier for using information, patent, trade mark and know-how in the manufacture of the licensed product in India.* Therefore, there are two concepts which operate simultaneously, namely, price for the imported goods and the *royalties/ license fees which are also paid to the foreign supplier.*

19. Rule 9(1)(c) stipulates that payments made towards technical know-how must be a condition prerequisite for the supply of imported goods by the foreign supplier and if such condition exists then such royalties and fees have to be included in the price of the imported goods. Under Rule 9(1)(c) the cost of technical

know-how is included if the same is to be paid, directly or indirectly, as a condition of the sale of imported goods. At this stage, we would like to emphasize the word indirectly in Rule 9(1)(c). As stated above, the buyer/importer makes payment of the price of the imported goods. He also incurs the cost of technical know-how. Therefore, the Department in every case is not only required to look at TAA, it is also required to look at the pricing arrangement/agreement between the buyer and his foreign collaborator. For example, if on examination of the pricing arrangement in juxtaposition with TAA, the Department finds that the importer/buyer has misled the Department by adjusting the price of the imported item in guise of increased royalty/ license fees then the adjudicating authority would be right in including the cost of royalty/license fees payment in the price of the imported goods. In such cases the principle of attribution of royalty/license fees to the price of imported goods would apply. This is because every importer/buyer is obliged to pay not only the price for the imported goods but he also incurs the cost of technical know-how which is paid to the foreign supplier. Therefore, such adjustments would certainly attract Rule 9(1))(c)."

30. While laying down the aforesaid proposition this Court has considered the case of *Collector of Customs (Prev.), Ahmedabad Vs. Essar Gujarat Ltd.* reported in 1996 88 ELT 609 (S.C.) to which also reference was made at the time of hearing of the appeals.

31. There is yet another decision on the aforesaid issue rendered by three Judges' Bench of this Court in the case of *Associated Cement Companies Ltd. Vs. Commissioner of Customs* reported in (2001) 4 SCC 593. Having referred to the case of *Essar Gujarat* (supra) and after having noted Rules 3, 4 and 9 of the Rules, this Court has stated thus in paragraph 42, 43 and 44 as follows:-

A "42. ..... Therefore, the intellectual input in such items greatly enhances the value of the paper 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 B or any manual.

43. *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* C *a 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.*

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44. It is a misconception to contend that what is being taxed is intellectual input. What is being taxed under the E Customs Act read with the 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 F 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 G 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

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though the composite product, i.e., the painting, is worth millions." A

32. The issue that arises for our consideration is therefore appears to be answered by the aforesaid decision in *Associated Cements Companies Ltd.* (Supra). In the said decision this Court had stated clearly that if a pre-recorded music cassette or a popular film or musical score is imported into India, duty will necessarily have to be charged on the value of the final product. 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 license fees related to the imported goods that the buyer is required to pay, directly or indirectly, as a condition of sale of goods. Therefore, when pre-recorded music cassette is imported as against the blank cassette, definitely its value goes up in the market which is in addition to its value and therefore duty shall have to be charged on the value of the final product. Therefore, there can be no dispute with regard to the fact that value of the royalty paid is to be included in the transaction value. B C D

33. In all these cases, there is no dispute that the cassettes under question are brought to India as pre-recorded cassettes which carry the music or song of an artist. There is an agreement existing in all the matters that royalty payment is towards money to be paid to artists and producers who had produced such cassettes. Such royalty becomes due and payable as soon as cassettes are distributed and sold and therefore, such royalty becomes payable on the entire records shipped less records returned. It could therefore, be concluded that the payment of royalty was a condition of sale. Counsel appearing for the Respondent relied upon the commentary on the GATT Customs Valuation Code. We failed to see as to how the aforesaid commentary on the GATT Customs Valuation Code could be said to be applicable to the facts of the present case. The specific sections and the rules quoted hereinbefore are themselves very clear and unambiguous. We are required E F G H

A only to give interpretation of the same and apply the same to the facts of the present case.

34. Considering/Looking at the decision of this Court in the case of *Associated Cement Companies Ltd.* [supra] and also to the clear and unambiguous provisions of law discussed B above we set aside the orders passed by the Tribunal in matters, i.e., Civil Appeal No. 8627-8628 of 2002, Civil Appeal No. 2959 of 2008, Civil Appeal No. 4751 of 2006, Civil Appeal No. 2832 of 2006 and restore the order passed by the Department, whereas Civil Appeal No. 1 of 2009 is dismissed. C We leave the parties to bear their own costs.

B.B.B. Appeals disposed of.