

(1970) 08 DEL CK 0012
In the Delhi High Court
Case No : Civil Writ No. 115-D/63

J.K. Synthetics Ltd.

APPELLANT

Vs

Collector of Central Excise

RESPONDENT

Date of Decision : 28-08-1970

Acts Referred:

Central Excise Rules, 1944 — Rule 173A, 173B, 173C, 173D, 173E

Citation : (1985) 21 ELT 410

Hon'ble Judges : Rajinder Sachar, J

Bench : Single Bench

Advocate : N.A. Palkhiwala, S. Sorabjee and Ravinder Narain, for the Appellant;
L.M. Singhvi, Brijbans Kishore and J.P. Gupta, for the Respondent

Judgement

Rajender Sachar, J.—This petition under Articles 226 and 227 of the Constitution of India seeks to quash the order dated 1st February, 1963 passed by the Collector of Central Excise, Delhi holding that "Polymer chips" produced by the petitioner are covered by Item 15A(iii) of the First Schedule of the Central Excises and Salt Act, 1944 (hereinafter called the Act of 1944) and the petitioner is liable to pay duty under the said item at the rate of 20 per cent ad valorem.

2. The petitioner-company has a factory at Kota wherein Nylon 6 yarn is manufactured by it from "Caprolactum" which is basic raw material required for the manufacture of Nylon 6. The petitioners-company is assessed to duty on the import of "Caprolactum" under Item No. 28 of the I.C.T. at the rate of 40 per cent ad valorem (the said duty I am now told has been raised to 54 per cent). The end product i.e. Nylon 6 yarn is again assessed to Central Excise duty at the rate of 4.50 per kg. under Item No. 18 of the Central Excise Tariff. The imported Caprolactum which is a monomer has to be first polymerized before Nylon 6 yarn is obtained there from. The polymerized Caprolactum chips are obtained at an intermediary stage in the manufacture of Nylon 6 yarn the said polymer chips are not sold as such in the market by the petitioner and are entirely used in the process of manufacture of Nylon 6 yarn. It is further alleged in the petition that

these chips cannot be sold in the market as "Plastics".

3. It is stated that during one of the visits by the respondent to the petitioner-factory in August, 1962, it was represented to him that polymer chips obtained from the polymerized Caprolactum cannot be regarded as Plastics not otherwise specified under Item 15A(iii) of the Schedule I of Act of 1944. It is stated that polymer chips cannot be used for the conventional plastics and vice versa because of the different properties. It is alleged that Nylon 6 yarn which is produced by the petitioner-factory from the polymer chips is separately assessed to Central Excise Duty under Item No. 18. It is, however, alleged that the respondent by his letter dated 1st February, 1963, has held that polymer chips are liable to Central Excise duty under item No. 15A (iii) of the Schedule I of Act of 1944 without any justification and reason. It is stated that the petitioner had given overwhelming data before the respondent to show that the polymer chips cannot be classified as plastics. It is also alleged that the petitioner had when it was granted a personal hearing on 10th December, 1962, produced an eminent German Scientist, Dr. Paul Maahs to further clarify and explain the representation sent by the petitioner earlier. It is maintained that polymer chips are not at all liable to assessment to duty as plastics and that the order of the respondent by which he has imposed this levy is illegal and without jurisdiction. It is also alleged that the petitioner had out of abundant caution filed an appeal to the Central Board of Revenue under the provisions of the Act of 1944. It was, however, maintained that the aforesaid remedy is not real remedy to the petitioner inasmuch as the Central Board of Revenue is also a Government authority exercising its supervisory and executive jurisdiction over the respondent and the respondent has acted under the general directions of the Central Board of Revenue that duty should be levied on all intermediary products. Under the said circumstances the said remedy is illusory, neither adequate nor specific. It was further stated that the Central Board of Revenue takes time in disposing of the appeals and the petitioner is to carry on its day to day business and to know exactly its position whether it is worthwhile for it to carry on the business with the heavy impact of the afore said levy. It was, Therefore, maintained that the petitioner has no adequate or specific remedy except to move this Court under Articles 226 and 227 of the Constitution.

4. A return has been filed in the shape of an affidavit sworn by Mr. G.D. Chatterjee, Assistant Collector, Central Excise, Ajmer. A preliminary objection is taken to the effect that the order dated 1-2-1963 is not the final decision and that as admitted by the petitioner it has filed an appeal before the Central Board of Revenue which is pending and, Therefore, the petition is misconceived. It is also stated in the return that there is no realization of duty from the petitioner and for this reason the petitioner has no cause of action. The petition is said to be of anticipatory relief and deserves to be rejected.

5. On merits it is denied that the polymer chips do not fall within "Plastics not otherwise specified". It is stated that polymer chips are covered by Item 15A(iii)

of Schedule I of the Act of 1944. It is maintained that-polymer chips are obtained by the polymerization of the caprolactum and are known as "Polymide resins" and that they can further be used as raw material for manufacture of different plastic articles by using special type of extrusions and injection moulding techniques. The product being a thermoplastic material by itself is correctly assessable under Item 15A(iii) of the First Schedule of Act of 1944. It is stated in the return that polymer chips are marketed products and were being imported by the petitioner in the first instance under the trade name "Ultramid B.S.". On this countervailing duty at the rate of 20 per cent ad valorem was being paid. Subsequently, however, the petitioner has set up a plant for the manufacture of this material from the imported Chemicals known as Caprolactum so that the factory manufactured polymer chips of which the corresponding trade name of the foreign manufacturers was "Ultramid B.S.". It is denied that polymer chips are not assessable to duty. It is maintained that the decision of the respondent dated 1-2-1963 is perfectly just. It is maintained that the views of the German Scientist produced by the petitioner were heard by the respondent with the assistance of the departmental Chemical examiner and that the reasons for classifying the polymer chips under item No. 15A(iii) were explained orally to the petitioner at that time. It is denied that the remedy before the Central Board of Revenue is not a real remedy or that the disposal of appeal take inordinate time, it is maintained, Therefore, that the present petition is misconceived and is liable to be rejected on this ground. The return was filed on 3-7-1964.

6. A further affidavit in rejoinder on behalf of the petitioner was filed and it is dated 29-4-1965 in which it was repeated that the respondent had definitely given a finding that the petitioner-company was liable to pay excise duty on the polymer chips obtained by it during the process of manufacture of Nylon 6 yarn and thus covered by Item 15A(iii) of First Schedule of the Act of 1944. It was denied that the relief sought by the petitioner-factory was anticipatory. Along with this rejoinder letters from the Deputy Superintendent of . Central Excise dated 12-2-1963 and 16-2-1963 were annexed calling upon the petitioner to supply information, about the polymer chips so as to enable the Excise staff to raise a demand for polymer chips by the petitioner. By the letter dated 16-2-1963, the Deputy Superintendent, Central Excise wrote to the petitioner that as polymer chips produced by the petitioner had been classified as plastics by the respondent and the petitioner was required to observe the Central Excise formalities and to pay the duty under Central Excise Law failing which action under the law would be instituted against the petitioner. The plea of the petitioner that duty may not be demanded until the decision of the Central Board of Revenue was rejected.

7. A further affidavit was filed on behalf of the respondent in the form of affidavit by Shri K.C. Joshi, Assistant Collector, Central Excise, Ajmer in reply to the rejoinder affidavit of Shri S.S. Agarwal dated 29-4-1965. It was again maintained that the remedy by way of appeal to the Central Board of Revenue was adequate. It was stated that the letters dated 12-2-1963 and 16-2-1963 did not

amount to threat to recover the excise duty but simply informed the petitioner that according to the department particular items "mentioned therein were considered dutiable and the duty was to be levied in accordance with the Central Excise Law. It was again reiterated that polymer chips produced by the petitioner are assessable under Item 15A(iii) of First Schedule to the Act of 1944.

8. The main contention in the writ petition, Therefore, is that the polymer chips which are obtained at an intermediate stage in the manufacture of Nylon 6 yarn which is the end products manufactured by the petitioner and are not assessable to duty under Item No. 15A(iii) of Schedule I of the Act of 1944, Entry 15A for the relevant period reads as under :

"15A. Plastics, All Sorts :

(i) Moulding powders, granules and flakes (thermosetting and 20% ad valorem thermoplastic).

(ii) Polyethylene films, Layflat tunings and P.V.C. sheets (that is to say, polyvinyl chloride sheets).

(iii) Not otherwise specified."

It may be mentioned that this entry was amended in April, 1962 and remained as such till 28-2-1964. The said item was again amended from 29-2-1964. In the present case the challenge has been made by the petitioner to the order of the respondent dated 1-2-1963 holding that the polymer chips manufactured by the petitioner are covered by Entry 15A(iii). For the relevant period the entry has been reproduced above. Mr. Palkhiwala, learned Counsel for the petitioner admitted that the Entry 15A(iii) has been subsequently amended in 1964. According to him even the amended entry subsequent to 1964 does not make any difference and the polymer chips obtained by the petitioner are still not covered by the said entry.

9. Mr. Singhvi, learned Counsel for the respondent however, submitted, that the present entry as well as the amended entry covers the case of the petitioner. As the challenge in the petition is only to the order of the Collector dated 1-2-1963, the only question, that needs to be determined is whether the polymer chips obtained by the petitioner are covered by the Entry 15A(iii) at the relevant time. In my view, Therefore, it is not necessary for me to determine whether the contention of Mr. Palkhiwala that even the amended entry subsequent to 1964 would not cover the case of the petitioner or the rival contention of Mr. Singhvi that the amended entry covers the case of the petitioner is correct or not. The present petition Therefore will only be concerned with deciding whether the Entry 15A(iii) at the relevant time (before being amended in 1964) covers the case of the petitioner namely whether the polymer chips produced by the petitioner are included in Item 15A(iii) reproduced above. Before I deal with the merits of the case, I must deal with the preliminary objection which was very vehemently argued by Mr. Singhvi. The contention of Mr. Singhvi was that the order of the

respondent was appealable and an appeal lies to the Central Board of Revenue. In fact, the counsel contended, an appeal had been filed by the petitioner before the Central Board of Revenue, and it was, Therefore, not permissible for him to urge the points in the writ petition before exhausting the remedies provided under the Act of 1944. Mr. Singhvi submitted that where the Act provides for the remedies of appeal and revision it is not permissible in law for a party to come to the High Court to seek remedy when the same can be obtained from the authorities under the Act. According to him it would not be conducive to the proper administration of these quasi-judicial matters if the persons were permitted to come to the High Court without first having exhausted the remedies provided under the Act. Mr. Singhvi further contended that the question whether polymer chips are covered by the Entry 15A(iii) under the heading "plastics of all sorts" is essentially a question of fact and the same must be allowed to be decided by the authorities constituted under the Act who are in the best position to do so. He submits that this Court does not decide the disputed question of fact and as there is a dispute between the petitioner and the respondent as to whether polymer chips are covered by the Entry 15A(iii) the only appropriate course is to relegate the petitioner to the remedy provided under the Act. He, however, conceded that the plea that this Court under Article 226 of the Constitution should not entertain the petition when alternative remedies are available is not a question of jurisdiction but is only of discretion. Mr. Singhvi also did not seriously contend that in no case can the High Court entertain the petition under Article 226 of the Constitution simply because the petitioner has an alternative remedy and has not availed of it, though he urged strongly that the present is not the exception.

10. Mr. Palkhiwala, learned Counsel for the petitioner submitted that the rule requiring exhaustion of statutory remedies before the writ to be granted is a rule of policy and convenience as well as discretion and not of law. He further maintained that this plea of the alternative remedy not having been availed of is not an inexorable bar to the entertainment of the writ petition in this Court under the suitable circumstances. He listed various circumstances which according to him took the present case out of the normal rule that the party must first be asked to exhaust the statutory remedies. He submitted that the present was an exceptional case, and Therefore, the preliminary objection that he must exhaust his right of appeal and revision should not stand in the way of the petitioner getting relief if it was so entitled on merits.

11. Mr. Palkhiwala pointed out that the excise chargeable on the petitioners' products runs into lakhs of rupees every year and he says that he had applied to the Deputy Superintendent of Central Excise not to demand the payment of the excise duty until the disposal of the appeal by the Central Board of Revenue but that the same was rejected as is clear from the letter dated 16-2-1963 which has been annexed as Annexure B to the affidavit of Mr. Agarwal filed on behalf of the petitioner dated 29-4-1965. From this letter Mr. Palkhiwala contends that it was quite clear that the petitioner was told that it will have to pay the excise duty

even during the time its appeal was pending. According to him to ask the petitioner to pay such a huge sum is not efficacious alternative remedy. It may be mentioned that in the affidavit filed in reply by the respondents sworn by Mr. G.D. Chatterjee dated 3-7-1964, it was not the case of the respondent that excise duty will not be realised till the disposal of the appeal by the Central Board of Revenue. All that was stated was that as the appeal has been filed before the Central Board of Revenue and it is pending, the writ petition was misconceived.

12. A further affidavit dated 15-7-1965 was filed by Mr. K.C. Joshi in reply to the affidavit of Mr. Agarwal. Here again the objection taken was that an appeal has been filed before the Central Board of Revenue and that, Therefore, this remedy was not available to the petitioner. It was not pleaded that the demand by the Excise authorities would not be realised till the disposal of the appeal. In that view of the matter it is quite apparent that so far as the realisation of the amount on account of excise duty was concerned, it was never contemplated to be stayed and would obviously have been realised, had the petitioner not moved this Court by means of this writ petition. It is only after the petitioner had moved this Court and a stay of recovery had been ordered that the proceedings for the realisation of the amount or to proceed against the petitioner in accordance with law with which he had been threatened by the letter of the Deputy Superintendent of Police, Kota dated 16-2-1963, were not pursued. I may mention at this stage that the factum of the appeal having been filed and pending before the Central Board of Revenue had been mentioned in the petition in the first instance. The contention of Mr. Singhvi is that if this appeal also remains pending and this petition is also heard on merits it will mean that the petitioner will be able to avail of the remedy of appeal in case he was to fail on merits in this Court. According to him such a decision would be anomalous one and should not be permitted to exist. I found force in this contention of Mr. Singhvi and, Therefore, put it to the counsel for the petitioner that before the arguments should proceed in the petition it must be indicated whether the appeal that had been filed before the Central Board of Revenue was to continue or that the petitioner would undertake to withdraw the appeal. The counsel for the petitioner Mr. Sorabjee informed me that the petitioner would withdraw the appeal which has been filed by it and the petition, Therefore, may proceed on the footing that no appeal has been filed by the petitioner. This undertaking having been given, the result is that the apprehension of Mr. Singhvi that in case the petitioner fails in this Court, it may avail of the alternative remedy no longer survives as the petitioner has chosen to pursue this writ petition only. I may also mention that Mr. Singhvi after consultation with the department informed me that if the petitioner was to withdraw, the writ petition and to pursue, Therefore, the remedy of appeal and revision the duty of excise will not be realised from it till the matter was disposed of in appeal or revision. But as submitted by Mr. Palkhiwala, the matter was not only restricted to this particular year but related also to subsequent years as the liability was going on accumulating the petitioner wanted a decision at the earliest which will not be possible if the matter was left

to the appellate or Revisional authorities. Mr. Palkhiwala also contended that the remedy of appeal and revision was otherwise also illusory as the Board and the Central Government had already decided that polymer chips produced by the petitioner and similar other companies was liable to excise duty under Item 15A(iii) of Schedule I to the Act and, Therefore, the remedy by way of appeal and revision would be an idle formality. In this connection he referred me to the averment made in para 9 of the petition to the effect that the Collector had acted under the general directions of the Central Board of Revenue that duty should be levied on all intermediate products like Polymer chips. He pointed out that in the reply affidavit filed by the respondent there is no specific denial of the allegations made in the petition that the respondent had acted under the general directions of the Central Board of Revenue. Another significant fact which shows that the remedy by way of appeal or revision will be illusory is furnished in the judgment of the Bombay High Court in Nylon Synthetic Fibres & Chemicals Limited v. Shri R.K. Audi, Assistant Collector and Ors. (Miscellaneous No. 491 of 1964) decided on 30th April, 1970. In this case the point raised was identically the same whether the polymer chips were covered by Item 15A in Schedule I to the Central Excises and Salt Act, 1944. In the judgment there is a reference to the fact that though the petitioner company had been insisting to the Assistant Collector that it was not liable to excise duty under Item 15A, the later had written a letter to the petitioner dated 28th November, 1964 in which it was stated that the Government of India had decided to levy duty on Polymer chips under Item ISA of the Schedule I of the Act. Mr. Palkhiwala pointed out, and in my opinion rightly that in view of the fact that the main submission of the counsel for the petitioner that Polymer chips were not covered by Item 15A having been rejected by the Central Government which is the Revisional authority under the Act, it would be idle ceremony for the petitioner company to go up in appeal or revision or to prosecute the remedy provided under the Act.

13. Another factor which in my opinion should be taken into account in not rejecting the petition on the ground of alternative remedy is that the matter of duty on Polymer chips is a matter regarding money liability. The present writ petition has been pending in this Court since 1963. If the petition was to be thrown out on this preliminary ground the result will be that the matter will go back to the departmental authorities who will take further time for its decision and as the matter is such which in the normal course would have to be decided in Court, it would again take a number of years before this matter can be finally settled. In that view it seems to me it would even be better for the respondent to have the position decided in Courts so that the respondent is in a better position to know the real situation. For the contention that without exhausting the alternative remedy the petition under Article 226 of the Constitution should not be entertained, Mr. Singhvi referred me to N.T. Veluswami Thevar Vs. G. Raja Nainar and Others, in which it was observed as follows :

"As the question has also been raised as to the propriety of interfering in writ petitions under Article 226 with interlocutory orders passed in the course of an

enquiry before the Election Tribunal, we shall express our opinion thereon. The jurisdiction of the High Court to issue writs against, orders of the Tribunal is undoubted ; but then, it is well settled that where there is another remedy provided, the Court may properly exercise its discretion in declining to interfere under Article 226."

These observations were made in the context of a challenge having been made to a interlocutory order by the Election Tribunal and, Therefore, have no relevancy to the present case.

14. Reference is then made to C.A. Abraham, Uppoottil, Kottayam Vs. The Income Tax Officer, Kottayam and Another, where their Lordships of the Supreme Court observed that the Income Tax Act provides a complete machinery for assessment of tax and imposition of penalty and for obtaining relief in respect of any improper orders passed by the Income Tax authorities and a person who is aggrieved by an order of the Appellate Assistant Commissioner imposing a penalty cannot be permitted to abandon resort to that machinery and to invoke the jurisdiction of the High Court under Article 226 when he had adequate remedy open to him by way of appeal to the Tribunal. In that case of course the matter required investigation of facts and, Therefore, obviously the relief by way of writ petition was not available. Their Lordships of the Supreme Court have in a number of cases under the Income Tax Act upheld the issuance of writs under Article 226 of the Constitution by the High Courts.

15. In Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another, their Lordships upheld the power of the High Court to issue a writ under Article 226 of the Constitution of India quashing the notice issued by the Income Tax officer u/s 34 of the Act if he had acted in excess of his jurisdiction.

16. The next case referred to was the The British India Steam Navigation Co. Ltd. Vs. Jasjit Singh, Addl. Collector of Customs, Calcutta and Others, in which an appeal had been directly filed in the Supreme Court against the order of the Collector and it was observed by their Lordships that if such a procedure was permitted it will lead to the anomalous result that a question of fact determined by the Collector of Customs may have to be re-examined by it as a Court of facts and an argument impeaching the validity or propriety of the order of fine may also have to be considered and these precisely are the matters which the legislature has left to the determination of the appellate and the revisional authorities. It was also observed that the High Court should be slow in encouraging parties to circumvent the special provisions made providing for appeals and revisions in respect of orders which they seek to challenge under Article 226 of the Constitution, but nevertheless it was observed as under :

"In the present case, however, these writ petitions were presumably admitted because they raised a question of some importance which had already been raised by some appeals properly brought before this Court under Article 136 and

so, we have allowed the counsel to argue these writ petitions on the question of construction alone."

17. It was further observed by their Lordships of the Supreme Court in this judgment :

"... the rule that a party who applies for the issue of a high prerogative writ, should, before he approaches "the Court, have exhausted other remedies open to him under the law, though not one which bars the jurisdiction of the Court to entertain the petition or to deal with it, but is a rule which courts have laid down for the exercise of their discretion."

This case also does not, Therefore, lay down that in appropriate cases a writ petition cannot be entertained simply on the ground that the party has not exhausted the alternative remedy of appeal or revision.

18. The next case referred is Orient Paper Mills Ltd. Vs. Union of India (UOI), . This case is very strongly relied by Mr. Singhvi. In this case the question for determination was whether "Machine Glazed Paper" was "packing and wrapping paper" chargeable under Item 17(3) of First Schedule of the Central Excise and Salt Act, 1944. The petitioner Mill had contended that it was manufacturing M.G. Paper and the same was covered by Item 17(3) but the Excise authorities were taking the view that it was covered by Item 17(4). In that case the decision of the Collector had been influenced by the fact that certain direction had been issued by the Central Board of Revenue and the Collector had not applied his independent mind but had gone by the directions. This, their Lordships of the Supreme Court, found to be illegal as in their view the Collector being the quasi-judicial authority had to apply independent mind and, Therefore, directed that the matter be sent back to the Collector for decision whether the M.G. Paper should be assessed as "Printing Paper" or as "packing and wrapping paper". Mr. Singhvi specially relied on the observations as follows :

"Both the appellant as well as the Revenue invited us to decide the case on the basis of the material on record. Ordinarily this Court does not go into questions of fact. That is the duty of the authorities under the Act. We see no exceptional circumstances in this case requiring us to deviate from the ordinary rule."

19. The learned Counsel contended that even when both the sides wanted their Lordships of the Supreme Court to decide the matter, the matter was sent back to the authorities under the Act for decision. He contended that similarly in the present case there is no reason why the matter whether polymer chips are covered by Entry 15A should be decided by this Court and the petitioner be not relegated to the remedy of appeal or revision.

20. Mr. Singhvi also referred me to Sales Tax Officer, Jodhpur and Another Vs. Shiv Ratan G. Mohatta, . In this case the order of the Sales Tax Officer was quashed by the High Court but as the facts had not been examined their Lordships set aside decision of the High Court and remanded the case back to

the Sales Tax Officer to decide the disputed question of facts. It was observed by their Lordships that to warrant entertainment of a petition under Article 226 of the Constitution there must be something more in a case, something going to the root of the jurisdiction of the Sales Tax Officer, something which would show that it would be a case of palpable injustice to the assessed to force him to adopt the remedies provided by the Act.

21. As I have already indicated the present case is an exceptional case for the reasons mentioned and, Therefore, it comes within the exception mentioned by their Lordships of the Supreme Court. The absolute contention, Therefore, of Mr. Singhvi that in this case as there is a remedy of appeal and revision, the petition should be dismissed summarily, Therefore, cannot be accepted. As I had indicated above the rule of exhaustion of the alternative remedy is a question of discretion and not of jurisdiction and has been so observed by the Supreme Court in Civil Appeal No. 794 of 1967 (Union of India v. Hariram Shamji Thakkar and Ors. decided on 5-2-1968, wherein it was stated as under :

"Recourse to the High Court for an appropriate writ is not always barred because the order is capable of being rectified in appeal to the departmental authorities. If there exists an adequate alternative remedy the High Court may leave the party aggrieved to seek relief before the Tribunal of appeal. But the rule is not inexorable. Existence of right of appeal does not bar the jurisdiction, of the High Court to entertain a writ petition at the instance of an aggrieved party. If the alternative remedy is onerous or may not be equally efficacious or for other sufficient reason, the High Court may examine the validity of acts done by official bodies, alternative remedy notwithstanding. The question is one of discretion and not of jurisdiction."

22. Mr. Singhvi also contended that the present writ petition raises a disputed question of facts and on this ground also the petition should be thrown out. In my view there is a fallacy in the argument of the learned Counsel. There is no disputed question of facts so far as the main pleadings of the parties are concerned. Just because according to the petitioner the Polymer chips are not covered by Entry 15A while according to the, respondent Polymer chips are covered by Entry 15A does not make it a disputed question of fact. All the facts relating to the process of obtaining Polymer chips and the various constituents are admitted. The question only is whether on these admitted facts a liability to excise duty can be created on the Polymer chips obtained by the petitioner under Entry 15A. The question here is not of deciding the disputed question of facts but it is simply of interpreting the Entry 15A on the basis of facts on which there is no dispute. The contention of the petitioner is that on the admitted facts the Polymer chips are not covered by Entry 15A and the order of the Collector holding the petitioner liable to pay excise duty amounts to assuming the jurisdiction where it has none and also it is patently erroneous. Such a contention can obviously be decided under Article 226 of the Constitution. Even in matter of disputed question of fact the power of the High Court to decide the

same is not ruled out, as was observed by Shah, J. of the Supreme Court (In Civil Appeal No. 794 of 1967) :

"Again in a petition for the issue of a writ under Article 226 of the Constitution, the High Court, where the right to relief depends upon a decision on disputed questions of fact, ordinarily relegates the party aggrieved to agitate the dispute in a civil suit. That is however, a rule of practice and not an incident of the jurisdiction of the High Court. In a case in which a plea of infringement of a fundamental right of a party is raised, the High Court may ordinarily enter upon investigation of fact as well as law. Even if the claim to relief is not founded on infringement of a fundamental right, the High Court may in the exercise of its discretion in appropriate cases try disputed questions of fact in determining the right of a party claiming the issue of a high prerogative writ on the ground that a public authority has acted to his prejudice."

23. Mr. Palkhiwala has contended that there is a serious misdirection of law and a fundamental wrong approach in the attitude of the respondent when construing Entry 15A. According to him it is a settled principle of interpretation that entries in an Excise Act should be construed in the manner and in terms in which they are known to the trade and to the commercial community. According to him the respondent has construed the Entry 15A on Scientific and technical approach with the result that he is acting in excess of his jurisdiction. He has also contended, and in my opinion rightly, that the Collector in coming to his decision proceeded on such erroneous view of law and approached the case on entirely wrong footings that the error goes to the very root of jurisdiction and thus it amounts to exceeding his jurisdiction.

24. I also cannot accept the contention of Mr. Singhvi that it is open to the Collector to construe Entry 15A in a patently erroneous manner and yet the petitioner would be without remedy to seek the aid of this Court and must necessarily be driven to the remedy of appeal and revision. In my view if a provision of taxing statute was erroneously construed and by such erroneous construction the Collector assumes jurisdiction which in fact does not vest in him it would be a clear case of acting without jurisdiction and would also be a case of patent illegality. In my view, Therefore, as the petitioner is raising the contention that on admitted facts, Entry 15A does not cover Polymer chips, and if this contention is right, the result would be that it is being asked to pay money without any authority of law. I cannot conceive of any greater infringement of petitioner's right and, Therefore, it is not possible for me to accept the submission of Mr. Singhvi that the petitioner is not entitled to invoke Article 226 of the Constitution even in these circumstances.

25. Mr. Singhvi also sought to contend that the order of the Collector did not mention all these facts and details which had been mentioned by the petitioner and, Therefore, it would not be proper for this Court to decide the matter on this material. This in my opinion is not the correct approach. It is admitted by the respondent that a detailed representation was made to the respondent by the

petitioner taking the stand that polymer chips were not covered by Entry ISA. It is also admitted in the return that a German Scientist was taken by the petitioner before the respondent to support this contention. It is quite apparent that the plea that Polymer chips are not plastics was the very contention which was sought to be supported by the petitioner in its representation as well as at the time of personal hearing before the Collector. If the respondent by his impugned order, Annexure A to the petition, has not chosen to give reasons for rejecting the contention of the petitioner, the grievance of the petitioner that this matter has not been disposed of judicially and in a legal manner is quite genuine. The non-performance of the duty by the respondent cannot be availed of to put forward a plea that the writ petition is not maintainable because the Collector has not chosen to give, reasons. Admittedly various contentions were raised before the Collector and the same are being raised here and it cannot be held that simply because the Collector failed to perform his duty, the petitioner must be deprived of its right to seek relief under Article 226 of the Constitution. As a matter of fact this argument of Mr. Singhvi that no reasons are mentioned by the Collector is an argument against his first contention that the petitioner had adequate remedy by way of appeal before the Central Board of Revenue. It, is well settled that if the authority concerned does not indicate reason then the aggrieved party is denied the right of effectively pursuing his appeal as he could not urge the ground against the impugned order of the first authority. In that view of the matter also it seems to me that this is a case in which alternative remedy of filing an appeal is not adequate remedy available to the petitioner.

26. One other reason which has persuaded me not to throw out the petition on this preliminary objection is that this writ petition was admitted several years back and it would be unnecessary harsh if the petition was thrown out on the preliminary ground without deciding the question on merits now.

27. In this connection I may also make a reference to Union of India (UOI) Vs. Delhi Cloth and General Mills, . In that case a petition under Article 226 of the Constitution of India challenged the liability to pay excise duty under Item 23 of the First Schedule to the Central Excises and Salt Act, 1944. The petitioners were manufacturers of Vanaspati and at an intermediate stage they produced a substance which the Excise authorities claimed was not a refined oil because deodorisation had not been done and the substance without deodorisation could not be called a "refined oil" as known to the consumers in the commercial community. The writ petition had been allowed by the Punjab High Court, Circuit Bench at Delhi and an appeal of the Union of India against the said judgment was dismissed by their Lordships of the Supreme Court. In this case no objection was raised that the petitioners must be relegated to the alternative remedy of appeal or revision or that the decision whether a particular item fell within one entry or other of the First Schedule to the Act could not be determined because there was a dispute on the question of facts.

28. Another case reported as South Bihar Sugar Mills Ltd. and Anr. etc. v. Union

of India and Anr. etc. AIR 1968 SC 1922 may be referred. In that case again the question was whether gas produced by the manufacturers was kiln gas and hence not chargeable under the Excise Act whereas the Revenue contended that the process employed by the petitioner company involved the production of carbon dioxide which was compressed gas and was, Therefore, liable to Excise duty under Item 14H in the First Schedule of the Act. The Punjab High Court dismissed the writ petition filed by the company and the appeal against that judgment was allowed by their Lordships of the Supreme Court. In that case only demand notice had been served on the manufacturers which was quashed by their Lordships of the Supreme Court. In that case also no objection was raised that the petitioner company must be relegated to the remedy of appeal or revision or that the question whether the substance produced was kiln gas or compressed carbon dioxide was a disputed question of fact and could not be decided in a petition under Article 226 of the Constitution.

29. These cases, Therefore are against the contention of Mr. Singhvi that the present petition should be thrown out on the preliminary ground that the question raised is a disputed question of facts or that the petitioner should be asked to avail of the alternative remedy of appeal or revision.

30. Another reason why I think the preliminary objection ought to be rejected is that in the meanwhile the Bombay High Court in a writ petition i.e. Nylon Synthetic Fibres & Chemicals Limited v. Shri R.K. Audim, Assistant Collector and Ors. Misc. No. 491 of 1964 decided on 30-4-1970, has dealt with the similar points and has come to the conclusion that Polymer chips are not covered under Item ISA of First Schedule of the Act. A similar contention has been made by the petitioner in the present case that Polymer chips are not covered by Entry 15A. It is true that this judgment has been appealed against, but so long as this judgment stands I don't think it would be very proper for any authorities under the Act to take a different view from that of the Bombay High Court. It is true that technically that decision has been given in a case of another company to which the petitioner in the present case was not a party, yet the judicial propriety would require the authorities under the Act to follow the judgment of the Bombay High Court until it is reserved in appeal and not to take a view different from that of Bombay High Court. If this was permitted this would lead to uncertainty of law as the Tribunals are under the General Superintendence of the High Courts and must follow their decision. If, Therefore, the petitioner was to be relegated to seek its remedy before the appellate or the revisional authority only one of the two courses could be followed i.e. (i) that the authority under the Act should follow the Bombay High Court decision and give relief to the petitioner or (ii) that the respondent should ignore the judgment of the Bombay High Court and take a contrary view. In the event of the first course being followed the Excise authorities will be prevented from challenging the view taken by the Bombay High Court so far as the present petitioner is concerned because it will not be possible for the respondent to have this matter pursued further in any proceedings. In the other alternative, the result will be ignoring and acting

contrary to the judgment of the Bombay High Court by the Tribunal under the Act which would not be consistent with the proper administration of justice but rather will be destructive of it.

31. In that view of the matter and in view of the facts and circumstances of the case and the long time that has elapsed since the matter has been pending in this Court, I think it will not be proper to reject this petition on this preliminary ground. The contention of Mr. Singhvi that the petition is not maintainable on this ground must, Therefore, be rejected.

32. The next contention of the counsel for the petitioner is that Polymer chips produced by the petitioner are not Plastics and hence they are not covered under Entry 15A of the First Schedule of the Act. In this connection an affidavit has been filed on behalf of the petitioner by one Mr. M.R. Jain, the Chief Chemist of the petitioner which describes a process by which Polymer chips are obtained and supports the assertion in the petition that Polymer chips which are obtained by the petitioner are unfit to be used for the manufacture of plastics and cannot be termed as Plastics. In this affidavit it is stated that Caprolactum is classified as monomer which means a single part. When Chemical substances are grouped together and constitute many parts, they are classified as "Polymers" meaning several parts. The basic steps towards the transformation of the raw material in the petitioner company constitutes the process known as "Polymerization" and in this process the raw material Caprolactum is polymerized to obtain polymer. It is further stated that the conditions under which the process of Polymerization is undergone is determinative of the question as to which category of Polyamide is obtained. The grade of polyamide obtained by the petitioner is stated to be known as Nylon 6 for textile fibres. In the process one of the Chemical compounds which is added is Titanium Dioxide which is delustering agent and is added according to the requirement. There is some dispute between the parties as to whether Titanium Dioxide is added for the process of making Polymer chips or/for Nylon 6 fibres as well as plastics. According to the petitioner Titanium Dioxide is only added when the Polymer chips are for the purpose of Nylon 6 yarn and never for the plastics. After this, it is stated, the mixture goes to V.K Reactor. Thereafter the raw material is polymerized into Polyamide and is in liquid stage and then it gets a cold water and is solidified. Thereafter it proceeds to Chips cutter, where the polyamide solid is cut into chips. After that the chips are pumped into Extractor and then transferred to a Hopper and then sent to the dryer and thereafter they are sent for the spinning purposes where polyamide are melted and spun through fine jets with the aid of Nitrogen into Nylon 6 fibres used in textile industry. This end product Nylon 6 yarn is covered by Item No. 18 of the Central Excise Tariff on which duty is paid by the petitioner. It is further stated that the polymer chips obtained in the petitioner company are exclusively suitable for spinning of yarn for textile industries only. It is also stated that the raw material caprolactum can be polymerized by different technical methods under different conditions to obtain different grades of polymer. There are, however, two broad grades of polymers namely (i) Polymer chips used

exclusively for textile industry and suitable only for spinning textile fibres ; and (ii) Polymer chips used exclusively as a material for the Engineering suitable for plastic moulding injection and extrusion purposes and which are unfit for use in textile industry. It is asserted that it is the Polymer chips obtainable under category (ii) only which fall within the entry "Plastics of all sorts". Different procedures are said to be used for these two categories. The type of chips obtained depends on the conditions and procedure adopted for polymerization of caprolactum. It is also stated that at the time of the polymerization of caprolactum in V.K. Reactor, no additives are added which are essential to be added if the polymer chips are to be used for plastic purposes. On the contrary it was maintained that if such additives were added to the polymer chips they would become unsuitable for spinning purpose. The conclusion is sought to be derived that the polymer chips obtained for plastics industries cannot be used for spinning of textile yarn and that the polymer chips suitable for spinning of textile yarn are not suitable for use in plastic industries. It is further maintained that for technical and Chemical reasons it is not possible to produce with the V.K. Reactor in the petitioner company polymer chips usable for plastic industries, particularly because polyamide useful for plastic industry must be of high molecular weight material of 23,000 to 35,000 whereas polyamide obtained by V.K. Reactor in the petitioner company's plant produces polyamide or polymer chips of low molecular weight ranging between 10,000 to 17,000. It is further asserted that the polymer chips obtained in the petitioner company correspond exactly to polymer chips produced by the German firms BASF in Germany which are described under the trade name of "Ultramid BS". It is further stated that polymer chips produced in the petitioner company have a low relative viscosity ranging up to 2.30 and low molecular weight ranging up to 17.00 and that the same cannot be used for plastic industry for which polymer chips of Nylon 6 must have a minimum relative viscosity of 2.70 which may range up to 3.20 or in some cases up to 4.00 and the molecular weight of 23,000 to 35,000. It is positively Asserted that polyamide of textile fibre cannot be used for plastic and vice versa.

33. It is further stated that if polymerization is to be done for the purpose of plastics, additives like the politicizes are essential to be added and it is then only that the same can be used for Nylon plastic industry. It is however, asserted that if politicizes are added at the time of polymerization the resultant polyamide becomes unfit for Nylon fibres for spinning.

34. A. further affidavit of Mr. K.C. Joshi, Assistant Collector, Central Excise, Ajmer, dated 15-7-1965, was filed by the respondent. It is admitted that the petitioner imported "Ultramid BS" which is the name of the product corresponding to the Polymer chips which are now being manufactured by the petitioner. It is stated that the Polymer chips have Thermoplastic properties and that "Ultramid BS" can be used for manufacture of textile fibres as well as the plastic material for manufacture of articles made of plastics.

35. Later on some further affidavits were filed by the petitioner of 6 persons dealing and familiar with the plastic industries which are to the effect that polymer chips used by the petitioner company for the manufacture of Nylon yarn are not plastic articles and are not commercially used for producing plastic products and that it cannot be regarded as raw material for manufacture of plastic nor are they known as plastics commercially.

36. A further affidavit by Mr. V.J. Bakre, Chief Chemist, Central Revenues Control Laboratory, Government of India, dated 26-7-1970, was filed and I permitted it to be placed on record. In this affidavit it denied that the polymer chips which are used by the petitioner company for spinning yarn are not fit for being moulded into plastic articles or other industrial components. Reference is made to the various definitions of "Plastic" given in some of the standard books of which I shall have occasion to deal with at later stage in my judgment.

37. In order to answer the question whether "Polymer chips" obtained in the petitioner company can be included in the entry "Plastic of all sorts", it will be necessary to make a reference to various text books which give some salient features of Plastic. It may, however, at once be noticed that the contention of Mr. Palkhiwala was that the ultimate test that will have to be applied in finding out whether polymer chips are plastics will be the test of finding out what material is known in the market and commercial field as plastic and not what is called technically and scientifically as plastic. He has also contended that though from technical and scientific view polymer chips obtained by the petitioner company cannot be termed as plastic yet if taking hyper technical view of the matter the polymer chips could be Chemically and technically termed under the heading "Plastic" the same cannot yet be covered by Entry 15A of the Central Excise Act because the test to be applied in cases covered by the Excise Act which is Revenue Earning Act is the vernacular language test rather than the technical language test. Before I deal with the various definitions of plastic some of the admitted facts which emerge after a consideration of the various affidavits be noticed as under :

(1) The process by which the polymer chips are obtained in the petitioner company is not disputed.

(2) It is also not disputed that the molecular weight of the polymer chips obtained by the petitioner company and which are suited for textile fibres is from 10,000 to 17,000.

(3) It is further not disputed that the molecular weight of the polymer chips suitable for plastic is to range from 23,000 upward.

(4) It is not disputed that the polymer chips in the petitioner company are with low relative viscosity ranging up to 2.30 whereas the minimum relative viscosity of polymer chips for plastic industry must range between 2.70 up to 3.30 or even up to 4.0.

(5) It is not disputed that the polymer chips obtained in the petitioner company correspond to Ultramid BS, which were used to be imported from a German firm BASF.

(6) It is also not disputed that in the manufacture of polymer chips by the petitioner company politicizes are not added.

(7) There are different grades of Nylon 6 "Polycaprolactum" depending upon the degree of Polymerization. This fact has been admitted by Mr. Chatterjee on behalf of the respondent in his affidavit dated 3-7-1964. Some polyamide are fibre forming to produce synthetic fibres of the Nylon type.

The contention of Mr. Palkhiwala, Therefore, is that before polymer chips obtained by the petitioner company can be called plastic, so as to be covered by the Entry 15A, it must be at least shown that these polymer chips are at all capable of being used either as a raw material for plastic industry or as a plastic. According to the counsel anybody wanting to obtain Polymer chips for fibre has to take a decision much earlier than the stage of Polymer chips. The classification whether the Polymer chips will be of textile fibre or whether they will be plastic has to be determined at the stage of polymerization. According to Mr. Palkhiwala if Polymer chips are to be obtained which could be called plastics and be used for the purpose of plastic industry the additive of politicizes and other additives are essential and as admitted by in the case of polymer chips obtained by the petitioner no politicizes are added it would be wrong to say that they are nevertheless plastic. He says that all plastics are polymer but that does not mean that all polymers necessarily are plastics as the polymers can be both plastics as well as textile fibres.

38. Encyclopedia Britannica, Volume 18 (A New Survey of Universal knowledge ; Plants to Raymund of Tripoli) published by Encyclopedia Britannica Limited, 1961 Edition, defines plastic as under :

"The term plastic derived from the Greek plastikos, appears to have been used first as a suffix implying growing developing and forming. Later it was used as an adjective meaning capable of being formed. The manufacture of pottery and earthenware depends on the plastic qualities of the clay, the making of the glass and plastics and the use of the putty asphalt and cement are all depending upon the plasticity of the product."

"...Moreover, modern technology shows that the materials which are designated as rubber, fibres, resins and plastics are of a similar molecular structure and by appropriate Chemical and physical treatment it is possible to inter convert any of these materials. It follows that certain structure features are common to all these products and being common they relate to similarity in physical, properties between materials which are not necessarily Chemically related. It might be argued that the rubber is a plastic since it can be fabricated by procedure similar to those employed in moulding plastics but rubber is not generally considered to be a part of the plastic industry. Moreover, synthetic rubber is in a similar

category even though the preparation of the polymeric rubber molecule employs many of the processes developed for the preparation of resinous polymers. Similarly, the fibre industry is considered to be independent of the plastic industry and here again the same raw materials, polyamides (Nylon) cellulose and cellulose acetate are used by both industries. Plastics are also divorced from the self-supporting type of film production such as the manufacture of photographic film and cell phones. The term plastic, Therefore, is essentially a commercial classification to which no strictly scientific definition can be applied."

From this definition it would be seen that the term has now come to have a commercial classification and that even though rubber fall in the same category it is still not covered under the word "Plastic".

39. In *Polymers and Resins*, by Brage Golding, 1959 Edition, published by Dr. Van Nostrand Company, Inc. Princeton, New Jersey ; plastic is defined as under :

"A Plastic has been defined in a limited sense as any of a large group of organic substance, whether natural or synthetic, which can be moulded (Plastics= fit for moulding). The noun "Plastic" is usually applied to all polymers which are not considered to be elastomers or fibres ; i.e. which exhibit neither the long range elasticity of elastomers nor the very high crystalline of most fibres. In the engineering sense, however, a plastic is a mixture containing one or more resins compounded with fillers, politicizes, lubricants, dyes, etc. which has been subsequently fabricated."

"Commercial nylon fibres are linear and have molecular weight averages of the order of 12,000 to 20,000. If the average molecular weight is below 6,000 little or no fibre formation is possible; fibres formed from polymers with an average molecular weight of about 6,000 to 10,000 are weak and brittle; as the average molecular weight increases above this range, the fibres becomes stronger. However, if the molecular weight runs much over 20,000, the polymer becomes too difficult to melt or dissolve. Therefore, the process of polymerization must be stopped in the desired average molecular weight range."

From this it was contended that the manufacture of plastic and the manufacture for the purpose of spinning are known in the trade separately and it is wrong, Therefore, to show both of them under the same heading "Plastic".

40. In order to support the argument of the petitioner that politicizes are an essential feature for the manufacture of plastic, reference is invited to the book entitled "The behavior of politicizes" by Ibert Mellan ; published by Porgamon Press, Headington Hill Hall, Oxford, London; as under:

"Following the discovery of camphor as plasticizer a number of politicizing materials were introduced as substitutes for camphor."

"The plasticizer and the base material of plastic substances are recognised as so interdependent that one without the other can be said to have little or no meaning in the plastics industry."

"Graver concluded that a brittle, high molecular weight polymer becomes a useful plastic substance only after plasticisation. plasticizers are used for their ability to impart relatively permanent flexibility toughness and improved flow. Not only plasticizers but heat as well are used with brittle and rigid polymers."

Reference may also be made to Van Nostrand's Scientific Encyclopedia, 4th Edition, 1968, published by D. Van Nostrand Co. Inc. to which both the petitioner as well as the respondent refer.

41. It is stated in the affidavit of Mr. G.D. Chatterjee on behalf of the respondent in support of their assertion that polymer chips are plastic that because synthetic fibres forming polyamide (including Nylon) are essentially thermoplastic and, Therefore, must be deemed to be plastic. Mr. Palkhiwala strongly protested against the above said assertion and maintained that in order to find out whether polymer chips are plastic or not it is meaningless to call any of them as thermoplastic as being irrelevant. According to him, the thermoplastic only means a material which can be softened to a pliable mass by heating, then shaping it to a desired form which is retained on cooling to the solid state. According to him thermoplastic is a quality of material which may be common to various items and it would be wrong to include all of them under the head "Plastic". In this connection reference is made to the definition of thermoplastic in British Plastics Year Book, 1967, published by Life Books Limited, Stamford Street, London, where it is mentioned as under :

"Thermoplastic"

A material that can be softened to a pliable mass by heating, then shaped to a desired form which is retained on cooling to the solid state. This process of softening can be repeated a number of times without damage to the material always providing that the heat applied is not such as to cause Chemical decomposition.

The other passages mentioned in the books may also be looked into :

"Extrusion"

The process of forcing materials in the plastic condition through a die to produce strips, rods, tubes, or profiles.

"Nylon"

A high molecular weight polyamide produced typically by the condensation of a dibasic acid such as adipic acid and a diamine such as hexamethylene diamine. Used as fibres and filaments, for injection moulding and extrusion and in surface coatings.

Nylons are distinguished by number, such as Nylon 6.6 and Nylon 6. These numbers refer to the carbon atoms present in the reactants used to prepare the particular polyamide. The principal nylons are nylon 6.6 from hexamethylene diamine and adipic acid; 6 from caprolactam 6.10 from hexamethylenediamine

and sebasic acid; 11 from aminoundecanoic acid.

Reference is then invited by the respondent to the publication of 1965 Book of ASTM Standards, Part 27, Plastics General Methods of Testing published by the American Society for Testing and Materials, 1916 Race St. Philadelphia, Pa, 19103.

Mr. Palkhiwala however strongly contended that the definition of Nylon given in the respondent's affidavit had been deliberately given wrongly from the above said book (1965 Book of ASTM Standards, Part 27) which deals with plastic and an impression has been sought to be created as if the definition shows Nylon only as plastic. According to him there is no foundation for this because the same publication has treated separately Nylon fibre and Nylon plastic. The definition of Nylon plastic in this book is as under :

"Nylon Plastics"

Plastics based on resins composed principally of a long chain synthetic polymeric amide which has recurring amide groups as an integral part of the main polymer chain.

The definition of Nylon for textile fibre as given in 1964 Book of ASTM Standards, Part 25, published by the American Society for Testing and Materials is as under :

"Nylon Textile"

Fibres filaments, yarns, and related forms of Nylon, suitable for spinning, knitting, weaving, braiding, or other textile operations.

42. This definition had been pressed into service in the return to show that Nylon fibre even is included in the definition of plastic by this publication. It was, however, pointed out by the counsel for petitioner that this definition has "been wrongly pressed into service by the respondents as in the publication. Part 27 is dealing with plastics General Methods of Testing and that this publication had itself made a distinction of Nylon which is for textile material as is clear from the definition given in Part 25 published separately and which has been reproduced above.

43. Mr. Singhvi referred to "Modern plastics" by Harry Barren, Second Edition, published by Chapman and Hall Ltd., London ; in which at page 623 it is said Nylon is one of the best known and least understood of the plastic materials at the present time. It is of outstanding industrial importance. The term is a generic one, intended to cover polyamides ---Nylon has very great possibilities as a straight forward plastic which can be manipulated by the usual processes employed in the industry ...The technique of production of fibres, bristles, filaments, etc. is very much a plastic process.

44. This definition was urged to support the contention of Mr. Singhvi that simply because the end products produced by the petitioner is Nylon 6 fibres, it does not mean that polymer chips produced by them are not covered by the definition

of the word "Plastic". Counsel for the petitioner, however, brought to my notice the definition of plastic given in this very book at pages 5 and 7 wherein it is written as under :

Page 5.-Often it is the plasticizers rather than the resin components which become the determining factor in the availability of the final plastic. Another controlling factor is the equipment required to manufacture the various items.

Page 7."-When these are mixed with modifying agents such as plasticizers, fillers, or the like, the resulting product is usually called a plastic material after it is formed to shape. The term "Plastic material" is usually reserved for the end product of the process even though these may only be a plastic intermediate stage.

The counsel for the petitioner contended that it is recognised in this very book that the addition of plasticizers really determines whether the material is to be plastic and that as admittedly no plasticizer is used by the petitioner, the polymer chips produced by the petitioner, Therefore, cannot be said to be plastic.

Reference was then made by Mr. Singhvi to the affidavit of Mr. Bakre dated 26-7-1970 in which an extract of the term plastic is to be found which is as under :

Plastics.--In this entry, the term plastics is used in the general sense to denote mixtures of materials, one of which is a polymer, that are capable of being formed into a fibre, sheet or solid, or cast in a mould, at one stage of processing and subsequently becoming more rigid at another, although the degree of rigidity may vary widely. Plastics contain, in addition to the polymers, some or all or various other components, such as fillers, solvents, plasticizers, lubricants, accelerators, dyes etc. There are three major groups into which these materials based upon synthetic or natural polymers may be classified upon the basis of mechanical form and behaviors; Elastomers, of low modulus of elasticity, soft and easily deformable, but which may stiffen appreciably on stretching; plastics (the more restricted use of the term) those polymers of intermediate modulus of elasticity; and Fibres, characterized by high initial elastic moduli.

45. The counsel for the respondent contended that the above extract supports his contention that fibre polymer should also be regarded technically and scientifically as plastic. The counsel also brought to my notice the following extract from Van Nostrand's Scientific Encyclopedia, IV Edition, published by D. Van Nostrand Company Inc.

Page 1368.--Nylons are durable and tough plastics which can be used for noiseless gears, oil less bearings, and many other uses, especially as fibres.

Counsel for the petitioner, however, pointed out that plastic has restricted meaning and does not apply to polyamides which fall in the category "suitable for textile fibre spinning" such as Polymer chips obtained by the petitioner.

46. Reference was made by Mr. Singhvi to "Dictionary of Plastics" by J. A. Wordingham and R. Reboul, published by George Nawnes Limited, Tower House, Southampton Street, London, 1964 Edition and to the definition of Spinning at page 166 as the technique of manufacturing filaments or fibres by forcing the molten plastics material through a spinneret and spinneret is defined as a device embodying a number of small holds through which a plastic material can be forced to produce filaments or fibres. At page 173 Titanium Dioxide is mentioned as a non-toxic white coloured inorganic pigment.

47. The counsel for the petitioner, however, submitted that no much reliance can be placed on this Dictionary as the author has mentioned that he has found differences of opinion existing between companies in the same country as a term used in one country may mean something rather differently. In this connection it was pointed out that the mention of Titanium Dioxide as an inorganic pigment is not mentioned in "Encyclopedia of Polymer science and Technology" Volume 10, Edited by Herman F. Mark & others; published by Inter science Publishers, New York, wherein a table is given of different inorganic pigments, including of the class Oxides but no mention is made of Titanium Dioxide. The suggestion is that if this entry does not include Titanium Dioxide as one of the inorganic pigment the mention of it in the Dictionary of Plastics, by J.A. Wordingham and R. Reboul is inaccurate.

48. Similarly a reference is made to pages 439--442 in the book entitled "Plastics International" (2nd Edn.) by Temple Press Books, London, and it is pointed out that though all important inorganic fillers manufactured by leading companies in Great Britain are set out together with their trade names, yet there is no mention of Titanium Dioxide in the list.

49. Reference was made by the respondent to pages 282, 284 and 285 of the Handbook of Textile Fibres by J. Gordon Cook, published by Merrow Publishing Co. Ltd. (4th Edition) especially to page 284 where it is mentioned as follows :

"The molten poly caprolactum may be spun directly at this stage, without any intermediate insulation of solid polymer (See Direct Spinning below). More commonly, it is extruded from the pressure vessel as a thick macaroni like strand which is cooled by a water spray or by falling on to a cooled metal band. The solidified polymer is chopped into small chips of maximum diameter about 1/2 inch.

The chips are washed in dematerialized water which dissolves out the bulk of the caprolactum; they are then centrifuged and dried in vacuo at a temperature below 85°C. The washed and dried chips contain about 1 per cent of caprolactum."

The counsel for the petitioner, however, pointed out that "Polycaprolactum is in equilibrium with about 10% of the monomer, which must be removed by washing with water before the polymer can be spun as mentioned in Textbook of Polymer Chemistry by Fred W. Billamcyer, Jr.

50. Reference was also made by the respondent to "Elseviers" polymer series", Volume I, by R. Houwink and others, which shows that fibres are extruded by the Extrusion machines.

51. Reference was also invited to page 93 of Polyamide resins, Second Edition by Don F. Floy, which shows as follows :

"Nevertheless, Nylon was something new as a textile fibre material a molten plastic that could be changed to a fibre which looked like natural continuous fibres such as silk or rayon. And, again it was a fibre which would be drawn or stretched four or five fold to strengthen it and take it more lustrous. Melt spinning and drawing were new concept to the fibre field."

Mr. Singhvi also referred to page 464 of "Encyclopedia of Polymer Science & Technology", Volume 10, by Herman F. Mark & Norman G. Gaylord to point out that caprolactum is effective plasticizer. The suggestion was that it was not necessary for the production of plastic to add any plasticizer.

52. Reference is then invited to page 15 of "Plastics in the Service of Man", A Pelican book by E.G. Couzens and V.E. Yarsely, published by Penguin Books where it is mentioned as follows :

"In the book "Plastics in the Service of Man" by Couzens and Yarsley, which is a book intended for the general reader who is anxious to be well informed in the matters of daily interest."

53. Reference was then made to pages 176-178 of the said book where the process of spinning fibres like dry spinning, wet spinning and melt spinning are mentioned. Melt spinning is applied to insoluble polymers such as the Polyamides e.g. nylon and Terylene.

54. Reference was also made to "Concise Guide to Plastics", Second Edition, by Herbert R. Simonds and Hames M. Church, published by Reinhold Publishing Corporation, New York, where a table of the progress in plastic development mentions polyamide (Nylon) fibres in the table giving details.

55. From the above said extracts, it is quite clear that even in Scientific and Technical sense the word plastic is not universally being used to define fibres manufactures as Nylon 6. In fact, Nylon 6 polymers are essentially being used for the manufacture of textile fibre. It is also clear that polymer of more molecular weight than 18,000 or 20,000 are not considered fit for textile fibres and that the average molecular weight of polyamide used for manufacture of fibre is up to 20,000. Golding in his treatise on (Polymer and Resins) defines plastic as being applicable to all polymers which are not considered to be elastomers or fibres i.e. which exhibit neither the long range elasticity of elastomers nor the very high crystalline of most fibres. Encyclopedia Britannica also mentions that fibre industry is considered to be independent of the plastic industry. Thus the Technical Text Books have also recognised that the term plastic is mainly a commercial classification of the word and cannot be defined

only in a scientific sense. Mr, Singhvi has contended that the term "Plastic" as mentioned in the Act should be interpreted in the broader and in scientific and technical sense. According to him the word "Plastic" is known and means only the large group of material which contains essential ingredient and organic substance of large molecular weight, and which, while solid in the finished stage at some stage in its manufacture has been or can be formed into various shapes by flow. He submitted that the basic raw material, however, is caprolactum and the fact that by various processes the end products produced by the petitioner is nylon 6 fibre it does not mean that polymer chips obtained by the petitioner at an intermediate stage are not to be included in the definition of plastic.

56. As noticed, the definition even in the technical books does not give such a rigid definition of the word "Plastic". The books seem to recognise that by user and commercial affidavit the word Plastic must be considered independent of the fibre and can only be applied to polymer chips are not considered to be elastomer or fibres.

57. Mr. Palkhiwala, however, challenged the view of the respondents in having applied the scientific or technical test to define the word plastic that is to be found in the Entry 15A of the First Schedule of the Act. Mr. Palkhiwala stated that the test which was being suggested by the respondent throughout and has also been reiterated in the latest affidavit of Mr. Bakre, was a scientific and technical text which was clearly in opposite and irrelevant when an entry in a fiscal statute was to be interpreted.

58. According to Mr. Palkhiwala the test that has to be applied was the test of how the word plastic was understood in the market and the commercial field and how the people belonging to trade understood it. According to him the fact whether a particular item could be known technically and scientifically as plastic was not determinative of the meaning as the Act was for the purpose of raising revenue and, Therefore, it should be given the meaning as understood in the trade. According to Mr. Palkhiwala this was the test which has been recognised in a number of decided cases and it was that test alone which must be applied in the present case to determine whether the word "Plastic" in the entry cover the polymer chips which are obtained by the petitioner. In order to support his contention as to how the Entry 15A in the First Schedule of the Act should be interpreted, the counsel for the petitioner referred to a number of authorities where the test of principle of interpreting by giving a popular meaning as understood by the persons dealing in the trade was applied. The first authority referred to is King v. Planters Nut and Chocolate Company Limited reported in 1951 Can LR 122 where the question that arose was whether a producer or manufacturer of salted peanuts and cashew nuts which were sold and delivered in Canada were liable to the payment of Sales Tax on the ground that salted peanuts and cashew nuts were either (a) vegetables or (b) fruit within the meaning of Schedule III of the Excise Act. The question that called for determination in the case was whether salted peanuts and cashew nuts fell

within the definition of either Fruit or Vegetable. Evidence was given in that case of an Assistant Professor of the Department of Botany at the University of Toronto, who deposed that peanuts could be included from botanical angle in the definition of fruit. According to the both peanuts and cashew nuts were vegetable in the wider meaning of that word and that it was also a fruit. The Court in that case opined that the words "Fruit" and "Vegetable" are not defined in the Act and they being ordinary words must be construed according to the popular sense. It was observed by the Court as follows :

"Now the statute affects nearly everyone the producer or manufacturers, the consumer who in the last analysis, pays the tax. Parliament would not suppose in an Act of this character that manufacturers, producers, importers, consumers, and others who would be affected by the Act, would be botanists. The object of the Excise Tax Act is to raise revenue, and for this purpose to class substances according to the general usage and known denominations of trade. In my view, Therefore, it is not the botanists' conception as to what constitutes a "fruit" or "vegetable" which must govern the interpretation to be placed on the words, but rather what would ordinarily in matters of commerce in Canada be included therein. Botanically, oranges and lemons are berries but otherwise no one would consider them as such."

The finding of the Court was summed up as follows :

"My finding must be that as products and as general commodities in the market, neither salted peanuts nor cashew, or nuts of any sort, are generally denominated or known in Canada, as either fruits or vegetables. I think it may be assumed, Therefore, that if Parliament had intended to include "nuts" among the exempted foodstuffs, the word "nuts" would have appeared in the schedule. That being so, it must follow that salted peanuts and cashew nuts, which as I have said above are considered generally in Canada to be within the category of nuts, do not fall within the exemptions provided for fruit and vegetables in Schedule III.

59. Mr. Palkhiwala stressed that the test adopted was whether the products were known in Canada, the country where the sales tax was being imposed, as "fruit" or "vegetable". According to him the test to be applied in the present case should also be whether polymer chips are known as "Plastics" in India.

60. In Craies on "Statute law", 6th Edition at page 163 it has been observed as under by Pollock B. in *Grenfell v. Inland Revenue Commissioners* :

"If a statute contains language which is capable of being construed in a popular sense, such a statute is not to be construed according to the strict or technical meaning of the language contained in it, but is to be construed in its popular sense, meaning, of course, by the words "popular sense", that sense which people conversant with the subject-matter with which the statute is dealing would attribute to it."

61. Further on the Rule is elaborated that the popular sense is to be given to the ordinary word as follows ;

"And in All. Gen. v. Bailey, it was held that the word "spirits" being a word of known import, is used in the Excise Act in the sense in which it is ordinarily understood. We do not think, said the Court, that in common parlance, the word "spirits" would be considered as comprehending ,liquid like sweet spirits of nitre, which is itself a known article of commerce not ordinarily passing under the name of "spirits". So the popular or commercial sense has been adopted for the expression "children" gas, Bohea, tea, five miles square, "grain", "park" premises, "rubbish" the working classes, "gin", "trailer", "Purchasing", "court"."

62. The next case to which Mr. Palkhiwala referred as Borys v. Canadian Pacific Railway Co. and Anr., 1953 1 All E.R. 451. In that case the word Petroleum fell to be interpreted which was mentioned in the original document. The dispute was whether the word "Petroleum" would also include gas. Analysing the evidence by the Courts, it was found that both the substance i.e. "petroleum" and "gas" are hydrocarbons and contain the same element. In considering the question as to what meaning was to be attributed to the word "petroleum" in the original reservation, their Lordships observed as follows :

" "Petroleum" in the original reservation, it becomes necessary to decide who are the persons whose use of the word is to determine the sense in which it is employed in the relevant document, inasmuch as the chemist and laboratory expert may attribute to it a meaning different from that which the lay mind would adopt. As has been said, the Chemical contents of the petroleum and the natural gas found in the field are the same and, regarded scientifically, the substances are Therefore, the same. But a scientific similarity of substance does not establish that the materials are themselves rightly to be described by the same name. The proper approach, says the appellant, is to ascertain the meaning of the word in the mouths of those non-scientific persons who are concerned with its use, such as landowners, business men and engineers, and to be guided by them as to the true construction of the reservation. The vernacular, not the scientific, meaning is, he maintains, the true one and in support of this contention he calls attention to the observations, of Lord Halsbury, L.C. in Glassgow Corporation v. Farie when he says of mines and minerals that, in construing the expression, it has to be determined what these words mean in the vernacular the mining world, the commercial world, and landowners at the time when the grant is made. This method of interpretation has been repeated and accepted more than once, and their Lordships agree that, where it can be ascertained that a particular vernacular meaning is attributed to words in circumstances similar to those in which the expression to be construed is found the vernacular meaning must prevail over the scientific. But the distinction is not a rigid one to be applied without regard to the circumstances in which the word is used. It was said by Lord Waston in the same case."

"Mines and "minerals" are not definite terms ; they are susceptible of limitation

or expansion, according to the intention with which they are used."

In their Lordships' view, the same observations are true of the meaning of petroleum. It may vary according to the circumstances in which it is used.

According to the Privy Council, Therefore, the proper approach in interpreting the word is to ascertain the meaning which an ordinary man or a trader attributes to a particular word. Mr. Palkhiwala contends that the test to be applied to the word "Plastic" is the vernacular one namely, what in the market or trade is understood by the word "Plastic", whether when the word plastic, is mentioned in the market any trader would assume that what was being mentioned was Polymer chips of Nylon 6 & 7 textile fibre.

63. Mr. Palkhiwala then referred to the case reported as Ramavatar Budhaiprasad Etc. Vs. Assistant Sales Tax Officer, Akola, . In that case the question was whether the dealers in betel leaves were liable to pay sales tax under the entry of Vegetable and it was held by their Lordships that the word "vegetable" (in the taxing statute) is to be understood as in common parlance i.e. denoting the class of vegetables which are grown in a kitchen garden, or in a farm and are used for the table. Referring to the meaning of "vegetable" given in the dictionary as to whether it will cover "betel leaves" their Lordships observed as follows:

"Reliance was placed on the dictionary meaning of the word "vegetable" as given in Shorter Oxford Dictionary where the word is defined as "of or pertaining to, comprised or consisting of, or derived, or obtained from plants or their parts. But this word must be construed not in any technical sense nor from the botanical point of view but as understood in common parlance. It has not been defined in the Act and being a word of every day use it must be construed in its popular sense meaning that sense which people conversant with the subject-matter with which the statute is dealing would attribute to it. It is to be construed as understood in common language ; Craies on Statute Law, p. 153 (5th Ed.)."

Their Lordships of the Supreme Court approved the observations in the case of 1951 Can LR 122.

64. The next case referred to is the Commissioner of Sales Tax, Madhya Pradesh Vs. Jaswant Singh Charan Singh, . In that case the dealers were doing the business in firewood and charcoal and the question that called for determination was whether the charcoal is covered under the Entry I, Part III of Schedule II to the Act i.e. the Madhya Pradesh Sales Tax Act. The entry read coal under the said Act. The dealers had relied on the meaning given in the dictionary to the word "coal" and had submitted that it included charcoal and, Therefore, their case was covered by Entry I of Part III of Sch. II. The Additional Sales Tax Officer and Assistant Commissioner had held that charcoal was not covered by Entry I of Part III of Sch. II. On further appeal the Board of Revenue held that charcoal would be included in the terms "coal" and this decision had been upheld by the High Court. Dealing with the matter about the interpretation of the taxing statute Shelat J. who spoke for the Court, observed as follows :

"Now, there can be no dispute that while coal is technically understood as a mineral product, charcoal is manufactured by human agency from products like wood and other things. But it is now well settled that while interpreting items in statutes like the Sales Tax Acts, resort should be had not to the scientific or the technical meaning of such terms but to their popular meaning or the meaning attached to them by those dealing in them, that is to say, to their commercial sense."

65. Their Lordships noticed various decisions including that of 1951 Canada Law Reports and the earlier decision of the Supreme Court i.e. Ramavatar Budhaiprasad Etc. Vs. Assistant Sales Tax Officer, Akola, and summed up the position as follows :

"The result emerging from these decisions is that while construing the word "coal" in Entry I of Part III of Sch, lithe test that would be applied is what would be the meaning which persons dealing with coal and consumers purchasing it as fuel would give to that word. A Sales Tax statute is being one levying a tax on goods must in the absence of a technical term or a term of science or art, be presumed to have used an ordinary term as coal according to the meaning ascribed to it in common parlance. Viewed from that angle a merchant dealing in coal and a consumer wanting to purchase it would regard coal not in its geological sense but in the sense as ordinarily understood would and include "charcoal" in the term "coal". It is only when the question of the kind or variety of coal would arise that a distinction would be made between coal and charcoal; otherwise, both of them would in ordinary parlance as also in their commercial sense be spoken as coal."

66. The learned Counsel then referred to Union of India (UOI) Vs. Delhi Cloth and General Mills, .

67. In that case the question that called for determination was whether the intermediate product obtained by manufacturers of Vanaspati would be known as refined oil even though it has not been deodorized, and would be subject to excise duty under Item No. 23 of the First Schedule on the ground that it was a refined oil as known to the market. In that case their Lordships held that unless the oil was deodorized it was not known in the market as refined oil and, Therefore, no duty could be levied on this goods as the substance was not known to the market as refined oil.

68. Another case referred to was South Bihar Sugar Mills Ltd., etc. Vs. Union of India (UOI) and Others, . In this case the manufacturer of sugar produced kiln gas which consisted of several gases namely Carbon Dioxide, Carbon Monoxide, Oxygen and Nitrogen. The gas thus produced was sucked by a pump and was used for the sugar factory. The contention of the department was that the companies produce Carbon Dioxide through the lime kiln. In repelling this contention their Lordships reiterated the proposition laid down in the earlier case of Union of India (UOI) Vs. Delhi Cloth and General Mills, to the effect that in

order of become goods there must be something which can ordinarily come to the market to be bought and sold and is known to the market. It was held that the kiln gas was not Carbon Dioxide nor compressed Carbon Dioxide known as such in the commercial community and was not liable to duty under the First Schedule of the Act. Their Lordships held as follows :

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

The counsel for the petitioner contended that the test, Therefore, that must be applied to give a finding whether the polymer chips obtained by the petitioner are covered under the Entry "plastics of all sorts" is to ask oneself the question whether any person who goes to the market and wants to buy plastic will conceive of asking for Polymer chips on the understanding that it is covered by the word "Plastics". According to the counsel, the test has to be as to what people who deal with it understand by the word "Plastic" i.e. to say the people who are in the trade or who are consumers and how they use the word "Plastics" in common parlance.

69. Mr. Singhvi did not dispute, as he obviously could not, the test that has been laid by the authorities and also approved by the Supreme Court, for the interpretation of these words in statute like the Excise Act which are meant to raise revenue. He contended however, that there was nothing to show that the word "Plastics" was not understood in common parlance as polymer chips. According to him Plastics was a word which covered the whole process including the obtaining of Polymer chips and it makes no difference whether the Polymer chips produced by the petitioner company were Nylon Fibre or were Nylon plastics. According to him the ultimate user of Polymer chips cannot determine whether the polymer chips of the petitioner would be included in the word "Plastics". We have, Therefore, now to see whether the tests which have been laid down by the decided cases are satisfied in the present case and it can be held as contended by the counsel for the petitioner that the polymer chips obtained by the petitioner company are not Plastics as understood in the trade. In this connection it is necessary to emphasise certain admitted and unchallenged statements of fact on record :

(a) Polymer chips obtained by the petitioner company are of low relative viscosity ranging up to 2.30 and low molecular weight ranging up to 17,000 and that the same could not be used for Plastic industries for which the minimum viscosity is from 2.70 up to 3.20 and the molecular weight is 23,000 upward.

(b) No politicizes are used in the process of polymerization and further that it is absolutely essential to use politicizes if the Polymer chips are to be used for plastic purposes.

(c) Polymer chips obtained by the petitioner company are not suitable for Plastic Industry. Similarly the polymer chips which are suitable for plastic industry cannot be used for spinning of textile yarn.

(d) No additives are added in the process of Polymerization by the petitioner-company.

(e) For making any change in the process of conditions of polymerization in the petitioner factory change of specification would have to be made in the V.K. Reactor used by the petitioner" s plant.

(f) Polymer chips obtained in the plant of the petitioner are exactly similar to the polymer chips obtained by Badische Anilin & Soda Fabrik A.G. (B.A.S.F.) Ludwigshafenamrhein; A German firm which are described by them under their trade name "UL-TRAMID BS".

70. These above facts clearly bring about vital differences between the Polymer chips obtained by the petitioner company and those necessary for the purpose of plastic. It seems prima facie too much to say that though the nature of the Polymer chips obtained by the petitioner are such that it can never be used by any manufacturer of plastic or by any industry for Plastic purpose (rather the polymer chips obtained are such that they do not have the minimum essential ingredients for being utilised for plastic purpose) yet they must be included in the word "Plastic" on the basis of wider and scientific definition simply because polymerization has to be done even for plastic purpose. This is in view an entirely fallacious way of answering the question posed. The test to be applied is not whether polymerization is done by the petitioner-company and whether polymerization will have also to be done by some one doing the work of Plastic Industry. The test is whether the polymer chips obtained by the petitioner company are usable or are known in common parlance to the market as plastic by the persons concerned in trade with it. As far as the question whether the people in trade or the manufacturers consider these Polymer chips under the heading Plastic or textile fibre we have first the affidavit of W.L. Huelter, who was Technical Adviser with Chemi-color Private Limited which company are the authorised Technical representatives in India of M/s. Badische Anilin and Soda Fabrik. A.G. Ludwig Shafen, West Germany (company known as BASF). In the affidavit it is stated that BASF had supplied the catalogue of a material for engineers and another one of BASF products. In the catalogue of Ultramid, a material for the Engineer, all the Ultramid meant for Plastic Industry falling within the category of Plastics and Auxiliaries for plastics are set out. The Ultramid BS is not mentioned in the category of plastics and Auxiliaries for plastics in this catalogue. There is the other catalogue which has been issued for Plastic products, and extract of which is at page 143 of the paper book. Under the item

"Raw materials for synthetic Fibres" "Ultramid BS" is mentioned as one of the items. The contention of the learned counsel for the petitioner is that this catalogue which the manufacturers themselves had issued includes "Ultramid BS" (that is the same as Polymer chips obtained by the petitioner company) as a commodity under the heading of raw material for synthetic fibres but has not been included in the heading of Plastic or Auxiliaries for Plastics. The contention of the counsel is that had Ultramid BS been also known in the market as Plastics, or for Plastic products, it is impossible to imagine that the manufacturer would not include it in the category of Plastics. According to the counsel efforts of the manufacturer would not include it in the category of Plastics. According to the counsel efforts of the manufacturer would be to allege greater use of the category of Ultramid BS rather than to restrict it, and that he would not exclude it from. Plastics, if Ultramid BS was not known in the market or in the trade as plastic, and was not known under synthetics fibre category. This fact the counsel maintains, supports his submission that Polymer chips of the petitioner-company are not known in the trade and in the circle which deals with it as plastics. He says that the fact that the Plastic Industry is not using Ultramid BS can only be on the basis that the same is not included in the entry of Plastic. He has also pointed out that in the catalogue under the heading Plastics and Auxiliaries for plastics only Ultramid is mentioned as is clear from the extract of the catalogue at page 136 of the record. This according to the counsel also supports the assertion that there is a vital difference between the Ultra-mid and Ultramid BS and the two categories of goods are never equated under the same heading of Plastics. According to these categorisations Ultramid BS is excluded positively by the conscious act of the manufacturers from the heading "Plastics". It may be mentioned that no counter-affidavit has been filed by the respondent to show that these categorisations by the manufacturer BASF are in any way arbitrary or are against the usual categorisations made by other manufacturers of "Plastics Industry". It must, Therefore, be accepted that according to the manufacturer "Ultramid BS" is not included and known in the trade by the manufacturer under the category of Plastics and Auxiliaries for the plastics, but is known and included in the entry of "Raw material for synthetic fibres".

71. The next important piece of evidence on which reliance has been placed by the learned counsel for the petitioner is the affidavit on behalf of the Badische Anilin & Soda Fabrik AG (BASF) in which it is stated that the Polymerization units installed by the petitioner company are designed for the production of Nylon 6 polymer applied for the spinning of Nylon 6 fibres. It is also definitely asserted that if politicizes and mould release agents are added during the caprolactum polymerizations in the V.K. Reactor process in Kota in the petitioner company, it would make the produced polymer useless for the fibre extrusion filled. It is also asserted that the petitioner-company is not equipped in its Nylon 7 fibre plant to produce in any visible commercial quantity of Nylon 6 polymer with the desired special properties required for the plastics injection moulding field. It is further stated that the Nylon 6 chips for fibre spinning produced by the petitioner is a

polymer especially designed for the fibre spinning field. This affidavit also brings into prominence the fact that the manufacturing processes for Nylon 6 fibre and for Nylon Plastic are distinct and that Polymer chips produced by the petitioner company cannot be used and are not known as plastics for those who are engaged in the trade of Nylon plastics.

72. Reliance has been placed by the counsel for the petitioner on the four affidavits filed by the persons who are in the trade. Before I deal with these affidavits I must notice a preliminary objection raised by the learned Counsel for the respondent that these affidavits should not be taken into account and that if they were to be taken into account he may be allowed an opportunity to give a reply to them. Mr. Singhvi contended that these affidavits have been placed on record without the permission of the Court and as such they must not be taken into consideration. In my view, however, that is not correct. These affidavits were put in Along with an application filed by the petitioner on 1-12-1969 which is C.M.P. 1463 W/69 and is at page 167 of the record. In that application it was clearly stated that the petitioner wanted to file affidavits of four persons who were in the trade and that they be allowed to be placed on record. The said application was allowed in the presence of counsel by Rangarajan J. on 2-12-1969 with the following orders :

"CM. 1463-W/69-allowed. Counter-affidavit to be filed in three weeks."

From the above order it is quite clear that these affidavits were allowed to be placed on record with the permission of the Court and the respondent was given time to file the reply. The respondent has actually availed of this opportunity and filed affidavit dated 26-7-1970 of Mr. V.J. Bakre, Chief Chemist, Central Revenues Control Laboratory, Government of India. This affidavit though filed during the course of hearing was permitted by me to be placed on record and was actually referred to by the counsel for both the sides. In this affidavit reference is made to the four affidavits filed Along with C.M. 1463-W/69. It cannot, Therefore, be said that these four affidavits were placed on record without the permission of the Court and that the same Therefore cannot be taken into account. The affidavit of Mr. Bakre, however, did not in any manner challenge the assertion made in these four affidavits to the effect that Polymer chips obtained by the petitioner-company were not known in the market as "Plastics". The affidavit of Mr. Bakre only stated that the Polymer chips of the petitioner company should be regarded technically and scientifically as Plastics. Even though no denial was made to the assertion of these four affidavits filed Along with C.M. 1463/W of 1969, I indicated to Mr. Singhvi during the course of arguments on the first day that I would be quite prepared to allow him to place on record any other affidavit that he might like to produce in counter to these four affidavits. Mr. Singhvi took instructions and informed me that it was not possible for him to give any affidavits in reply to these four affidavits unless the case was adjourned for over a month. This request of Mr. Singhvi obviously could not be acceded to. The civil miscellaneous application ; 1963-W/69, had been allowed on 2-12-1969 and a

period of over 7 months by now had elapsed. If during this period the respondent had not considered it proper to file any affidavit in reply to these four affidavits, the inference must be that, in fact, there was no affidavits which The respondent were in a position to file as counter to these four affidavits. I consequently refused to adjourn the hearing of the case which I had already heard for over a day and a half.

73. One of the affidavits filed is that of Mr. Vaman Vitthal Ketkar who is the Executive Officer of Indian Plastics Limited, Bombay, who also claims to have been the Chairman and was at that time a member of the Technical and Development Committee of All India Plastics Manufacturers' Association. It is stated by him that he is in charge of the purchase of various raw materials and production of various plastic goods manufactured by the said company, and in his opinion the Polymer chips as used in the manufacture of Nylon Filament yarn are not plastic articles and are not. and cannot be used commercially for producing plastics products. He also states that they are not known commercially in the field of Plastic trade and industry.

74. Another affidavit is by one Mr. Frederick Benjamin Pinto who is said to be running the Plastic Industry known as Nylon Plastic Industries. His affidavit states that Ultramid BS material is not known as plastic material or raw material for Plastic Industry in the Trade and Industry in India. He specifically refers to the user of Ultramid of BASF for the purpose of Plastic industry.

75. The next affidavit is by one Mr. R.S. Risbood, Assistant Manager in the Technical Sales Service of Indian Commercial Company Private Ltd., Bombay. According to this affidavit Nylon moulding powders used for moulding and extrusion purposes have a higher molecular weight whereas Nylon 6 products from Caprolactum used for spinning textile yarn has a much lower range of molecular weight. He further states that Nylon 6 which is used for textile yarn cannot be used as a moulding powder which is commonly known as injection moulding, extrusion and blow moulding etc. in plastic Trade and Industry.

76. Another affidavit is by Mr. Lakhiram Gupta Manager of M/s. Plastic Products Limited. The said company is stated to be in the trade of plastic since 1938 and manufactures plastics goods. His affidavit states that in 1962 the company had erroneously imported a small quantity of Polymer chips Ultramid BS, from BASF and the same were found totally unfit and unusable for the manufacture of plastic goods. It is also stated that the said material was sticking to the mould and thus making the manufacture of plastic goods impossible.

77. These affidavits were filed to show that the persons in trade and business do not understand Polymer chips produced by the petitioner company to be covered by the entry Plastics of all sorts. It was as a matter of fact maintained that the Polymer chips of the petitioner-company are totally unfit to be used for Plastic Industry as such. The counsel for the petitioner, Therefore, contended that according to the test laid down by the various authorities and accepted by the

Supreme Court it was obvious that the Polymer chips produced by the petitioner-company are not understood or known in the trade and in the market and in common parlance as "Plastic". Accordingly the counsel contended that the respondent was not justified in imposing the excise duty on the petitioner on the ground that the Polymer chips were Plastics. He says that basically and fundamentally a wrong approach has been made by the respondent as the only test that seems to have been applied by the respondent was that of a technical and scientific test did not support the decision of the respondent that Polymer chips were plastics. But that if the correct test, being the test of average businessman and that of trade, was applied there was no escape from the conclusion that Polymer chips were not plastics as understood in the trade. In my view there is great force in the contention of the counsel for the petitioner. A perusal of the various extracts from the books and affidavits would show that Polyamide Nylon 6 may either be suitable for textile fibres or for plastics depending upon the conditions and process under which the polymerization is undertaken for obtaining the respective polyamide. This polyamide can be of two types; firstly polymer chips used exclusively for spinning textile fibres and secondly Polymer chips used exclusively as the material suitable for Plastic, moulding injections extrusion purposes. This type, however, is unfit for the use in textile industry. An assertion has been made in the affidavit on behalf of the petitioner and it was not denied that the Polymer chips obtained by the petitioner-company are totally unfit for use in the Plastic Industry.

78. Mr. Singhvi, however, contended that even if these affidavits were to be taken into account, they did not show that the polymer chips are not covered by the entry "Plastic" in the trade or in the business circle relevant for this purpose. He submitted that these affidavits are by persons who are engaged in the plastic industry and all that these affidavits show is that the Polymer chips produced by the petitioner-company are not used as raw material for plastic industry or plastic goods by the deponents. According to him these affidavits did not show that the Polymer chips are not to be included in the entry of Plastic. In my view there is no force in this contention of Mr. Singhvi. The facts found on the record show that the Polymer chips produced by the petitioner-company are not known in the trade and business circle as plastic nor are they used nor in fact can they be used in the Plastic Industry at all. The process by which the Polymer chips are obtained also materially differs from that by which the polymerization would have to be done if it was necessary to use it for plastics. There is an affidavit of the manufacturer, BASF along with their catalogue which shows that the manufacturer also consider "Ultramid BS" (same as the polymer chips produced by the petitioner company) to be included under raw material for synthetic fibre and not for plastic and auxiliary for plastic. It is thus clear that whether from the manufacturer's point of view or from the point of view of the trade or from the point of view of the Plastic Industry the polymer chips produced by the petitioner-company are not known in common parlance and by people who use them as plastic. The respondent had ample time to file affidavits from the people in trade

or other manufacturers to show that the Polymer chips produced by the petitioner-company or by other companies in similar circumstances were known in the market or in the trade as plastic. No affidavits have been filed in return, and the affidavits that have been filed have made an effort to justify the action of including the Polymer chips produced by the petitioner-company under the entry plastics purely on technical and scientific consideration. It has not been asserted in any of the affidavit filed on behalf of the respondent that Polymer chips produced by the petitioner-company have ever been used in the manufacture of plastic goods or that they can be so commercially used. The test which is applicable, Therefore, of interpreting the words of fiscal statute as laid down by the various authorities is what the expression means to the average manufacturer or the trader or dealer of the plastic material. The material on record clearly show that, the Polymer chips of the spinning range obtained by the petitioner-company are not regarded as plastic by any of the persons dealing in it in the trade or business. After consideration of all the material and various facts mentioned above, I am of the view that the Polymer chips obtained by the petitioner-company for the manufacture of Nylon 6 yarn are not covered by the expression "Plastic of all sorts" under Entry 15A of Sch. I of the Act and the order of the respondent in imposing the excise duty on the petitioner is, Therefore, not warranted by any law.

79. The next contention of the petitioner-company was based on the assumption that even if the Polymer chips obtained by the petitioner-company were said to fall within the entry "Plastic of all sorts" it would still not attract the excise duty. The argument was that the Polymer chips" obtained by the petitioner-company were in such a condition that it was not possible to market them and that, in fact, they were not being marketed. It was contended by the counsel for the petitioner company that the petitioner has no arrangement for the removal of the Polymer chips from the factory for sale to any other factory. It was also contended that the removal of the Polymer chips from the factory involves a highly technical arrangement as care has to be taken that no trace of moisture gets into them. Reference was made to the affidavit filed by Mr. Jain to the effect that the petitioner-company had imported air tight metal containers from West Germany and that these containers were not available in India under the present conditions and it was commercially not possible to take the same from the market. The argument was that as the petitioner-company was not in a position to market and sell the Polymer chips obtained by the petitioner-company, it would not attract the excise duty because the duty imposed is in the very nature of things to be imposed on goods. It was contended that in order that a commodity should be goods it should be something known to the market and, Therefore, unless a commodity was known to the market it would not attract the excise duty. Reliance for this proposition was sought from Union of India (UOI) Vs. Delhi Cloth and General Mills, and South Bihar Sugar Mills Ltd., etc. Vs. Union of India (UOI) and Others, where the Lordships of the Supreme Court observed that by very words of Central Excises and Salt Act, 1944, excise duty is livable on

goods, but as the Act does not define the goods but defines the excisable goods, the meaning of the goods may be referred to from the dictionary. In this connection their Lordships of the Supreme Court observed that "this definition makes it clear that to become goods an article must be something which can ordinarily go to the market to be bought and sold". Similarly reference was invited to passage in para 14 of the South Bihar Sugar Mills Ltd., etc. Vs. Union of India (UOI) and Others, wherein the dictionary meaning was referred to. In my opinion, however, there is no merit in this contention. It is admitted by the petitioner that the Polymer chips produced by it are of the similar type which were imported by it under the trade name of "Ultramid BS". It is also admitted on record that for quite sometime before the petitioner company started manufacturing of Polymer chips it was importing these very goods under the trade name of "Ultramid BS". Thus it cannot be said that the Polymer chips produced by the petitioner-company are not goods known in the market, and that they also cannot be brought to the market to be bought and sold. The argument of the counsel for the petitioner was that as the company did not have technical and other resources to bring the Polymer chips into the market it ought to be held that these Polymer chips are not goods known to the market. In my view this argument is not supported by any principle or authority. The fact of a particular company having the necessary technical and other resources to bring a manufactured goods on to the market is not material to determine whether the manufacture has resulted in the producing goods. It should be noted, and it was fairly conceded by the counsel for the petitioner, that an excise duty is on the manufacture of goods and not on the sale. If that be so, then the moment the manufacture takes place excise duty is immediately attracted. Once, Therefore, if it be held that Polymer chips are manufactured and further Polymer chips are covered under the entry of "Plastic" there would be no escape from the conclusion that excise duty would be immediately attracted irrespective of the fact whether these polymer chips were actually brought to the market or whether the petitioner-company had the necessary resources to bring them to the market. In the case of Union of India (UOI) Vs. Delhi Cloth and General Mills, what was held was that raw oil without deodorisation was not known as refined oil as known to the consumers and the commercial community and it was for this reason that it was held that it did not attract the excise duty. Similarly in the case of South Bihar Sugar Mills Ltd., etc. Vs. Union of India (UOI) and Others, it was found that the kiln gas produced by the petitioner-company was not known as Carbon Dioxide in the market, and, Therefore, the imposition of duty under the head "compressed, Liquified or solidified Gases" was not covered. Reference was also made to a decision of Tarkunde J. of Bombay, High Court in Cosmos India Rubber Works Private Limited and Anr. v. G. Koruthu, Collector of Central Excise and Anr., Miscellaneous Petition No. 401 of 1963 decided on 10-3-1966. In that case the company manufactured hose pipes and purchased cotton fabrics as one of the raw materials. In the process of the manufacturing cotton fabrics was converted into "fractioned cloth". Excise duty was levied on the cotton fabrics purchased by the company before the fabrics was subjected to a process. The

department, however, sought to impose levy claiming it to be covered under Item 19 of the First Schedule to the Central Excises and Salt Act, 1944. His Lordships found that the fractioned cloth cannot be regarded as a finished cotton fabrics and cannot be placed in the market. His Lordship also found that this product was not marketed nor was it marketable and, Therefore, cannot be covered by the expression Excisable goods and as such no excise duty was levied. This case in my view is distinguishable for the reason that it was found that the fractioned cloth was not marketable or in any case finished goods. In the present case, however, it cannot be said that the Polymer chips are not finished goods or that they are not sold in the market as such. The fact that the petitioner itself has been importing it from abroad shows that the Polymer chips are goods known in the market. Mr. Singhvi was quite correct, in my opinion, when he contended that the mere fact that at this stage it is not possible for the petitioner-company to sell it in the market is not determinative of the question whether excise can be levied on it if it was to be held that it was plastics. In my view the contention of the counsel for the petitioner that even it was plastic, Polymer chips would not be liable to excise duty cannot be acceded to and must be repelled .

80. The next contention of the learned counsels for the petitioner was that in order to attract excise duty there must be removal of the excisable goods and as the Polymer chips (assuming them to be falling under the heading "Plastics") were never removed within the meaning of the Act or the Rules, and as such they were not liable to payment of any excise duty. In order to properly appreciate this contention it is necessary to reproduce Section 3 and Rules 7, 9 and 49 of the Central Excise to which reference has been made :

"Section 3(1).-There shall be levied and collected in such manner as may be prescribed duties of excise on all excisable goods other than salt which are produced or manufactured in India, and a duty on salt manufactured in, or imported by land into, any part of India, as and at the rates, set forth in the First Schedule."

"Rule 7: Recovery of duty.-Every person who produces, cures or manufactures any excisable goods, or who stores such goods in a warehouse shall pay the duty or duties livable on such goods, at such time and place and to such person as may be designated, in or under the authority of these Rules, whether the payment of such duty or duties is secured by bond or otherwise."

"Rule 9 : Time and manner of payment of duty.-(I) No excisable goods shall be removed from any place where they are produced, cured or manufactured or any premises appurtenant thereto, which may be specified by the Collector in this behalf, whether for consumption, export or manufacture of any other commodity in or outside such place, until the excise duty livable thereon has been paid at such place and in such manner as is prescribed in these Rules or as the Collector may require, and except on presentation of an application in the proper form and on obtaining the permission of the proper officer on the form."

"Rule 49 : Duty chargeable only on removal of the goods from the factory premises or from an approved place of storage.-(1) Payment of duty shall not be required in respect of excisable goods made in factory until they are about to be issued out of place or premises specified under Rule 9 or are about to be removed from a store room or other place of storage approved by the Collector under Rule 47."

81. Section 3 lays down that there shall be a levy on all excisable goods in the manner as may be prescribed. Relevant Rule 7 provides that every person who manufactures excisable goods is liable to pay duty at such time and place as may be designated under the Rules. The time and manner of payment of duty is further prescribed in Rule 9 which prohibits any excisable goods from being removed from any place where they are manufactured until the excise duty had been paid. Rule 49 further makes it clear that payment of duty need not be made until the excisable goods are about to be issued out of the place or premises specified under Rule 9. Counsel for the petitioner contended that a reading of these rules and Section 3 shows that it is only when the excisable goods are removed from any place under Rule 9 that a duty becomes payable under Rule 49. He maintains that even if the goods are manufactured on which excise is livable it will not still attract the excise duty until the excisable goods are removed from the place where they are manufactured. It was maintained that there was no removal of the goods i.e. Polymer chips from the place where they are manufactured or any premises appurtenant thereto as mentioned in Rule 9. Therefore, as provided by Rule 49 duty was not required to be paid until they are about to be issued out of place or premises specified in Rule 9. This argument is based on the assumption that there is no removal of the Polymer chips after they have been manufactured for the purpose of further manufacture into Nylon 6 yarn. It will be necessary Therefore, for this purpose to refer to the pleadings of the parties in this behalf. It was stated in the affidavit of Mr. G.D. Chatterjee, Assistant Collector, Central Excise, dated 3-7-1964 that the petitioner initially started with the manufacture of Nylon yarn from the imported material Polymer chips which were imported under the trade name of, Ultramid BS". Subsequently, however, the petitioner is stated to have set up another plant for the manufacture of Polymer chips from caprolactum. It was maintained that this product i.e. Polymer chips is manufactured in one plant while Nylon yarn i.e. the end product is manufactured in the other plant. The two plants are said to be distinctly separate and can work independently of each other. This plea by the respondent was challenged in an affidavit dated 29-4-1965 by Mr. Aggarwal on behalf of the petitioner-company. It was maintained that the plants set up by the petitioner-company is one composite plant for the manufacture of Nylon 6 yarn from the raw material caprolactum. It was also maintained that the Industrial license obtained by the petitioner company specifies that the petitioner company is entitled to manufacture of Nylon 6 yarn. Stated that this is the only Industrial license under which the-,entire factory of the petitioner functions and that the whole plant was imported at one time under a single import license. It was,

however, admitted that though the plant was installed at one time the V.K. Reactor plant in which polymerization of caprolactum takes place did not start functioning immediately after installation. During the said period "Ultramid BS" was imported which was used for the manufacture of Nylon yarn. It was asserted that the dry polymer chips have to be transferred from the Dryer to the Feeding Hopper through a specially imported air tight container which are imported and that further the said Polymer chips are immediately to be processed further otherwise they become unfit for use. It was also slated that technically it has now been found possible to pump Polymer chips from the Dryer to the Feeding Hopper directly but that it has not been possible somehow to install the said modification in the petitioner-company's plant. On the basis of this assertion in the affidavit it was sought to be argued by the counsel for the petitioner that, in fact, there was no removal at any time from any place of the Polymer chips and, Therefore, in terms of Rules 7, 9 and 49 of the Excise Rules no excise duty was to be paid. It was maintained that the whole process was a continuous and integrated process and, Therefore, it was not right for the respondent to demand excise duty on the ground that Polymer chips were removed from any premises. Reference was made to the judgment of the Bombay High Court i.e. Nylon Synthetic Fibres & Chemicals Limited v. Shri R.K. Audim, Assistant Collector and Ors.-Miscellaneous (491 of 1964) decided on 30-4-1970; which has accepted this contention of the petitioner. The Bombay High Court (Tulzapurkar, J.) however, has proceeded on the basis that the Excise Act did not contemplate the imposition of Excise levy on a continuous and integrated process until the Rules were amended by the introduction of Rules 173A to 173K in May, 1968. It also accepted the contention of the petitioner in that case that the removal from a place or premises mentioned in Rules 9 and 49 must be taken to mean the removal from the factory premises, and as admittedly the polymer chips are not removed from the factory premises, as such there is no removal and, Therefore the excise was not livable with great respect to the learned Judge I am not able to agree with the interpretation put on the Rules by him as being a correct one. If a reference is made to Rule 9. The requirement is that the excisable goods shall not be removed from any place where they are manufactured whether for consumption, export or manufacture of any other commodity in or outside such place until the excise duty livable paid. This rule clearly contemplates that even if the goods are removed from one part on the premises to another part of the premises for the purpose of further manufacture excise duty has to be paid. This Rule does not support the interpretation that the goods must be removed from the premises of the factory as such. In this connection the definition of factory in Section 2(e) of the Act which means any premises, including the precinct thereof where in or in any part of which excisable goods other than salt are manufactured or wherein or in any part of which any manufacturing process connected with the production of these goods is being carried on or is ordinarily carried on, shows that even a part of the premises where excisable goods are manufactured is covered by the word "factory" within the meaning of the Act. Now Rule 49 only says that payment of duty shall not be required in respect of

excisable goods made in the factory until they are about to be issued out of the place or premises specified under Rule 9. As excise is on the manufacture of goods the moment Polymer chips are manufactured, they attract the excise duty. Rule 49, however, defers the payment of this duty until the time they are about to be issued out of place. It cannot be denied in the present case that Polymer chips are manufactured and then placed in the containers. They are sent to the other part of the plant for the purpose of manufacturing Nylon yarn. It cannot be said that the manufacture of Polymer chips and the manufacture of Nylon yarn in any continuous integrated and without interruption process that it must be held that the Polymer chips as an excisable goods are never removed. The petitioner has not disputed that for some time it was importing Polymer chips (Ultramid BS) and was using it for the manufacture of Nylon 6 yarn. This shows that these processes are separate and that there is a removal from a part of the premises when the Polymer chips are taken to the other part of the premises for the purpose of further manufacture of Nylon 6 yarn. The whole argument of the learned Counsel for the petitioner seems to hinge on the fact that one import license was obtained for the plant and further that the same building houses the plant for the manufacture of Polymer chips and for the manufacture of Nylon 6 yarn. Even here of course it is not in the same part of the room that both these processes are carried on. It is an admitted fact that Polymer chips which are put in the air tight container are sent to another part of the premises where the process for the manufacture of Nylon 6 yarn is carried on. I fail to see how, the mere fact of the distance between the two processes can be determinative of the question whether the goods are removed within the meaning of the Excise Act and Rules. It obviously cannot be disputed by the Counsel for the petitioner that Polymer chips are produced in one part of the premises and adjacent to that there is another room in which separate process of further manufacture of Nylon 6 yarn is being carried on. The removal of Polymer chips would attract the Excise duty. The mere fortuitous chance of both the processes being available in one place or building cannot result in the Polymer chips which may be excisable goods not being subject to a levy of excise on the ground" that there is no removal. The Counsel for the petitioner also pointed out that there was a process by which the Polymer chips could be pumped into the Feeding Hopper from the Dryer directly. The suggestion was that if that continuous process was there, there would obviously be no removal of the Polymer chips which would be pumped directly and without having to put them into the air tight containers. I am not sure that there necessarily would be the result because it may be possible to urge that even if the Polymer chips are pumped from the Dryer to the Feeding Hopper yet they are being removed from the place of their manufacture and, Therefore, they are liable to excise. It may be further possible to say that the automatic or manual picking up of an excisable goods should make no difference in determining the question of the levy of excise. But it is not necessary to give any decision on this point as admittedly that process is not being followed by the petitioner-company. [The petitioner-company is admittedly manufacturing Polymer chips which are put in air-tight containers at one place

and the same are then removed from that part of the premises and then taken to another part of the premises for manufacture of another commodity i.e. Nylon 6 yarn. I fail to see how this process does not involve the removal of polymer chips within the meaning of the Excise Act and the Rules. The contention, Therefore, of Mr. Palkhiwala, the learned Counsel for the petitioner that even if Polymer chips were covered under the entry of plastics, the petitioner would still not be liable to pay excise duty because Polymer chips are not removed within the meaning of the Act and Excise rules, Therefore, has no force and must be rejected],

82. [In view, however, of my finding that the Polymer chips produced by the petitioner company are not covered by Item 15A(iii) of the First Schedule to the Central Excises and Salt Act of 1944, under Plastic of all sorts, this petition must be allowed and the impugned order of the respondent dated 1-2-1963 (Annexure A) is hereby quashed and appropriate writ is issued restraining the respondent his agents from recovering from the petitioner-company the excise duty in pursuance of the said order of the respondent dated 1-2-1963]. In the circumstances of the case, however, there will be no order as to cost.