

(1976) 10 BOM CK 0016
In the Bombay High Court
Case No : Misc. Petition No. 944 of 1973

Duke and Sons Ltd.

APPELLANT

Vs

Superintendent of C. Ex.

RESPONDENT

Date of Decision : 11-10-1976

Acts Referred:

Central Excise Rules, 1944 — Rule 10, 173, 9
Central Excises and Salt Act, 1944 — Section 8

Citation : (1976) 10 BOM CK 0016

Hon'ble Judges : D.M. Rege, J

Bench : Single Bench

Advocate : Porus A. Mehta and A.J. Rana, for the Appellant; L.J. Manjrekar and D.J. Dalal, for the Respondent

Judgement

1. This is a petition by M/s. Duke and Sons Pvt. Ltd. manufacturers of aerated waters, for the issue of writ of certiorari against the Superintendent Central Excise - Respondent No. 1, Assistant Collector of Central Excise - Respondent No. 2, Collector of Central Excise - Respondent No. 3 and Appellate Collector of Central Excise - Respondent No. 4 and the Union of India - Respondent No. 5, for quashing and setting aside the decision in the letter dated 12-10-1972 by the 1st Respondent and also an impugned order dated 31st May, 1973 by the 2nd Respondent and impugned decision of the 3rd Respondent contained in the letter dated 27-8-1973 and the impugned demand notices dated 22-2-1973 and 3rd/10th October, 1970 and also for Writ of mandamus against them to withdraw or cancel the said impugned decision and notices mentioned above and to refund Rs. 35,482.07 already paid by the petitioners towards the excise duty since 28-7-1973.

2. Few facts relevant for determination of the question arising under the petition are as follows :-

The first Petitioners manufacture non-alcoholic aerated waters. Amongst various varieties of aerated waters manufactured by the 1st Petitioners, there are certain

verities which are sweetened and flavoured in which admittedly they use synthetic essences for adding flavour.

3. Prior to 17-3-1972, Item 1D of the 1st Schedule to the Central Excise and Salt Act, 1944 under which excise duty was leviable on aerated waters provided :

"Aerated waters, whether or not flavoured or 10% advalorem" sweetened and whether or not containing vegetable or fruit juice or fruit pulp rate of duty.

4. With effect from 17-3-1972 the said item was varied so as to levy thereon excise duty at 20% advalorem instead of 10% advalorem. On the same day i.e. on 17-3-1972, the Union of India issued a notification inter alia exempting all types of aerated waters, excepting aerated waters in the manufacture of which blended flavouring concentrates in any form used, from excise duty in excess of 10% advalorem as it originally stood. The result of the notification was that from 17-3-72 created waters in the manufacture of which blended flavouring concentrates in any form were used were liable for excise duty at 20% advalorem while the other aerated waters continued to be liable for excise duty at 10% advalorem. According to the petitioners since they did not use in the aerated waters manufactured by them any "blended flavouring concentrates in any form" they were entitled to the exemption given under the said notification. Therefore, the petitioners by their letter dated 20-3-1972 addressed to the 1st Respondent declared that they did not use any blended flavouring concentrates in the aerated waters manufactured by them and pointed out that the ingredients used by them in various aerated waters manufactured by them were :

- (1) Water,
- (2) COW Gas,
- (3) Essences;
- (4) Colour,
- (5) Saccharine,
- (6) Sugar,
- (7) Preservatives,
- (8) Citric,

5. In spite of the said explanation, the first Respondent by his letter dated 13-10-1972 informed the 1st Petitioners that all aerated waters of all brands except those manufactured by the Petitioners contained flavouring concentrates and as such they attracted duty at the rate of 20% advalorem and that the petitioners should pay duty on that basis immediately. The 1st Respondent also stated in the said letter that the Deputy Chemist to whom samples drawn of aerated waters manufactured by the petitioners were sent had reported that all the samples of the petitioners contained blended flavouring concentrates. Thereupon the petitioners by their letter dated 21-10-1972 addressed to the

Asstt. Collector, Central Excise pointed out that the decision arrived at by the Superintendent in his aforesaid letter was arrived at without hearing the petitioners and without disclosing to the petitioners test report of the Dy. Chief Chemist and also without giving them an opportunity to explain or deal with the same. They also requested the 2nd Respondent to direct the first Respondent to furnish to the petitioners a full copy of the Test Report of the Deputy Chief Chemist, Bombay, including the method or methods employed by him and the work sheets on the basis of which he had arrived at his opinion. By his letter dated 16-12-1972 the 1st Respondent forwarded to the petitioners a copy of the report of the Dy. Chief Chemist showing that 12 samples mentioned therein were found containing blended flavouring concentrates. The Petitioners by their letter dated 12th December, 1972 requested for a full copy of the Test Report of the said Deputy Chief Chemist including the method adopted by him to come to his conclusion and also the work sheets for the same.

6. However, the petitioners received from the 1st respondent a notice dated 22-2-1973 under Rule 10 of the Central Excise Rules, 1944 demanding a sum of Rs. 2,94,889.83 for the period from 17-3-1972 to 31-1-1973 being the difference of 10% advalorem claimed by the Department. In reply thereto the petitioners by their attorneys' letter dated 5-3-1973 to the 1st Respondent denied that the Petitioners' manufacture contained concentrates and stated that therefore no duty was payable. They again called upon the first Respondent to disclose and furnish all the evidence on the basis of which it was held that the petitioners' aerated waters contained blended flavouring concentrates.

7. On 15-5-1973, the 2nd Respondent visited the factory of the Petitioners and made a detailed inspection of the process of the manufacture. Thereafter without giving any hearing or opportunity in the matter to the petitioners to put forward their case, the 2nd Respondent by his letter dated 31-5-1973 though admitting that the petitioners used only essences in the manufacture of their aerated waters held that the beverages manufactured by the petitioners fell out side the scope of exemption under the said notification dated 17-3-1972 since they were deemed to have been manufactured from blended flavouring concentrates. Accordingly he confirmed the provisional assessment made by the Superintendent under his aforesaid letter dated 22-2-1973.

8. Against the said order of the 2nd Respondent the petitioners by their letter dated 2-6-1973 pointed out that the Deputy Chief Chemist had erred in respect of the opinion submitted by him and asked for an opportunity to represent their case and in the meantime requested him to stay the enforcement of the demand notice. Under their letter dated 15-6-1973 addressed to the 4th Respondent the petitioners filed an appeal against the said decision of the 2nd Respondent and by their application dated 15-6-1973 applied to the 3rd Respondent for interim stay pending the disposal of the appeal by the 4th Respondent. The 3rd Respondent gave hearing to the petitioners in respect of their stay application on 3-8-1973 whereat they pointed out by referring to the decision of the Supreme

Court reported in Collector of Customs and Excise, Cochin and Others Vs. A.S. Bava, that if the Department insisted on the petitioners paying the whole amount, right of appeal would be infructuous. However, in order to safeguard the interest of the department, the petitioners showed their willingness to execute a bond in respect of the disputed differential duty not only for the period mentioned in the order under appeal but also for subsequent periods and also showed their willingness to pay interest at the rate of 6% thereon from 31-5-1973. However, the Asstt. Collector (Tech.) by his letter dated 27-8-1973 intimated to the petitioners that the 3rd Respondent had rejected the said application.

9. By three demand notices dated 3/10 September, 1973 issued under rule 10 of the Central Excise Rules, the Respondents demanded a sum of Rs. 19,680.96 for a period from 1st September, 1973 to 28th February, 1973 (sic) a sum of Rs. 1,14,084.39 for a period of 1-8-1973 to 31-5-1973 (sic) and a further sum of Rs. 43,771.78 for a period of 1-6-1973 to 27-7-1973 being the differential duty. The petitioners by their Attorneys' letter dated 19th September, 1973 pointed out that the said three demand notices were issued without issuing any show cause notice to them and without offering them any opportunity of submitting their explanation or granting them a personal hearing to deal with the allegations made by the Department.

10. According to the petitioners, Excise Authorities at Madras had given the benefit of the exemption under the said notification to M/s. Kali Aerated Water Works and Messrs. Spencer and Co. Ltd. in respect of aerated waters manufactured by them in which also only synthetic essences were used as in the case of the petitioners and have taken the view that the said manufacturers were not using any blended flavouring concentrates but were only using essences.

11. To the petition the petitioners have annexed at Ex. "L" a certificate of one Dr. Dubash, Reader in Food Technology, Department of Chemical Technology, University of Bombay stating that synthetic essences which alone were used by the petitioners were different from concentrates both in their production and usage. In para 6 of the petition the petitioners have also referred to certificates from M/s. Shannon Chemical Works, M/s. Naarden (India) Limited and M/s. Pioma Industries (Ex. B collectively to the petition) the manufacturers and also a letter from the Dy. Director Fruit and Vegetable Preservation, Bombay, a Government of India, Department, to show that concentrates known to the trade were not essences.

12. The petitioners have therefore filed this petition challenging the various decisions including the said demand notices amongst others on the following grounds :-

(1) that in arriving at the decision the 2nd respondent had committed an error going to the root of the matter in holding that the essences used by the

- petitioners in the manufacture of aerated waters and deemed to be concentrates,
- (2) that the decision displayed total non-application of mind,
- (3) that the said decision of the 2nd Respondent was arrived at arbitrarily without any material whatsoever and therefore perverse,
- (4) that the order passed by the 2nd Respondent was passed without giving any opportunity to the petitioners to explain or represent their case before him,
- (5) In any event the said demand notices issued under Rule 10 of the Civil Excise Rules were invalid as they were issued without issuing show cause notices as provided under the rule.

13. One Krishnan, Asstt. Collector of Central Excises, Bombay Division VII has filed an affidavit on behalf of the Respondents. The main stand taken in the said affidavit is that the synthetic essences admittedly used by the petitioners in the manufacture of their aerated waters were the same things as blended flavouring concentrates referred to in the notification, that the terms "Essences" and "Concentrates" were synonymous terms and can be and are interchangeable and they were co-extensive in sense and usage. According to him the term "concentrate" would mean volatile flavouring components in the concentrated form which are generally treated as essences and that essences are obtained by concentrating the flavouring principles from materials by distillation solvent extraction etc. and that blended flavouring concentrates were distinct from juice concentrates. Juice concentrates were juices that had been concentrated by removal of water which, when re-diluted with water, resembled original juice composition, and that like juice concentrates, the term "blended flavouring concentrate" was applied to the product known as essences obtained by the concentration of volatile flavouring component of materials by the process of distillation, solvent extraction etc. According to him distinction sought to be made by the Petitioners between the concentrates and essences was unreal and could not stand the test of science and technology. According to him the petitioners have not cited any technical authority in support of their contention nor have they scientifically or otherwise established any distinction between essences and blended flavouring concentrates. As regards the certificate from the manufacturers relied upon by the petitioners, the respondents have denied that they establish the petitioners' contention.

14. He has admitted that the concerned Asstt. Collector has personally visited the factory of the petitioners for ascertaining whether the first Petitioners' products fell within the exemption. According to him during the said visit the petitioners were given full opportunity to submit their case and the facts were fully discussed between the petitioners representative and the said Asstt. Collector.

15. He has also contended that the said notices of demand issued under Rule 10 of the Excise Act were proper and valid, as according to him no show cause

notice was required to be given before the issue of the notices. He has further contended that the said notices can be correctly linked to rule 9(b) and therefore reference in the said notices to Rule 10 did not make the said notices bad.

16. As regards the petitioners' contention that the documents or information asked for by them was not furnished to them he has stated that the copy of the full test report from the Dy. Chief Chemist, Bombay, and not a bare extract was furnished to the petitioners. According to him, the petitioners were not entitled to have and the Respondents were not bound to furnish to the petitioner any work-sheet on the basis of which the Deputy Chief Chemist had arrived at the test report. He has further stated that the Petitioners were furnished with whatever material was available with respondent No. 2.

17. According to him, initially the burden of proving that the essences and blended flavouring concentrates were different was on the petitioners which the petitioners had not discharged. However, according to him the department had discharged the alleged burden of proof by testing the said aerated waters and finding thereby that the said aerated waters involved the use of blended flavouring concentrates. As regards the petitioners' demand for furnishing to them a copy of the Dy. Chief Chemist's report, his contention is that the Deputy Chief Chemist is not required to furnish the method adopted by him for the purpose and the question of furnishing such method to the petitioners would not arise. He has further stated that the 2nd Respondent at the time of his visit to the petitioners' factory on 15-5-1973 made on the spot study and ascertained the nature of process carried out and the ingredients used in the manufacture of the products under reference. It was also not disputed that the petitioners had used the said ingredients in the manufacture of their products. He has further pointed out that it was open to the petitioners to cross examine the Deputy Chief Chemist if they so desired.

18. To their affidavit in rejoinder, the petitioners have annexed several certificates and documents from experts, manufacturers and dealers to show that their products did not contain any blended flavouring concentrates, but only contained essences and that both in their commercial as well as scientific meaning both the things were distinct. They have further stated that the Asstt. Collector of Excise when he visited their factory had noted during the said visit that each and every bottle of essences bore the label of a recognised manufacturer of India of Synthetic essences and he had conceded the use of essences during a very brief discussion in the course of his inspection when he was present. They have however categorically stated that during the said visit of the Asstt. Collector there was no discussion of the case in detail and have denied that they were given full opportunity to submit their case or discuss the fact fully as alleged by the Respondents. According to them, in fact to visit of the Asstt. Collector was to precede by regular hearing which was asked for by the petitioners but the same was not given and the said order was passed without hearing the petitioners.

19. They have further pointed out that the petitioners were entitled to have and the respondents were bound to furnish the full test report of the Dy. Chief Chemist including the work sheets on the basis of which he had arrived at the said conclusion. According to them the said work-sheets were withheld and suppressed since if they were produced they would demonstrably prove that it was not possible to establish that the petitioners had used concentrates and had not used essences as alleged in the report.

20. The petitioners have in support of their contention filed two affidavits of experts one being of Dubash a Reader in Food Chemistry with the Department of Chemical Technology, University of Bombay holding qualification B.Sc. (Hons.), B.Sc. (Tech.) and Ph.D (Tech.) of the Bombay University and Dr. Shreenivasan, an expert Food Technologist and Research Scholar with academic qualifications B.A. (Hons.) and M.A. (First Class) in Chemistry, University of Madras, D.Sc. in Biochemistry, University of Madras, to show that "blended flavouring concentrates" were distinct from synthetic essences used by the petitioners. They have also annexed certificates and/or letters to that effect of 3 manufacturers of essences and 2 dealings in the goods and have also filed their affidavits in the course of hearing.

21. As against this the Respondents have along with their affidavit in sur-rejoining put in an affidavit of their Dy. Chief Chemist, one Saluja Chemical Analyser Grade I, Customs House, Bombay, possibly as an expert to show that the essences are the same as blended flavouring concentrates.

22. Monday, 11th October, 1976 :

23. On those pleadings the learned Counsel for the petitioners has firstly challenged the order of the Asstt. Collector of the Central Excise dated 31-5-1973 (Ex. F to the petition) on the following grounds viz.

(1) the same is passed without jurisdiction, (2) that there was no material at all on record for passing the said order and therefore the same is arbitrary and perverse and lastly (3) the same has been passed without complying the principles of natural justice.

To understand the said contentions firstly it is proper to set out item 1D in the Schedule I to the Central Excise Act (as it stood on 17-3-1972) under which excise duty is sought to be levied on the petitioners' goods. As on 17-3-1972 the said item 1D reads as follows :

-----				Item	No.
Description	of	Goods	Rate	of	Duty
-----				1D	Aerated water,
whether or not 20% advalorem	flavoured	or sweetened	and whether or not		
contained vegetable	or fruit	juice	or fruit	pulp	-

24. A notification issued on the same day (Ex. C to the petition) reads as

follows :-

"G.S.R. 108(E) - In exercise of the powers conferred by sub-rule (1) of rule 8 of the Central Excise Rules, 1944, the Central Government hereby exempts aerated waters falling under Item No. 1D of the First Schedule to the Central Excises and Salt Act, 1944, (1 of 1944), from so much of the duty of excise leviable thereon as was in excess of ten per cent advalorem :

Provided that the aforesaid exemption shall not apply to aerated waters in the manufacture of which blended flavouring concentrates in any form are used."

25. The effect of the said entry read with the said notification was as follows :

"Aerated waters in the manufacture of which blended flavouring concentrates in any form are used 20% advalorem Others 10% advalorem."

26. It cannot be disputed that the petitioners are the manufacturers of aerated waters of various types and that in the manufacture of such aerated waters they have been using synthetic essences. This position is not disputed either by the Asstt. Collector of Central Excise in his said impugned order or by the respondents in their affidavit filed in this court. The only question before the Asstt. Collector was to decide whether the synthetic essences used by the petitioners in the manufacture of their goods were "blended flavouring concentrates" so as to fall outside the exemption and attract excise duty at 20% advalorem. In the impugned order the Asstt. Collector, has after stating that the spot study of the process of manufacture of aerated waters in the petitioners' factory revealed that the petitioners' beverages were made with blend of various flavouring materials etc. has concluded that "since they are deemed to have been manufactured from blended flavouring concentrates" aerated waters were not covered by exemption. The Asstt. Collector's said conclusion viz. that essences used by the petitioners are deemed to "blended flavouring concentrates" can be only on the basis that although in fact, the "essences" are not "blended flavouring concentrates" by some fiction they shall be considered to be so. It appears that there was no material at all before the Asstt. Collector to come to that conclusion nor has anything been shown at the hearing to support that conclusion. Admittedly the only material before him was the report of the Chemical Analyser in the office of the Deputy Chief Chemist dated 7-10-1972 (part of Ex. F collectively) termed as an extract in the impugned order. The said report was to the effect that twelve samples taken from the different aerated waters from the petitioners' manufacture was found to contain "blended flavouring concentrates". Apart from the question whether the Asstt. Collector could have at all relied on the said report without first giving to the petitioners a sufficient opportunity to meet the same, the impugned order shows that he himself does not appear to have accepted the conclusions of the chemical analyser in the said report which are definite in nature and do not import any fiction as the Asstt. Collector has done in his order in holding that the "essences" are Deemed to be "blended flavouring concentrates". The said conclusion of the

Asstt. Collector which is the basis of his said impugned order therefore appears to have been based on no material at all. His order is therefore arbitrary and liable to be set aside on that grounds alone.

27. The other ground of attack against the said order is that the same was made without following the principle of natural justice inasmuch as before passing the said order no opportunity of being heard was given to the petitioners. In my view on the admitted facts, on this ground also the impugned order cannot stand scrutiny. It is not disputed that in reply to the demand notice dated 22-2-1973 issued by the Superintendent Central Excise, the petitioners had by their attorneys' letter dated 5-3-1973 in terms pointed out that they did not know on what basis it was alleged therein that the petitioners' aerated waters contained concentrates and that if the Department was relying on any test report or any other evidence the same should be disclosed to them so that the petitioners could have an opportunity to meet the same. The petitioners again by their attorneys' letter dated 21-10-1972 (part of Ex. E to the petitioners) to the Asstt. Collector of Customs pointed out that the test report of Dy. Chief Chemist on which the Superintendent had based his demand was not given to them and that the decision was given without hearing the petitioners and/or without giving an opportunity to the petitioners to deal with the same and requested the Asstt. Collector to direct the 1st Respondent to furnish to the petitioners a full copy of the Test Report of the Deputy Chief Chemist, Bombay, including the method or methods employed by him and the work sheets on the basis of which he had arrived at his opinion that the products in question contained blended flavouring concentrates. By a further letter dated 7-12-1972, the petitioners again called upon the Asstt. Collector of Central Excises to furnish to them the copy of the test report of the Deputy Chief Chemist, Bombay, including details of the method adopted by him to determine that their beverages contained blended flavouring concentrates and a copy of his work sheets for such determination. In reply the Superintendent by his letter dated 16th December, 1972. Extract of Dy. Chief Chemist Report forwarded to the petitioners only a copy of the report of Chemical Analyser showing the result of the samples taken by him viz. that each of the 12 samples of different aerated waters manufactured by the petitioners had been found to contain blended flavouring concentrates, and that the samples were used up. The petitioners by their letter dated 22-12-1972 had again called upon the Superintendent to furnish to them a full copy of the test report of the Dy. Chief Chemist including the details and the methods adopted by under to determine that the petitioner's beverage contained blended flavouring concentrates. The said request of the petitioners was in fact not complied with at any time. However, sometime on 15th May, 1973, admittedly, the Asstt. Collector of Customs, 2nd Respondent herein had visited the factory of the petitioners and inspected the process of manufacture and thereafter without doing anything further in the matter passed the said impugned order dated 31st May, 1973.

28. Even till this day Respondents have not been able to produce the work sheets of the chemical analyser who is alleged to have analysed the samples of the

aerated water manufactured by the petitioners nor are they able to point out the method adopted by him for that purpose. No explanation is also forthcoming for not being able to do so. As pointed above, the petitioners had before the order by their attorneys" letter dated 5-3-1973 while making a request for disclosing the same pointed out that the same should be disclosed so that they might have an opportunity of dealing with same. The stand taken by the Respondents in the affidavit is that the Petitioners were not entitled to have the said work-sheets and methods of analysis disclosed to them and that if the petitioners so wanted they could have cross-examined the said Dy. Chief Chemist. In my view the said stand of the Respondents is not justified. In order to properly meet the said report either by producing evidence of their own or otherwise the petitioners were entitled to have disclosed to them the method adopted by the chemical analyser making the report in analysing the samples and also the work sheets, particularly in the light of the letter dated 6-12-1975 from the Asstt. Director Drug Controller, Government of Maharashtra (p. 55 of the compilation) stating that it would not be possible for their laboratory to give opinion whether the petitioners" drinks were made of essences or out of concentrates and the certificate issued by the Dy. Director, Fruit and Vegetable Preservation Bombay Regional Office of Food and Nutrition Board, Government of India dated 2-8-1973 (at p. 31 of the compilation) and by the Asstt. Director Drug Control Laboratory, Government of Maharashtra dated 13-11-1975 (p. 57 of the compilation) to the effect that petitioners used in their products synthetic essences and not fruit, fruit juice or fruit concentrates. However, all that the Asstt. Collector appears to have done before passing the impugned order was to inspect the petitioners" factory to see the process whereat it was admitted that the petitioners were using synthetic essences and then without anything more to pass the impugned order. In my view, before passing the said order the petitioners were entitled to have the material on which the said report of the chemical analyser was made viz. method of analysis adopted and the work sheets disclosed to them so as to enable them to meet the same and also generally the petitioners were entitled to have an opportunity of being heard given to them before passing the said order. That not having been done the impugned order appears to have been made without complying with the principles of natural justice. On that ground as well the said order cannot be sustained.

29. In this case it was never disputed that the petitioners have been using amongst other things only synthetic flavouring essences in the manufacture of various types of aerated waters. Therefore, the only question before the Asstt. Collector was of interpretation viz. whether aerated waters in the manufacture of which "synthetic essences" are used can or cannot be considered to be aerated waters in which "blended flavouring concentrates in any of form" were used, so as to find out whether they were or were not covered by the exemption. In other words the question was whether on the proper interpretation of the term "essences" as against "concentrates" "essences" were in fact the same or synonymous with "concentrates" or otherwise.

30. Reading the impugned order it is clear that even according to the Asstt. Collector in fact the essences and concentrates were not the same for according to him they are deemed to be the same. The Court therefore will have to find out on the material produced before it whether "the essence" can be interpreted to mean or were in fact same as "blended flavouring concentrates".

31. The learned Counsel for the Respondents has urged that for that purpose the court should send the matter back to the Asstt. Collector for the determination of the question by him on the fresh material that both sides may produce before him. I do not think it proper after a lapse of over four year to send the matter back again to the Asstt. Collector. All the material in that connection which both the parties could produce before the Asstt. Collector has been produced before me. Admittedly, according to the learned Counsel for the Respondents, the work sheets and methods applied by the Chemical Analyser for arriving at his conclusion in his report, which the petitioners were entitled to get, are not available this day. The petitioners had offered to keep ready for being cross examined by the Respondents if they so desired, the exports, the manufacturers and the dealers whose affidavits they have filed to support their contention that essences are considered to be distinct from concentrates both in trade and science. However, the learned Counsel for the Respondents has not availed himself of the said opportunity. He has also stated that it is not possible to make the chemical analyser who made the report also available for cross examination by the petitioners. He has also pointed out that it is not possible for the Department to procure any affidavit from the trader to counter the affidavits in that regard produced by the petitioners. Under the circumstances, it being only the question of interpreting terms in a taxing statute I see no reason why the matter should again be sent back to the Asstt. Collector.

32. In support of his said contention the learned Counsel for the Respondents relied upon a decision of the Supreme Court in the case Union of India (UOI) and Others Vs. The Tata Iron and Steel Co. Ltd., . From the decision it is clear that because of the particular circumstances in that case the Supreme Court had thought it necessary to send the matter back for determination to the custom authorities. On the other hand various decisions of the Supreme Court on the question cited across the bar would show that the Supreme Court had itself decided the question involving the interpretation of expressions in a taxing statute on affidavits filed before it at the hearing.

33. In this case the petitioners, in support of their contention viz. that essences used by them in the manufacture of aerated waters, were distinct from and were not "blended flavouring concentrates" referred to in the notification, have relied upon (1) the trade meaning, (2) dictionary meaning as well as (3) scientific or technological meaning of the said terms. So far as the trade meaning is concerned they have filed letters as well as affidavits of 3 manufactures viz. (1) M/s. Pioma Industries (ii) M/s. Naarden (India) Ltd. and (iii) M/s. Shannon Chemical Works and 2 dealers viz. (i) Roshanlal and Sons and (ii) T. Allimahomed

& Co. For technical meaning they have relied on the affidavits of two experts viz. (i) Dr. Dubash and (ii) Dr. Shreenivasan.

34. To counteract the said affidavits and in support of their contention that the "essences" are the same as "concentrates" the Respondents have only relied on the affidavit of Saluja Chemical Examiner Grade I Customs House as an expert.

35. It is now well settled by the decisions of the Supreme Court and this court that items or entries in taxing statutes inclusive of terms or expressions used therein which are not expressly defined, are to be construed in a sense which persons dealing with or commercially conversant with the same would attribute to it, in preference to its scientific, technical or laboratory sense or to the dictionary meaning [see (1) Union of India and Anr. v. Delhi Cloth and General Mills Co. Ltd. and Ors. AIR 1963 S.C. 701, (2) Commissioner of Sales Tax, Madhya Pradesh Vs. Jaswant Singh Charan Singh, South Bihar Sugar Mills Ltd., etc. Vs. Union of India (UOI) and Others, Minerals and Metals Trading Corporation of India, Ltd. Vs. Union of India (UOI) and Others, Madras Rubber Factory Ltd. Vs. The Union of India (UOI) and Others, Healthways Dairy Products Company Vs. The Union of India (UOI) and Others, and (7) an unreported decision of this court (Tulzapurkar, J.) in Misc. No. 491 of 1964 - Nirlon Synthetic Fibres & Chemicals Limited v. Shri R. K. Audim, Assistant Collector and Others].

36. Without disputing the said principle adopted by the Supreme Court for interpretation of the items or terms in the Taxing statute, the learned Counsel for the Respondents has raised two objections to the application of the said principle in the facts of this case.

37. Firstly according to him, in this case although the Excises Act itself does not define the terms "concentrates" and/or "essences" and there is nothing in the said Act to ascertain their meaning could be ascertained in reference to another statute viz. Tariff Act which is in pari materia with the Excise Act. According to him, from the provisions of the said Tariff Act it was clear that the intention of the legislature in using the terms "concentrates" in the excise act was that it should mean the same thing as "essences".

38. In support of his said contention, that expression in one statute could be interpreted in reference to the similar expression in another pari materia statute the learned Counsel for the Respondents has relied upon certain observations in the minority judgment in the Supreme Court decision in the case of J.K. Steel Ltd. Vs. Union of India (UOI), . In that case, the question was as regards the interpretation of item 26AA in Schedule 1 to the Central Excises and Salt Act which related to iron and steel products in different forms. The said entry was sought to be interpreted on reference to a similar entry 63(36) in the First Schedule to the Tariff Act. While dealing with the said contention Hegde, J. in his differing judgment at p. 1183 of the report observed as follows :

"For the purpose of interpreting the clause in question, reference may also be made to entry 63(36) in the First Schedule to Tariff Act. It may be remembered

that entry as well as entry 26AA in the First Schedule of the Act were enacted simultaneously under Finance (No. 2) Act, 1962. Both these entries came into force on the same day namely on 24th April, 1962. The Act and the Tariff Act are cognate legislations. In other words they are legislations which are *pari materia*. They form one code. They must be taken together as forming one system and as interpreting and enforcing each other. It is proper to assume from the surrounding circumstances, that these two entries were introduced in pursuance of a common purpose, that purpose being that the articles listed in entry 26AA whether produced out of indigenous pig iron or steel is not or made out of imported pig iron or steel is not must bear the same amount of duty".

39. However, it may be pointed out the majority judgment in that case did not accept the contention that an entry in the Excise Act could be interpreted with reference to a similar entry in Tariff Act which was in *pari materia* with the Excise Act. At p. 1177 of the report Sirki, J. who delivered the majority judgment observed :-

"I am not able to appreciate how the insertion of item No. 63(36) in the First Schedule of the Tariff Act or the subsequent amendment of the Indian Tariff Act, 1934, by Indian Tariff (Amendment Act) 1963 throw any light on the interpretation of item 26AA(i)".

40. But even otherwise the said above quoted observations of Hegde, J. appear to have been based on two important factors which existed in that case viz. (1) that both the said entries were inserted in the said statutes on one and the same day and (2) the surrounding circumstances showed that they were so incorporated for a common purpose. Both the said things are lacking in this case. The said contention of the learned Counsel for the Respondents viz. the term "blended flavouring concentrates" appearing in the said notification issued under the Excise Act can be interpreted inference to the cognate statute of Tariff Act, cannot at the outset be accepted.

41. But even assuming that such a method of interpretation were permissible the further argument of the learned Counsel for the Respondents in that connection is as follows :-

According to him item 21(7) in Section IV to the 1st Schedule of the said Tariff Act provides

21(7) "Blended flavouring concentrates" for the preparation of non-alcoholic beverages 100% advalorem.

42. Admittedly the said Tariff Act which is said to be *pari materia* with the Excise Act itself does not define essences or concentrates. However to support his said contention the learned Counsel for the Respondents has further sought to refer to entry 79(2) to Part IV to Schedule I to the said Import Trade Control Hand Book of Rules and procedure. The said item 79(2) provides :

----- Sr. Name of

article Item of the First Schedule No. to Indian Tariff Act, 1934
----- 79 Provisions
and oilman's stores and 21(1), 21(7), 21(8), groceries, all sorts, not otherwise
21(9) & 21(10) specified. (i) Semolina

(ii) Self raising flour

(iii) Saffron

(iv) Essences not containing spirit

(v) Chicory

(vi) Yeast

(vii) Others -----

43. The argument is that item (iv) in the said entry viz. essences not containing spirits, can have and has only reference to the above quoted item 21(7) in the Tariff Act being one of the entries referred in the third column to said entry 79(2) of the Import Trade Control Hand book. This according to the learned Counsel showed that the legislature while using the expression "blended flavouring concentrates" in the notification under the Excise Act intended that "essences" would be also included therein.

44. The said argument if not anything else is tortuous. Admittedly the said Import Control Order hand book is not a statute in pari materia with the Excise Act and therefore even on the arguments of the learned Counsel for the Respondents his efforts to interpret the said two expressions in Excise Act or notification issued thereunder with reference to a statute which is not pari materia cannot be sustained. But even otherwise what the learned Counsel for the Respondents is seeking to do is that by process of elimination he is trying to connect "essences" in the said entry 79(2) to the said entry 21(7) in the Tariff Act being one of such item as shown in the last column to the said entry 79(2) by taking each item in the said entry 79(2) against the entries of the schedule to the Tariff Act as are mentioned in the last column to the said entry 79(2). However, the said process of elimination is as well faulty as there are certain items in the said entry 79(2) such as Chicory or Yeast which cannot be connected with any of the entries from the Tariff Act as are mentioned in the 3rd column of the said entry 79(2) so also conversely some of the entries of the Tariff Act from those mentioned in the said entry 79(2) cannot be connected with some of the items mentioned in the said entry 79(2). The said contention of the learned Counsel for the Respondents cannot be accepted.

45. The next objection of the learned Counsel for the Respondents to the application of the said principle laid down in the decided cases viz. to interpret the entries in a taxing statute in accordance with that commercial meaning in this case, is that in applying the said principle in all the said decisions the Supreme Court as well as this court was concerned in finding out whether

particular goods on which excise duty was sought to be levied, as falling within a specific entry, could be said to be covered by that entry if interpreted in reference to its commercial meaning while according to him in this case that is sought to be enquired into is whether the petitioners' goods were or were not covered by the exemption notification by finding whether one of its ingredients was or was not "blended flavouring concentrates". In my view, the said objection of the learned Counsel for the Respondents cannot be sustained. In this case also if the entry 1-D in the Schedule is read with the notification then the entry splits itself into two items viz.

(1) aerated waters in the manufacture of which 20% advalorem "blended flavouring concentrates" are used (2) others. 10% advalorem

46. When admittedly in the aerated waters manufactured by the petitioners only synthetic essences are used they are sought to be deprived of the exemption under the notification and made liable for higher excise duty at 20% advalorem on the footing that they were using in their manufacture "blended flavouring concentrates". Under the circumstances the question would arise as the interpretation of or the meaning to be given to the expression "Blended flavouring concentrates" so as to find out whether that would include essences used by the petitioners. This in my view could be done by the court, when the Excise Act itself does not define the term "blended flavouring concentrates", by applying the principles laid down by the Supreme Court i.e. by finding out the meaning of the said term as used in the commercial world and thereby determining whether the said term "concentrates" can be considered to be the same as essences used by the petitioners.

47. Having dealt with the said two objections of the learned Counsel for the Respondents, it would be proper to find out whether there was any material on record to find out whether according to the commercial or trade meaning the terms "blended flavouring concentrates" in any form would mean the same thing or include therein essences or otherwise.

48. In that regard as pointed out above the petitioners have put in the affidavits and letters from three manufacturers viz. (i) M/s. Pioma Industries Ltd. (p. 9 of the compilation), (ii) M/s. Naarden (India) Ltd. (p. 10 of the compilation) and (iii) M/s. Shannon Chemical Works (p. 13 of the compilation) and also affidavits and letters from two of the leading dealers in goods viz. (i) M/s. Roshanlal and Sons (p. 56 of the compilation) and (ii) M/s. T. Allimahomed and Co. (p. 57 of the compilation).

49. As against this, in that connection, the Respondents have produced no material in support of their contention that essence are the same as concentrates although initially the burden was on them to do so. Nor have the Respondents availed themselves of the opportunity of cross examining the said Manufacturers and dealers, who were offered for cross examination by the petitioners. In that view of the matter, the said affidavits having gone uncontroverted the court will

have to accept their contents as correct.

50. Dealing firstly with the letters of the manufacturers (which are the same as their affidavit M/s. Pioma Industries in their letter dated 24th December, 1972 (page D of the compilation) have pointed out that essences manufactured by them were synthetic in nature and were manufactured from various Aromatic Chemicals etc. and that they were different from what was known in Aerated water Industries as "concentrates" which were of natural origin derived from fruits, nuts and seeds. They have further stated that they did not manufacture such type of concentrates.

51. The letter from M/s. Naarden (India) Ltd. dated 29th December, 1972 (p. 10 of the compilation) states that the various Flavours brought by the petitioners from them are "synthetic Flavours" blended from essential oils, aromatic chemicals, solvents, etc. and that they were not concentrates as concentrates are normally extracts from fruit juices, pulps, nuts, etc.

52. The letter from Shannon Chemicals Works dated 13-1-1973 (p. 13 of the compilation) points out that food flavourings supplied by them to the petitioners were chemical compounds manufactured mainly from aromatic chemicals and essential oils, and properly known as food flavouring essences and that they were totally different from products known as concentrates. They have further stated that their firm did not manufacture concentrates but only food flavouring essences.

53. The learned Counsel for the respondents has contended that the said letters ex facie would not be of help to the petitioners as admittedly they are from manufacturers only of essences and not of concentrates or concentrates and essences. According to him therefore the said manufacturers would not be competent to certify that concentrates are not the same as essences and/or are distinct from essences. In my view the said comment of the learned Counsel for the Respondents on the said letters is not justified and cannot be accepted. The said manufacturers are well known manufacturers of one of the ingredients viz. essences used in the manufacture of aerated waters and would be quite competent to tell whether the concentrates also used in aerated waters would be the same as synthetic essences manufactured by them or otherwise. Their affidavit, therefore cannot be brushed aside simply on the ground that they are the manufacturers only of essences and not of concentrates.

54. Affidavits of dealers put in by the petitions are those of M/s. Roshanlal and M/s. T. Allimahomed. The letter from M/s. Roshanlal and Co. (p. 56 of the compilation) shows that they are dealers in flavouring essence and food colours since 1962 with an annual turn over of about Rs. 11 lacs. According to them in their trade there was a distinct known difference between essences and concentrates and they supply essences and not concentrates.

55. The letter by another dealer viz. T. Allimahomed and Co. dated 26-8-1976 (p. 57 of the compilation) shows that they have been dealing in all requirements of

aerated waters since 1925 and that they had the annual turn over of 40 lacs. They have certified that in their trade flavouring essences and blended flavouring concentrates were understood and known as two different and distinct item, that in fact, there was no trading in the open market of any form of concentrates and that the flavouring essences which were manufactured and sold in the open market were all essences and not concentrates. They have also pointed out that in the market no buyer of concentrates even if they were available would accept a flavouring essence nor would a buyer of flavour essence accept a concentrate even if they were available.

56. As regards these letters from the dealers also the learned Counsel for the Respondents has contended that since even according to them concentrates were not dealt with in the open market, they were not dealers in concentrates and therefore they were not competent to say that in trade the concentrates were known as distinct from the essences. In my view the said contention of the learned Counsel for the Respondents cannot be sustained. The statements in the letter of M/s. T. Allimahomed that concentrates are not sold in the open market does not mean that they are not sold at all the market. The said leading dealers, particularly the said M/s. T. Allimahomed and Co. who are more specific in their statements, who have been dealing in requisites of aerated waters, for past many years, would be quite competent to speak about concentrates and essences, both of which can form part of or can be used in the manufacture of aerated waters.

57. The said affidavits both of manufactures and dealers in my view clearly establish that according to the trade or commercial meanings concentrates are distinct from synthetic essences used by the petitioners and that concentrates cannot include in their trade meaning synthetic essences.

58. Ordinarily as laid down by the Supreme Court, in case of interpretation of items or expression in taxing statutes, its commercial or trade meaning it to be accepted in preference to the scientific or technological meaning or even to the dictionary meaning.

59. However, even on the basis of the contention of the learned Counsel for the Respondents that the principle of accepting commercial meaning does not apply in this case or even otherwise to lend assurance to the court that trade commercial meaning attributed to the terms "concentrates" as being distinct from "essences", was correct the learned Counsel for the petitioner has also relied on two affidavits of experts in food technology viz. Dr. Dubash and Dr. Shreenivasan who have supported their opinion from standard works on the subjects which were also cited before me as well as on the dictionary meaning of the said term. As I will presently point out in this case the said scientific or technological meaning so also the dictionary meaning of the said terms as well synchronises with trade meaning mentioned above.

60. Firstly dealing with the dictionary meaning the meaning of the term

"concentrates" to be found in the Webster's New International Dictionary at p. 469 is inter alia "a food reduced in bulk by elimination or water fluid". The meaning of the expression "essences" as found at p. 777 is inter alia :

"8A(1) : A substance considered to possess in high degree the predominant qualities or virtue of a plant, drug or other natural product from which it is extracted - used as a flavouring".

61. As the dictionary meaning shows essences are also equated with essential oil. The said Dictionary meaning therefore shows that the concentrates and essences are distinct and different in their nature.

62. Coming to the scientific or technological meaning of the said expressions firstly I may refer to affidavits of two experts food technologists filed by the petitioners to support their contention that concentrates are distinct from essences. One of such affidavit is that of one Dr. Shreenivasan - Exhibit A to the said affidavit gives a dazzling long list of his academic qualifications, distinctions, previous services, awards and distinctions, his services as Principal Speaker and Participant in various fields. His qualification viz. B.A. (Hons.) and M.A. (first Class) in Chemistry, University of Madras, D.Sc. in Biochemistry, University of Madras and his achievements are more than sufficient to qualify him to be an expert in the field of food technology. In his affidavit he has supported his opinion that "concentrates" are distinct in every respect from "essences" by referring to various recognised standard books. In paragraph 8 of his affidavit he has, after pointing out various distinctions between processes of obtaining essences and concentrates and their nature, pointed out -

"that the said distinction should be clear when it is realised, for example, that orange oil is in the active odoriferous constituent of the orange fruit, quite distinct from orange juice concentrate. The latter, on dilution, gives rise to the juice while the former does not. A concentrate, therefore, contains the extractives, including the active flavour component, whereas the flavouring principles contain only distinct entities with the characteristic flavour built into the molecule. Vanilla extract is a concentrate while vanillin an appropriate solvent is a synthetic flavour or essence."

63. He has further pointed out in paragraph 10 of this said affidavit that -

"An essence, when used with other adjuncts such as citric acid, preservative, sugar etc. does not become a concentrate, since the latter expression clearly and unambiguously connotes that it can be restored to the original by a process of mere dilution with or without adjuncts like sugar."

Ultimately he has concluded that "the word "concentrates" is a common usage in food technology and has a specific meaning."

64. To the similar effect is an affidavit of the other expert one Dr. Dubash. He is a Reader in Food Chemistry with the Department of Chemical Technology, University of Bombay and is actively associated with teaching and research since

1960. His academic qualifications are : B.Sc. (Hons.), B.Sc. (Tech.) and Ph.D (Tech.) of the University of Bombay. His qualification to make an affidavit as an expert therefore cannot be disputed. He has given his opinion by reference to various standard books, a list of which he has annexed to his affidavit. Firstly in para 4 of his affidavit he has categorically stated that -

"essences and concentrates are two entirely distinct entities and cannot be equated as being synonymous."

65. In para 6 of the affidavit, he has also pointed out inter alia, that Flavour Essence was defined by Jacob as a solution of flavouring materials in appropriate solvent. According to him, to the manufacturers "concentrates" mean, a flavour base wherein all or part of the flavour base comes from actual concentration of natural fruit or juices. The counter act the said two affidavits of their experts filed by the petitioners, the Respondents have filed an affidavit of one Saluja Chemical Examiner Grade I Customs House Bombay as an expert. According to the said affidavit his academic qualifications are M.Sc. (Tech.) His experience was : Working as Chemical Examiner, Grade I of the Bombay Customs since 25th May, 1972 and has an experience of 25 years as a chemist. His said affidavit shows that he has nothing to do with the knowledge of food technology. His affidavit is completely silent on the question whether as a chemist or chemicals analyser he had anything to do with food technology so as to qualify himself as an expert in the line, to speak about the nature and distinction, if any, between the two substances "concentrates" and "essences". His affidavit therefore cannot be accepted as that of an expert so as to read the same against the said affidavits of their experts put in by the petitioners. However, even reading the said affidavit at its face value, firstly one finds that although according to the said Chemical Examiner admittedly the term "blended flavouring concentrates" was not found by him in any technical book on the subject, while dealing with the term "concentrates" he has to support his opinion, completely misquoted a passage from the Standard Book : Flavour Technology by Nicholas Pintaure 1971 Ed 58. However his said affidavit does no where authoritatively contribute any thing to support the Respondents' view that concentrates are synonymous with essences. His reliance for that purpose in para 6 of the his said affidavit on the formula of "Imitation Vanilla Concentrates" at p. 28 of Chemical Formulary Vol. I by H. Bennet also cannot take the matter any further.

66. The opinion expressed by the petitioner's two experts in their said two affidavit also finds support in the Standard Texts referred to by the learned Counsel for the petitioners.

67. Firstly, I may refer to a passage from a standard book by Nicholas Pintaure on Flavour Technology 1971 Ed. In the chapter titled "Fruit Essences and Imitation Flavours" at pp. 58-59 the following passages being out clearly what volatile flavouring components or essences are.

"Volatile flavouring components, or essences, are conventionally made by

distillation procedures. For example, fruit is reduced to a liquid state such as a juice, and this juice is treated with steam to vaporize or strip off the flavouring components. The resulting vapour is condensed and then rectified in an efficient distillation column. The resulting essence does not contain solely the flavouring components but is largely water and alcohol with but a very minor proportion of the actual flavouring matter."

68. It further points out :

"In this connection it must be realized that the flavouring components are not individual compounds but the flavour of each commodity is a complex mixture of many different compounds such as esters, ethers, aldehydes, ketones, etc. in a wide range of molecular weights. Purification by distillation can never be completely effective because many of the individual flavour components have boiling points close to that of alcohol and water, or from zoetrope's with water or alcohol."

69. After dealing with another convenient method of isolating essences or volatile flavouring components by adding solvents, the author goes to point out at p. 59 :

"After evaporating the solvent from the extract phase, the flavouring principles are obtained as a residue in a highly concentrated form essentially free from water and alcohol and possessing the true natural aroma of the produce from which they were extracted. The products may be employed for flavouring products of all kinds, for example, concentrated fruit juices, dehydrated fruit juices, etc."

70. Then the following passage at p. 64 of the said book clearly brings out the distinction between "concentrates" and "essences" :

"The essence obtained from the juice of citrus fruits, crushed berries and grapes, purees of deciduous fruits (such as apricots, apples, pears, peaches etc.) can be used to impart a natural, fresh and characteristic flavour and aroma to food products and confections, ice cream, etc. or reincorporated into the concentrated source material. Orange essence obtained by this process can be added to concentrated orange juice and convert the usual flat, cooked paste of reconstituted beverages made from such concentrates into beverages which cannot be distinguished from natural fresh juice."

71. In reference to the said passages the learned Counsel for respondents pointed out the essences are not always artificial or synthetic and they also can be derived from the natural base either fruit or vegetables. According to him the experts' affidavits show that according to them the essences are only synthetic but not obtained from natural base. No doubt it is true that the said affidavit of experts only deal with artificial and synthetic essences as used by the petitioners in their manufacture and not with the essences obtained by natural base. However, I do not think that the said affidavits could be read to say that according to the said experts essences cannot be derived from a natural base

such as fruit material. As various authorities produced before me show that although it was possible to obtain essences from a natural base such as fruits or vegetables, the same involved considerable expenses than in obtaining synthetic or imitation essences from an artificial base. However, this defect, if at all, which the learned Counsel for the respondents has sought to find out in the said affidavits of experts has really no relevance to the question whether the "essences" and "concentrates" are same or distinct.

72. In that connection one may further refer to a passage in another Standard Book by G. Frank Phillips titled Beverages : Carbonated and Noncarbonated, 1974 Ed. In the chapter on "Beverage Acids, Flavours, Colours and Emulsifiers" under the caption "Commercial Forms of flavour" the following passage appears at 132.

"For a flavour to be acceptable for use in commercial products, it must be water-soluble or dispersible. The processes by which this form is attained result in many different finished Flavours. Examples are extracts, emulsions, concentrates, powders, and combinations of each."

73. Then at p. 134 of the book, under the caption - "Concentrates" the author observes :

"To the flavour manufacture, "concentrate" means a flavour base wherein all, or part, of the flavour comes from actual concentration of natural fruit or juices. For most flavour purposes, there is a limit to degree of concentration that can be reached. This necessitates adding further flavour to achieve an acceptable product."

74. A little further he observes :

"Natural or true fruit flavour concentrates usually are somewhat weak in flavour strength or character. To overcome this problem, there are added other stronger natural Flavours that are compatible with the concentrates."

75. Then at page 170/171 the author has given various REPRESENTATIVE FORMULAS OF SYRUP AND SODA FLAVOURINGS. They are amongst other : Cola Flavour Emulsion, Cola Syrup, Cola Flavour Concentrate, Cola Nut Essence (Tincture) Cola Flavour Base, Cola Flavour, Cola Nut Extract etc. A look at the formula for "Cola Flavour Concentrate" as against the formula for "Cola Nut Essence" would show that concentrates and essences are formed of distinct ingredients and cannot be equated with each other.

76. A reference also to a passage at p. 197 in the Standard Book "Synthetic Food Adjuncts" by Jacob also clearly brings about the said distinction between "concentrates" and "essences".

77. In the connection at this stage a reference also may be made to certain passages from the book of Encyclopedia of Chemical Technology by Kirk Othmer, Second Edition Volume 9, p. 352.6 dealing with Flavour Materials, which is relied

upon by the learned Counsel for the Respondents. (A typed extract of the said passage was handed over to the court). The first part deals with essential oils and in the later part reference is made to the artificial essences.

78. Then under the caption and Fruit juices the following observation appear :

"Another group of natural flavourings is that of fruit, such as apple, apricot, blackberry, cherry, grape, loganberry, peach, pineapple, raspberry, and strawberry. The whole fruit, crushed fruit, and puree may be used directly in foods, ice cream, cakes, and confections, but it is more commonly employed as juice or its concentrates. By careful concentration under vacuum and avoidance of excess heat, water may be removed from the juice without too great a loss of flavour. However to avoid this loss the raw juice may be flash-distilled and the distillate then concentrated usually to 100-fold or greater and added back to the juice concentrate to reinforce the natural fruit character. Such volatile fruit concentrates are stable for a considerable time, especially under refrigeration, but when returned to a fruit concentrate are unstable."

79. The extract at the end points out that in the commerce several classifications of flavourings and compounded flavourings are listed according to composition such as (1) "True Fruit" composed of fruit juices and their concentrates, (2) "Fruit Flavours with other Natural Flavours" in which fruit concentrates or extracts are fortified with natural essential oils or extractions of other naturally occurring plants, (3) "Fruit Flavours Imitation" in which fruit concentrates are fortified with synthetic materials, (4) natural essential oils, their concentrates (Terrene less or partially terpenoid oils), and compounded oils and (5) "Imitation Flavours", made with synthetic materials alone or in combination with essential oils. This classification also particularly Items 3, 4 and 5 cannot support the contention of the Respondents but on the other hand brings out the distinction between "concentrates" and "essences."

80. The learned Counsel for the respondents also referred me to the following A passage at p. 4 from a book called "Food flavourings" Composition, Manufacture, and use by Joseph Merory 5th Ed.

"Evaporation of water from expressed fruit juices and flavouring extracts by vacuum distillation yields concentrated soluble solids and extractive matter with little flavouring. The aromatic substances are stripped from the juice or flavouring extract during the vacuum distillation. They separate in form of vapour, part of which is recovered by condensation while the more volatile part is lost. Thus, the condensed material after vacuum distillation retains only a part of the original flavour. Coupled with the concentrated extractive matter, a flavour concentrate is obtained which is similar in character but weaker in volatile components to the flavour of the fruit from which it is made."

81. This passage however does not show that essences and concentrates are the same. (As I have pointed out above reliance by the respondents on the formula of "Vanilla concentrates" to be found at p. 28 in the book chemical formulary by

H. Bennet Volume I, also cannot take the matter any further.

82. In my view all the said passages from the Standard Books clearly support the opinion expressed by the petitioners' experts in their affidavits that in all their aspects "concentrates" are distinct from "Essences" used as flavouring substances by the petitioners in the manufacture of aerated waters. As discussed above in this case not only by their trade or commercial meaning "concentrates" and "essences" are distinct and no synonymous with each other but the said distinction in the meaning is also to be found both in its technological sense and in their dictionary meaning. Since it is admitted in this case that the petitioners are using only synthetic essences in the manufacture of beverages or aerated waters and since in my view the essences cannot be included in the term "blended flavouring concentrates" the said aerated waters manufactured by the petitioners would fall within the exemption provided by the notification and would be liable for excise duty only at 10% advalorem.

83. That brings me to the other contention of the petitioners that the notices of demand one dated 22-2-1973 (at p. 14 of the compilation) and three others dated 31-5-1973 (pp. 37-30 (sic) of compilation) issued under Rule 10 of the Rules made under the Excise Act, for the payment of differential duty were invalid as they were issued without giving a show cause notice to the petitioners as expressly required under the said Rules.

84. Firstly since I am holding that the impugned order of the Asstt. Collector was bad and invalid and liable to be set aside the said notice of demand issued in pursuance of the said impugned order will have as well to be set aside.

85. But even otherwise I have held in Misc. Petition No. 723 of 1974 Pralhad Mills Ltd. v. Union of India that demand notice issued under the said Rule 10 without first issuing a show cause notice as specifically provided under the said rule were invalid and liable to be set aside.

86. In that regard by reason of my aforesaid decision the learned Counsel for the respondents has not raised any contention as regards the three notices of demand all issued on the same day i.e. 31-5-1973. However as regards the 1st notice of demand dated 22-2-1973 he has contended that although the said notice was termed as a notice of demand it should really be treated as a show cause notice against which the petitioners had made a representation and were heard and the Asstt. Collector had thereafter by his impugned order confirmed the said demand. In my view the said contention of the learned Counsel cannot be accepted. The said rule read with Rule 173-J seeks to confer a power and jurisdiction on the authorities to reopen the assessment in respect of the dues short levied by serving on such person within 1 year from the date on which the duty or charge was paid by issuing the show cause notice excess amount. Being a fiscal statute the said rule giving jurisdictional powers has got to be strictly construed. Therefore demand sought to be made by a demand notice without the issue of a show cause notice in strict compliance with the said Rule 10 will be

valid. The said notices of demand are in any event invalid and are liable to be set aside.

87. The result therefore is that the petition succeeds. Rule is made absolute in terms of prayers (a) and (b) excluding the letter dated 27-8-1973 of the Collector as mentioned therein. Respondents to pay petitioners costs.

88. Any bank guarantee given by the petitioners for the grant of interim reliefs will stand discharged. However, the order as regards the refund contained in prayer (b) to the petition as well as the order as regards discharge of the bank guarantees not to be operative for a period 8 weeks from today.