
(2003) 05 KAR CK 0010

In the Karnataka High Court

Case No : Writ Appeal No's. 6077-6078, 6079 and 6080 of 1999

Engge Industrial Services (P) Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 26-05-2003

Acts Referred:

Customs Tariff Act, 1975 — Section 2, 3

Citation : (2002) ECR 531 : (2004) 164 ELT 242 : (2003) 3 KCCR 192 SN

Hon'ble Judges : S.R. Nayak, J;K. Ramanna, J

Bench : Division Bench

Advocate : S.S. Naganand, for Sundaraswamy Ramdasand Anand, for the Appellant; M.V. Chandrashekar Reddy, CGSC, for the Respondent

Final Decision : Allowed

Judgement

1. In these writ appeals, the question that arises for our decision is, whether the appellants are liable to pay additional duty in respect of a vessel brought in by them for breaking up in terms of the provisions of the Custom Tariff Act, 1975, for short "the Act". A learned Single Judge of this Court, by the judgment under appeals, has held that the appellants are liable to pay additional duty in respect of the vessels concerned.

2. The above question arises in the following factual background :

The first appellant is a company carrying the business of ship-breaking at Mumbai and Mangalore Ports. The second appellant is a citizen of India and a share holder and Director of the first appellant-company. The ship-breaking industry in India is labour intensive and contributes a substantial amount of iron and steel scrap for the Iron and Steel Industry. It is stated that the ship-breaking industry in India is carried on without the aid of power (electricity) and is largely a manual operation involving semi-skilled and unskilled labourers. It is further stated that the ship-breaking industry is instrumental in supplying a substantial part of the raw material required by mini-steel plants which have set up

induction furnaces. Some of the bigger steel plants also utilise the scrap generated by the ship-breaking industry. The steel produced by the ship-breaking industry is utilised for re-rolling by mini-steel plants. It is claimed that on account of the ship-breaking industry, there is a substantial saving of electricity utilisation.

3. The Union Finance Minister in his Budget Speech for the financial year 1993-1994, delivered on 27-2-1993, stated thus :

"91. The ship-breaking industry is employment intensive and an important source of raw materials for the secondary sector of our steel industry. In order to encourage the growth of this industry, I propose to prescribe a lower merged duty of customs at 5% ad valorem. The ferrous materials obtained from breaking up of such ships, etc., which are presently subject to excise duty are being fully exempted."

According to the appellants, having regard to the foregoing speech of the Union Finance Minister, they negotiated for the purchase of a ship by name M.V. YAGUAR built in 1967 in Sweden and registered under the FLAG of St. Vincent and Grenadines, Kings Town. A Memorandum of Agreement was entered into by the appellant with the owners of the said vessel M.V. YAGUAR, viz. DELTA ONE INTERNATIONAL, P.O. Bag 50188, Dubai, United Arab Emirates, on behalf of M/s. Magnanda Shipping Corporation of Monrovia, Liberia, for the purchase of the vessel at a price of US \$ 1,164,150-00. Pursuant to the Memorandum of Agreement, the vessel was conveyed to the appellant under a Bill of Sale and the vessel arrived from St. Vincent at Mangalore on 26-7-1993. The appellant took delivery of the vessel at Mangalore Port under a Delivery Protocol dated 29-7-1993.

4. On 3-8-1993, the appellant presented a Bill of Entry to the Customs Appraiser, Office of the Assistant Collector of Customs, New Mangalore Port, the fourth respondent herein, bearing BE No. 07 dated 3-8-1993 relating to the import of the said vessel claiming classification of the vessel under Chapter 89.08.00 of the Act read with Notification No. 74/93, dated 28-2-1993. The basic duty has been indicated in the Bill of Entry as 5% ad valorem amounting to Rs. 22,62,073.00. The additional duty has been indicated as nil under Notification No. 167/86-C.E., dated 1-3-1986 read with Notification No. 44/93-C.E., dated 28-2-1993. The fourth respondent did not agree with the appellant's claim of nil rate of duty as far as additional duty is concerned and struck off the claim for nil rate of duty claimed as per Notification No. 167/86-C.E., dated 1-3-1986 and Notification No. 44/93, dated 28-7-1993. The fourth respondent made the assessment of the Bill of Entry No. 07, dated 3-8-1993 on the following basis :

"On an assessable value of Rs. 4,52,41,469.00 the basic duty at 5% was assessed at Rs. 22,62,073-00 and the additional duty was assessed at Rs. 93,08,030-00. The fourth respondent ignored the full exemption from Central Excise Duty of goods falling under Chapter 89 -- vide Notification No. 167/86,

dated 1-3-1986."

5. The appellants, aggrieved by the above order of the fourth respondent, preferred Writ Petitions No. 38005 and 38006 of 1993. Further, the additional duty as nil claimed by the appellant with regard to import of vessels "M.V. BOUVET/Ex RANA" under Bill of Entry No. 6, dated 2-7-1993 and "M.V. ARGOS" under Bill of Entry No. 001741, dated 8-11-1993 was also rejected by the fourth respondent vide Assessment Order dated 14-7-1993 and Assessment Order dated 13-11-1993 respectively, and those orders were also assailed by the appellant in Writ Petition No. 26685 of 1993 and Writ Petition No. 43567 of 1993 respectively. In all these writ petitions, inter alia, it was contended by the appellants that on all goods imported into the country, duty of customs is levied under the Act; the procedure for calculation of duty and other connected matters is specified in the Customs Act, 1962; the vessels imported by the appellant are classifiable under Chapter 89.08.00 of the Schedule to the Act which reads as follows :

"DESCRIPTION RATE OF DUTY

Vessels and other floating structures for breaking up. 40% + Rs. 1,400/- per light displacement tonnage"

Under Notification No. 74/93-Cus., dated 28-2-1993, all goods falling under the Heading 8908 of the First Schedule to the Customs Tariff Act, 1975, when imported into India are exempted from so much of the duty of customs leviable thereon as is in excess of the amount calculated at the rate of 5% ad valorem. As regards the Customs duty, there is no dispute between the appellant and the respondent-authorities. The vessels imported by the appellants are classifiable under Chapter 89.08.00 of the Schedule to the Central Excise Tariff Act, 1985 which reads as follows :

"DESCRIPTION RATE OF DUTY

Vessels and other floating structures for breaking up. Rs. 1,400/- per light displacement tonnage"

By Notification No. 167/86-C.E., the Central Government has exempted, inter alia, goods falling under Chapter 89 from the whole of the levy of excise where no operation is carried on in or in relation to the manufacture of the said goods with the aid of power. Therefore, u/s 3 of the Customs Tariff Act, no additional duty is payable on the vessel M.V. YAGUAR imported by the appellant for the purpose of breaking as the appellant is not carrying on any manufacturing activity i.e., ship-breaking with the aid of power.

6. Learned Single Judge, not agreeing with the above contention of the appellants that the demands raised by the respondents for additional duty are contrary to the provisions of the Act and without authority of law, dismissed the writ petitions. Hence, these four writ appeals by the aggrieved appellants.

7. We have heard Shri K. Naganand, learned Counsel for the appellants and learned Central Government Standing Counsel for Revenue.

8. Shri Naganand would contend that the demand of additional duty on the vessels imported is without jurisdiction inasmuch as u/s 3 of the Act, additional duty payable is equivalent to excise duty for the time being leviable on an article, if produced or manufactured in India, and, since by virtue of Notification No. 167/86, excise duty leviable on products under Chapter 89.08.00, if power is not involved in the process is nil, the appellant is not liable to pay additional duty. Shri Naganand would point out that it is specifically pleaded that the appellant is not using any power for the process of breaking up of the vessels. Shri Naganand would also contend that a distinction has to be drawn between the usual import of a vessel which is sea-worthy and the import of a vessel for the purpose of breaking up and both of them cannot be equated for the purpose of levying additional duty. Shri Naganand would also contend that the Finance Minister in his Budget Speech for the financial year 1993-1994 spoke about "merged duty" of Customs at 5% ad valorem to be imposed on vessels used by ship-breaking industry. According to Shri Naganand, the expression "merged duty" denotes the merger of the two duties leviable on the product imported under Sections 2 and 3 of the Customs Tariff Act. Shri Naganand would highlight that though two interpretations are possible from the relevant provisions of the Act, the Court should adopt the one which is beneficial to tax-payers and not to the Revenue. Shri Naganand would also contend that the State cannot practice an invidious discrimination in the matter of levy of taxes and the ground of invidious discrimination urged in the writ petition is not at all dealt with by the learned Single Judge.

9. Learned Senior Standing Counsel for Government of India, on the other hand, contended that an exemption notification granting exemption under Rule 8(2) of the Central Excises and Salt Rules, 1944, does not automatically grant exemption in respect of additional duty leviable u/s 3 of the Act and as such, it is of no avail to the appellants for seeking the kind of reliefs sought in the writ petition. Learned Senior Standing Counsel would submit that the Budget Speech is not a law and assuming that an assurance was given in the course of such a speech, which is only subject to the ultimate approval by the Parliament in a manner envisaged under the Constitution itself and the speech of the Finance Minister cannot have primacy or overriding effect on the law made by the Parliament.

10. Section 3 of the Act provides for levy of additional duty of customs. The relevant portion of the said section reads as follows :

"Section 3. Levy of additional duty equal to excise duty. -- (1) Any article which is imported into India shall, in addition, be liable to a duty (hereafter in this section referred to as the additional duty) equal to the excise duty for the time being leviable on a like article if produced or manufactured in India and if such excise duty on a like article is leviable at any percentage of its value, the additional duty to which the imported article shall be so liable shall be calculated

at that percentage of the value of the imported article.

Explanation. -- In this section, the expression "the excise duty for the time being leviable on a like article if produced or manufactured in India" means the excise duty for the time being in force which would be leviable on a like article if produced or manufactured in India, or if a like article is not so produced or manufactured, which would be leviable on the class or description of articles to which the imported article belongs, and where such duty is leviable at different rates, the highest duty."

It is seen from Section 3 that in addition to customs duty levied u/s 2 of [he Act, Section 3 levies a duty equal to the excise duty for the time being leviable on a like article (emphasis is supplied by us) if produced or manufactured in India.

11. The vessels imported by the petitioner are classifiable u/s 89.08.00 of the Schedule to the Central Excise Tariff Act, 1985, which reads as follows :

"By Notification No. 167/86-C.E., the Central Government, has exempted, inter alia, goods falling under Chapter 89 from the whole of the levy of excise where no operation is carried on in or in relation to the manufacture of the said goods with the aid of power."

The relevant portion of the Notification No. 167/86-C.E., dated 1-3-1986 reads as follows :

"In exercise of the powers conferred by Sub-rule (1) of Rule 8 of the Central Excise Rules, 1944, the Central Government hereby exempts goods of the description specified in column (2) of the Table hereto annexed and falling under the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), from the whole of the duty of excise leviable thereon which is specified in the said Schedule :

Provided that no process in or in relation to the manufacture of the said goods is ordinarily carried on with the aid of power :

Provided further that the exemption contained in this notification shall not apply to sandalwood oil.

The Table :

Sl. No. Description of goods

(1) (2)

1. All goods falling within Chapters 14, 71, 89 and 92.

2. All goods falling under Heading Nos. 30.01, 32.03, 33.01, 33.03, 36.02, 44.01, 44.02, 44.03, 44.04, 44.05, 46.01, 51.05, 62.92, 69.01, 69.02, 69.03, 69.04, 69.05, 83.01, 83.15, 95.01, 95.01, 95.02, 95.03, 95.05, 95.06, 95.07 and 95.08."

12. Chapter 89 of the Central Excise Tariff Act like the Customs Tariff Act deals

with Ships, Boats and Floating Structures. Tariff Heading 89.08 relates to "Vessels and other floating structures for breaking up". The language is identical with the Tariff Heading 89.08 in the Customs Tariff Act. The rate of additional duty is, therefore, directly linked with the rate of Excise Duty. The rate of Excise Duty in respect of Tariff Item No. 89.08 under the Central Excise Tariff being nil by virtue of Notification No. 167/86-C.E., dated 1-3-1986, the rate of Additional Duty in respect of Tariff Item 89.08 under the Customs Tariff Act must also be nil. The requirement under Notification No. 167/86 that no power should be used in the process or in relation to the manufacture of the goods could, in the context of the language of Tariff Heading 89.08, mean the scrap produced by the breaking of the vessel. The appellant in the writ petition has categorically stated that no power is used in the breaking up of the vessels. This responsible statement made on oath is not denied by the respondents.

13. However, learned Single Judge has held that the product imported is a vessel which falls under Chapter 89; for availing the benefit of Notification No. 167/86-C.E., dated 1-3-1986, it has to be seen whether the process of manufacture of the ship itself involves any use of power; imported vessel could not have been built without the aid of power and, therefore, the benefit of Notification No. 167/86-C.E., is not available to the appellant. In appreciating whether the above holding of the learned Single Judge is tenable in law, it becomes necessary to draw a distinction, at the threshold, between the usual import of a vessel for servicing and the import of a vessel for the purpose of breaking up. The two instances cannot be equated by applying any rational norm nor any comparison is reasonably possible if we keep in mind the legislative purpose of the exemption clause. It is also relevant to notice that the entries in the Customs Tariff Act and the Central Excise Tariff Act are different for vessels imported for use and vessels imported for breaking up. In this case, the vessels have been imported by the appellant for breaking up only and that breaking up of vessels is done without the use of power. The durability of ships when built in India is not a relevant consideration to determine the duty on ships imported for the purpose of breaking.

14. Learned Single Judge has held that the actual product imported is a ship and, therefore, whether the product got from it is exempted from Central Excise or not is of no consequence. In holding so, learned Single Judge has placed reliance on the decision of the Supreme Court in *Thermax Private Limited Vs. The Collector of Customs (Bombay), New Customs House, and Hyderabad Industries Ltd. and Another Vs. Union of India and Others*,

15. The vessels imported by the appellant are not seaworthy and they are admittedly for the purpose of breaking. There is a separate entry for this purpose both under the Customs Tariff Act and Central Tariff Act. The product actually imported is the material that can be retrieved from the ship; the structure by itself is of no value and the appellant subjects the vessel to a process to retrieve the material from the structure without the use of power.

16. It is the contention of Shri Naganand that in deciding the claim of the appellant for exemption from duty, the Budget Speech of the Finance Minister for the financial year 1993-1994 in Parliament is relevant and that speech would be a key to understand what actually the Parliament intended. The relevant portion of the Budget Speech of the Finance Minister is extracted supra. In the said speech, it has been stated that "merged duty" of customs at 5% ad valorem is to be levied on the vessel used by the ship-breaking industry. The use of the term "merged duty" denotes the merger of the two duties leviable on the product imported under Sections 2 and 3 of the Customs Tariff Act. The Supreme Court in *K.P. Varghese Vs. Income Tax Officer, Ernakulam and Another*, on consideration of its earlier judgments in *The Sole Trustee, Lok Shikshana Trust Vs. The Commissioner of Income Tax, Mysore*, *Indian Chamber of Commerce Vs. Commissioner of Income Tax, West Bengal II*, *Calcutta*, and *Additional Commissioner of Income Tax, Gujarat Vs. Surat Art Silk Cloth Manufacturers Association*, while holding that the speech made by the Mover of the Bill can be referred to for the purpose of ascertaining the mischief sought to be remedied by the legislation, was pleased to observe thus :

"Now it is true that the speeches made by the Members of the Legislature on the floor of the House when a Bill for enacting a statutory provision is being debated are inadmissible for the purpose of interpreting the statutory provision but the speech made by the Mover of the Bill explaining the reason for the introduction of the Bill can certainly be referred to for the purpose of ascertaining the mischief sought to be remedied by the legislation and the object and purpose for which the legislation is enacted. This is in accord with the recent trend in juristic thought not only in Western countries but also in India that interpretation of a statute being an exercise in the ascertainment of meaning, everything which is logically relevant should be admissible."

17. When the material words in a statute are capable of bearing two or more considerations, the most firmly established rule for construction of such words is the rule in *Heydon's case* (1584) Co. Rep. 7= 76 ER 637 which has now attained the status of a classic described by the Supreme Court in the case of *Kanailal Sur v. Paramnidhi Sadhukhan* - AIR 1957 SC 307. In the case of *Anderton v. Ryan* - 1985 (2) All. ER 355, it was held that the rule in *Heydon's* (supra) case which is also known as "purposive construction" or "mischief rule", enables consideration of four matters in construing an Act : (i) what was the law before the making of the Act; (ii) what was the mischief or defect for which the law did not provide; (iii) what is the remedy that the Act has provided, and (iv) what is the reason of the remedy. The rule then directs that the Courts must adopt that construction which shall suppress the mischief and advance the remedy. K. LLEWELLYN, in his article, "Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed", speaking on the necessity of legislative purpose to legislative interpretation, has said, "If a statute is to make sense, it must be read in the light of some assumed purpose. A statute merely declaring a rule, with no purpose or objective, is nonsense". MART and SACKS

have inquired whether it is not true that, "the meaning of a statute is never plain unless it fits with some intelligible purpose".

Although the above statements of LLEWELLYN, HART and SACKS go beyond "tautology to self-contradiction" and may not be true, because, a statute may have no discoverable purpose, what they highlight is that every statute is enacted as an attempt to accomplish a legislative purpose. REED DICKERSON, in his book, *The Interpretation and Application of Statutes*", has stated thus :

"Every statute represents an attempt to accomplish an immediate legislative purpose, presumably an intelligible one. This purpose is coextensive with the legislative intent and, so far as it is discoverable from the statute and its proper context, it corresponds also to its legislative meaning."

The main value of the purposive rule of interpretation is that they imply that all commands, prohibitions, and other legislative communications are purposive acts that should be approached as such, thus putting the Court and other readers in a deferential frame of mind. A. LENKOFF, in his book, *"Comments, Cases and other Materials on Legislation 630 (1949)"*, has stated, the purpose of a statute is certainly an excellent guide for the discovery of the legislative intent".

18. The Heydon's (supra) rule was explained in the *The Bengal Immunity Company Limited Vs. The State of Bihar and Others*, , by S.R. Das, C.J., as follows :

"It is a sound rule of construction of a statute firmly established in England as far back as 1584 when HEYDON's case (supra) was decided that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered :

1st - What was the common law before the making of the Act.

2nd - What was the mischief and defect for which the common law did not provide.

3rd - What remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth, and

4th - The true reason of the remedy;

and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief and pro private commodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico."

The Supreme Court in *Bengal Immunity Co. case* (supra) applied the Heydon's rule in construction of Article 286 of the Constitution. After referring to the state of law prevailing in the Provinces prior to the Constitution as also to the chaos

and confusion that was brought about in inter-State trade and commerce by indiscriminate exercise of taxing powers by the different provincial Legislatures founded on the theory of territorial nexus, S.R. Das, C.J., proceeded to say :

"It was to cure this mischief of multiple taxation and to preserve the free flow of inter-State trade or commerce in the Union of India regarded as one economic unit without any provincial barrier that the Constitution-makers adopted Article 286 in the Constitution".

The rule was again applied by the Supreme Court in similar context while construing the changes brought about by the Constitution 46th Amendment Act in *Goodyear India Ltd., Gedore (India) Pvt. Ltd., Kelvinator of India Ltd. and the Food Corporation of India and Another Vs. State of Haryana and Another*, .

19. As per the rule of "purposive construction", the Parliament is presumed to intend that in construing an Act the Court, by advancing the remedy which is indicated by the words of the Act for the mischief being dealt with, and the implications arising from those words, should aim to further every aspect of the legislative purpose, construction which promotes the remedy Legislature has provided to cure a particular mischief. In Section 304 of Statutory Interpretation by FRANCIS BENNION dealing with nature of purposive construction, it is stated :

"A purposive construction of an enactment is one which gives effect to the legislative purpose by -

(a) following the literal meaning of the enactment where that meaning is in accordance with the legislative purpose (in this Code called a purposive-and-literal construction), or

(b) applying a strained meaning where the literal meaning is not in accordance with the legislative purpose (in the Code called a purposive-and-strained construction)".

In the same section, it is further stated : -

"When Judges speak of a purposive construction, they usually mean to refer to what this Code calls a purposive - and strained construction. Thus we find STAUGHTON, J., referring to the "power of the Courts to disregard the literal meaning or an Act and to give it a purposive construction, *A-G of New Zealand v. Ortiz*, (1982) QB 349. Lord DIPLOCK spoke of "competing approaches to the task of statutory construction -- the literal and the purposive approach" *Kammins Ballrooms Co. Ltd. v. Zenith Investments (Torquay) Ltd.*, (1971) AC 850. Nevertheless a purposive construction must obviously be in all cases a construction which gives effect to the legislative intention, whether or not the statutory language needs to be strained to achieve this. Most often a purposive construction, in the true sense, will be a literal construction".

In *Carter v. Bradbeer*, 1975 (1) WLR 1204, Lord DIPLOCK observed that "if one looks back to the actual decisions of the House of Lords on questions of statutory

construction over the last 30 years one cannot fail to be struck by the evidence of a trend away from the purely literal towards the purposive construction of statutory provisions". The matter was summed up by Lord DIPLOCK in this way -".....I am not reluctant to adopt a purposive construction where to apply the literal meaning of the legislative language used would lead to results which would clearly defeat the purposes of the Act. But in doing so the task on which a Court of Justice is engaged remains one of construction, even where this involves reading into the Act words which are not expressly included in it. Kammins Ballrooms Co. Ltd. v. Zenith Investments (Torquay) Ltd., (1971) AC 850 provides in instance of this; but in that case the three conditions that must be fulfilled in order to justify this course were satisfied. First, it was possible to determine from a consideration of the provisions of the Act read as a whole precisely what the mischief was that it was the purpose of the Act to remedy; secondly, it was apparent that the draftsman and Parliament had by inadvertence overlooked, and so omitted to deal with, an eventuality that required to be dealt with if the purpose of the Act was to be achieved; and thirdly, it was possible to state with certainty what were the additional words that would have been inserted by the draftsman and approved by Parliament had their attention been drawn to the omission before the Bill passed into law. Unless this third condition is fulfilled any attempt by a Court of Justice to repair the omission in the Act cannot be justified as an exercise of its jurisdiction to determine what is the meaning of a written law which Parliament has passed" Jones v. Wortham Park Settled Estates, (1980) AC 74."

20. The Supreme Court in Administrator Municipal Corporation, Bilaspur Vs. Dattatraya Dahankar and another, , while disapproving the mechanical approach of construction, in para 4, held :

"It seems to us that the High Court had a mechanical approach to construction. The mechanical approach to construction is altogether out of step with the modern positive approach. The modern positive approach is to have a purposeful construction that is to effectuate the object and purpose of the Act."

21. What transpires from the above discussion is that the legislative purpose as reflected in the Budget Speech of the Finance Minister for the financial Year 1993-94 should be kept in mind while construing the statute and statutory instruments in order to determine the liability of the appellants in these cases to pay additional duty under the Act in respect of vessels brought in by them for breaking up, and if that is kept in mind, we tend to hold that the appellants are not liable to pay additional duty as demanded by the Department.

22. It is also well settled that, while interpreting taxation laws, in a case where two views are possible, then, the one which is in favour of the assessee must be adopted. The Supreme Court in Union of India (UOI) and Others Vs. Onkar S. Kanwar and Others, , has held as follows :

"In any event this would clearly be a case where two views are possible. It is

settled law that if two views are possible then the one which is in favour of the assessee must be adopted."

23. Apart from the above position, the claim of the appellant is entitled to be allowed even otherwise solely in the light of the judgments of the Supreme Court in Hyderabad Industries Ltd.'s case (supra); Thermax Pvt. Ltd.'s case (supra) and Collector of Central Excise, Jaipur Vs. J.K. Synthetics, .

24. In the case of Hyderabad Industries Ltd. (supra), the appellants therein, who used asbestos fibre as a raw material, imported the same prior to 1986. On the import so made, the Department sought to raise a demand of additional duty of customs u/s 3(1) of the Customs Act. The appellants represented that on a correct interpretation, no duty was payable inasmuch as asbestos fibre, which was imported, had not been manufactured or produced, but was a natural mineral and thus no duty was leviable. The Collector, Central Excise, Hyderabad, however, issued a trade notice on 3-8-1997 taking the view that asbestos fibre, as processed and graded, had a distinct character differing from asbestos rock and the said item was covered within Tariff Item 22(F) of the Excise Act and therefore, there was a liability to pay the duty of excise. The Government of India and the Ministry of Finance also informed the appellants vide Ministry of Finance's letter dated 17-8-1997 that the process by which the asbestos fibre was obtained was a process of manufacture and the said item correctly fell within Tariff Item 22(F) of the First Schedule to the Excise Act. The consequence of this was that the demand u/s 3(1) of the said Act was raised because the imported item, namely, asbestos fibre was regarded as an article which was liable to duty of excise under the Excise Act. The appellants then filed various writ petitions before the Delhi High Court.

25. The main contention of the appellants was that the asbestos fibre which was imported had not been manufactured or produced and, u/s 3(1) of the Customs Tariff Act, additional duty of customs could be levied only if the article which is imported is one which is produced and manufactured in India and is liable to payment of excise duty. In other words, the submission was that asbestos fibre had not undergone any manufacturing or other process and, therefore, no additional duty could be charged. The Delhi High Court, not agreeing with the above contention, dismissed the writ petition and accepted the contention of the Department that extracting or removing the asbestos fibre from the rock amounted to manufacturing process being undertaken and, therefore, excise duty was leviable and, as a result thereof, additional duty u/s 3(1) of the Tariff Act could be imposed on the import of the asbestos fibre into India. Being aggrieved by the said judgment of the Delhi High Court, the dispute was carried to the Apex Court by way of appeals.

26. The Constitution Bench, while partially overruling the judgment in Khandelwal Metal and Engineering Works and Another Vs. Union of India (UOI) and Others, held that the levy of additional duty being with a view to provide for counter balancing the excise duty leviable, the additional duty can be levied only

if on a like article excise duty could be levied. The Supreme Court, in so holding, in Paras 15 and 17, observed thus :

"15. The Customs Tariff Act, 1975 was preceded by the Indian Tariff Act, 1934. Section 2A of the Tariff Act, 1934 provided for levy of countervailing duty. This section stipulated that any article which was imported into India shall be liable to customs duty equal to the excise duty for the time being leviable on a like article if produced or manufactured in India. In the notes to clauses to the Customs Tariff Bill, 1975 with regard to Clause 3 it was stated that "Clause 3 provides for the levy of additional duty on an Imported article to counterbalance the excise duty leviable on the like article made indigenously, or on the indigenous raw materials components or ingredients which go into the making of the like indigenous article. This provision corresponds to Section 2A of the existing Act, and is necessary to safeguard the interests of the manufacturers in India". Apart from the plain language of the Customs Tariff Act, 1975 even the notes to clauses show the legislative intent of providing for a charging section in the, Tariff Act, 1975 for enabling the levy of additional duty to be equal to the amount of excise duty leviable on a like article if produced or manufactured in India was with a view to safeguard the interests of the manufacturers in India. Even though the impost u/s 3 is not called a countervailing duty there can be little doubt that this levy u/s 3 is with a view to levy additional duty on an imported article so as to counterbalance the excise duty leviable on the like article indigenously made. In other words Section 3 of the Customs Tariff Act has been enacted to provide for a level playing field to the present or future manufacturers of the like articles in India. 17. The decision in Khandelwal Metal & Engineering Works case to the effect that additional duty of customs is leviable merely on the import of the article even if it is not manufactured or produced in India does not appear to be correct inasmuch as the said conclusion is based on the premise that Section 12 of the Customs Act, and not Section 3(1) of the Tariff Act, is the charging section. As we have already observed on a correct interpretation of the relevant provisions of the two Acts there can be no manner of doubt that additional duty which is levied u/s 3(1) of the Tariff Act is independent of the customs duty which is levied u/s 12 of the Customs Act. Secondly, it has been held by the Three Judges Bench in this case that excise duty is leviable if the article has undergone production or manufacture. The observation in Khandelwal Metal & Engineering Works case which seems to suggest that even if no process of manufacture or production has taken place the imported articles can still be subjected to the levy of additional duty does not appear to be correct inasmuch as the measure for levy of additional duty is the quantum of excise duty leviable on a similar article under the Excise Act. Duty under the Excise Act can be levied, as has been held earlier, if the article has come into existence as a result of production or manufacture. In other words when articles which are not produced or manufactured cannot be subjected to levy of excise duty then on the import of like articles no additional duty can be levied under the Customs Tariff Act. The levy of additional duty being with a view to provide for counter-balancing the

excise duly leviable, we are clearly of the opinion that additional duty can be levied only if on a like article excise duty could be levied. The decision in Khandelwal Engineering Works case to the extent it takes a contrary view, does not appear to lay down the correct law. Shri Vaidyanathan contended that this Court should be reluctant to reconsider a judgment which has held the field for a long time, but in our opinion public interest requires that law be correctly interpreted more so in a taxing statute where the ultimate burden may fall on the common man. We hasten to add that we are not over ruling the Khandelwal Metal & Engineering Works case in its entirety because the Court also held in that case that brass scrap was in any case an item which was manufactured and, therefore, excise duty was leviable. We have not examined, in the present cases, whether brass scrap can or cannot be regarded as a manufactured item for that question does not arise in the present cases."

In the light of the above opinion, the Supreme Court held that on the asbestos fibre imported into India, the appellants therein were not liable to pay any duty u/s 3 of the Customs Tariff Act and accordingly, set aside the judgment of the Delhi High Court.

27. In *Thermax Pvt. Ltd.*'s case (*supra*), the assessee imported goods described as "Sanyo Single Effect Chiller" from Japan for the purpose of using the same for refrigeration/air-conditioning of the factories of Indian Rayon Corporation at Veraval and Nirlon Synthetics Fibre and Chemicals Limited. It paid the customs duty leviable thereon at the appropriate rate under the relevant entry of the Customs Tariff, but, claimed exemption from the additional duty of customs leviable u/s 3(1) of the Customs Tariff Act, 1975. The assessee cleared the imported goods after paying the customs duty as well as the additional duty but, on second thoughts, decided that it should have claimed a concession in respect of the additional duty on the strength of Notification No. 63/85 and 93/76 issued u/s 8 of the Act. It, therefore, made applications for refund of the additional duty, but, these applications were rejected by the Assistant Collector of Customs by his orders dated 25-2-1985 and 30-9-1985. When those orders were assailed before the Collector of Customs (Appeals), the Collector allowed the appeal from the order dated 25-2-1985, but his successor-in-office, who dealt with the appeal from the later order of 30-9-1985, took a different view and dismissed the assessee's appeal. The assessee as well as the Department preferred appeals from the respective order which went against them. The Tribunal accepted the Department's appeal, but dismissed the assessee's appeal. Hence, the assessee carried the matter to the Apex Court. In the above factual background, the Supreme Court held as follows :

"It will at once be seen that there is nothing in the scheme of the rule which makes it inapplicable to an importer of goods. The assessee here has imported the goods and is selling them for use in a factory, a use which qualifies for the concession under the Section 8 notifications. The types of use specified in the concessions notified could be of any kind and, even in the notifications under our

consideration, they are many and varied. In respect of items falling under S. Nos. 3 and 8, in particular, the actual users may be private individuals or authorities and need not necessarily be manufacturers using the goods in question is an "industrial process" in a narrow sense of that term. For instance, any computer room, hospital or factory purchasing parts of refrigerating and air-conditioning appliances and machinery for use in the computer room, hospital or factory would be entitled to claim the concession by following the prescribed procedure. Only, for claiming a concession in excise duty the user should be the manufacturer himself or he must have made the purchase from a manufacturer liable to pay excise duty on the item whereas in regard to a claim for CVD concession, the supplier will be an importer. The latter will be entitled to sell the goods at the concessional rate of duty (or at nil rate if there is an exemption) if the purchaser from him who puts the goods to the specified use (whether a manufacturer or not) fulfils the requirements of Rule 192. Since the concession under Rule 192 turns only on the nature and use to which the goods are put by the user or purchaser thereof and on whether he has gone through the procedure out-lined in Chapter X, it would not be correct to deny it to a supplier of such goods on the ground that he is an importer and not a manufacturer. That aspect is provided for by Section 3(1) of C.T. Act which specifically mandates that the CVD will be equal to the excise duty for the time being leviable on a like article if produced or manufactured in India. In other words, we have to forget that the goods are imported, imagine that the importer had manufactured the goods in India and determine the amount of excise duty that he would have been called upon to pay in that event. Thus, if the person using the goods is entitled to the remission, the importer will be entitled to say that the CVD should only be the amount of concessional duty and, if he has paid more, will be entitled to ask for a refund. In our opinion, the Tribunal was in error in holding that the assessee could not get a refund because the procedure of Chapter X of the rules is inapplicable to importers as such."

28. In *Collector of Central Excise v. J.K. Synthetics's case* (supra), the respondents therein were the manufacturers of polyester chips, polyester staple fibre and tow from mono-ethylene glycol (MEG). They imported the same and claimed that they were not liable to pay an additional duty of customs thereon because MEG was exempt from the payment of excise duty by virtue of a notification dated 4-5-1987 issued under Rule 8 of the Central Excise Rules, 1944. The claim of the respondents was rejected by the Assistant Collector and, in appeal, by the Collector, The Tribunal, in further appeal, upheld the respondents' claim. When the legality of the order of the Tribunal was assailed before the Apex Court, the Apex Court held, in Para 5, thus :

"The question then is in regard to the availability of the said excise notification for the purposes of the additional duty of customs. Section 3 of the Customs Tariff Act, 1975 provides for the levy of the additional duty of customs. It says that an article which is imported into India would, in addition to duties of customs levied under the Customs Act, be liable to a duty (hereafter in this

section referred to as the additional duty) equal to the excise duty for the time being leviable on a like article if produced or manufactured in India. The said excise notification exempts MEG from the whole of the excise duty leviable thereon. There being, therefore, no excise duty leviable on MEG, there is no additional duty that MEG can be made liable to having regard to the plain words of Section 3 of the Customs Tariff Act,"

29. In *Amar Steel Industries Vs. Collector of Customs*, , Ruma Pal, J., as Her Lordship then was, speaking for the Calcutta High Court, held that the rate of additional duty leviable under the Act is directly linked with the rate of excise duty. Since the rate of excise duty in respect of Tariff Item No. 89.08 under the Central Excise Tariff being nil by virtue of Notification No. 167/86-CE., dated 1-3-1986, the rate of additional duty in respect of Tariff Item No. 89.08 under the Customs Tariff Act must also be nil.

In the result and for the foregoing reasons, we allow writ appeal Nos. 6077, 6078, 6079 and 6080 of 1999 and set aside the order of the learned Single Judge dated 29-7-1999 and allow writ petition Nos. 38005, 38006, 43567 and 26685 of 1993, as prayed for. In the facts and circumstances of the case, the parties are directed to bear their own costs in these appeals.