

**(1976) 07 BOM CK 0032**

**In the Bombay High Court**

**Case No : Misc. Petition No. 1404 of 1975**

Cadbury Fry (India) Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

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**Date of Decision : 12-07-1976**

**Acts Referred:**

Constitution of India, 1950 — Article 226

**Citation : (1976) 07 BOM CK 0032**

**Hon'ble Judges : Rege, J**

**Bench : Single Bench**

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## **Judgement**

1. This is a Writ Petition under Article 226 of the Constitution of India, for a writ of certiorari, to quash and set aside certain orders being (1) order dated 1st September, 1971 by the Assistant Collector of Central Excise, Exhibit "D" to the Petition, (2) order dated 22nd November 1973 by the Appellate Collector of Central Excise, Exhibit "F" to the Petition and (3) order dated 9th July 1975 passed by the Joint Secretary, Government of India, Exhibit "J" to the Petition, in its revisional jurisdiction, and also a writ of mandamus, directing the Respondents to withdraw and/or cancel the said orders and to refund to the Petitioners an amount of Rs. 7,07,145.48P., and any other amount of excise duty collected on the said goods.

2. The question that arises in this Petition is whether, unflavoured and unblended powder obtained after processing and pulverising cocoa bean was liable of excise under Item I-A viz. "Cocoa powder" of the Schedule to the Central Excises and Salt Act, 1944. The contention of the Petitioners being that Cocoa powder in item I-A which is liable for excise is flavoured and blended cocoa powder known to the trade as such and unblended and unflavoured powder of cocoa bean which is sought to be made liable for the payment of excise duty under Item I-A is not known to the trade as cocoa powder and is not in excisable item and was not therefore liable for excise duty. On the other hand, it is contended by the Respondents that since the said unblended or unflavoured cocoa powder was

marketable product, it being imported into India and hence sold in India it was liable to excise duty under the said Item I-A.

3. A few relevant facts to appreciate the said rival contentions are as follows :-

4. The Petitioners' factory manufacturers amongst other things, two food products derived from cocoa beans viz. chocolates and food drinks such as cocoa powder, drinking chocolate and Bournvita. The basic raw material for the manufacture of these products is cocoa-beans which at all times relevant have been imported by the Petitioners from abroad. After their importation, the following process in the order mentioned is applied by the Petitioners to the said cocoa beans :-

(1) Cleaning and roasting cocoa beans the extent of roasting depending on whether it is proposed to manufacture chocolate or food drinks;

(2) Kibbling and winnowing, being processed whereby the shell of the said beans is removed and the inside kernel known as nib is subjected to grinding;

(3) treating and pressing cocoa beans which contain a large proportion of fat. On the said cocoa beans being pressed, they become a pasty substance known in the trade as mass. The mass is treated with certain chemicals and subjected to pressure to remove the excess fat. The extent to which the fat is removed depends on whether the mass is to be used for manufacturing cocoa powder, drinking chocolate or Bournvita. If the said mass is to be used for making cocoa powder, approximately 22 per cent of the fat is allowed to remain in the said mass. The mass thus pressed is known in the trade as cocoa cake;

(4) The said cocoa cake is thereafter pulverised into powder, and if it is to be used for the manufacture of cocoa powder, it is subjected, after pulverisation to blending and flavouring. If, on the other hand, the said mass is to be used for the manufacture of Bournvita, it is mixed with malt, sugar and other products and the entire mixture is cooked and dried and ground into granules to manufacture Bournvita.

5. According to the Petitioners, the said unblended and unflavoured cocoa powder is bitter and unpalatable in taste and is not directly consumed. In order to make cocoa powder, as is known in the trade, the said unblended and unflavoured cocoa powder is flavoured with the addition of substances, such as Vanilla, Cinnamon, Cassia and other powdered spices or else resins and salts. Thereafter the said substance is properly blended in sophisticated machines. According to the Petitioners, it is only such flavoured and blended cocoa powder, is known in the trade as cocoa powder. On the footing that the said unblended and unflavoured cocoa powder was not liable for excise duty and only the flavoured and blended cocoa powder was covered under the term cocoa powder in Item I-A the Petitioners did not take any steps to pay any excise duty on the unblended and unflavoured cocoa powder. The Petitioners set out their case in their letter dated 26th May, 1971 and 9th June, 1971 addressed to the excise

authorities.

6. Item I-A of the Schedule to the Central Excises and Salt Act, 1944, as amended on 1st of March, 1970, read as follows :-

"CONFECTIONERY, COCOA POWDER AND CHOCOLATES IN OR IN RELATION TO THE MANUFACTURE OF WHICH ANY PROCESS IS ORDINARILY CARRIED ON WITH THE AID OF POWDER, NAMELY -

|      |                   |     |  |                                                                                                                                                                                                                              |
|------|-------------------|-----|--|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| ---- | ----- ----- ----- | (1) |  | Boiled sweets, toffees, caramels, candies,  10 percent ad   nuts, (including almonds) and fruits kernels     coated with sweetening agent, and chewing     gums .....                                                        |
| ---- | ----- ----- ----- | (2) |  | Cocoa Powder .....  10 percent ad    valorem                                                                                                                                                                                 |
| ---- | ----- ----- ----- | (3) |  | Drinking chocolates, chocolates in the  10 percent ad   form of granules or powder   valorem                                                                                                                                 |
| ---- | ----- ----- ----- | (4) |  | Chocolates in the form of blocks, slabs,  10 percent ad   tablets, bars, pastilles or croquettes, or  valorem   in any other form, not elsewhere specified,     whether or not containing nuts, fruit     kernels, or fruits |
| ---- | ----- ----- ----- |     |  |                                                                                                                                                                                                                              |

7. By an order dated 1st September, 1971 the Assistant Collector of Central Excise rejected the Petitioners' contention as regards the said powder not being known in the market as cocoa powder and could not be liable for excise levy and held "that the said unblended and unflavoured cocoa powder was cocoa powder within the meaning of the said item and was liable for excess duty".

8. Against the said Order of the Assistant Collector, the Petitioners, on 10th January, 1972, preferred an appeal. The Appellate Collector, by his order dated 22nd November, 1973 rejected the said appeal of the Petitioners and inter alias, held that since the said product manufactured by Petitioners was marketable and that since unsweetened and unflavoured cocoa powder manufactured by the Petitioner was included in the said Tariff Item as cocoa powder, the same was liable for excise duty. He, therefore, rejected the Petitioners' appeal.

9. Against the said order, the Petitioners, on 20th May, 1974 filed a revision application to the Government. The Petitioner were granted personal hearing by the Joint Secretary, Government of India, on 9th June, 1975. At the said hearing, the Petitioners filed affidavits of 5 persons viz. (1) Kewal Krishan Kapoor, Export Manager of the Petitioners, (2) Pesi Khodadad Irani, working in the Great Western Stores, and carrying on business of purchase and sale of provision stores, (3) on Mr. Kanailal Saburbhai Desai, Factory Manager of Dr. Writer's Chocolates and Canning Co., (4) one Mr. Priyakant Himatlal Shah, Administrative Manager of Pure Ice-cream Co. (1967) Pvt. Ltd., and (5) Dr. Dinanath Vasudeo Rege, holding a Doctorate of the University of Bombay in Food Technology, and working in the Department of Chemical Technology of the University of Bombay, to show that, unflavoured and unblended cocoa powder was not edible and was

not known to the traders and purchasers in the market as cocoa powder.

10. The Revisional authority by his order dated 5th August, 1975, rejected the Petitioners' said application. He held that term "cocoa powder" appearing in Item I-A (2) of the Schedule was without any qualification and therefore included unflavoured and unblended cocoa powder. He further held that unblended and unflavoured cocoa powder being marketable, was excisable under the said item and for that purpose the use of the powder by the ultimate consumer in sweetened and flavoured form was immaterial. Further, according to the said Revisional Authority, it was not necessary that marketable cocoa powder should have a specific trade name; that under item No. I-A of the tariff, both cocoa powder and drinking chocolates had been made excisable, and therefore, if no duty was paid on such cocoa powder, it will go outside the excise net. He further held that even on the product manufactured for captive consumption, duty was levied. The said Revisional Authority, however, did not even refer to the various affidavits filed by the Petitioners or deal with the Petitioners' contention that the said item "cocoa powder" is to be given the trade meaning which has "flavoured and blended cocoa powder".

11. The Petitioners have, therefore, filed this Petition, challenging the validity of the said orders on various grounds mentioned in paragraph 11 of the Petition. The main ground being (1) that the expression "cocoa powder" used in the said Item I-A has not been defined in the said Tariff and must, therefore, be interpreted in the light of the meaning given to it in the trade, that the expression "cocoa powder" as understood in the trade means a product which is flavoured and blended and that the said product being unblended or unflavoured cocoa powder was not known in the trade as cocoa powder, and therefore, was not liable for excise duty, (2) that the test of marketability as applied by the authorities to the said product for bringing the same under item I-A was not correct and was therefore an extraneous and irrelevant consideration; (3) that there was no material whatsoever before the authorities to infer that unblended and unflavoured cocoa powder was a marketable product; (4) that reliance placed in the orders of the 2nd Respondent and the Central Government to the Brussels Tariff Nomenclature and certain statistics published by the Department of Commercial Intelligence and Statistics was entirely misconceived, as they only refer to unsweetened and unflavoured cocoa powder and it was not clear at all as to whether the said cocoa powder was blended or unblended; (5) that looking to the Item under which the said cocoa powder was sought to be made liable for levy, it was with only such items which are edible, and the said product on which the excise duty is sought to be levied not being edible, cannot be included in the category cocoa powder; and (6) that the approach of the revisional authority that, if no duty was levied on the said product, it would go outside the excise net, was erroneous.

12. The main contention of the Respondents in their affidavit in Reply is that since the said product of unblended and unflavoured cocoa powder was

marketable, it would come within the said term cocoa powder, in item I-A(b), and would be liable for excise duty. They have contended that since there is no dispute that the said product is marketable, test of the commercial meaning - attributed to the said term "cocoa powder" cannot be applied. They have further contended that the term "cocoa powder" in item I-A being unqualified, would as well include unflavoured and unblended cocoa powder and the said term must be given its plain and natural meaning because in interpreting the taxing statute, no words can be supplied or taken away from what is laid down in the statute. According to them, therefore, the contention of the Petitioners that unflavoured and unblended cocoa powder was not known as a consumer product in the market was irrelevant. They have denied that the Tariff Item I-A deals with articles of food only; and that in order to be covered by item I-A, the product "cocoa powder" must be in the nature of a finished consumer product like chocolate and confectionery. According to them, unflavoured and unblended cocoa powder was edible product, i.e. a product which was fit for human consumption, and, therefore, the said item I-A covered all sorts of cocoa powder blended or not, sweetened or not or flavoured or not.

13. Broadly speaking, the main question involved in this case is; What test is to be applied to determine the meaning to be given to the excisable article "cocoa powder" found in item I-A, the petitioners contended that the term "cocoa powder" to be excisable has to be understood in the same manner as it is understood by the trade and : The test that was applicable was that of the common commercial sense in which it is understood in trade by purchasers and consumers. As against this, it is contended by the Respondents that test to find out whether the item on which excise is sought to be levied as being included in Schedule, was to find out whether it was marketable.

14. Item I-A with which we are concerned, relates to confectionery, cocoa powder and chocolates in or in relation to the manufacture of which any process is ordinarily carried on with the aid of power viz. (1) Boiled sweets, toffees, caramels, candies, nuts etc. (2) Cocoa powder, (3) Drinking chocolates, chocolates in the form of granules or powder, and (4) Chocolates in the form of blocks, slabs, tablets, bars, pastilles or croquetes, or in any other form, not elsewhere specified whether or not containing nuts, fruit kernels or fruits.

15. In that connection, certain decisions relied by the Learned Counsel for the petitioners may be considered first.

16. The first decision relied upon by the Learned Counsel for the Petitioners was in the case of His Majesty The King v. Planters Nut and Chocolate Company Ltd., 1951 Canada Law Reports, 122. In that case the question that arose in respect of an item in Schedule III to the Canadian Sales Tax Excise Tax Act, R.S.C. was that whether the salted peanuts and cashew nuts fall within the category of fruit or vegetable covered by certain item of the Schedule to the said Act, so as to be liable to Sales Tax hereunder. Negating the contention of the Revenue that the said items fell within the category of either fruit or vegetable, the court

observed :-

"The object of the Excise Tax Act is to raise revenue, and for this purpose to class substances according to the general usage and known denominations of trade. In my view therefore, it is not the botanist's conception as to what constitutes "Fruit" or "Vegetable" which must govern the interpretation to be placed on the words, but rather what would ordinarily in matters of commerce in Canada be included therein. Botanically, oranges and lemons are barriers, but otherwise no one would consider them as such".

17. I think it can be asserted that in Canada both the peanut and cashew nut are considered by almost everyone, as falling within the category of "Nuts".

18. The next decision was in the case of *Borys v. Canadian Pacific Railway Co.* and another, reported in 1953 All England Law Reports, 1953, I. at 451. That was a case of interpretation of an expression "petroleum", contained in a contract of lease, granted to the defendants. Although the said decision turns on the expression as used in the contract and not in a taxing statute, the manner of approach by the Court to such expression would be relevant. The court, while trying to find out what was intended by the parties by the use of the said expression, observed :-

"When endeavouring to ascertain the meaning which is to be attributed to "petroleum" in the original reservation, it becomes necessary to decide who are the persons, whose use of the word is to be determined the sense in which it is employed in the relevant document, inasmuch as the chemist and laboratory expert may attribute to it a meaning different from that which the lay mind would adopt. As has been said, the chemical contents of the petroleum and the natural gas found in the field are the same, and regarded scientifically, the substances are, therefore, the same. But a scientific similarity of substance does not establish that the materials are themselves rightly to be described by the same name. The proper approach, says the appellant, is to ascertain the meaning of the word in the mouths of those non-scientific persons who are concerned with its use, such as landowners, business men and engineers, and to be guided by them as to the true construction of the reservation. The vernacular, not the scientific, meaning is, he maintains, the true one, and in support of this contentions, he calls attention to the observations of Lord Halsbury, L.C., in *Glasgow Corporation v. Farie* (1), when he says of mines and minerals, that, in construing the expression, it has to be determined what these words mean in the vernacular of the mining world, the commercial world and landowners at the time when the grant is made. This method of interpretation has been repeated and accepted more than once, and Their Lordships agree that, where it can be ascertained that a particular vernacular meaning is attributed to words in circumstances similar to those in which the expression to be construed is found, the vernacular meaning must prevail over the scientific".

19. The next decision is in the case of *Ramavatar Budhaiprasad Etc. Vs. Assistant*

Sales Tax Officer, Akola, that was the case under the Sales Tax Act, and the question there was whether, betel leaves which were mentioned specifically in Item 36 and which were subsequently deleted, would be covered by Item No. 6 which dealt with vegetables except when sold in solid containers. While negating the contention that the same would be covered under the item "vegetables", on the footing that the dictionary meaning given to the word "vegetable" as to - "of or pertaining to, comprised or consisting of, or derived, or obtained from plants or their parts", supported that contention, the Court observed :-

"But this word must be construed not in any technical sense nor from the botanical parlance. It has not been defined in the Act and being a word of every day use it must be constituted in its popular sense meaning subject matter with which the statute is dealing would attribute to it".

20. The next decision relied upon by the Learned Counsel for the petitioners, and on which the Learned Counsel for the Respondents has also relied as supporting his contention as well, viz. it accepts the test of marketability of the goods for determining the meaning, of the items of Schedule, is in the case of Union of India (UOI) Vs. Delhi Cloth and General Mills, . In that case, for the purpose of manufacturing "vanaspati" which was hydrogenated oil, the petitioners had purchased groundnut and til oil from the open market directly from manufacturer. The oil was subjected to different processes in order to turn it into Vanaspati. It was their case that the only finished product that they manufactured from raw materials thus purchased, was Vanaspati which was liable to excise duty as a vegetable product. They further contended that at no stage did they produce any new product which would come within item 23 of the Schedule viz., "vegetable non-essential oils all sorts, in or in relation to the manufacture of which any process is ordinarily carried on with the aid of power". According to the Respondents, however, in the course of the manufacture of Vanaspati, i.e. the vegetable product from raw groundnut and til oil, the Petitioners brought into existence at an intermediate stage after carrying out some processes with the aid of power, a product which was known to the market as "refined oil", which falls within the Item 23 of the Schedule, and was therefore, liable for excise duty.

21. The Supreme Court firstly held that the fact that the substance produced by Petitioners at an intermediate stage is not put in the market would not make any difference, if from the raw material has been brought into existence a new substance by the application of processes one or more of which are with the aid of power and that substance is the same as alleged by the Respondents "refined oil" as known to the market, an excise duty may be leviable under Item 23. However, as regards the question whether the intermediary brought into existence, was "refined oil" as alleged by the Respondents, so as to be liable to excise duty under Item 23, the Court observed :-

"But has it been shown that the substance produced by the Petitioners is at any

intermediate stage before Vanaspati comes into existence, "refined oil" as known to the market ? We are not satisfied that this has been shown. As already stated, a summary of the numerous processes necessary to turn the raw groundnut or til oil into vegetable produce has been given in the affidavits sworn to by the experts on both sides. It does not appear to be disputed that the process of deodorisation is applied in the Petitioners' factory after hydrogenation is complete. The appellant's case is that before hydrogenation has started the substance in the hands of these Petitioners is "refined oil" as known to the market. That raises the important question whether any oil is known as "refined oil" in the market before deodorisation has taken place". As already indicated, the appellants' case is that deodorisation is not necessary for "refined oil" to come into existence; the Respondents' case on the other hand is that without deodorisation the substance is not "refined oil".

22. After referring to several affidavits, the court ultimately held that the Union of India had failed to prove that the oil they intended to make liable for excise duty was not known in the market as refined oil as the same was not deodorised.

23. It was also sought to be argued that even if it be held that the Respondents did not manufacture refined oil, as is known to the market, they must be held to manufacture some kind of "non-essential vegetable oil" within Item 12, by applying to the raw material purchased by them, the processes of neutralisation by alkali and bleaching by activated earth and or carbon. The court held, negating the said contention :-

"To say that "manufacture" is complete as soon as by the application of one or more processes, the raw material undergoes some change, is to equate "processing" to "manufacture" and for this there is no warrant of law. The word "manufacture" used as a verb is generally understood to mean as "bringing into existence a new substance" and does not mean merely "to produce some change in a substance", however minor in consequence the change may be" The Court further observed :-

"Moreover, the definition of word "goods" make it clear that to become "goods" an article must be something which can ordinarily come to the market to be bought and sold".

24. This decision, in my view, puts beyond pale of doubt, that while interpreting the meaning of the word in a taxing statute, the court has to look to the meaning given to the expression in the commercial world and not its technical or scientific meaning or even a dictionary meaning.

25. The next decision is in case of Commissioner of Sales Tax, Madhya Pradesh Vs. Jaswant Singh Charan Singh, . That was the matter under M.P. General Sales Tax Act, and the items concerned there were charcoal and coal. The question was whether the charcoal was covered under Entry I of Part III of Schedule II to the M.P. General Sales Tax Act, 1958; which provided Sales Tax payable on "coal" at the rate of per cent or whether it was liable for sales tax under Entry I of Part VI

of Schedule II to the said Schedule which provided for payment of sales tax on "other goods not included in Schedule I or any other part of the Schedule at 4 per cent. While trying to find out under which of the said entry "charcoal" would be liable for sales tax, the Supreme Court, following the aforesaid decision of the Canadian High Court, observed :-

"While construing word "coal" in Entry I of Part III of Schedule II, the test that would be applied is what would be the meaning which persons dealing with coal and consumers purchasing it as fuel would give to that word. A sales tax statute is being one levying a tax on goods must in the absence of a technical term or a term of science or art, be presumed to have used an ordinary term as coal according to the meaning ascribed to it in common parlance. Viewed from that angle both a merchant dealing in coal and a consumer wanting to purchase it would regard coal as ordinarily understood and would include "charcoal" in the term "coal". It is only when the question of the kind or variety of coal would arise that a distinction would be made between coal and charcoal; otherwise, both of them would in ordinary parlance as also in their commercial sense be spoken as coal".

26. The next decision is in the case of South Bihar Sugar Mills Ltd., etc. Vs. Union of India (UOI) and Others, . That case was under the Central Excises and Salt Act (1944) Schedule I dealing with item 14H, which read as follows :-

"14H. Compressed liquified or solidified gases, the following :-

x x x x x x x x x x x x x x x x x x x x x x x x Item (iv) Carbonic acid Fifty per cent (Carbon dioxide) ad valorem x x x x x x x x x x x x x x x x x x x x x x x x x x x x x x x

27. In that case, in the course of manufacture of sugar by carbonation process, certain gas-known as kiln gas was produced, which contained a certain percentage of carbon dioxide. Excise duty was sought to be levied on the said "Kiln gas" under the said Item 14-H on the footing that it contained "Carbonic Acid". The question that arose before the Court was whether the said "Kiln gas" can, in spite of the fact that it contained "carbon dioxide", fall within the said Entry. On the several affidavits filed before the Court, the Court found that commercial carbon dioxide as brought to the market for being bought or sold had contents of at least 99% of carbon dioxide and is either compressed and packed in steel cylinders or liquified or solidified. While negating the contention of the Department, the Court observed as follows :-

"The Act charges duty on manufacture of goods. The word "manufacture" implies a charge but every change in the raw material is not manufacture. There must be such a transformation that a new and different article must emerge having a distinctive name, character or use. The duty is levied on goods. As the Act does not define goods, the legislature must be taken to have used that word in its ordinary, dictionary meaning the dictionary meaning is that to become goods it must be something which can ordinarily come to the market to be bought and

sold and is known to the market. That it would be such an article which would attract the Act was brought out in Union of India (UOI) Vs. Delhi Cloth and General Mills, .

In our view, the gas generated by these concerns is kiln gas and not carbon dioxide as known to the trade, i.e. to those who deal in it or who use it. The kiln gas in question therefore is neither carbon dioxide nor compressed carbon dioxide known as such to be commercial community and therefore cannot attract Item 14-H in the First Schedule".

28. In another decision of the Supreme Court, in the case of Sarin Chemical Laboratory Vs. Commissioner of Sales Tax, U.P., , the question was whether "Sarin Tooth Powder" manufactured by the appellants was "cosmetic" or a "toilet requisite" so as to be liable to sales-tax as falling within Entry VI of the Notification. It was found there that neither expression "cosmetic" nor "toilet requisite" was defined in the Act. The dictionary meaning of the expression "cosmetic" was, "A preparation to beautify or alter appearance of the body or for cleansing, colouring, conditioning or protecting skin, hair, nails, eyes or teeth". The same dictionary gave the meaning of the expression "toilet" as, "an act or process of dressing cleansing and grooming of one's person". The word "toiletry" was explained in the said dictionary to mean "an article or preparation used in making one's toilet such as soap, lotion, cosmetic, tooth paste, shaving cream, cologne etc". Without following the said dictionary meaning, the Court held that "tooth paste" was a toilet preparation and observed :

"According to the dictionary meaning tooth powder is regarded both as an item of cosmetic and toilet but as observed by this court in Ramavatar Budhaiprasad Etc. Vs. Assistant Sales Tax Officer, Akola, , the names of articles, the sales and purchases of which liable to be taxed given in a statute unless defined in the statute must be construed not in a technical sense but as understood in common parlance".

29. The next decision is in the case of Minerals and Metals Trading Corporation of India, Ltd. Vs. Union of India (UOI) and Others, . The court there was concerned with Item 26, viz., Metallic Ore of all sorts except Archers and other pigments ores and antimony ore, and the question that the court had to decide was, whether Wolfram ore WO<sub>3</sub> 65% fell within the said Item 26, metallic ores of all sorts with the exceptions mentioned therein. It was not disputed that Wolfram ore was not within the exception, and therefore, the authorities had to determine whether such ore was "Metallic Ore". While dealing with this question, the Court observed at page 2554 as follows :-

"We are wholly unable to comprehend how in order to fall under item 26 the ore has to be mined. There is a good deal of force in the argument of Mr. Setalvad for the appellant that the normally acceptable merchantable quality of Wolfram or tungsten contains a minimum 65% WO<sub>3</sub>. This is the usable ore and it is in that sense that it is commercially understood. Wolfram ore when mined contains

only .5 to 2 per cent WO<sub>3</sub> and in order to make it usable and merchantable ore with minimum 65% WO<sub>3</sub>, concentration is necessary. If Item 26 of the Import Tariff is to be restricted to Wolfram being material containing .5 to 2 per cent WO<sub>3</sub> it would be mainly rock which can neither be imported in large quantity and which will have no market. The separating of Wolfram ore from the rock to make it usable ore is a process of selective mining. It is not a manufacturing process. The important test is that the chemical structure of the ore should remain the same. Whether the ore imported is in powder or granule form is wholly immaterial. What has to be seen is what meant in international trade and in the market by Wolfram ore containing 60% or more WO<sub>3</sub>. On that there is a preponderating weight of authority both of experts and books and writings on the subject which show that Wolfram ore when detached and taken out from the rock in which it is embedded either by crushing the rock and sorting out pieces of Wolfram or by washing or magnet separation and other similar and necessary process it becomes a concentrate but does not cease to be ore. Unless the ore is roasted or treated with any chemical it cannot be classed as processed".

30. The Court have found that such Wolfram ore concentrate containing 65% WO<sub>3</sub> which was of the merchantable quality and was known commercially as such and imported as ore was therefore not liable for duty.

31. The next decision is in the case of Commissioner of Sales Tax, U.P. Vs. S.R. Brothers, Kanpur, . The case arose under U.P. Sales Tax Act (15 of 1948). The items sought to be charged with sales tax were "food colours" and "syrup essences". Item 10 dealt with Dyes and colours and composition thereof and Item 37 dealt with "Scents and perfumes". The case of the Department was that. "food colours" fell under the said Item 10, while "Syrup essences" fell under the said Item 37. In the course of arguments, in support of their contention, the Department sought to rely on the dictionary meaning given to the said items and also contended that the words "dyes and colours" in Entry No. 10 of the List and words "scents and perfumes" in Entry No. 37 of the said list were unqualified and there being no limitation discernible on their plain and general meaning, they must be held to be wide enough to cover "food colours" and "syrup essences". The court, while negating the said "dictionary" approach in determining the meaning to be given to the said Items and also negating the other contention, held :-

"In our opinion, the Random House Dictionary can not serve as a safe guide in construing the words use in the list in the Notification in question for the purpose of deciding whether or not the words used in entries Nos. 10 and 37 cover food colours and syrup essences; indeed the Dictionary is apt to be a somewhat elusive guide in understanding the meaning of the words and expressions with which we are concerned in the context in which they are used. This Dictionary gives all the different shades of meanings attributable to the words referred by that is hardly helpful in solving the problem raised in the present controversy. The words "dyes and colours" used in Entry No. 10 and the words "scents and

perfumes" used in Entry No. 37 have to be construed in their own context and in the sense, as ordinarily understood and attributed to these words by people usually conversant with and dealing in such goods. Similarly the words "food colours" and "syrup essences" which are descriptive of the class of goods the sales of which are to be taxed under the Act have to be construed in the sense in which they are popularly understood by those who deal in them and who purchase and use them".

32. Reliance was also placed on certain observations of the Supreme Court in case of *Madras Rubber Factory Ltd. v. Union of India and Others*, reported in 1976 S.C.C. 242. In that case the Supreme Court had observed that "while interpreting the meaning of the words in a Taxing Statute, the acceptance of a particular word by the trade and its popular meaning should commend itself to the authority".

33. The next Supreme Court decision in that connection relied upon by the Learned Counsel for the Petitioners is in the case of *Healthways Dairy Products Company Vs. The Union of India (UOI) and Others*, . In that case, the Central Government had, by a notification exempted "prepared or preserved foods" falling under Item IB, from whole of excise duty except these, inter alia mentioned in Items 12 and 13 :

"12. Milk powder but excluding such powder specially prepared for feeding of infants".

"13. Condensed Milk, whether sweetened or not".

34. Excise duty was sought to be levied on Condensed Milk and condensed Skimmed Milk as falling under the said item 13. The question was whether condensed Skimmed Milk could be covered under said items 12 or 13. The Petitioners had contended that condensed skimmed milk fell within the exemption notification. While holding that the condensed skimmed milk, as commonly understood, was not covered by the said Items and therefore was exempted from duty, the Court observed :-

"It was well established by several authorities of this Court that for the purpose of levy of excise duty or any other similar tax the description of goods as popularly and commonly understood has to be taken as the description of the same goods in the relevant provisions of the statute or the rules".

35. The Court therefore held that the condensed skimmed milk was covered by exemption notification.

36. The last of the decisions relied upon was an unreported Judgment of this Court by Tulzapurkar J. in the case of *Nirlon Synthetic Fibres & Chemicals Ltd. v. Shri R. K. Audim, Assistant Collector and Others*, delivered on 30th April, 1970. There the question was whether "Polymer Chips" otherwise 15A in Schedule I to the Central Excise and Salt Act, 1944, which provided :-

15A PLASTICS, ALL SORTS - (i) Moulding powders, granules and flakes 20 ad valorem (thermosetting and thermoplastic). (ii) Polyethylene films lay flat tubing"s and P.V.C. Sheets (that is chloride sheets). (iii) Polyethylene films lay flat tubing"s and P.V.C. Sheets (that is to say, polyvinyl chloride sheets). (iv) Not otherwise specified fall within item 15A.

37. After dealing with the authorities on the question and the meaning to be attributed to items that are specified in the Entries, the Court observed :

"After giving my anxious thought to the aforesaid rival submissions that have been put forward by Counsel on either side. I am of the view that the Central Excises and Salt Act is not an Act applied to any particular science or art but is a general statute, whose object is to raise revenue and for this purpose to classify substances according to general usage and known denomination of trade and, therefore, the proper ride of construction applicable in respect of the items or entries OCCURRING IN Schedule I to the said Act would be that these items or entries inclusive of the words and expressions comprised in sub-clauses thereof will have to be construed not in the scientific or technical or laboratory sense but in the sense which person dealing with or commercially conversant with those items or sub-items would attribute to them. It is true that several words and expressions occurring in sub-clauses (i), (ii) and (iii) of item 15A(1) are high sounding, jaw-breaking and unpronounceable words from layman"s point of view but from such appearance these words it cannot be concluded that these are scientific or technical terms and the true criterion would be whether these words and expressions are well known to and are freely used by manufacturers, traders and dealers in that line as if they have become common place words of everyday use with them and having regard to the manner in which almost all words and expressions occuring in entry 15A(1)(i), (ii) and (iii) have been freely used by manufacturers, traders and dealers in large number of advertisements appearing in trade journals - Popular Plastics or British Plastics Year Book, it is obvious that these words and expressions will have to be regarded as common place or household words qua them and not scientific or technical terms, with the result that the item and sub-items will have to be understood in the sense which persons dealing with or commercially conversant with those substances would attribute to them".

38. In that connection, I may also refer to a decision of the Supreme Court, in fact, relied upon by the Learned Counsel for the Respondents, in support of his contention, viz., in the case of Union of India v. Hindu Undivided Family Business known as Ramlal Mansukhrai Rewari and another, reported in Union of India (UOI) Vs. Hindu Undivided Family Business known as Ramlal Mansukhrai, Rewari and Another, . This decision, instead of supporting the contention of the Learned Counsel for the Respondents, reiterates the same principle laid down by the Supreme Court in its decision cited above. In that case, excise was sought to be levied on uncut circles left after rolling of billets by the rolling mills, under Item 26-A(2), which provided for levy of excise on Copper and copper alloys

containing not less than 50% by weight of copper -

(1) In any crude form including ingots, bars, blocks, slabs, billets, shots and pellets.

(2) Manufactures, the following, namely, plates, sheets, circles, strips, and foils in any form or size.

(3) Pipes and tubes.

It was sought to be argued that under the said item, only the trimmed circles and not uncut circles, were liable for excise. The court negated that contention mainly because of the wording of the said item which provided for "Circles ..... in any form or size".

39. However, in that case, the Supreme Court, while deciding the case of the wording of the Entry 26-A, pointed out that it was still open to consider the question on the test of commercial meaning that can be given to the said expression "Circle" if any evidence had been produced by the Petitioner to that effect.

40. The Learned Counsel for the Respondents also relied on decision of the Supreme Court in the case of *The Martand Dairy and Farm Vs. The Union of India (UOI) and Others*, to show that the ordinary meaning is to be given to the expression used under the Central Sales Tax Act. In that case a notification exempted milk and milk products such as Chhena, Dahi, Khoa, Butter and Cream, but excluding (i) products sold in sealed containers (ii) Sweet meats and (iii) ghee from duty". In that case, the Petitioners had sold the product included in the said entry in containers which were soldered and not sealed and on that ground had claimed exemption. The Supreme Court negated the said contention by observing :-

"All that the notification states is that products sold in sealed containers must sail out of the harbour of exemption. The simple question is this : Was the sale of cream ? Yes. Was it, when sold, packed in containers which were sealed ? Yes. On these two affirmative answers the exclusion from the exemption operates".

41. That decision has no reliance to the question before me particularly because, what the Supreme Court was concerned in that case was to find the meaning of the word "sealed" and not with the meaning of any excisable item in the Schedule.

42. The above cited decisions, in my view, unmistakably show that the excisable items under the Central Excise Act, which is taxing statute dealing with the levy of excise on goods, unless the Act itself defined the same, are to be construed in a sense ordinarily and commonly understood and attributed to those words by people commercially conversant with and dealing in such goods and for that purpose the dictionary meaning of the said words cannot be a safe guide.

43. As against this, the Learned Counsel for the Respondents contended that test

to be applied in such cases is whether the goods on which excise was sought to be levied were marketable. However, he has not been able to substantiate his said contention by any decision. As pointed out above, the only decision that he relied upon viz., in the case of Union of India (UOI) Vs. Hindu Undivided Family Business known as Ramlal Mansukhrai, Rewari and Another, , in support of his said contention, does not lay down any such proposition but supports the contention of the Petitioners. The said contention of the Learned Counsel for the Respondents, therefore, cannot be accepted.

44. However, even if such goods were marketable, that by itself would not make the goods liable for excise, for, the Respondents will have further to show that the said goods were marketable as such, i.e., as Cocoa Powder, which would, in turn in order to find out the meaning of the word "Cocoa Powder" necessitate the application of the test of commercial meaning given to the said word.

45. The learned Counsel for the Respondents also contended that in any event, since the words "Cocoa powder" appearing in Item I-A are without any qualification, the meaning to be attributable to the said words should be its plain dictionary meaning, and, while interpreting the said word, no words should be supplied or taken away from what was in the statute. This very contention was in terms negated by the Supreme Court in its decision in Commissioner of Sales Tax, U.P. Vs. S.R. Brothers, Kanpur, cited above. The said contention of the Learned Counsel for the Respondents, therefore, cannot be accepted.

46. If therefore, the test applicable for ascertaining the meaning of the said words "Cocoa Powder" in Item I-A was to be one attributed to it by the trade, then in that case, all the authorities i.e., Assistant Collector, Collector and the Revisional Authority who have in their orders applied the test of marketability have decided the matter by applying a wrong test and their orders therefore cannot be sustained in law. This is more so in the case of the revisional order passed by the Joint Secretary to the Government of India, who had passed the order holding the said goods viz. unblended and unflavoured cocoa powder as liable for excise duty mainly relying on the marketability test by completely ignoring the several affidavits filed by the Petitioners before him to show how the said word "Cocoa Powder" was understood in trade, viz., it covered only flavoured and blended Cocoa powder, and further, on a strange reasoning that if no duty was paid on cocoa powder, it would go outside the excise net.

47. Dealing further with the merits, it may be first pointed out that as laid down by Supreme Court in the case of Deputy Commissioner of Agriculture Income Tax and Sales Tax Quilon v. Travancore Rubber and Tea Co., reported in 20, Sales Tax Cases at page 520, in all cases of taxation the burden of proving the necessary ingredients laid down by law to justify taxation is upon the taxing authority. In this case if the taste of giving trade or commercial meaning to the excisable goods were to be applied, then admittedly, the Respondents have not produced any material in discharge of their burden to show that unflavoured and unblended cocoa powder was as well known in the trade as "cocoa powder" in

the same manner as blended and flavoured cocoa powder was known. All the material that they produced viz., a Bill of Entry in respect of cocoa powder and subsequent correspondence (annexed to their Affidavit in Reply) related to the question as to the cocoa powder being marketable. The said Bill of Entry in favour of Calcutta Confectionery Works as well the correspondence in connection therewith does not also show whether cocoa powder imported was or was not blended or flavoured. The said Calcutta Confectionary Works, by their letter dated 2-11-1976 in reply to the Respondents' query whether cocoa powder mentioned in the said Bill of Entry was unblended and unflavoured had stated that the same was natural processed "cocoa powder".

48. Similarly, reliance placed by the Learned Counsel for the Respondents on Monthly Statistics of Foreign Trade of India Imports - Vol. II, also cannot take the Respondents' case any further. All that is showed was that unsweetened "cocoa powder" was imported into India and the same was therefore sold in the market. It did not show that what was imported was known to the trade as "Cocoa powder". The Learned Counsel for the Respondents has also relied on brief entry at 18.03 in Brussels Tariff Nomenclature (Exb. 2 to the Affidavit in Reply), relating to Cocoa paste (in Bulk or in Block) whether or not defatted. The said Entry is -

Cocoa paste is obtained by grinding roasted cocoa beans

x x x x x x x x x x x x x x x x x x x x x x

The paste can be used in this state by confectioneries but it is generally used for the manufacture of cocoa butter, cocoa powder and chocolate.

x x x x x x x x x x x x x x x x x x x x x x

49. The said Entry also cannot help Learned Counsel for the Respondents in his contention. Firstly, it does not indicate whether cocoa powder referred to therein was unblended and unflavoured cocoa paste or otherwise. Moreover, apart from that the said entry cannot be of help in determining the commercial or trade meaning in India of the said goods "cocoa powder".

50. As against this, the Petitioners had produced before the Revisional Authority certain materials by way of affidavits, to substantiate their said contention that in trade only the flavoured and blended cocoa powder is known as "cocoa powder" referred to in item I-A. It would be proper to see whether the said material can be said to substantiate the Petitioners' said contention. The Petitioners had filed five following affidavits :-

(1) The first affidavit was of one K. K. Kapoor, Export Manager of the Petitioner Company. According to him, in International Trade and parlance, the word "Cocoa Powder" meant flavoured and blended cocoa powder packed in proprietary packs. Cocoa Powder without flavouring and blending is not a recognised article of consumer purchase and would not be accepted by the export markets against their order of "Cocoa Powder". He has further stated that

the Company has exported cocoa powder for the last three years and that all the cocoa powder exported by the company has always been flavoured and blended.

(2) The second Affidavit was of one Mr. P. K. Irani, working in Great Western Stores, Bombay, and who had an experience of the business of purchase and sale of provision stores including confectionery, cocoa powder and chocolates. According to him, the expression "Cocoa Powder" as used and understood in the confectionary trade refers to the flavoured powder packed in tins which can be straightway made into a beverage merely by adding water and/or milk. After referring to several brands of cocoa powder, he has stated that he had been shown by the Petitioners a sample of pulverised cocoa cake which was unblended and unprocessed; that during his entire experience, he had never come across such material in his business and such material was not known in the trade as "cocoa powder".

(3) The third affidavit was of K. S. Desai, Factory Manager of Dr. Writer's chocolates and Canning Co. According to him, the expression "cocoa powder" meant the pulverised cocoa cake which was flavoured and blended with the addition of substances such as vanillin, cinnamon, cassia and other powdered spices or oleo resins and salts. Such flavouring substances were blended with the said pulverised cocoa cake and it was that processed and blended pulverised cocoa cake which was known as cocoa powder and from it a beverage was prepared by adding water and/or milk. He has further stated that if "cocoa powder" was marketed and sold without flavouring and blending, it would be rejected by the consumers and they will return the tins to the company as defective as not being "cocoa powder". Lastly he has stated that pulverised cocoa cake without being flavoured and blended cannot be used and was never used as a food drink; that it can be and is only used as an intermediate product in the manufacture of other food drinks.

(4) The fourth affidavit was of one P. R. Shah, Administrative Manager of Pure Ice Cream Co. (1967) Pvt. Ltd. According to him, his company was the manufacturer of chocolate and other ice-creams, and for manufacturing chocolate ice-cream, they purchased cocoa powder from the Petitioners, by giving to the Petitioner Company cocoa beans imported by them against import licence, and asking the Petitioner Company to process the same for them into cocoa powder, and that the cocoa powder that they buy from the Petitioner company was flavoured and blended cocoa powder, and they did not know of any other form of "Cocoa powder".

(5) The last one was the affidavit of one Dr. Dinanath V. Rege, attached to the Department of Chemical Technology of the University of Bombay, in its Food Technology section. He has pointed out that the unflavoured and unblended cocoa powder was pulverised or powdered form of cocoa cake after it was broken up. Cocoa cake is obtained from cocoa beans which were roasted, kibbled, winnowed for shell separation, ground, treated and pressed. At that stage, the pulverised cocoa cake is bitter and unpalatable. As far as he was aware, such

pulverised cocoa cake was not capable of being consumed directly and in fact is not being so consumed. In his opinion, the pulverised cocoa cake cannot be regarded as "Cocoa Powder" as known to the trade, and so far as he was aware, pulverised cocoa cake without being flavoured and blended cannot be used and is never used as a food drinks; that it can be and is only used as an intermediate product in the manufacture of other products.

51. These affidavits were before the revisional authority and if the proper test had been applied, then in my view, these affidavits would have sufficiently shown that the meaning that is attributed to the words "cocoa powder" in commerce and trade only relates to flavoured and blended cocoa powder. The said affidavits were from the persons in the traders and purchase powder. The said affidavits were from the persons in the traders and purchasers, and one of them was an expert in food technology.

52. It was contended by the Learned Counsel for the Respondents that these affidavits show only the meaning attributed to the words "cocoa powder" by a section of trade and there is no material to show that the other sections of trade which buy and sell the unflavoured and unblended cocoa powder also attribute the same meaning to the said goods. It is difficult to appreciate the said contention of the Learned Counsel for the Respondents. As pointed out above, the burden of showing that the unblended and unflavoured cocoa powder was known to the trade as "cocoa powder" as mentioned in item I-A lay on the Respondents. The Respondents cannot be heard to complain that the Petitioners had not discharged the burden which was the Respondents' obligation to discharge.

53. Lastly, I may also mention that the group of items amongst which the excisable entry "cocoa powder" is placed viz., Food : Chocolates Sweets etc., would also indicate that "cocoa powder" referred to therein was an edible item. The affidavit filed by the Respondents would show that it was only flavoured and blended cocoa powder that was an article of consumption by mixing it with milk or water, while unflavoured or unblended cocoa powder was not edible. There is no material produced by the Respondents to the contrary.

54. In that view, of the matter, I hold that all the said orders passed by the authorities concerned cannot be sustained, and are liable to be set aside. There is also sufficient material on record to hold that only flavoured and blended cocoa powder was recognised by the traders and purchasers as "cocoa powder" and it was only such "Cocoa Powder" that was liable for excise duty under Item I-A. The authorities were therefore wrong in seeking to levy excise duty on unflavoured and unblended cocoa powder, under the said Item I-A.

55. In the result, therefore, the Petitioners succeed. The Rule is made absolute in terms of prayers (a) and (b). The Respondents to pay to the Petitioners costs of the Petition.

56. The operation of the order stayed for eight weeks only to the extent of the

amount mentioned in prayer (b) being refunded.