
(1990) 10 BOM CK 0033

In the Bombay High Court

Case No : Writ petitions No. 685, 2031, 2518, 3317 of 1986; 699, 2265 3068, 3645, 3816, 3975 of 1987; 119, 1534, 1802, 2030, 2315, 2595, 2717 of 1988

Bussa Overseas and Properties (Pvt.) Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 09-10-1990

Acts Referred:

Customs Act, 1962 — Section 111, 124, 25(1)

Citation : (1991) 53 ELT 165

Hon'ble Judges : T.D. Sugla, J;Sujata V. Manohar, J

Bench : Division Bench

Advocate : Shri I.N. Chhagla, S/Shri G.R. Vahanvati, Janak Dwarkadas and Mr. P.D. Gandhi, instructed by Desai Berjis and Chinoy, for the Appellant; Shri K.R. Bulchandani, Shri I.M. Sethna and K.C. Sidhwa, for the Respondent

Judgement

Sugla, J.—Issues involved in these seventeen petitions under Article 226 of the Constitution of India are somewhat similar. For the sake of convenience all of them are disposed of by a consolidated judgment.

2. The issue in Writ Petition Nos. 685, 2031, 2518 and 3317 of 1986, 699, 2265, 3068, 3645 and 3975 of 1987, 1534, 2030, 2595 and 2717 of 1988 is whether the goods imported by the petitioners answer the description "Ethyl Alcohol" mentioned in the respective REP licences. The goods imported are in most of the cases Whisky concentrate. In few cases it is Gin concentrate or Brandy concentrate, described in the Bill of Entry as "... years old Vatted Malt Scotch Spirit at 60% or 61% Vol." "Compound Alcoholic Preparations known as concentrated extract for manufacture of Alcohol Beverage" and "Compound Alcoholic Preparation known as concentrated extract for manufacture of Alcoholic Beverages at Appro. 60/61% V/V." or more or less respectively.

The issue in Writ Petition Nos. 3816 of 1987, 119, 1802 and 2315 of 1988 is whether the Gin concentrate and Whisky concentrate imported by petitioners are

or can be treated as "Gin or Whisky" so as to attract higher rate of duty. In Writ Petition No. 119 of 1988 there is no one more issue involved and that issue is whether wooden casks used for the import of Whisky concentrate are containers of permanent nature within the meaning of Notification No. 184/76 so as to be liable to duty.

3. Writ Petition No. 2518 of 1986 is governed by Import Trade Policy of 1983-84, Writ Petition No. 685 of 1986 is governed by 1984-85 Policy and other writ petitions are governed by 1985-88 Policy. The relevant provisions in this regard are, it is common ground, similar. For the sake of convenience while dealing with the rival contentions reference is proposed to be made to 1984-85 policy only.

Writ Petition No. 119 of 1988 is governed by Customs Tariff Act, 1985-86 and Writ Petition Nos. 3816 of 1987 and 1802 and 2315 of 1988 by Customs Tariff Act, 1987-88.

4. In all cases the Customs Authorities issued notices u/s 124 of the Customs Act, 1962 requiring the petitioners to show cause why action should not be taken u/s 111(d) of the Customs Act. The ground for issuing the notice in most of the cases has been that the import licence produced is not valid to cover the goods imported for reasons mentioned on the back of the notice. In other cases, the ground given is that the goods imported are "Gin" or "Whisky" pure and simple and are liable to higher rate of duty. In one case an additional ground is taken in that the wooden casks used as container are of permanent nature and as such liable to duty. The petitioners in all these cases are one and the same company. They have come to this Court at the stage of the issue of show cause notices. By interim orders passed in each case, the Customs Authorities were directed to clear the goods imported under different licences on payment of duty at the admitted rate and on the petitioners' finishing bank guarantee in respect of the disputed duty.

Show cause notice were not stayed. The Customs Authorities were left free to continue with adjudication proceedings. However, up till the last day of hearing of these petitions, the Customs Authorities had not completed adjudication proceedings in most of the cases if not in all cases.

5. As regards the first issue Shri Chhagla, the learned counsel for the petitioners stated that the REP licences are for the import of "Ethyl Alcohol" at Sr. No. 165 in Appendix 3 Part A of 1984-85 Policy. The goods imported are concentrate Whisky, Gin or Brandy. The only pertinent question is whether or to the concentrates of Whisky, Gin or Brandy answer the description of "Ethyl Alcohol" for which REP licences were issued. Answer to this question has got to be in the affirmative in view of the categorical averment of Shri S. P. S. Pundir, Dy. Collector of Customs in his affidavit dated 26th August 1986 in Writ Petition No. 2031 of 1986 that the goods imported are covered by the description "Ethyl Alcohol". Referring to the objection of the Customs Authorities, Shri Chhagla stated that the duty of the Customs Authorities is to check whether the goods

imported are covered under the REP licence and not to further check whether the goods imported though covered under the REP licences are of the kind as are used as raw material by the Registered Exporter (to whom REP licences were originally granted) in the products exported. According to Shri Chhagla this was not the function of the Customs Authorities. In any event question such as whether the correct declaration of the raw-materials was given by the Registered Exporter, whether the REP licence was properly issued for the raw-materials actually used in the product exported and whether the REP licence was misused and if so what should be done about it all fall within the domain of the Licensing Authorities.

In this context Shri Chhagla pointed out that the Customs Authorities at Bombay had themselves been clearing identical goods till 1986 without any objection. Similar goods are cleared even now by the Customs Authorities in Madras and Calcutta. A few consignments under the REP licences involved herein have also been cleared by the authorities in Bombay. It, therefore, does not lie in the mouth of the authorities now to say that the goods imported herein are not covered by "Ethyl Alcohol" for which REP licences are admittedly issued.

In support Shri Chhagla also invited the Court's attention to the adjudication orders dated 8th July, 1983 in the case of Tilaknagar Distillery and dated 12th August, 1983 in the case of Pravara Sahakari Sakhar Karkhana Ltd.

6. Shri Bulchandani, the learned counsel for the Customs Department, on the other hand, contended that the Customs Authorities had not at all exceeded their jurisdiction. It was their duty to see that the goods imported are those for which the import licence was issued. He took us through one of the import licences by way of sample to show that the very title of the licence was "MANUFACTURER/EXPORTER PRIOR EXPORTS". The licence is described as B. 16.1. .. & B. 16.2. .. This was also the description given in Column No. 3 against "Description of goods". He then made reference to the conditions at the back of the licence which, according to him, clearly showed that the licence was subject to the conditions in force relating to the goods covered by the licence as described in the relevant Import Trade Control Policy Book or any amendment thereof made upto and including the date of issue of the licence, unless otherwise specified. He stated that any importer or exporter or a person dealing in REP licences would know the scope and import of REP licence. The dictionary meaning of the word "replenishment" he pointed out, is very clear. The question of replenishment can arise in respect of an item which is used. Admittedly, the kind of goods imported under these licences are not rather cannot be used in the manufacture of Dyes or Dye-intermediate. It is, thus, clear on the face of the licence the Ethyl Alcohol to be imported under REP licence against description B. 16.1 or B. 16.2 has to be Ethyl Alcohol of the kind which is or can be used in the manufacture of Dyes and Dye-intermediate. The goods imported are, thus, not covered by the description of the goods mentioned in the REP licence. He next argued that if the goods imported were in fact, "Ethyl Alcohol", the Bill of Entry would have shown so.

The Bill of Entry gives description "3 years old Vatted Malt Scotch Spirit at 60% Vol." etc. The Customs Authorities had, therefore, necessarily to examine whether the goods were covered within the description "Ethyl Alcohol" in the REP licence. While doing so, there can be nothing wrong if they further examine whether the Ethyl Alcohol imported was or could be used in the manufacture of Dyes and Dye-intermediate. In this context he strongly relied on the observations of Jahagirdar J. and Mehta J. in their respective order/judgment dated 20th October 1986 and 8th March 1990 in Writ Petition Nos. 2518 of 1986 and 2593 of 1988.

7. In order to appreciate rival contentions it is desirable to mention that REP licences in question were issued in favour of Registered Exporters under the relevant Import Policies. The licences thereunder are issued by the Licensing Authorities by way of replenishment of a percentage of raw-material, components or parts used by the Registered Exporters in the manufacture of the products they export. The petitioners are not Registered Exporters. They purchased the licences either direct from the Registered Exporter/s or from persons who in turn had purchased the same from the Registered Exporters. The licences though issued in the name of Registered Exporters, are not subject to "actual user" condition. Except for cases covered by paragraphs 136(2), 138, 185(2) and 186(1), these licences are freely transferable in full or part in favour of any other person. The licence holders or the transferees are entitled to import the goods covered by such licences.

Thus, strictly speaking it is not quite correct to say that the object of the Scheme is only provide to the Registered Exporters, to some extent, by way of import replenishment, the essential raw-materials required in the manufacture of products exported. The REP licences being freely transferable can be and are sold by the Registered Exporters and they make profit out of it. The object of the Scheme, to some extent, is thus diluted. Therefore, it can be reasonably inferred that the object of the Scheme is not merely to provide a percentage of some of or all the raw-materials used by the Registered Exporters in the products exported but also to argument their income by way of sale of REP licences issued in their favour.

8. The export products are grouped under various groups. Items permissible for import against each export product covered by the Policy are given in Column 4 of the Policy statement given in Appendix 17 read with Column 5. In the present case REP licences are issued to Registered Exporters who export Dyes & Dye-intermediates. These products find place in Appendix 17 at Sr. No. B. 16.1 and B. 16.2 Column 4 there against permits import of Dye intermediates and chemicals in Appendix 3 and use in the manufacture of the product exported. Relevant note in Column 5 is "please see paragraph 8 of General Conditions in this Appendix". One of the raw-materials used in the manufacture of Dyes and Dye-intermediates in "Ethyl Alcohol", 95% /100% (denatured). But there is no such item in Appendix 3 by this description. The item that finds place in Appendix 3

Part A at Sr. No. 165 is "Ethyl Alcohol". In other words "Ethyl Alcohol" is of a generic nature which includes different kinds of Ethyl Alcohol including the kind mentioned above.

The Policy makers were well aware of this difficulty. Paragraph 8 of general conditions in Appendix 17 specifically refers to this aspect of the matter. It notes that against certain export products Column 4 permits import of items appearing in Appendix 3 without mentioning the specific items and that it is difficult to mention in Column 4 itself specific items of raw materials and components which go into the production of the product exported. In order to meet such a situation paragraph 8 further provides that while applying for REP licences the Registered Exporter has to submit with export application the list of items actually used as raw-material/components/parts in the manufacture of product/s exported except items excluded in Column Nos. 4 and 5. The Registered Exporter is obliged to ensure that only those items are included in the list as are actually used as raw-materials/components/ parts in the manufacture of product/s exported. The licensing authority has power to delete such item or items which on scrutiny are not found to be actually used by the Registered Exporter in the manufacture of the product/s exported. If at any time subsequent to the issue of REP licences, the licensing authority finds that the licence was issued in respect of an item or items which is/are not actually used as raw-materials/components/parts in the manufacture of product/s exported, the licence in question is liable to cancellation. If the licence has already been used by the time, irregularity or the mistake comes to the notice of the licensing authority, the licensing authority has the power to adjust the value of the licence in respect of that item against the import entitlement of the exporter in any other category without prejudice to any other action he may like to take in this behalf under the import and export contract obligation.

9. The first pertinent question is whether the goods imported herein which are commonly known as concentrated Whisky, Brandy or Gin answer the description of the goods in the REP licenses. As stated earlier the description of the goods in the licences is "Ethyl Alcohol". We do not think that in view of the affidavit of Shri S. P. S. Pundir dated 26th August 1986 in Writ Petition No. 2031 of 1981, it can be seriously disputed by the respondents that the goods imported herein are covered by the description "Ethyl Alcohol". Reference may usefully be made in this connection to paragraph 3(a) & (b) of the affidavit reading as under :

"(a) The petitioners have imported a raw material, which they contend is Ethyl Alcohol falling under Appendix 3 of the Import Policy AM 85 at serial No. 165 of that Policy;

(b) Admittedly, this is Ethyl Alcohol (hereinafter referred to as the "said goods").

However, this is not enough as the contention of the Customs Department is that REP licence is issued for the purpose of replenishment of some or all raw-materials use by the Registered Exporter in the product/s exported. The

Registered Exporter in this case did not use concentrated alcohol of 60% or near about strength but used Ethyl Alcohol of 95% 100% denatured. By necessary implication Ethyl Alcohol which could be imported under the REP licences in question would be that kind of Ethyl Alcohol which could be used as a raw material in the manufacture of Dyes and Dyes-intermediate. Our attention in this connection was invited to the description of the goods in the REP licence and the conditions of the licence mentioned on the back of the licence.

There is no merit in the arguments advanced on behalf of the department in this regard. The reason is not far to seek. REP licences are primarily issued with a view to replenish a percentage of all or some of the raw materials used in the manufacture of products exported. The Registered Exporters in whose favour these licences are granted are obliged to ensure that they apply for such raw material or raw materials only as are used by them in the products exported. However, even though Ethyl Alcohol for which these REP licences are granted is a generic term comprehending within its different kinds of Ethyl Alcohol put to many and different uses, the licences are issued simpliciter for Ethyl Alcohol without restricting its meaning or scope in the licences in any manner. In this connection, it may be noted that whenever the Licensing Authorities are empowered to and consider it necessary to specify the kind of commodity with reference to the use to which it is to be put to, that is mentioned in the licence itself. But in these licences nothing of the kind is mentioned. Under the circumstances, it is not possible to accept the contention of the Customs Authorities that though the imported item is covered by the description "Ethyl Alcohol", it cannot be imported under these licences as it is not used as raw material in the product exported by the Registered Exporters. This becomes further clear when it is kept in view that all powers in this regard vest in the Licensing Authority who in terms of paragraph 8 of Appendix 17 is empowered to ensure that the REP licences are issued for the items which are used by the Registered Exporter in the manufacture of product/s they export. In case a licence is wrongly issued for an item, he has the power to cancel the licence. In case the licence has already been used before irregularity or mistake comes to his notice, the Licensing Authority can take appropriate steps against the Registered Exporter. All this, to our mind, shows that whether a licence is issued for a particular item properly is something between the Licensing Authority and Registered Exported. But once the licence is issued and the Registered Exported or the transferee of it imports the goods, so far as they are concerned they will be entitled to import such goods which answer the description of the goods mentioned in the licence unless the licence is cancelled or suspended etc. Admittedly, REP licences involved in the present case have not been cancelled by the licensing authority. Accordingly we do not agree with the Customs Authorities that from the fact that these are REP licences, it must be assumed that the items for which the licences are issued are further qualified that the goods imported should be such as are used in the manufacture of product/s exported by the Registered Exporter.

In the 1988-91 Import and Export Policy, the concentrates of alcohol beverages find place at Sr. No. 30 in the list of restricted items in Appendix 2 Part B. This also shows that concentrates of alcohol beverages which are imported by the petitioners in the present case are Ethyl Alcohol which could be imported under the REP licences for Ethyl Alcohol which are now prohibited as a result of their mention in the restricted items as stated above. It is common ground that in the Import and Export Policies for 1983-84, 1984-85 and 1985-88 with which we are concerned in these petitions, the concentrates of alcohol beverages were not included amongst the restricted items.

10. Though we agree with Shri Chhagla on the question of import and scope of REP licence, we do not agree with him that the facts such as clearance of goods on this basis upto 1986 by the Customs Authorities at Bombay and even now at Calcutta and Madras and/or the adjudication by the Customs Authorities in two cases should justify his claim about the scope of REP licence. All that at best shows that the Customs Authorities have taken a particular view of the matter in the past and at some places they are taking the same view even now. But that does not mean that if that particular view taken by them is not correct in law, the Customs Authorities should be precluded from applying correct law. Since there was not even a suggestion that an erroneous practice followed or an erroneous view taken by the Customs Authorities creates estoppel against their statutory duty to apply the correct law, it was necessary to examine the relevant provisions of Import Policy and the Customs Act to understand the correct law and that is what we have done.

We also do not agree with Shri Bulchandani that the two decisions of this Court strongly relied upon by him should be taken to lay down the law in this regard. In *Chawla & Sons v. Union of India*, Writ Petition No. 2518 of 1986, Jagdish Chandra J. was considering the question whether interim relief should not be granted. In this order dated 20th October 1986 by which he granted interim relief, he made certain observations which apparently support the department's case. It cannot, however, be ignored that his observations in that case were only tentative. In *SVA Udyog Viniyog Ltd. v. Union of India*, Writ Petition No. 2593 of 1988, Mehta J. by his judgment dated 8th March, 1990 held that almonds were dry fruits and not seeds inter alia observing that Chapter 12 dealt with different types of seeds and the note at the commencement of the Chapter to the effect that it does not apply to products of Heading No. 08.01 or to olives (Chapter 7 or Chapter 20) made the position abundantly clear. His further observation that under REP licences only such items can be imported as are in some way related either as raw-material or components or parts with the product/s exported, is, thus, to be read in that context. The appeal against this judgment is stated to be pending. In our judgment, these two decisions also do not, thus, help the department much.

11. Undoubtedly, as held by the Supreme Court in the case of *Oswal Woollen Mills Ltd and Another Vs. Union of India (UOI)* and *Another*, a transferee of REP licence cannot have better rights than the Registered Exporter himself in whose

favour the licence is originally issued. But that has not been even suggested by Shri Chhagla. On the other hand, the Supreme Court had held in the case of Union of India (UOI) Vs. Tarachand Gupta and Bros, that the collector of Customs, while examining the goods imported under the licence covered by an entry, has only to ascertain whether the goods are of the description in that entry. His going beyond this would be non-compliance of the entry. In that case the entry involved was 295. There was no dispute that the parts imported were covered by that entry. The case of the Customs Authorities was that on assembling, the parts would become other articles, namely, motor cycles and scooters. It was held that such a process, if adopted by the Collector, would mean that he was inserting in entry 295 a restriction which was not there. That power he obviously did not have. This decision is applicable in the case before us. Ethyl Alcohol appearing at Sr. No. 165 in Appendix 3 Part A is without any restriction. The goods imported are covered by this entry. The Customs Authorities contend that even though the goods imported are covered by the entry Ethyl Alcohol, they would not be covered by the entry, as the Ethyl Alcohol imported is not the kind which is used a raw-material in the manufacture of Dyes and Dye-intermediates. As held by the Supreme Court, this is not permissible.

In the case of Rattan Exports Ltd., Delhi Vs. Collector of Customs, Calcutta, the Supreme Court again held that the goods imported would be bound in entry by the description of the goods in the REP licence. It is a different thing that a different scheme was under consideration in that case and the decision went against importer.

12. The learned Single Judge of our High Court took the view in the case of Shivshankar Tilakraj Vs. Union of India and others, , that it was not for the Customs Authorities to find out whether the import licence issued by a competent authority was correctly given and whether the conditions precedent for the granting of import licence were satisfied in a particular case. The customs were not in law empowered to investigate into the correctness or otherwise of an import licence given by the appropriate authorities. In the case of Lokash Chemical Works Vs. M.S. Mehta, Collector of Customs (Preventive) Bombay and others, another learned Single Judge of our Court drew distinction between the functions of Customs Authorities and Licensing Authorities in this regard. He held that even if it was assumed that the licence could not have been issued as per the Policy in respect of those items, once the licence was issued, no authority could prevent the import of items mentioned in the licence except by cancellation thereof in accordance with the Import (Control) Order, 1955. It may be stated that the Supreme Court had also held in the case of East India Commercial Co. Ltd., Calcutta and Another Vs. The Collector of Customs, Calcutta, that even an import licence obtained by misrepresentation did not make the licence non est. The result was that the goods should be deemed to have been imported under proper licence unless the licence was cancelled. One of us Smt. Sujata Manohar J. in the case of Bansilal Jesesingh v. Union of India 1986 (16) RCR 396 paragraph 8 and Shri Bharucha J. in the case of K Uttamlal (Exports) Pvt. Ltd.

Vs. Union of India, paragraph 5 also took the same view.

13. In the case of Ricardson Hindustan Ltd. Vs. Union of India (UOI) and Another, one of us Mrs. Sujata Manohar J. held that in the matters relating to Import-Export Policy and procedure, the interpretation given by the Chief Controller of Imports and Exports was final and that in case of doubt regarding these matters the Customs Authorities should consult the Import Trade Control authorities before clearance of the goods. But once the Import Trade Control authorities clarified that the goods in question could be imported under the licence, it was not open to the Collector of Customs to find fault with that order and refuse to clear the goods. In the present case, it is on record that by letter dated 25th June 1982 the Controller of Imports and Exports for JCCI & E, Madras to the Collector of Customs, Bombay had clarified that concentrated malt spirits was covered under Entry No. 156 of Appendix 3 (Ethyl Alcohol) in the Import and Export Policy for 1982-83 (Vol. I).

From the discussion above, it appears clear to us that the REP licences involved herein are for Ethly Alcohol as per Entry No. 165 of Appendix 3 PART A of 1984-85 Policy. Though the licences for Ethly Alcohol were issued on the ground that a kind of Ethly Alcohol was used as raw-material by the Registered Exporter in the manufacture of product/s exported, the licence as such did not have any such restriction. In any event, it was for the Licensing Authority to cancel the licence it was found that the licence was issued for an item which was not actually used by the Registered Exporter in the manufacture of product/s exported. The Licensing Authority could have also taken further appropriate steps in the event it was found that the licences issued were misused. No such steps were taken by the Licensing Authority. On the contrary it clarified in response to query from the Collector of Customs. Madras that the concentrated malt spirits were covered under Entry No. 156 of Appendix 3 (Ethyl Alcohol) in the Import and Export Policy for 1982-83 (Vol. I). The restriction about the concentrated beverages is also introduced for the first time in the Import and Export Policy for 1988-91. Having regard to the above facts and keeping in view the ratio of the decisions referred to by us above, we are satisfied that the goods imported herein answer the description of the goods covered in the REP licences.

14. This takes us to the next issue which arises in Writ Petition Nos. 3816 of 1987 and 119, 1802 and 2315 of 1988. That issue is whether the goods imported are Whisky or Gin classifiable under the sub-heading (2) of Heading 22.00 or sub-heading 30 or 50 of Heading 22.08 as contended by the Customs Authorities. The department's case appears to be that the imported goods are nothing but concentrated Whisky or Gin. They are potable. Mere fact that these can be consumed after dilution by adding more water or Soda than in the case of ordinary Whisky or Gin sold in the market, does not mean that it is no consumable or cannot be drunk at all. The goods imported are thus, it is contended, Whisky or Gin classifiable under Heading 22.09(2) and/or 22.08.30/50. The case of the petitioners, on the other hand, is that the goods

imported herein are known in the Trade as concentrated Whisky or Gin which are qualitatively different from Whisky or Gin known to Trade. Concentrated Whisky or Gin is not and cannot be sold to consumers or even to the wholesalers direct as Whisky or Gin. These have to be sold to distilleries only who after due process convert them into Indian made foreign Whisky or Gin and market after bottling. It is only thereafter that it is known and sold as potable Whisky or Gin. It is contended that the goods imported are classifiable under the Heading 22.09(3) in Writ Petition No. 119 of 1988 and under the Heading 22.08.10 in Writ Petition Nos. 3816 of 1987, 1802 of 1988 and 2315 of 1988.

15. In his report dated 4th February 1987 the Chief Chemist has stated that the imported goods appear to be a compound alcoholic preparation (Gin) used in the manufacture of Beverages. In his affidavit dated 26th August 1986 in Writ Petition No. 2031 of 1986, Shri Premchand, Chemical Examiner Grade I states :

"The other product viz, un-denatured Ethyl Alcohol, more commonly and in trade parlance known as vatted malt scotch spirit/over proof strength whisky i.e. concentrated whisky is of 60% strength and is a potable commodity i.e. commodity used for human consumption and not a raw material for the manufacture of Dyes & Dyes Intermediate. This product is only used by distilleries which process such product to make and sell Alcoholic beverages which are meant for human consumption."

This is also the averment of Shri S. P. S. Pundir Dy. Collector of Customs in his affidavit dated 26th August 1986 in Writ Petition No. 2031 of 1986 [See paragraph 3(d)]. He stated that admittedly the said imported goods can be used only in the distilleries for the manufacture of Alcoholic beverages such as Whisky.

It is to be noted that no affidavit has been filed by the Respondents in the above said Writ Petitions. The report of the Chief Chemist and the averments of Shri Pundir, Dy. Collector of Customs in Writ Petition No. 2031 of 1986 evidently support the petitioner's claim. The averment of the Chief Chemist in the affidavit in Writ Petition No. 2031 of 1986 referred to above to the effect that the goods imported are potable also, in our view, requires to be read in the context of earlier averment to the effect that it is not a raw material for the manufacture of Dyes and Dyes-intermediate. This becomes clear from his further averment that this product is used only by distilleries etc. Having thus, regard to the undisputed factual position we are inclined to accept to claim of the petitioner that the concentrated Whisky or Gin imported herein is not consumable as such. There are sold to the distilleries where they undergo blending and colouring process which improves the colour and order of the products. Finally, these are bottled and enter the market as what is known as Whisky or Gin. From the fact that the distilleries have to pay excise duty on such a process, it can be assumed that the process is not just diluting the concentrated Whisky or Gin by adding water or Soda as contended by the Customs Authorities. It is a detailed and specialised process undertaken by the distilleries only. Accordingly, we have no difficulty in holding that the goods imported herein are not consumable as such.

An argument was advanced on behalf of the Customs Department which appeared attractive on the face of it, namely, it may be that the concentrated Whisky or Gin is not consumed as such. However it cannot be disputed that it can be consumed at least by few persons who are addicted to such drinking. On a careful consideration we find that this argument is stated to be rejected only. There are persons who even drink kerosene oil or even petrol. That does not mean that kerosene and petrol are consumable. Likewise the pertinent question herein is not whether some body consumes the concentrated Whisky or Gin. The pertinent question is whether the same is ordinarily consumable.

16. In this context, it may not be out of place to refer to the following material in support of our above conclusion. In Writ Petition No. 3816 of 1987 (at page 117), the test report of the sample inter alia is to the effect :

"... content of Ethyl Alcohol is 80.6%... It appears to be Gin (concentrate)."

The declaration in Invoice Exhibit D (at page 131) in Writ Petition No. 119 of 1988 inter alia is to the effect that :

"..... The goods covered by this invoice are meant for manufacture of alcoholic beverages."

The certificate Exhibit E (at page 132) of ALLPORT CONSULTING ANALYSTS LTD. is that :

".... the product covered by Montrose Whisky Company's Invoice dated 28th August, 1985 is a complex mixture of distillates, tinctures, alcoholates and natural essence and the said product contains in part or in full aromatic principles which characterise alcoholic beverage, namely Whisky. From the said product beverage whisky can be obtained by diluting the concentrated alcoholic strength to 43 per cent. by adding distilled or purified water."

There are then the averments in the petition at page 56 [paragraph 4 [(xxiv) (xiv) (q)] clauses (vii) to (ix) to the effect, which remain uncontroverted;

"(vii) The order of the Appellate Collector Shri S. N. Karkhnis in the matter of M/s. Pravin Nanalal wherein he held that in the manufacture of Indian Made Foreign Liquor the practice has been to import overproof strength liquors and to dilute them to specified alcoholic strength and bottle them thereafter.

(viii) permits dated 11th April, 1985 and 6th November, 1985 issued by the Assistant Commissioner of Prohibition and Excise to Maharashtra Distilleries Ltd. permitting to clear and transport the said goods from the Customs to their Distillery at Chikhalthana at Aurangabad under their escort and use it in the manufacture of Indian Made foreign Liquor.

(ix) Provisions of Sections 272 and 273 of the Indian Penal Code by which the sale of any goods which are injurious to health is punishable as a criminal offence."

The note with the last report at page 136 is significant. It reads as under :

"Note :- The strength of sample shows that it is overproof. Though this is whisky in a sense that it is potable spirit obtained by distillation of an aqueous extract of an infusion of malted Barley that has been fermented with strains of *saccharomyces cerevisial*, this is not whisky for retail sale as per I.S. 4449/1980 an per Maharashtra State Excise Rules. However, actual use may also be ascertained.

In this connection attention is invited to T.C. No. 2249/21-2-86 on a similar point."

17. To determine the scope of the headings and sub-headings 22.08 and 22.09 in CCCN it is desirable to refer to the wording of the headings and sub-headings :

"22.08 Ethyl alcohol or neutral spirits, undenatured, of a strength of 80 degree or higher, denatured spirits (including ethyl alcohol and neutral spirits) of any strength.

22.09 Spirits (other than those of Heading No. 22.08); liqueurs and other spirituous beverages : compound alcoholic preparations known as "concentrated extracts" for the manufacture of beverages.

It is evident that the Heading 22.08 covers (1) undenatured ethyl alcohol and neutral spirits of strength not less than 80 degree and (2) denatured spirit (including ethyl alcohol and neutral spirits) of any strength. The goods imported herein are undenatured and are of 60 degree strength or near about. Naturally, therefore, they are not classifiable under the Heading 22.08.

For the purpose of taxation Heading 22.09 has been divided into three sub-headings :-

(1) not elsewhere specified;

(2) whisky, brandy and gin; and

(3) liqueurs and other spirituous beverages; compound alcoholic preparations (Known as concentrated extracts") for the manufacture of beverages.

Admittedly the case of the customs department is that the goods imported are classifiable under sub-heading 2 of Heading 22.09 whereas the case of the petitioners is that they are classifiable under sub-heading 3 of the same heading. Incidentally, this is also the dispute in Writ Petitions where as against the aforesaid headings and sub-headings, sub-headings of Entry 22.08.10 and 22.08.30 or 50 are involved. The said headings read as under :

22.08 Undenatured ethyl alcohol of an alcoholic strength by volume of less than 80% vol-spirits, liqueurs and other spirituous beverages; compound alcoholic preparations of a kind used for the manufacture of beverages. 22.08.10 Compound alcoholic preparations of a kind used for the manufacture of beverages. 22.08.20 22.08.30 Whiskies 22.08.40

22.08.50 Gin and Geneva 22.08.90

The Explanatory Notes appearing in Part I and Part II for the purpose of Heading 22.09 in CCCN are found referred to in the Writ Petition No. 119 of 1988 in paragraph 4(xxiv) (xiv) (f). On reading the heading and the explanatory notes in the CCCN, it appears clear to us that the concentrated extracts which are imported herein and which are used in the manufacture of beverages would be covered by the term "compound alcoholic preparations (Known as "concentrated extracts")" for the manufacture of beverages appearing in the sub-heading 3 of Heading 22.09 of the CCCN. We have already held in the earlier paragraphs that the goods imported are not and cannot be treated as Whisky, Gin or Brandy as is known in the trade. Accordingly, we hold that the goods imported herein are classifiable under Sub-heading 3 of Heading 22.09 for the purpose of Writ Petition No. 119 of 1988 and under Heading 22.08.10 for the purpose of other three writ petitions. There is no dispute that if the goods imported are classifiable under sub-heading 3 of Heading 22.09 and/or 22.08.10, the goods are not liable to additional duty in view of the exemption Notification No. 146/76.

18. Needless to mention that in view of the Supreme Court's decision in the case of United Offset Process Pvt. Ltd. Vs. Asst. Collector of Customs, Bombay and Others, , it is the settled law that if there is no meaning attributed to the expressions used in the particularly enacted statute, then the items in the customs entries should be judged and analysed on the basis of how such expressions are used in the trade or industry or in the market. In other words, it should be taken to be an accepted form of construction to give such expressions meaning as the persons who deal in them in the market if there is any, give them.

19. This takes us to the next and the last issue, namely, whether in view of Exemption Notification No. 184 of 1976 the petitioners are or are not liable to pay any duty on the containers. It is common ground that the imported goods are brought in huge wooden caskets and that is normal packing material. The caskets are of oak wood and the oak wood is generally strong. The imported goods are kept in this type of wooden caskets as it helps in better maturing of the goods. Relevant part of the notification in this regard read as under :-

"1.15.1 PACKAGES & CONTAINERS :

Subject to certain conditions packages or containers or the like, in which goods are imported or exported from India are exempt from basic import duty, additional duty and export duty.

G.S.R. 443(E) - In exercise of the powers conferred by sub-section (1) of Section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby directs that where any goods are imported into, and exported from India, in packages or containers or the like, such packages or containers or the like shall be exempt :-

(i) from the whole of the duty of Customs leviable thereon under the First or the Second Schedule to the customs Tariff Act, 1975 (51 of 1975), as the case may be, and

(ii) from the whole of the additional duty leviable thereon u/s 3 of the Customs Tariff Act, 1975 (51 of 1975), in the case of imports,

Provided that -

(a) the value of the packages or containers or the like in which the goods are packed is included is the value for which the goods contained therein have been invoked :

(b) the goods are not packed in packages or containers or the like which are of a permanent character and accordingly strong enough to be suitable for repeated use; and

(c) the packages or containers or the like in which the goods are packed are such as are normally used in the trade for packing such goods."

Thus, the packages, containers or the like are exempt from duty under the notification provided all the three conditions referred to hereinabove are satisfied. The value of the containers is admittedly included in the value in which the goods contained therein are imported. There is no suggestion that the containers used herein are not of the kind as are normally or ordinarily used in the trade for packing the imported goods. In the circumstances, the first and second conditions are obviously satisfied. The dispute is limited to the third condition only. While the case of the Department is that the containers are strong enough to be suitable for repeated use, it is the case of the petitioners that that is not so. As stated earlier the containers used for the goods are marketed by the distilleries in India to whom they have to be sold, the packing has to be in bottles. Assuming for the sake of the argument that the wooden caskets being of oak wood are strong, it cannot be accepted that such caskets are suitable for repeated use. The reason is that wooden caskets are used as containers for Ethyl Alcohol when it is imported in bulk from abroad in a ship or ships. To expect that these wooden caskets will be sent back to the foreign supplier for use again as containers for Ethyl Alcohol or something else is too much. That apart, this may not even be viable proposition economically. Besides there may be risk of their breaking in the course of re-shipping. Having regard to the above discussion we are inclined to hold that the wooden caskets in which the imported goods are contained qualify for exemption from duty under the above Notification No. 184/76.

In the result, all the petitions are allowed. Rule in each of the petitions is made absolute.

Bank Guarantees and I.T.C. Bonds furnished in pursuance of interim orders are to be discharged forthwith.

In Writ Petition No. 119 of 1988 the disputed amount of duty as also additional duty as well as duty on containers has been already paid. In view of this judgment, the same to be refunded to the petitioners forthwith.

No order as to costs.

On the application of Mr. Bulchandani for the respondents, the operation of the order in so far as it relates to the discharge of Bank guarantee as well as I.T.C. Bonds and refund of duties already paid, stayed for a period of six weeks from to-day.