
(1995) 07 GAU CK 0032
In the Gauhati High Court
Case No : Civil Rule No. 343 of 1992

Jayshree Tea and Industries Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 27-07-1995

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11B, 11B

Citation : (1995) 2 GLJ 204

Hon'ble Judges : J.N.Sarma, J

Bench : Single Bench

Advocate : R.Gogoi, S.Mitra, K.N.Choudhary, J.P.Bhattacharjee, D.N.Mehta, A.Dutta, Advocates appearing for Parties

Judgement

1. This application has been filed challenging the legality and validity of the order dated 12.11.91/27.11.91 issued by the Assistant Collector, Customs and Central Excise, Jorhat classifying the UF and PF solutions manufactured by the petitioner company in its factory unit of Mariani and captively used as glue compounds in the said factory for manufacture of plywood, under the erstwhile Tariff Entry 15 A (i) of the First Schedule to the Central Excise and Salt Act and the present subheading 3909.10 and 3909.51 of the schedule to the Central Excise Tariff Act, 1985 and on the basis of the said classification rejecting the refund claim of the petitioner for the period from 1.10.77 to 15.9.82 and finalising the assessment of the said products from September, 1982 to March, 1987. That is Annexure 6 the writ application.

2. At the time of admission, this Court passed an interim order to the following effect:

? In the meanwhile the operation of the impugned order at Annexure 6 in so far as it relate to recovery of excise duty from September, 1982 onwards is stayed.?

3. The brief facts of the case are as follows :

That the goods in question namely, UF solution and PF solution used as adhesive

agents by the petitioner company in its factory unit at Mariani have been assessed all along to central excise duty by classifying the said goods under Tariff Item ISA (i) and on the assumption that the said goods are dutiable under the aforesaid item and the petitioner company continued to pay duty at the appropriate rate on the basis of such classification. On 22.10.80, there was a decision by the Delhi High Court holding that solution in question did not fall under the Tariff Item ISA (i) and the same were not dutiable item. After that on 11.4.81, the petitioner company wrote a letter on the basis of that judgment that the collection and levy of duty on the solution in question from the petitioner company had been illegal and unauthorised. Accordingly, the petitioner company stopped payment of duty of these goods in question with effect from 16.9.82 and on 20.11.82 filed three refund claims for a total of Rs.51,33,004.71 being the duty realised during the period 1.10.77 to 15.9.82. The respondent No.4 i.e. the Assistant Collector of Customs and Central Excise, Jorhat by a adjudication order dated 20.8.83 was pleased to reject the contention and claim of the petitioner. An appeal was filed before the learned Collector (Appeal), Central Excise, Calcutta who, by its judgment and order dated 17.9.83 was pleased to set aside the order of the learned Assistant Collector with the further direction to the authority to determine the case afresh in accordance with law after reducing of the samples of the goods in question. On 27.2.87 the respondent No.4 passed an order holding the solution in question to be classifiable under Tariff Item No. ISA (i) and dismissed the refund claims of the petitioner company. As against the aforesaid adjudication another appeal was filed and by order dated 22.7.87, that appeal was allowed and the matter was remanded with the direction that the said authority shall decide the case afresh examining of the sample as requested by the petitioner company. Thereafter, the departmental authority took sample of the goods in question for testing of the same. It is contended that in the meantime, this question came before different Courts and the authority and in has consistently been held that the UF and PF solution in question manufactured for the purpose of captive consumption do not attract Central Excise duty and the same are not dutiable items.

5. A Civil Rule being Civil Rule No.3499 of 1991 was filed before this Court praying for a direction to the respondents to classify the solution in question under the appropriate tariff item in accordance with the judgment of this Court and to grant necessary refund of the amount collected by the department on the basis that the goods in question were not liable to payment of central excise duty. Thereafter, on 13.7.91, this Court vide Annexure 5 dispose of the Civil Rule with the following direction:

? Upon hearing the counsel of the parties and relying on the decision referred to above, we direct the Assistant Collector, Customs and Central Excise, Jorhat to finally dispose of the claims of the petitioner and passed order for refund as claimed within a period of three (3) months.?

6. The decision relied on by this Court in that judgment is (1989) 2 GLJ144 (M/s

Varat Timber, Assam M/s Veneer Mills vs. Assistant Collector of Customs & Central Excise, Tinsukia) wherein Aqua solution in the shape of Phenol Urea formalin manufactured only for the purpose of captive consumption were held not to be dutiable. Thereafter, the impugned order dated 12.11.91 was passed by the Assistant Collector Customs and Central Excise, Jorhat. The learned Assistant Collector inter alia found in the judgment as follows :

? During personal hearing the assessee stated that they are manufacturing a solution of Urea/Phenol with formalin in the process of adhesive with other materials being used captively and this solution is not a "commodity" as is identifiable and marketable. They also stated that the said solution is essentially used in the process of manufacture of plywood and they are intermediaries and intermediate products and the products have no shelf life and are not marketable. Relying upon the decision of the Supreme Court in the case of M/s Union Carbide India Ltd. vs. Union of India & others they stated that in order to attract excise duty the article manufactured must be capable of sale to a consumer and article crude or elementary form are not dutiable as those are merely intermediate products and not "goods". They further argued that in the instant issue Aqueous Solution of Phenolic Resin cannot be regarded as artificial or synthetic resin in liquid form and stated that the Supreme Court has also held that excisable goods under section 2 (d) of the Act means goods specified in the schedule to the Central Excise Tariff Act, 1985 as being subject to duty of excise. They contended that therefore it is necessary to find out whether these are goods i.e. to say, articles as known as the market as separate distinct identifiable commodities and whether the tariff duty levied would be as specified in the schedule and simply because a certain article falls within the schedule it would not be dutiable under law if the said article is not "goods" known to market. They stated that marketability is therefore an essential ingredient and criterion to be dutiable under the schedule to the Central Excise Tariff Act, 1985. They also contended that the said UF/PF solution is used in the process of manufacture of ply wood, have no shelf life, are not marketable and is a heterogeneous mixture of urea, formalin, ground nut, cake powder/tamarind seed powder and caustic and at times urea is substituted by phenol and therefore they have no specific identify and can not be sold as marketable. The assessee contended that it is never a finished product and is processed in an integrated process in manufacture of plywood. They further stated that the Hon'ble Calcutta High Court in its order dated 26.4.89 held that UF/PF solution is not identifiable as such, nor marketable, nor having shelf life and therefore it will not attract Central Excise Duty under item 15A (i) of the Central Excise Tariff nor by virtue of Rule 9 and 49 of the Central Excise Rules, 1944 as amended by Notfn. No.20/82 dated 20.2.82. Finally, they prayed that the refund claims should be sanctioned on the basis of the aforesaid judgment.

(b) Moreover, from the stamps affixed on the final products plywood and allied products manufactured by the assessee it is very clear that the products manufactured by the assessee are marketed by them declaring the same as ?

Synthetic Resin Bonded.?

(c) The assessee has always contended that they are making only a solution of urea/phenol with formaline. But after chemical reaction urea/phenol and formalin lose their identify and a new product emerges. And hence the assessee's claim that the product is only a solution of urea/phenol and formalin is baseless.

(d) As discussed in para 9 above with heat/temperature and chemical reaction in a steam kettle Urea, Phenol and formaline are completely transformed into a new product called UF/PF Resin whose name, character and use are different from those of their basic raw materials. Intermediate products does not mean that the products are unfinished, incomplete and nonexcisable goods. Provisions under Explanation to Rule 9 and 49 are very explicit that for the purpose of discharge of duty any excisable goods manufactured in a factory and captively consumed/ utilised as such or after subjection to any process/processes whether in continuous process or otherwise for manufacture of any other commodity shall be deemed to have been issued/removed immediately before captive consumption/utilisation. In other words only because the subject goods are not marketed by the subject assessee it cannot be treated that the products are not "goods."

(e) Thus the subject products are excisable and liable to duty under a tariff entry.

(f) From plain reading of the extracts/portions of the above tariff entries and the Explanations thereto whether prior to or after Finance Bill, 1982 it is very clear that there is specific description of the subject goods in any state/form is solid, liquid or pasty etc. as entered prior to 1.3.82 in TI No. 15 A (i) and in the form of the liquid or pasty mass including emulations, dispersions and solutions as entered from 1.3.82 in TI. No. 15 A (i). There is for more specific description of the said goods at subheading No.3909.10 as Urea Resins and at 3909.51 as phenol formaldehyde resin in the Schedule to the Central Excise Tariff Act, 1985 effective from 28.2.86. The subject goods are resols as reported by the Chief Chemist, which is also very specifically described at Explanation II to TI 15 A (i) effective from 1.3.82. Under this Explanation the subject goods are condensation, polymerisation products, resols produced by Chemical Synthesis. The products have the essential character of complete or finished goods as resins used in bonding layers of wood and article of wood. According to Rule 3 (a) the subject goods have got more specific than general description at the tariff entries at TI No. 15 A (i) either before or after the Finance Bill, 1982 as well as at subheading Nos.3909.10 and 3909.51 of the Schedule to the new Tariff Act. The assessee claimed classification of the subject goods under TI No.68 because TI No.68 is a last resort, a residuary tariff entry which provides that goods which cannot to classified under any of the Tariff Item Nos.1 to 67 are classifiable under Tariff Item No.68. This aspect is also very clear from the judgment of the Supreme Court in the case of M/s Dunlop India Ltd. vs. Union of India, 1983 ELT 1566 wherein it is decided that where an article has, by all standards, a reasonable claim to be classified under an enumerated item in the Tariff

Schedule, it will be against the very principle of classification to deny it the percentage and consign it to an orphanage of the residuary class. The question of competition between two rival classification will however stand on a different footing.? According to Rule 4 of the Interpretative Rules also description of goods at tariff subheading No.3909.51 is appropriate to the subject goods which are most akin in description, quality, character, and use etc.

(g) The assessee's expression "solution of UF/PF Resin" is in fact liquid UF/ PF Resin ordinarily known in trade parlance. Bringing a precise distinction between "solution" and "Liquid" the assessee has relied on scientific, technical or dictionary meaning of the word. In Commissioner of Sales Tax vs. SN Brothers (1973) 31 STC 302SC and in Mineral and Metal Co. vs Union of India, 1972 SC 2551 and in many other cases it was held that such scientific, technical and dictionary meaning should not be a basis of classifying a tariff item, because while enacting a fiscal statute like sections, schedules, rules of Central Excise Act and tariff the Parliament do not use the words applicable to a particular science. Therefore, the words used in fiscal statutes have to be construed in their own context and in the sense as ordinarily understood. In the case of Hyderabad Asbestos Cement Product Ltd. vs. UOI, 1980 ELT 735 (Del) it was held that if the Parliament has specifically included a particular product in the First Schedule to the Central Excise and Salt Act, 1944 its validity cannot be questioned on the ground that it did not involve any process amounting to manufacture. In the light of these arguments solution of UF/PF Resin is classifiable under TI No. 15 A (i) at all material times and not under TI No.68. At present the same fall very expressly under subheading Nos.3909.10 and 3909.51. Keeping in view the Hon'ble Supreme Court's judgment in the case of Dunlop India Ltd. vs. Union of India & others reported in 1983 ELT 1566 the CEGAT in the case of Collector of Central Excise, Puna vs. General Pharmaceutical (P) Ltd. Pune, 1986 (26) ELT observed that whenever there is a specific entry under a particular tariff item, the item will fall in the specific entry then in general entry.

(h) Therefore, though the products were captively consumed, duty paid on the products, had been realised from the ultimate consumers. Thus refund of the amount of duty paid by them will amount to unjust enrichment. Therefore, even if for arguments sake but not accepting the same, other grounds are not considered, the assessee is not entitled to get the refund in the light of Central Excise and Customs Laws (Amendment) Act, 1991. (No.40 of 1991).

(i) In view of the above discussion, I hold that the subject products are correctly classified under Tariff Entry No. 15 A (i) of the erstwhile Central Excise Tariff and now under subheading Nos.3909.10 and 3909.51 of the Schedule to the Central Excise Tariff Act, 1985 and as such duty on the same has been correctly paid by the assessee. I therefore, feel that there is no merit in the three claims to refund of duty amounting to Rs.51,33,004.71 paid and claimed on the subject goods from 1.10.77 to 15.9.82 and accordingly I hereby reject the same.?

7. Thereafter, ultimately Assistant Collector, Customs and Central Excise, Jorhat

passed the Following order :

? I also finalise provisional assessment made under RT12 returns for the months from September'82 to March'87 demanding for duty so not paid by them on the subject goods from 16.9.82.?

8. It is legality and validity of this order which is challenged in this writ application. 9.1 have heard Shri DN Mehta learned Advocate for the petitioner and Shri KN Choudhury, learned Central Government Standing Counsel for the respondents. Shri Mehta makes two submissions :

(i) That in holding that the items are dutiable goods, the authority exceeded his jurisdiction and did not follow settled position of law.

(ii) That as the goods are not dutiable, the amount realised is wrongful gain on the part of the authority and it is liable to be refunded.

10. On the other hand, Shri Choudhury, learned CGSC submits :

(i). That the classification of the goods were done in accordance with law and the petitioners are not entitled to dispute the same before this Court.

(ii) The petitioners are not entitled to refund as it will amount to unjust enrichment and in alternative he submits that in order to determine the claim of refund, the Court is duty bound to have a look at section 1 IB and section 12B and 12C of the Central Excise and Salt Act, 1944 as amended.

11. Shri Mehta, learned Advocate for the petitioners in support of his contention, relies on the following decisions :

(i) 1991 (55) ELT 433 (SC) (Union of India vs. Kamlakshi Finance Corporation Ltd.) wherein he relies in paragraph 6 of the judgment to support his argument to the effect that the Assistant Collector had no jurisdiction to bypass the orders passed by the higher authority. Paragraph 6 of the judgment is quoted below: ? Sri Reddy is perhaps right in saying that the officer were not actuated by the any malafide in passing the impugned orders. They perhaps genuinely felt that the claim of the assessee was not tenable and that, if it was accepted, the Revenue would suffer. But what Sri Reddy overlooks is that we are not concerned here with the correctness or otherwise of their conclusion or of any factual malafide but with the fact that the officers, in reaching their conclusion, bypassed two appellate orders in regard to the same issue which were placed before them, one of the Collector (Appeals) and the other of the Tribunal. The High Court has, in over view, rightly criticised this conduct of the Assistant Collectors and the harassment to the assessee caused by the failure of these officers to give effect to the orders of authorities higher to them in the appellate heirarchy. It cannot be too vehemently emphasised that it is of utmost importance that, in disposing of the quasijudicial issuer before them, revenue officers are bound by the decisions of the appellate authorities. The order of the Appellate Collector is binding on the Assistant Collectors working within his jurisdiction and the order

of the Tribunal is binding diction of the Tribunal. The principles of judicial discipline require that the order of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the appellate authority is not acceptable to the department in itself and objectionable phrase and is the subjectmatter of an appeal can furnish no ground for not following it unless its operation has been suspended by a competent Court. If this healthy rule is not followed the result will only be undue harassment to assessee and chaos in administration of tax laws.? In the instant case, I do not find that the Assistant Collector defied the order of the higher authority. So, this judgment does not help the petitioner.

(ii) On the same point, Shri Mehta relies on a judgment reported in 1992 (62) ELT 280 (Bom) (Ramesh Occhavlal Shah vs. Union of India) where in paragraph 15,16 and 17 it is stated that under Article 141 of the Constitution, the law declared by the Supreme Court is binding on all. No attempt, therefore, should be made to side track the binding decision of the Supreme Court on any pretext or pretence or to whittle down, wish away or be unbound by the ratio thereof. There is no quarrel with this proposition of law but what is important is to find out as to whether that was the position in the present case.

(iii) 1992 (57) ELT 201 (Bom) (Solar Pesticides Pvt. Ltd. vs. Union of India) wherein the Bombay High Court has laid down the law regarding refund as follows:

? The scheme (of the Amendment Act) envisages a direct transfer of the burden of duty along with the sale of the same goods which were imported, to the buyer. The doctrine of unjust enrichment, which is the genesis of the amendment, has no application in cases where the imported goods are either consumed by the importer or are used by him in the manufacture of other products. In the case of the imported product customs duty paid on it become a part of the cost of manufacture of the new item or items in which the imported component is an ingredient. In such cases the doctrine of unjust enrichment is not invoked. Since the additional duty of custom has not been directly passed on by the petitioners to any third party by selling the imported goods, they are entitled to claim refund of this amount under proviso (a) to section 27 (2) of the amendment section 27. (AIR 1990 SC 47 followed).? (iv) 1995 (57) ECR 1 (SC) (Moti Laminates Pvt. Ltd. vs. Collector of Central Excise, Ahmedabad) where in paragraph 12, the law has been laid down as follows :

? It cannot thus be disputed that even if the resin produced by the appellants are resols as mentioned in item 15A it could not be subjected to duty. The purpose of specifying the goods in the Schedule is two fold, one, the rate on which the duty would be charged and other that if the goods satisfy the description and are covered in the entry then they are liable to pay excise duty. But even in respect of specified goods it could be established that it was not marketable or capable of being marketed, therefore, no duty was leviable on it.

The finding on this aspect has been extracted earlier. The Assistant Collector (Excise) found that unless some retarder or stabiliser was added the unstable solution was not marketable. Even assuming that such solution could last for 15 days as found by the Tribunal that would not help the Department unless it is further found that it was a produce which was marketable or capable of being marketed. The Collector had agreed with the finding of Assistant Collector that without any further process the solution was incapable of being used for any other purpose. It further cannot be disputed that even the life for 15 days depended on maintenance of particular temperature and heat. It cannot, therefore, be said that the goods were marketable or capable of being marketed. Since the test of marketability or capable of being marketed applied even to those goods which are mentioned in the tariff item the intermediate resin produced by the appellants which are mentioned as resols under tariff item No. 15A were not exigible to duty. The finding of the Tribunal that once the product manufactured by the appellants answered the chemical description of the product under tariff item 15 A it was assessable to duty whether it was marketable or not was thus not well founded.?

12. In 1989 (24) Excise and Customs wherein the question was whether the starch hydrolysate arising during manufacture of sorbitol and captively consumed was liable to excise duty. The Supreme Court pointed out that what was liable for duty was glucose in any form. In order to determine the duty the department must establish that the product on which duty was demanded was known in the market as glucose in one form or the other. The Supreme Court further found that there was positive evidence that starch hydrolysate was never marketed and in view of the further fact that in view of the nature of the goods being highly unstable, it was highly improbable that the goods were capable of being marketed and there being, in spite of the opportunities, no evidence produced at all that the goods, in fact were capable of being marketed, the starch hydrolysate was not dutiable under the Act.

13. 1986 (8) CEC 185 (The Union Carbide India Limited vs. Union of India & others). That was a case where the appellant was a public limited company and carried on the business of manufacture and sale of flashing lights (torches), dry cell batteries, chemicals and plastics. The appellant purchased aluminium slugs and produced aluminium cans or torch bodies at its factory by a process of extrusion. A notice was issued to them for price declaration for aluminium cans and the appellant took the position that the aluminium cans were neither sold nor were capable of being sold in the market, and could not be described as "goods" for the purpose of the Central Excise and Salt Act, 1944 and also that the preparation of aluminium cans out of aluminium slugs did not amount to manufacture, and that aluminium cans were merely an intermediate product in the manufacture of flashlights. This contention of the appellant did not find favour with the excise authorities. The appellant filed a writ petition and it was allowed by a Single Judge, but on appeal by the department a Division Bench reversed the judgment of the Single Judge and dismissed the writ petition. On

appeal the Supreme Court found that the aluminium cans prepared by the appellant were employed entirely by it in the manufacture of flashlights, and were not sold as aluminium cans in the market. The Supreme Court further found that the record disclosed that the aluminium cans, at the point at which excise duty was levied, existed in a crude and elementary form incapable of being employed at that stage as a component in a flashlight. Therefore, the aluminium cans produced by the appellant could not be described as excisable goods and did not fall within dutiable goods. The Supreme Court further held that goods must refer to article which are capable of being sold.

14. Shri Mehta, learned Advocate further contended that notification were issued by the authority regarding supplying of salts, polling past as. well as binding charge used in taxable goods being circular No.51/1989 dated 5.9.89 (CBSE) and circular No.53/1989 dated 20.9.89 (CBSE) and on the basis of this circular also the authority shall not entitled to levy excise duty on the goods. These two circulars are not directly on the point. So, the question of following directions by the authority do not arise.

15. Before we proceed further, let us have a look in the affidavitinopposition filed by the department. The two things are highlighted by them (i) that Urea Formaldehyde and Phenol Formaldehyde Resin are identical goods and they can ordinarily come to the market to be bought and sold. The contention of the petitioner that they captively consumed the goods in the manufacture of plywood products and doesnot come in the market is absolutely irrelevant and does not imply that the products are not marketable and in making this claim, reliance was placed in two cases.

(i) 1977 ELT 199 (Union of India vs. DCGM).

(ii) 1978 ELT 336 (South Bihar Sugar Mills vs. Union of India).

16. They denied that the product is only a solution of Urea/Phenol and Formaldehyde. In paragraph 16 of the affidavitinopposition, it is stated as follows:

?That with regard to the statement made in paragraph 17 of the writ petition, the deponent states that while fixing the product of the final products the duty element is added to the costs of production and thus, the burden of duty element passes on to the ultimate consumer. Therefore, assuming that the products in question were captively consumed, duty paid on Urea Formaldehyde and Phenol Formaldehyde resin has been realised from the ultimate consumer. Thus, the refund of amount of duty paid by the assessee on Urea Formaldehyde and Phenol Formaldehyde resin amounts to undue enrichment. Therefore, the assessee is not entitled to get refund in view of the provisions contained in Central Excise and Customs Laws (Amendment) Act, 1991, hereinafter referred to "Amendment Act."

In this connection, the deponent further states that the Amendment Act came into force with effect from 20.9.91. The provisions of law relate to refund of

Central Excise Duty as contained in section JIB of Central Excise and Salt Act, 1944, hereinafter referred to as "the Act" has been amended by the Amendment Act. The Legislature while amending the provisions of law relating to refund as contained in section 11B of the Act was fully aware of the question of undue enrichment involved in refund claims made by the assesseees from time to time and the same awareness is reflected in inserting section 12B of the Amendment Act. There is a statutory presumption by virtue of said section 12B that incidence of duty has been passed to the consumer. After coming into force of the Amendment Act with effect from 20.9.91, any amount considered refundable is to be credited under section 12C of the Act. However, any amount of excise duty as determined by the Assistant Collector, Central Excise under the provisions of the Amendment Act instead of being to the Consumer Welfare Fund be paid to the assessee only when the case falls under anyone of the proviso to section 1 IB (2) of the Act. Thus, allowing refund claim of the petitioner would entail undue enrichment which is not envisaged in the Amendment Act.?

17. A rejoinder was filed on behalf of the petitioner wherein it is stated as follows: ? That it has all along been the contention of the petitioner that disputed UF and PF Aqua solutions have a very short pot life or shelf life as they call it and get spoiled in a short time of 24 hours or so after they are made ready. As such, it does not satisfy the very first criterion mentioned in para 2 above and can not be considered a marketable or dutiable commodity as held by the Hon"ble Supreme Court in the case of Collector of Central Excise vs. Ambalal Sarabhai Enterprises, 1989 (43) ELT 214 wherein the Hon"ble Lordship of the Apex Court observed inter alia that if an article losses its character in a couple of days it is highly improbable that it is capable of being marketed and hence it could not be considered dutiable.?

18. Regarding unjust enrichment, their contention is in paragraph 7 of this reply. That is quoted below :

? That the respondents have quite unnecessarily introduced the question of undue enrichment in relation to sanction of refund due to the petitioner when the primary duty cast on them under the law and in pursuance of the High Court's directions contained in Civil Rule No.3499 of 1991 was to sanction the refund or to pass a speaking order on the merits of the petitioner's claim for refund, a view that has been taken by the Customs Excise and Gold (Control) Appellate Tribunal in their judgment in the case of CCE Bhubaneswar vs. Lakshmi Narayan Motor Engineering Works & others, 1993 (46) ECR 677. The aspect of undue enrichment is not at all relevant where the claim is otherwise not due on merits. It is therefore a crude attempt on the part of the respondents to introduce extraneous consideration and element of bias against the petitioner in their affidavitinopposition in utter disregard of the fact that the provisions of the law as amended by Central Excise Customs Laws (Amendment) Act, 1991 are not at all applicable to the petitioner's case who had used the disputed items by way of captive consumption in the manufacture of plywood. Furthermore this case had

arisen much before the aforesaid amending law was enacted, and the alleged undue enrichment on the part of the petitioner could not be presumed by the respondents to show that any undue enrichment was in fact involved as held by various Courts in relation to the cases arising before the enactment of the amended law.? 19. Shri Choudhury, learned Advocate for the respondents places reliance on the following decisions in support of his contention:

(i) AIR 1988 SC 191 (M/s JK Cotton Spinning and Weaving Mills Ltd. & another vs. Union of India & others). That was a case regarding interpretation of Rule 9 of Central Excise Rules, 1944. In paragraph 22 of the judgment, the Supreme Court has laid down the law as follows :

?All the above decisions relate to Rule 9 and 49 before they were amended. Leaving aside the question of specification for the time being, Rule 9 before its amendment prohibits the removal of excisable goods whether for consumption, export or manufacture of any other commodity in or outside such place until the excise duty livable thereon has been paid. It is manifestly clear from Rule 9 that it contemplates not only removal from the place where the excisable goods are produced, cured or manufactured or any premises appurtenant thereto, but also removal within such place or premises for captive consumption or "home consumption" as it is called. Thus if a commodity which is manufactured in such place or premises and is used for the manufacture of another commodity, then it will be a case of removal for the purpose of payment of excise duty. This view which we take clearly follows from the expression ?whether for consumption, export or manufacture of any other commodity in or outside such place.? Thus consumption of excisable goods may be within such place or outside such place. The decisions which have taken the view that if a commodity manufactured within the factory in one plant is transferred to another plant for the purpose of production of another commodity will be removal for the purpose of payment of excise duty are, in our opinion, correct. It is not easily understandable why the definition of expression "factory" under section 2 (e) of the Act has been taken resort to in some of the decisions for the purpose of interpretation of Rule 9. There can be no doubt that if a commodity is taken outside the factory it will be removal, but Rule 9 does not, in any manner, indicate that it is only when the goods are removed from the factory premises it will be removal and when the excisable goods manufactured within the factory is removed from one plant to another it will not be a case of removal. On the contrary, as noticed already, Rule 9 clearly embraces within it captive consumption of excisable goods, that is to stay, when excisable goods manufactured in the factory are used for production of another commodity.?

(ii) 1992 (1) GLJ 409 (National Plywood Industries Limited vs. Shri KP Mazumdar). That was a case for refund of Rs.75,03,483.58 realised from the petitioner as excise duty for aqua solution produced for captive use in manufacture of plywood together with interest. The Division Bench of this Court considered section 1 IB (2) and 11C substituted by the Central Excise and

Custom Laws (Amendment) Act, 1991 and this Court held that the amended proviso shall apply to such an application for refund.

(iii) (1992) 4 SCC 389 (Union of India & others vs. Jain Spinners Limited & others). That was also a case for refund. When section 11B came into force, an application for refund before the Assistant Collector was pending and it was held by the Supreme Court as provided in the Act, the amended provisions were applicable to the said application. It was further held that the High Court's order of February 19, 1986 under which alone the refund was claimed could not be an exception nor could the High Court make such order after September 20, 1991 directing the payment contrary to the said provisions. It was further found by the Supreme Court that the person claiming refund have failed to prove that they had not passed on the duty in question to others. The Supreme Court further held that whether the reasons given by the Assistant Collector are valid or not is not for the Court to comment upon in these proceedings. It was further pointed out that the person has his remedy to challenge the said orders on merits. The amended provisions of section 1 IB it was pointed by Supreme Court, came into force on September 20, 1991 and the person claiming refund are not entitled to take advantage of an earlier order unless they succeed in showing the statutory authorities that they had not passed on the whole or any part of the duty in question to others. The Supreme Court pointed out that the Courts are bound to follow amended provisions of the law and the Courts cannot order for withdrawal or refund of the duty to the assessee unless the assessee discharges the burden cast on him by the statute. In the instant case, the impugned order by the Assistant Collector was passed on 12.11.91, 27.11.91 i.e. after the amended Act came into force on September 20, 1991 and the amended Act will apply to the case in hand. The Supreme Court pointed that if that is not the law, it would result in a discriminatory and invidious situation. It would also open a new door for unjust enrichment by enabling the assessee to bypass the statutory provisions which have been specifically enacted to prevent the malpractice.

(iv) (1995) 2 GLR 31 [1995(1) GLJ 537] (Kanubari Forest Products (P) Ltd. & others vs. State of Nagaland). That is a Division Bench decision of this Court. In paragraph 24 it was pointed out by the Division Bench as follows :

.?From the decisions cited above the law regarding refund of money paid by way of tax or levy, may be summarised as follows :

(1) Normally, if tax or duty is realised by mistake from a dealer or a manufacturer, manufacturer is entitled to receive back the money so realised by the authority under mistake.

(2) High Court under Article 226 of the Constitution may grant consequential relief by way of refund of money within the period of limitation prescribed for recovery of the money in a suit.

(3) If, however, money was realised under a particular Act and there is a provision for retention of the said tax or duty though recovered by mistake and if

any provision is made under the particular Act for utilisation of the said money, refund may be refused for certain purpose which may benefit a section of the public. Even if there is no such provision for retention of money, but it is clearly established that the burden has been shifted to the consumer in that case also the refund may be refused.?

20. On the basis of law as indicated above, now let us determine two questions which require determination :

(i) Whether duty is livable on UF and PF solution ?

(ii) Whether the petitioner is entitled to the refund as claimed for ?

21. Regarding the decision of first question, let us have a look at the pleadings. Paragraph 3 of the writ application states as follows :

?That for the manufacture of ply wood the petitioner company processes various inputs, such as, veneers, core frames and adhesive or glue compound. The glue compound is a hydrogenous mixture of urea formalin, groundnut, cake powder/ tamarind seed powder and caustic soda. At times urea is substituted by phenol. The said glue compounds are called aqueous solution of urea and formalin (UF solution) and aqueous solution of phenol formalin (PF solution). In the course of manufacture of plywood, logs of timbers are peeled to veneers. The veneers are dried to optimum level and then cut to sizes. Such veneers are then chosen for core and face according to quality. The said UF solution and PF solution are thereafter spread on the layers of veneers. Such veneers are thereafter put for hot pressing where they are fast bonded with the help of adhesive which fully polymerise by course linking under heat and pressure of the press. In this way plywood is manufactured. It may be mentioned herein that the said solutions are/ were at all material times used by the petitioner company in its factory unit at Mariani for the manufacture of plywood, as aforesaid and the same is/was not used for any other purpose. Your petitioners further state that the solutions in question are not marketable goods and are neither sold in the marketable goods and are neither sold in the market by the petitioner company, or the same are capable of being so sold due to short shelf life of about 2448 hours of the solution in question.?

22. There is also a decision of a Division Bench of this Court reported in 1989 (2) GLJ141 (Varat Timber, Assam vs. Assistant Collector of Customs and Central Excise) that aqueous solution in the shape of Phenol or UF manufactured only for the purpose of captive consumption are not dutiable.

23. In that view of the matter, the first question is decided in favour of the petitioner holding that they are not excisable goods and they do not have a market of their own.

24. The next question is that whether the petitioners are entitled to refund as claimed by them and whether it will amount to unjust enrichment. As quoted above and as found by the Assistant Collector, the duty was passed to the

consumers and it was realised ultimately from the consumers. In the writ application as well as in the affidavit in reply and in the affidavit in rejoinder, this position has not been controverted by the petitioners.

25. That being the position and in view of the law enunciated by the Apex Court as well as by the Division Bench of this Court I hold that the petitioners are not entitled to the refund of the amount as claimed as it will amount to unjust enrichment.

26. Accordingly, this writ application is partially allowed holding :

(i) That the UF and PF solutions manufactured and consumed by the petitioner company in the factory at Marioni are non-dutiable items.

(ii) The petitioner is not entitled to the refund as claimed as the same will amount to unjust enrichment.

27. The writ application accordingly, shall stand disposed of.