

**(2002) 09 BOM CK 0032**

**In the Bombay High Court**

**Case No : Writ Petition No. 1460 of 1983**

Godrej Industries Ltd.

APPELLANT

Vs

Asstt. Collector of C. Ex.

RESPONDENT

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**Date of Decision : 17-09-2002**

**Acts Referred:**

Central Excises and Salt Act, 1944 — Section 11D, 12, 4(4)

**Citation : (2003) 161 ELT 68**

**Hon'ble Judges : V.C. Daga, J;H.L. Gokhale, J**

**Bench : Division Bench**

**Advocate : D.B Shroff and H.C. Daruwala, instructed by Crawford Bayley and Co, for the Appellant; M.I. Sethna and R. Asokan, for the Respondent**

**Final Decision : Dismissed**

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## **Judgement**

This Judgment has been overruled by : Godrej Industries Ltd. Vs. D.G. Ahire Assistant Collector of Central Excise and Another, (2008) 131 ECC 39 : (2008) 157 ECR 39 : (2008) 228 ELT 321 : (2008) 7 JT 628 : (2008) 10 SCALE 152 : (2008) 8 SCC 600 : (2009) AIRSCW 512 : (2008) AIRSCW 1165 : (2008) 1 Supreme 699

H.L. Gokhale, J.—The petitioner is a public limited company engaged in the manufacture of a variety of cosmetics and toilet preparations including liquid hair dyes amongst other products. Respondent No. 1 to this petition is the then Assistant Collector of Central Excise functioning under the Central Excises and Salt Act, 1944 ("the Act" for short) whose notices and decision of the year 1983 holding one of the products of the petitioners, namely hair-dyes to be hair lotions under Tariff Item No. 14F of the First Schedule to the Act as it then existed (and consequent demands of duty) are under challenge in this writ petition. Respondent No. 2 is the Union of India.

2. Mr. Shroff appears for the petitioner and Mr. Sethna appears for the respondents.

### 3. Brief facts of the dispute :

Cosmetics and toilet preparations are liable to excise duty under Tariff Item 14F. This item, as it stood prior to 1st April, 1985, had a particular wording and the said wording has been changed subsequent to 1st April, 1985. There is no dispute that hair dyes have been subsequently covered under this amended Tariff Item 14F specifically with effect from 1st April, 1985. The case of the petitioner-company is that the tariff item as it stood prior to 1st April, 1985 did not include hair dyes amongst the categories which were included under cosmetics and toilet preparations. As against that, the case of the Central Excise Department has been that hair dyes were covered under the category of "hair lotions" occurring in Tariff Item 14F as it stood even prior to 1st April, 1985. The petitioner does not dispute that hair dyes are a category of cosmetics, but it is the case of the petitioner that for attracting duty of Central Excise, the concerned product has to be specifically covered under the particular entry. The hair dyes not being so included in cosmetics and toilet preparations prior to 1st April, 1985 were not excisable and it could also not be said to have been covered under the category of "hair lotions". The controversy assumes significance for the reason that if hair dyes were covered under hair lotions, they would be governed under Tariff Item No. 14F during the relevant time and then the excise duty will be 105% whereas if they were not so covered under Tariff item 14F, they would be falling under the residuary entry No. 68 where the excise duty will be only 8%.

4. As stated above, the first submission of the petitioner-company has been that during the relevant period, hair dyes were not covered under Tariff Item No. 14F. Alternatively, it is submitted that to protect their position, the petitioner had raised the price of the product by 105% but paid duty at 8% only, and therefore, if the said item is held to be covered under Tariff Item No. 14F, the petitioner would be at the most liable to pay difference of about Rs. 20 lakhs as per notice of the Respondents issued in November, 1988. On the other hand, the respondents maintain that hair dyes were covered under Tariff Item No. 14F and the petitioner must pay full difference in duty and not merely Rs. 20 lakhs or so as submitted by the petitioner. Further, it is submitted by the Respondents that even if the product is held not to be covered under Tariff item No. 14F, the petitioner ought to be directed to pay the entire difference since they have collected the duty at the rate of 105% from the consumers but have not paid it to the respondents and retaining this amount of difference has resulted in unjust enrichment to the petitioner. In the circumstances, two issues arise for our determination, viz :-

(a) Whether hair dyes were covered under Tariff Item No. 14F of the Central Excise Tariff at the relevant time?

(b) Secondly, in either of the situations, what should be the monetary liability for the petitioner?

5. (a) In the instant case, though we are concerned only with the excise duty

payable by the petitioner for the calendar year 1st January to 31st December, 1982, the decision in this behalf will have its effect until 1st April, 1985.

(b) The petitioner was first given a general show cause notice dated 13th July, 1982 by Respondent No. 1 as to why their liquid hair dye should not be classified under Tariff Item 14F and charged with the duty accordingly. The notice stated that during the pendency of the determination, the classification of the liquid hair dye would continue under Tariff Item 68 on a provisional basis and that the petitioner should execute a necessary bond for provisional assessment under the relevant Rule 98. The petitioner filed a reply to this notice and also filed their written submissions. The petitioner was also issued with four specific demand notices which were dated 2nd August, 1982, 11th October, 1982, 27th December, 1982 and 17th February, 1983. One out of these four notices, the one dated 11th October, 1982 has, subsequently, been dropped. The other three notices covered the period from January to December, 1982.

6. The first notice dated 2nd August, 1982 stated in the reasons annexed thereto that the investigation revealed that the product Liquid Hair Dye appears to answer the definition of cosmetics and was, therefore, classifiable under Tariff Item 14F. The reasons enclosed with the second notice dated 27th December, 1982 stated amongst others: that "from the point of view of composition and the ingredients of the product, it would not be possible to say that the hair dye should not be regarded as hair lotion. The enclosure to the third notice dated 17th February, 1983 repeated the same reasons as annexed with the second notice.

7. As stated above, the petitioner filed its reply and also filed detailed written submissions before the respondent No. 1. The petitioner heavily relied upon the judgment of a learned Single Judge of this Court (M.H. Kania J, as he then was) in the case of Subhash Chandarnishat Vs. Union of India and Another, . That petition was concerning two products known as "Vasmol, Emulsified Hair Oil" and "Vasmol Pomade" manufactured by that petitioner. It was the case of the petitioner in that case that both these products were hair dyes meant for the purposes of darkening hair and since the products were hair dyes, they were not chargeable under Tariff Item 14F. The wording of Tariff Item No. 14F at the relevant time was the same as the one with which we are concerned in the present matter for the year 1982. The learned Single Judge held that these products did not fall under Tariff Item 14F. He further held that the expression "namely" appearing in Tariff Item 14F could not be said to have been used in the illustrative sense but it had to be read in a restrictive sense.

8. This submission of the petitioner was rejected by respondent No. 1 by his order-in-original dated 24th May, 1983 (annexed at Exhibit "L" to the petition) wherein he held that the expression "namely" was illustrative and that the hair dyes produced by the petitioner were covered under Tariff Item 14F(ii)(a), i.e. hair lotions, creams and pomades. He also held that the petitioner was liable to pay the excise duty of Rs. 1,16,10,001.08 as claimed in the three notices.

Consequently, a show cause-cum-demand notice dated 2nd June, 1983 (annexed at Exhibit "M" to the petition) was also served on the petitioner demanding the excise duty for the subsequent period of January to March, 1983 to the tune of Rs. 22,62,764.72. Being aggrieved by this decision of respondent No. 1 dated 24th May, 1983 and the subsequent notice dated June 2, 1983, the petitioner has filed this petition, wherein: prayer Clause (a) challenges the legality and validity of this decision dated 24th May, 1983 and also the subsequent notice dated June 2, 1983. The petitioner has sought an interim injunction restraining the respondents from classifying the particular entry under Tariff Item 14F and demanding and recovering the excise duty based thereon and taking any action in pursuance to the above referred order and notice.

9. At the time this petition was filed, the writ petitions covering this subject-matter, used to be allotted to Single Judges under the relevant Rules of this High Court. Accordingly, this writ petition came up for consideration before a Single Judge on 1st July, 1983 when he passed the following order :-

"Rule. Interim relief in terms of prayer (c)(ii) excluding the words "demanding or", and (c)(iii)."

The result of this order has been that from the date of this order, the following interim order has been running in favour of the petitioner, viz. :-

"(c) that, pending the hearing and final disposal of the present petition, the impugned order passed by respondent No. 1 be stayed and the respondents, their agents, subordinates and servants be restrained by order and injunction of this Hon"ble Court from :-

(i) .....

(ii) ..... recovering from the petitioner any excise duty on the said hair dyes in excess of the excise duty payable thereon under T.I. 66; and

(iii) taking any action directly or indirectly in pursuance of or to give effect to the impugned order (Ex. L hereto) and/or the impugned Notice (Ex. M hereto) or to recover the said amount of Rs. 1,16,10,001.08."

Needless to state that this interim order helped the petitioner until end of March, 1985 till which date the earlier Tariff Item prevailed whereafter the wording of the Tariff Item came to be changed from 1st April, 1985. The petition has now reached before us for final hearing and is placed before the Division Bench since under the High Court Rules as of now, these matters are assigned to Division Bench.

10. At this stage, it is material to refer to Tariff Item 14F with which we are concerned in the present matter as it was prevalent prior to 1st April, 1985. The said entry reads as follows :-

Item No. Description of goods Rate of Duty

14F

Cosmetics and Toilet preparations not containing alcohol or opium, Indian hemp, or other narcotic drugs or narcotics, namely :-

(i)

Preparation for the care of the skin including beauty creams, vanishing creams, cold creams, make-up creams, cleansing creams, skin foods and tonics, face powders, baby powders, toilet powders, talcum powders and lipsticks :

(ii)

Preparation for the care of the hair- (a) Hair Lotions, creams and Po-mades: (b) Perfumed hair oils; (c) Shampoos whether or not containing soap or detergent;

(iii)

Shaving creams, whether or not containing soap or detergents.

Explanation : "Alcohol", "opium", "Indian Hemp", "Narcotic Drugs" and "Narcotics" have the meanings respectively assigned to them in Section 2 of the Medicinal and Toilet Preparations (Excise Duties) Act, 1955, (underlining supplied).

100 per cent and valorem

11. Submissions on behalf of the petitioner :-

As stated earlier, it is not disputed by the petitioner that hair dye is a kind of cosmetic or toilet preparation, but it is the case of the petitioner that unless it is specifically covered, it cannot be said to become excisable under the particular Tariff Entry. Mr. Shroff, learned Counsel for the petitioner, submitted that if cosmetics and toilet preparations of all types were excisable under the caption of cosmetics and toilet preparations, there was no need to specifically mention three categories thereof, namely, (i) the preparations for the care of skin, (ii) the preparations for the care of hair, and (iii) shaving creams. Mr. Shroff submitted that again in the category of preparations for the care of hair, there are three specific sub-categories and respondent No. 1 has held the hair dyes as being hair lotions under sub-category (ii)(a) of Tariff Item 14F. Mr. Shroff submitted that hair dyes are not hair lotions and that was the view taken by the learned Single Judge in the case of Subhash Chandarnishat (supra), (hereinafter referred to as "the Vasmol case" for convenience since that was the name of the company involved in that case). In Para 5 of the judgment, the learned Single Judge has rejected the submission on behalf of the Excise Department that the expression "namely" was merely illustrative. The learned Judge has clearly held that the expression "namely" was not used in an illustrative sense but in a restrictive sense. Amongst others, the learned Judge has held that "the very fact that these goods had to be specifically included in the said item by way of amendments shows that the word "namely" was used in the said item not in an illustrative

sense but in a restrictive sense".

12. Mr. Shroff has placed reliance on this judgment also for the reason that in Paragraphs 6 to 13 thereof, it has been held that such entries should be construed not in the sense in which they would be understood in technical matters or scientific laboratories but in the sense which the people dealing in or commercially conversant with the items would attribute to them. In Paragraph 10 of this judgment, the learned Judge has referred to the affidavits filed on behalf of the petitioner wherein the first one was by the Manager of a leading departmental store in Mumbai, namely Akbarally's. The Manager stated in his affidavit that Akbarally's were distributors of hair dyes, and if a customer came to the counter and asked for a hair cream or hair lotion or hair pomade, he would never be given the product vasmol and the said product was only sold as a hair dye and only to those customers who asked for a hair dye or a hair darkener. Mr, Shroff has pointed out that similarly in the present case, some 45 affidavits were filed by the petitioner before respondent No. 1 submitting that its product is not known in that commercial parlance as a hair lotion, cream or pomade. There is specific reference to the filing of these affidavits in Paragraph 6 of the impugned order of the 1st respondent dated 24th May, 1983. Mr. Shroff therefore submitted that the same approach ought to be adopted in the present case.

13. A Division Bench judgment, which is relied upon on behalf of the respondents, namely the one in the case of Chimanlal Beliram Mehta v. M.G. Vaidya reported in 2000 (124) E.L.T. 40 (Bom.) was also relied upon before the learned Single Judge in the Vasmol case. As recorded in Para 9 of the judgment of the Division Bench, no attempt was made in that matter before the concerned authorities to place the commercial sense in which the persons dealing with the subject understood the term "Hair Lotion". In fact in that paragraph, the learned Judges accept that entries appearing in the statutes like Central Excise Act or Sales Tax Act are to be understood not in their technical or scientific or laboratory sense but they are to be understood in commercial sense. However, in the facts of that case, the matter was argued from the point of view of composition and ingredients of the product, and hence the particular product was held to be a hair lotion and not hair dye for Tariff Item 14F. The learned Single Judge, who decided the Vasmol case, has referred to this judgment in Paragraph 8 and explained as to why the Division Bench has decided the matter the way it was decided and as to why he was taking a different approach. Mr. Shroff submitted that in the circumstances, the 1st respondent had to follow the approach adopted by the learned Single Judge. Mr. Shroff also laid emphasis on the proposition from the judgment of Lord Reid in Anisminic Ltd. v. The Foreign Compensation Commission reported in (1969) All E.R. 208 which laid down that if a Tribunal having jurisdiction refused to take into account something which it was required to take into account or based its decision on some matters which it had no right to take into account, the court would be entitled to interfere with the decision of the Tribunal. This proposition has been accepted by the Apex Court in Union of India (UOI) Vs. Tarachand Gupta and Bros, . Both these cases

are referred in the Vasmol judgment. Mr. Shroff submitted that in the present case when 45 affidavits were presented to respondent No. 1 pointing out the commercial use of the particular product, he could not have ignored them.

14. Again, in the facts of the present case, Mr. Shroff draw our attention to the communication dated 3rd March, 1975 issued by the Superintendent of Central Excise (Range IV Division VII) to the petitioner which stated as follows :-

"Sub : Sample of Godrej Permanent Hair Dye.

Deputy Chief Chemist has opined that samples of "Godrej Permanent Hair Dye" - "Brown & Balck" sent to him for analysis, do not fall under Tariff Item 14F(ii). This is for your information."

This communication dated 3rd March, 1975 is annexed to the affidavit in rejoinder of Shri Nikhil Bhatt, Legal Executive of the 1st petitioner affirmed on 21st January, 2001. Mr. Shroff therefore submitted on the basis thereof that even on a technical basis, the hair dyes did not fall in Tariff Item No. 14F(ii) as per the said opinion of the Deputy Chief Chemist from the office of the 1st respondent himself.

15. To further advance his submission that a hair dye was not a hair lotion, Mr. Shroff relied upon the reasons given in the decision of a Special Bench of CEGAT at New Delhi in the case of 1984 ECR 2603 . In that matter, the question involved was with respect to the correct classification of a product "Sunsilk Hair Conditioner" manufactured by the appellant. It was the case of the appellant that the said hair conditioner was not a hair lotion, cream or pomade classifiable under Tariff Item 14F, but dutiable under Tariff Item 68 as in the present case. The case of the Excise Department was that the said conditioner was a grooming aid; and was a hair lotion, and a hair conditioner was only a nomenclature assigned to it. The appellant had relied upon the affidavit of one Dr. Siva Raja Iyer, an Eminent Scientist and there is a reference to his affidavit in Para 12 of the said judgment. Dr. Iyer had stated in his affidavit amongst others that "a hair lotion is a "leave-on" product whereas a hair conditioner is a "rinsing agent"". Mr. Shroff submitted that in the case of a hair dye also, after applying the same to the hair, one has to wash off the hair and one cannot leave it on as in the case of a grooming agent like the hair lotion.

16. In this context Mr. Shroff relied upon a judgment of the Apex Court in the case of Collector of Central Excise and Others Vs. Calcutta Steel Industries and Others, , wherein the Apex Court has held that if the Revenue wants to tax particular goods known as such, then the onus is on the Revenue. He submitted that in the present case, the respondent No. 1 has not discharged the burden and either in the commercial sense or in the technical sense, hair dye would not be classifiable as hair lotion. Similar is a subsequent judgment of the Apex Court in Hindustan Ferodo Ltd. v. Collector of Central Excise, Bombay reported in 1997 (89) E.L.T. 16 which is also to the same effect.

17. With respect to the controversy as to whether the commercial meaning of the term has to be accepted, he drew our attention to four different judgments of the Apex Court. The first amongst these is the one in the case of Shree Baidyanath Ayurved Bhavan Ltd. Vs. Collector of Central Excise, Nagpur, wherein the Apex Court held that "Lal Dant Manjan" (Tooth Powder) is not a medicine (Ayurved). The court held that the goods are to be classified according to the popular meaning attached to them by those using the product. Thereafter in the case of Chemical and Fibres of India Ltd. Vs. Union of India and others, , the Apex Court held that the tariff entry using commercial words is to be interpreted as that term is understood in the trade, however where strictly technical or scientific words are used, approach for their interpretation would be different. Similarly, in Reliance Cellulose Products Ltd., Hyderabad Vs. Collector of Central Excise, Hyderabad-I Division, Hyderabad, , the Apex Court has held that if a word used in a fiscal statute is understood in common parlance or in the commercial world in a particular sense, it must be taken that the Excise Act used the word in the commonly understood sense. However, if the legislature itself has adopted a technical term in a particular entry, it has to be understood in the technical sense. In that matter, the Court also held that the test report of the Chemical Analyser and Chief Chemist of the Government, unless demonstrated to be erroneous, cannot be brushed as Excise duty lightly. The fourth judgment in this line is the one in the case of Commissioner of Customs, New Delhi Vs. M/s. Parasrampuriah Synthetics Ltd., . In that matter, the Court was concerned with the words "printed book" and the court held that one of the basic principle of interpretation of statute is that the legislature intends to ascribe the ordinary common parlance meaning to the words used therein. Mr. Shroff therefore submitted that in the instant case, hair dye could not be classified as a hair lotion which is what the impugned order has held. In this context, Mr. Shroff submitted that where two opinions are possible, the assessee should be given the benefit of doubt and the opinion favourable to it should be given effect to. He relied upon the judgment of the Apex Court in M/s. Poulouse and Mathen Vs. Collector of Central Excise and another, in this behalf.

18. Then comes the second question as to whether the petitioner would still be entitled to an order in their favour even if it succeeds on the first part. This is because the first notice dated 13th July, 1982 itself informed the petitioner that though they were called upon to explain as to why hair dye should not be classified under Tariff Item 14F. In the meanwhile pending decision, the classification of hair dye will continue under Tariff Item 68 and it will be treated as provisional. Mr. Sethna, learned Counsel for the respondents, submitted that having obtained the interim relief as pointed out above, the petitioner was not expected to charge at a higher rate to cover their position as per the Tariff Item 14F and it would lead to unjust enrichment. Thereupon Mr. Shroff pointed out that to this show cause notice dated 13th July, 1982, a reply was sent by the petitioner on 8th September, 1982 (Exhibit-F to the petition) prior to filing of the petition pointing out that the petitioner intended to and 105% excise duty ad

valorem to arrive at assessable value and that on the assessable value so arrive at they will be paying excise duty at 8%. This was with a view to cover or protect or insure themselves and at the end of that letter they have specifically asked respondent No. 1 to confirm that what was proposed was in order. In this behalf Mr. Shroff made three statements : viz. (1) the petitioner recovered in the process excise duty much less from the customers, (2) whatever duty was recovered was paid to the Government, and (3) may be, at the highest the method of calculation adopted by the petitioner to arrive at the assessable value was an erroneous one. He submitted that as per this calculation, at the highest the unpaid excise duty for the year 1982 would come to about Rs. 20 lacs as per the respondents' notice of November, 1988, and not Rs. 1,16,10,001.08 as claimed by the Revenue.

19. Mr. Shroff lastly submitted that there was no prohibition in law against the petitioner or for that matter against anybody from selling their product at whatever higher price they wanted to sell. The petitioner was confident of the quality of its product. It had a near monopoly in that product. It took risk in increasing the price by adding 105% to the price component an amount exactly equal to the amount of 105% excise duty. In this view of the matter, at the highest, it may be liable to pay proportionate excise duty @ 8% on the component of 105% rise in price, in that event the additional excise liability payable may be around Rs. 20 lacs or so in addition to the additional burden by way of Income Tax since its income would go up. In the submission of the petitioner, it is a purely commercial decision of the petitioner and it cannot be categorised as windfall to the petitioner. He thus submitted that the petitioner had claimed three types of deductions, viz. (a) trade discount, (b) post-manufacturing expenses, and (c) excise duty. The increase in price by the petitioner is not excise duty but profit at the most liable to Income Tax. Besides, the principle of unjust enrichment has been brought into the statute subsequently by adding Section 11D with effect from 20th September, 1991. That apart, there was no representation to the customers that any amount was being recovered from them as excise duty. Section 12A requiring excise duty to be mentioned separately in the invoices also came into force from 20th September, 1991. These sections will not apply to the present case since they have no retrospective effect.

20. Reply of the respondents :

The Respondents contested the petition by filing affidavit in reply and through arguments by Counsel. Mr. Sethna, learned Senior Counsel appearing for the respondents, submitted that although hair dyes were specifically included by amending the Tariff Entries from 1st April, 1985, that inclusion was only a clarificatory one. In his submission, hair dyes were covered under the main heading of Tariff Item No. 14F at the relevant time also since the heading covered cosmetics and toilet preparations and then used the expression "namely". He submitted that if any particular item did not fall under specific

items mentioned in the Entry, it would still fall under cosmetics and toilet preparations in view of the use of the phrase "namely". He also drew our attention to the fact that the Drugs and Cosmetics Act, 1940 specifically includes hair dyes as an item of cosmetics.

21. The second submission of Mr. Sethna was that the Vasmol case, which was decided by a learned Single Judge, was concerning the categories "creams and pomades" and not hair lotions. He referred to various passages from the said judgment to emphasise this aspect and submitted that as far as hair lotions are concerned, the relevant judgment concerning them would be the one of the Division Bench in the case of Chimanlal Mehta (supra). Thus on page 215 of the report of Excise Law Times, the learned Single Judge recorded as follows in the Vasmol case :

"The Collector rejected the contention of the petitioner that Vasmol was hair dye meant solely for the purpose of darkening hair and was not covered by Item 14F of the First Schedule to the said Act. He further rejected the contention of the petitioner that Vasmol Emulsified Hair Oil and Vasmol Pomade were used only by such persons who wanted to change the colour of their hair. The Collector observed that these two products contained the ingredients of a hair cream and hair pomade and they could be classified as such even though they had an additional property of darkening hair. The Collector relied on the advertisements issued by the petitioner claiming that these products had the qualities of a hair darkener and a hair tonic."

Mr. Sethna submitted that it was this order of the Collector which was under challenge before the learned Single Judge and the question was as to whether the concerned products were hair cream and hair pomade. The question was not with respect to hair lotions. In the submission of Mr. Sethna, the learned Single Judge could take a view different from that of the Division Bench in the case of Chimanlal Mehta (supra) only because the matter was not concerning hair lotions, otherwise he was bound by the view taken by the Division Bench. He submitted that it is for this reason that the respondent No. 1 has followed the Division Bench judgment amongst others since the same was concerning hair lotions. In that matter, the product consisted of two liquids known as Encola Cone 1 and 2 and they had to be mixed in equal proportions before applying to the hair. The present matter also involved similarly mixing of two liquids before application.

22. Mr. Shroff had pointed out that some 45 affidavits were tendered by the petitioner before the respondent No. 1 and for deciding the meaning of the term on the basis of the common parlance test, the respondent No. 1 ought to have given a due weightage to these affidavits. As far as this aspect is concerned, Mr. Sethna pointed out that the respondent No. 1 was bound by the decision of the Division Bench in Chimanlal Mehta's case and any number of such affidavits would not make a difference. He submitted that the basic question was as to whether the decision of the respondent No. 1 could be categorised as perverse.

He pointed out that the respondent No. 1 had the decision of the Division Bench before him which governed the field concerning hair lotions and if he has followed it, his decision could not be termed as perverse. On the other hand, only in the event he had not followed it then it could have been termed as perverse and this court would interfere therewith and not otherwise. Mr. Shroff had relied upon the Dy. Chemist's opinion that the product would fall under entry 14F. Mr. Sethna contested the submission relying upon a judgment of the Gujarat High Court in *Stadfast Paper Mills Vs. D.R. Kohli, Former Collector of Central Excise, Baroda and Others*, wherein the Court held that the evidentiary value of the report of Chemist, lies only insofar as it studies the data obtained by him through chemical analysis. The court had observed - "It is none of the functions of the chemists to give an opinion as to whether the goods in question would be covered by a particular item of the Tariff Schedule".

23. Mr. Sethna relied upon a judgment of the Apex Court in the case of *The Collector of Customs, Madras Vs. K. Ganga Setty*, . In that matter, the question was with respect to the decision of the Customs Authorities classifying "feed oats" as grain. In Para 7 of that judgment, the Supreme Court referred with approval to an earlier judgment in the case of *A.V. Venkateswaran, Collector of Customs, Bombay Vs. Ramchand Sobhraj Wadhwani and Another*, , and then commented as follows :

"It is primarily for the Import Control Authorities to determine the head or entry in Tariff Schedule under which any particular commodity fell, but in doing so, these authorities adopted a construction which no reasonable person could adopt, i.e. if the construction is perverse, then it is a case in which the court is competent to interfere. In other words, if these were two constructions which one could reasonable bear, and one of them which was in favour of Revenue was adopted, the court has no jurisdiction to interfere merely because the other interpretation favourable to the subject appeals to the court as the better one to adopt."

24. Mr. Sethna submitted that the judgment of the learned Single Judge in the *Vasmol* case can survive only if it is read as dealing with a subject different from the one before the Division Bench. If it is canvassed that it is covering the same subject, it will have to be held per incurium. He therefore submitted that in case this court holds that the judgment of the learned Single Judge governs the present controversy, the better course will be that the matter should be referred to a Larger Bench inasmuch as, in his submission, the judgment of the Division Bench held the field and not the one by the learned Single Judge. Having made the above submission with respect to the judgment of the learned Single Judge, Mr. Sethna submitted that although the judgment of the Division Bench adopted the scientific or the technical test, it did observe in Para 10 thereof that two expressions "hair lotions" and "hair dyes" could be used interchangeably in the commercial world. He submitted that these observations could not be ignored.

25. Mr. Shroff for the petitioner had relied upon the judgment of the Apex Court

in the case of Poulouse & Mather (supra) to submit that where two views are possible on a Tariff Entry, the one favouring the assessee should be preferred. Mr. Sethna pointed out that as far as that judgment is concerned, it is recorded in Para 15 thereof that the concerned department itself was having considerable doubts about the matter and the position was not free from doubt. It is in this context that the court has made the above observations. He also drew our attention to four other judgments of the Apex Court where the strength of the Bench was much more and wherein the courts have consistently held that where two constructions are possible and one of them in favour of the Revenue was adopted, the court had no jurisdiction to interfere merely because the other interpretation favourable to the subject appealed to the court as a better one to adopt. These judgments are :-

- (1) A.V. Venkateswaran, Collector of Customs, Bombay Vs. Ramchand Sobhraj Wadhwani and Another,
- (2) The Collector of Customs, Madras Vs. K. Ganga Setty,
- (3) Girdharilal Bansidhar Vs. Union of India (UOI),
- (4) V.V. Iyer of Bombay Vs. Jasjit Singh, Collector of Customs and Another,

In fact in the last judgment, the Apex Court observed as follows :-

"In our opinion, there is nothing in the decision of the Collector which can warrant its condemnation as perverse or unreasonable. Even if it be assumed that because of the language used in the two items viz.: Item 74 (vi) and 74(x) of the I.T.C. Schedule, there is some room for confusion, it would not be competent for the High Court to interfere in a writ petition with the conclusion of finding of the Collector of Customs regarding the scope and ambit of those items."

Similar has been the view of a Division Bench of this Court in the case of Kulkarni Black and Decker Ltd. Vs. Union of India, . Mr. Sethna therefore submitted that there was no warrant to categorise the decision of the respondent No. 1 as a perverse one for this court to interfere.

## 26. On monetary liability:

Then coming to the second part of the controversy as to whether in either of the situations, what should be the monetary liability for the petitioner, Mr. Sethna pointed out that the petitioner had in fact collected duty at the rate of 105% and there was no dispute about that. This had been done inspite of the fact that this court had granted it interim relief on 1st July, 1983 permitting it to clear the goods with excise duty at 8% only. Although the petitioner did collect higher duty, it is also an admitted position that the petitioner paid excise duty at the rate of 8% only. The petitioner's letter dated 8th September, 1982 informing the respondents about the mechanism adopted cannot cure the situation. In his submission, this charging of the amount at the rate of 105% in excess was

entirely on account of the higher excise duty and could not be pressed into service as their profit. It was contended that even if the petitioner succeeds in this petition and the court holds that the appropriate classification is Tariff Entry No. 68 and not 14F(ii)(a), the amount collected towards the payment of excise duty could not be retained by the petitioner.

## 27. Findings:

We have considered the submissions advanced by both the parties carefully and also examined in detail the various cases cited before us. We have also examined the documents placed on record including findings under challenge. We have also given our thoughtful consideration to the literature produced by rival parties in support of their respective submissions.

## 28. Issue (a):

As far as the first submission with respect to interpretation of the expression "namely" in the Tariff Entry 14F is concerned, there is a detailed discussion in Para 5 of the judgment of the learned Single Judge in Vasmol case, and we are in agreement therewith. If the phrase "cosmetics and toilet preparations" was itself an inclusive one, there was no need to mention specific preparations thereafter although the expression "namely" is used after the words "cosmetics and toilet preparations" and before the particular items. Besides, these items are amended from time to time to include various items periodically. We are dealing with a taxing statute and the citizens must know specifically as to whether a particular product is covered thereunder or not. In the present entry, the expression "namely" will have to be held as restrictive of the genera words "cosmetics and toilet preparations" and not merely illustrative. Thus, if hair dyes were not specifically mentioned at the relevant time, they had to fall under particular categories of hair lotions, creams and pomades, if at all they were to be charged to excise duty. The submission of Mr. Shroff in this behalf will have to be accepted.

29. Then we come to the second aspect of the controversy as to which of the two judgments hold the field, namely the Vasmol judgment or the one in the case of Chimanlal Mehta, and whether the respondent No. 1 was bound to follow either of the two. Now, in this connection, what we have to note is that three show cause notices, with which we are concerned in this matter, called upon the petitioners to explain as to why their product "liquid hair dye" should not be reclassified under Tariff Item No. 14F. The reasons in support of these notices enclosed with the second and the third notices stated that from the point of view of composition and ingredients of the product, hair dyes, will have to be regarded as hair lotions. Although this was the rationale behind issuance of the show cause notices, the petitioner took a stand that in common parlance, hair dyes could not be regarded as hair lotions and relied upon some 45 affidavits in support. The petitioner also relied upon the judgment in the Vasmol case. As far as respondent No. 1 is concerned, although he has recorded that such 45

affidavits were filed before him, he has emphasised the definition of the term "lotions" as given in the Chambers 20th Century Dictionary in Para 9 of his judgment describing them as liquid preparations, medicines or cosmetics. In Para 10 of his judgment, he has noted that in the Vasmol case, the products were either emulsified hair lotions or pomades which are not liquids. In the present case, we are concerned with two liquids which are mixed together to prepare a third one for darkening the hair. In Para 11 of his judgment, the respondent No. 1 has observed that the hair dye in the present case is similar to the one in Chimanlal Mehta's case and not the one in Vasmol's case as their hair dyes are commercially known as hair lotions and thereafter he has observed that whereas all hair dyes are hair lotions, but all hair lotions may not be hair dyes. It is from this point of view that respondent No. 1 held that the judgment in Chimanlal Mehta's case held the field and Mr. Sethna also emphasised that the judgment in Vasmol case specifically stated that it was covering pomades and hair creams. That being so, he has submitted that the same is the only way the judgment of the learned Single Judge could apply separately to the facts that were before him, or else it will have to be held as per incurium.

30. We have anxiously considered these submissions and what we find is that the judgment in Chimanlal Mehta's case also accepts in Para 9 that "when court is dealing with entries appearing in statutes like Central Excise Act or Sales Tax Act etc., the entries are to be understood not in a technical or scientific or laboratory sense but they are to be understood in commercial sense. Having said that, the court has specifically recorded in that judgment that as far as the matter before the Division Bench was concerned, no attempt was made to place before the concerned authorities the commercial sense in which the person dealing with the subject understood the term "hair lotions". After considering the technical data, the court did come to the conclusion that the concerned hair dyes will have to be considered as hair lotions but what it observed in Para 10 thereafter is relevant.

"10. Secondly, even if the question is approached from the aspect from which Mr. Joshi wants us to approach, it seems to us rather difficult to accept this contention. It is true that the petitioners product "Ensola Cone" contained, apart from 90% water and perfumery material, ingredients like Lead Acetate and Sodium Thiosulphate, the ingredients which have the properties of giving colour to the hair. It is also true that the petitioners have not advertised their product as any hair lotion or pomade or cream or anything of the kind but the same has been advertised as Hair Darkener. In other words, the product is intended to be used solely for darkening hair or blackening grey hair. But the question is whether even such a product is commercially known as hair lotion or not, for it is in that sense that the relevant item under the tariff will have to be understood and in this context it would be relevant to refer to a couple of passages appearing in the standard books on which Mr. Joshi has relied which would go to show that the two expressions, viz., hair lotion and dyes are not used in contradistinction with one another but are and could be used interchangeably in the commercial world."

31. Mr. Shroff emphasised the ingredients of the product which was involved in that case and the one in the present case to make distinction. He drew our attention to the caution notice printed on the product and placed for our perusal the Text Book referred to in Chimanlal Mehta's case, namely the one by William Poucher. He also submitted that the observations in Para 10 of the above judgment will have to be considered as governing only the technical approach. He submitted that if these observations are to be extended to cover the commercial parlance, then they are at best an obiter and not laying down any proposition to hold the field.

31. In this connection, it is also relevant to note that the Division Bench has repeated this observation in Para 11 once again and dealt with hair dyes, hair restorers and hair tonics, and thereafter it has observed -

"it is not possible to make a clear cut distinction between hair lotions and hair dyes for the purpose of classifying the two differently so that only the former would fall under the tariff and the latter would not".

It is true that it was only the technical data which was presented before that Court, yet, at the same time, having looked into the standard authorities and the manner in which these preparations are made and advertised, the Division Bench has arrived at the above conclusion. It has held that the two phrases could be used interchangeably in the commercial world also. Again what is important to note is that the Vasmol case was concerning emulsified hair oil or pomade, and both these products were held to be cream and pomade on the basis of the common parlance evidence that was produced before the court. In the present case the common parlance evidence was sought to be produced, but in view of the pronouncement of the Division Bench as noted above, the respondent No. 1 has not gone into that aspect. The question is whether this court should interfere into the approach adopted by respondent No. 1. As pointed out by Mr. Sethna and rightly so, unless one categorises the approach as perverse one, one is not expected to interfere therewith. In the present case, the Division Bench has made observations at two different places on the commercial interchangeability of the terms. When the Division Bench could form and express such an opinion, though the data before it was a technical one, it will be difficult to find fault with the respondent No. 1 if he chooses to adopt that approach. It is undoubtedly true that he could have followed the approach taken in the Vasmol case, but that would have been at the risk of ignoring the observations of the Division Bench. No doubt. It is true that the learned Single Judge had explained the observations of the Single Judge to find out a way in the matter before him. In our view, the judgment of the learned Single Judge will have to be restricted to the facts of that case which were before him as applicable to creams and pomades. Faced with the two judgments, the respondent No. 1 had preferred to follow the one given by Division Bench on hair lotions. In our view, for the reasons stated above, it is not possible to categorise the approach of the respondents No. 1 as a perverse one. The submissions canvassed by Mr. Shroff is undoubtedly an

attractive one, namely that a hair lotion is a leave-on product whereas a hair-dye is a rising agent and the two are different. However, as commented by the Division Bench there are products which go under the names of hair restorers, hair lotions and so on, and it is not possible to make a clear cut distinction between hair lotions and hair dyes for the purposes of tariff. The observations of the Division Bench coming from its wisdom and experience will have to be respected and we are not prepared to treat them as an obiter.

33. For the same reasons as above, this is not a case similar to one before the Apex Court in the matter of Poulouse & Mather (Supra) where there was a considerable doubt about the correct classification in the concerned department itself. In the present case, it is not a situation like that. The respondent No. 1 was faced with two judgments and he has preferred to follow the one of the Division Bench making certain observation about the commercial use through the data before that court was predominantly a technical one. In view of the conclusion that we have arrived at on the first aspect of the controversy, the petitioner will have to pay the excise duty for the relevant period as per Tariff Item 14F of the Central Excise Tariff.

34. Issue (b):

Let us now turn to another issue, which in our opinion will squarely answer the case of the petitioner, even if one was to arrive at a different conclusion on the first issue. The question is as to whether the petitioner could be permitted to retain the excess amount which they have collected under the garb of excise duty. In order to answer this question one has to turn to Section 4 of the Central Excise Act which provides for valuation of excisable goods for purposes of charging duty of excise. u/s 4(1), the duty of excise is chargeable on any excisable goods with reference to the value which is deemed to be the price at which such goods are ordinarily sold by the assessee to a buyer in the course of whole-sale trade where buyer is not a related person and the price is the sole consideration for the sale. Section 4(4)(d)(ii) states that value in relation to any excisable goods does not include the amount of duty of excise, sale tax and other taxes, if any, payable on such goods, and subject to such rules as may be made the trade discount, etc. may be allowed as deduction.

35. Reading of the aforesaid section clearly indicates that the wholesale price which is charged is deemed to be a value for the purposes of levy of excisable duty, but the element of excise duty, sales tax or other taxes which is included in the whole-sale price is to be excluded in arriving at assessable value. This section has been so construed by the Apex Court in Asstt. Collector of Central Excise and Others Vs. Bata India Ltd., and it is thus clear that when cum-duty price is charged, then while arriving at the excisable value of the goods, the element of duty payable is to be excluded. In this case, the price indicated in the wholesale price list was reduced by trade discount post-manufacturing expenses and element of excise duty @ 105% ad valorem to arrive at the assessable value so arrived. In this view of the matter, when we examine the strength of the

submission of the petitioner that merely because excise duty @ 105% was deducted from the price to arrive at the assessable value on which 8% excise duty was paid it cannot lead to the conclusion that the difference was recovered from the customer and retained by the petitioner. No doubt, the petitioner was certainly free to charge any price, but from the wholesale price the deduction that was available u/s 4(4)(d)(ii) of the Act could never have been claimed by petitioners because the deductions were permissible only when they pay the amount as duty u/s 4(4)(d)(ii) of the Act.

36. In the above backdrop, can it be said that the act of claiming deductions @ 105% while calculating assessable value of the goods was an innocent act on the part of the petitioner. The answer is certainly "No". Can it be said to be a mistaken deduction on the part of the petitioner? Again, answer is "No". The petitioner was very much conscious and aware of the possible liability of excise duty in the event of dismissal of the petition. Thus, two alternative ways were open to the petitioner to cover or insure itself from the possible liability of excise duty in the event of dismissal of this petition; one was to increase the selling price of their product and another was to calculate the component of excise duty which was @ 105% and shift this burden on the customer and recover the same from them.

It is an admitted fact that while calculating assessable value the petitioner claimed deduction @105% instead of claiming deduction of only @ 8% on account of excise duty. Had it been a deduction @ 8% instead of @ 8%, then the assessable value would have been much more than the one disclosed to the Excise Department. In this case, the declared wholesale price for "Hair Dye Black 20 ml (including Developer 86 ml)" was Rs. 659/-. In order to calculate the assessable value, the petitioner followed the method as set out herein below:

PRICE LIST W.E.F. 8-9-82

1. Hair Dye Black 40 ml including developer 86 ml = Wholesale Price Rs. 659

Assessable Value = Cum-duty price - deduction

1 + rate or duty

= 659.00-(26.38 + 157.01)

1 + 105/100 Deduction: 1. Trade Discount Rs. 26.36

2. PME Rs. 157.01

= 659 -183.37

100+105

100 Rate of duty @ 105 %

= (659-183.37) x 100

205

= 475.63x100

205

= 47563

205

=

232.01

Assessable value claimed in col. No. 11 is Rs. 232.01 duty @ 105 % shown in the col. No. is Rs. 243.62

37. The above calculation would reveal that on the assessable value of Rs. 232.01 the petitioner paid 8% excise duty, namely, Rs. 232.01 the petitioner paid 8% excise duty @ 105% as against 8%. The petitioner ought to have deducted excise duty component only @ 8% instead of 8% instead of 105%, then using same formula the assessable value would have been Rs. 659/- minus Rs. 218.60/- (Rs. 26.36 + Rs. 157.01 + Rs. 35.23) = Rs. 440.40. On this assessable value the duty at the rate of 8% would have been Rs. 35.23. Had it been so, the wrongly deducted component of the excise duty @ 105% would have been the net profit of the petitioner. But factual position is otherwise. The petitioners herein while calculating assessable value actually claimed deduction @ 105% on account of excise duty component instead of claiming it @ 8%. In other words, the figure of 8% excise duty was substituted with that of 105% and factually and actually the said deduction of 105% was shown and claimed on account of excise duty. The deduction claimed and collection made in this court was retained in the accounts books. In the balance-sheets for the relevant financial years, this amount was shown as duty liability.

38. With a view to examine the submission of the petitioner, we asked the petitioner to produce the relevant papers and the annual reports and balance-sheets. In all these annual reports, there is a remark which is as follows under the notes to accounts : one of such specimen is reproduced herein below :-

"Schedule 15 - In respect of Different - Rs. 168.48 lacs excise duty."

"The Excise Authorities have raised the demand against which the company was granted interim relief by the Bombay High Court from payment of the said demand. Pending decision of the Court, the company has not debited the said amount to the profit and loss account."

It will be not out of place to mention that an attempt was made in the assessment year 1983-84 to claim deductions on account of liability accrued towards excise duty on Hair Dye. This assessing officer, who passed the assessment order dated 29th November, 1985 observed in the assessment order as under: -

"After discussion, I am of the opinion that as the liability has not been provided by the assessee and is also disputed in appeal before the Bombay High Court, no deduction on this account can be allowed at this stage. Hence, the amount of Rs. 74,39,003/- is not allowed."

The above rejection was not challenged in the appeal, obviously by that time Section 43B was on the Income Tax statute with retrospective effect which provides the deduction only on actual payment of tax liability and that too in the year in which it was discharged. It is therefore clear that it was a conscious act on the part of the Petitioner and with full knowledge they recovered and retained excise duty @ 105 % collected from their customers. No doubt one letter was passed on to the Central Excise Department disclosing this fact but the department failed to realise the modus operandi adopted by the petitioner in this behalf. Had this deduction been a mistaken one, then while calculating assessable value the deduction would have been @ 113% (i.e. 105% + 8% = 113%). But it is not so. It is exactly 105%. As a matter of fact, the petitioner claimed deduction on account of excise duty @ 105% instead of @ 8% while calculating assessable value and retained the benefits thereof with themselves. The petitioner did not disclose this fact in clearest possible terms to this court and, on the thereof almost for more than 13 years and used the said amount in their business. The Revenue is deprived of the advantages of the said amount, it is thus clear that the petitioner deducted higher amount of excise duty presumably on the premise that they may be required to pay @ 105% in the event of dismissal of their petition, but did not pay this amount of duty so collected to the Revenue. The petitioner very well knew that Section 4(4)(d)(ii) permitted deduction only of such amount which is paid excise duty and which was so collected. The fact, therefore, remains that its amount was collected as excise duty and not paid to the Revenue.

39. It is needless to mention that, had it been the amount towards the increase in the price of the product, then, in that event the petitioner would have treated this amount as their profit and would not have claimed deduction in their return filed under Income Tax Act for assessment year 1983-84. It is thus clear that the amount of excise duty at the rate of 105% was collected from the customers. In other words, the liability of the excise duty was transferred on the customers and the same amount has been realized and retained by the petitioners. It is needless to mention that in the event of payment of excise duty to the Revenue in future, they would be entitled to claim deduction in the assessment year in which they would pay it to the Revenue. As such no prejudice would be caused to the petitioners if they are required to pay the said amount to the Revenue.

40. The above discussion would show that there is no dispute that the petitioner has added ad valorem amount at the rate of 105% to the price of product, but has paid duty @ 8% only. Mr. Sethna and Mr. Shroff pointed out the relevant forms filed by the petitioner for the purposes of classification and have drawn our attention to Section 4(4)(d) of the Central Excises and Salt Act as it stood at the

relevant time. It is true that as canvassed by Mr. Shroff, Sections 11D and 12A were not incorporated in the Act at the time, but principles analogous to Section 11D will certainly govern the field. A judgment of Full Bench of this court has taken the same view much earlier in the case of *New India Industries v. Union of India* reported in 1990 (46) E.L.T. 23 (Bom.) = 1990 (1) B.C.R. 515. The Full Bench observed that the conduct of the petitioner in a case like the present one is very much relevant. The Court observed in that matter as follows :-

"But it is not possible to hold that in determining a claim for refund, the writ court cannot at all enter into the question who had actually borne the burden of the said tax whether the person from whom the tax was collected had himself borne it or had passed on the burden to others. But it can never be accepted that unless there is legislation in this behalf, on the ground of unjust enrichment, the writ court cannot deny an assessee refund to tax collected from him without authority of law."

41. It is needless to mention that no one can be allowed to retain the amount collected in the name of tax or make claim for refund of tax or duty if it transpires that he has passed on the burden on the customers or others and in that case, the doctrine of unjust enrichment would debar such party to claim any benefit therefrom. The doctrine of unjust enrichment is a just and salutary doctrine. Under this doctrine, no person can seek to collect the duty from both ends. In other words, he cannot collect the duty from the purchaser at one and retain the same without paying it to the State. The power of the court is not meant to be exercised for unjustly enriching a person. If an assessee has passed on the tax to the consumer or a third party and sustained no loss or injury; allowing him to retain the amount will result in windfall to him. Such a person will be unjustly enriched. This will result in the assessee or claimant obtaining a benefit, which is neither legally nor equitably due to him. It is needless to mention that the power under Article 226 has to be exercised to effectuate the rule of law and not for abrogating it. Where a person approaches the High Court but fails, he cannot take advantage of the amount of duty so collected. He is under an obligation to return the said amount to the Revenue. Thus, case in hand is a clear case of undue enrichment and on this count also, the petitioner must fail.

42. In the circumstances, we hold that hair dyes concerned manufactured by the petitioner were covered under Tariff Item No. 14F of the Central Excise Tariff at the relevant time. And even if one were to take the view that they were not so covered under Tariff Item No. 14F but under residuary Entry No. 68, still the petitioners would be liable to pay duty @ 105% since they have collected it at that rate from the consumers but have not passed it on to the respondents.

43. For the reasons stated above, the petition is dismissed. Rule is discharged with costs quantified at Rs. 10,000/-. The interim order stands vacated. The respondents will be entitled to recover the excise duty for the relevant period as per the impugned order and notices.

After the judgment and order was pronounced, Mr. Shroff, learned Counsel appearing for the petitioner, asked for continuation of the interim injunction which was running during the course of the proceeding for a further period of 8 weeks. Mr. Asokan, learned Counsel appearing for the respondents, has submitted to the orders of the Court. Accordingly, we direct that no recovery will be made on the basis of the impugned notices and on the basis of this order for a further period of 8 weeks. Mr. Asokan, learned Counsel appearing for the respondents, has submitted to the orders of the court. Accordingly, we direct that no recovery will be made on the basis of the impugned notices and on the basis of this order for a further period of 8 weeks.