

(1979) 11 MAD CK 0023

In the Madras High Court

Case No : Writ Petitions No's. 152 and 455 of 1977

Madras Fertilisers Limited

APPELLANT

Vs

Assistant Collector of Central Excise and Others

RESPONDENT

Date of Decision : 19-11-1979

Acts Referred:

Central Excise Rules, 1944 — Rule 10, 173J, 56A
Central Excises and Salt Act, 1944 — Section 35, 35A, 36, 36(1), 36(2)
Constitution of India, 1950 — Article 226, 226(1), 226(3), 32
Sea Customs Act, 1878 — Section 40
Tariff Act, 1934 — Section 2A

Citation : (1981) 8 ELT 194

Hon'ble Judges : Vardarajan, J

Bench : Single Bench

**Advocate : Mutham Reddy and B. Lakshminarayan Reddy, for the Appellant;
U.N.R. Rao, for the Respondent**

Final Decision : Allowed

Judgement

Vardarajan, J.

These two writ petitions have been filed by the Madras Fertilisers Ltd. against (1) The Assistant Collector of Central Excise, Madras, (2) The

Superintendent of Central Excise, Madras and (3) the Union of India, under Article 226 of the Constitution of India-W.P. No. 152 of 1977 for the

issue of a writ of certiorari or any other appropriate writ or order calling for the records relating to the proceedings bearing C. No.

V/14/HH/3/2/74-VC of the Assistant Collector of Central Excise and quashing the order dated 7-1-1977 passed by him therein, and W.P. No.

455 of 1977 for the issue of a writ of mandamus or any other appropriate writ or order directing the Assistant Collector of Central Excise to

refund the excise duty paid on Complex Fertilizers-NPK Mixtures-manufactured by the petitioner company up to 5-3-1976 after adjusting the duty payable on the Urea used in the manufacture of the Complex Fertilizers and the credit taken for the countervailing duty paid on the imported Muriate of Potash used in the manufacture of the Complex Fertilizers.

2. The petitioners are manufacturers of Fertilizers liable for excise duty at 15 per cent ad valorem under item No. 14-HH of the First Schedule to the Central Excises and Salt Act, 1944. They own three units in the same factory at Manali the first designed to produce Ammonia, the second to produce Urea and the third to produce Complex Fertilizers. The distribution of Fertilisers is governed by the Fertiliser Control Order, 1957. The components of the NPK Complex Fertilisers, namely NPK 14-28-14 and NPK 17-17-17- according to the petitioners are Urea manufactured by the petitioners' factory on which excise duty is paid at 15 per cent ad valorem and Muriate of Potash imported from abroad on which countervailing duty is paid u/s 2-A of the Indian Tariff Act.

3. By the Notification No. 25/70-Central Excises, dated 1-3-1970 the Central Government exempted mixed fertilisers falling under Item 14-HH of Schedule I manufactured with the aid of power from two or more fertilisers on all of which appropriate amount of duty of excise or, as the case may be, additional duty u/s 2-A of the Indian Tariff Act, 1934, has already been paid, from the whole of the duty of excise leviable thereon. The Explanation to that notification states that for the purpose of the notification "mixed fertilisers" means mixtures of fertilisers containing more than one nutrient (nitrogen, phosphate or potash) and does not include single nutrient fertilisers >ike super phosphate manufactured from rock phosphate.

4. The petitioners requested the Assistant Collector of Central Excise by their letter dated 21-12-1972 for permission to clear NPK Complex Fertilizers manufactured by them subject to payment of excise duty on the urea portion of the NPK at the relevant date and requesting him to confirm their understanding of the said Notification No. 25/70-C.E. that they could clear NPK without payment of excise duty by paying excise duty on the urea consumed in the manufacture of NPK and not claiming refund of countervailing duty paid on muriate of potash. The Assistant Collector of Central Excise negated the petitioners' request by his letter dated

16-7-1974 observing thus:

On a plain construction, it would appear that this notification is limited to mixed fertilisers which are manufactured with the aid of power

exclusively from two or more fertilisers whereas in the premises of M/s. Madras Fertilisers Ltd., the manufacture of NPK Mixture is from the

following:

- i. Urea,
- ii. Muriate of Potash,
- iii. Phosphoric acid,
- iv. Ammonia,
- V. Fillers, and
- vi. Coating agents.

So the manufacture is not from two or more fertilisers but from the fertilisers and other ingredients. A rigid interpretation of the notification would

therefore imply that NPK which is being manufactured from :

item (i) and (ii) and other ingredients is, therefore, not covered by the notification *ibid*. Apart from the above ammonium phosphate which goes

into the composition of NPK is also a well known fertiliser. Even though ammonium phosphate is not separately available for purposes of

assessment the fact that it is an independent fertiliser which goes into the composition of NPK is a circumstance which cannot be ignored. Since

ammonium phosphate as an independent fertiliser has not been subjected to levy and cannot be subjected to levy for practical reasons, the

conditions of Notification No. 25/70 to the effect that all fertilisers from out of which the mixed fertiliser is made should stand duty paid does not

stand satisfied. Even if duty is paid on urea, duty would not be paid on ammonium phosphate and as such the conditions of Notification cannot be

fulfilled. To extend the benefit of concessional assessment under Notification No. 25/70 to NPK would also be discriminatory vis-a-vis those who

manufacture mixed fertilisers by physical mixing of duty paid fertilisers like ammonium sulphate or urea and muriate/sulphate of potash. Whereas in

the case of NPK manufactured by M/s. Madras Fertilisers Ltd., the ammonium phosphate content would not have paid any duty, similar duty

could have paid by those who follow the other method of manufacture of mixed

fertilisers, I, therefore, hold that the benefit of Notification No.

25/70, dated 1-3-70 cannot be extended to NPK fertilisers manufactured by M/s. Madras Fertilisers Ltd., and they cannot be given the option to

clear NPK mixtures without payment of duty under Notification No. 25/70 by opting to pay the duties on urea"".

5. The petitioners filed an appeal before the Appellate Collector of Central Excise, Madras, on 11-9-1974 against the above order of the

Assistant Collector, contending inter alia that the ammonium phosphate formed in the slurries during interaction in the process is not one of the

finished products produced by them, that their plant is not built for the manufacture of ammonium phosphate, that ammonium phosphate is not

produced in the process in a solid or visually identifiable form and that, therefore, the view of the Assistant Collector that as no duty is paid on the

ammonium phosphate, duty is to be paid on the NPK complex mixtures is not relevant. The Appellate Collector, by his order dated 23-11-1974,

rejected the contention of the petitioners observing that ""according to the Notification it was only such mixed fertilisers are exempt which are

produced by blending, mixing or granulating duty paid fertilisers (two or more) with any substance wherein such mixtures are produced by physical

actions and without, chemical reactions. The fertilisers manufactured by the appellants are definitely complex fertilisers which are obtained by

chemical reaction. Such complex fertilisers cannot therefore be considered as simple mixtures for exemption provided in the notification.

6. The petitioners filed a revision petition dated 10-4-1975 before the Government of India against the said order dated 23-11-1974 of the

Appellate Collector, a copy of which is stated to have been received by them on 31-12-1974. The Government of India allowed the revision

petition by an order dated 18-2-1976 Observing :

The order in appeal is based on the contention that the mixture of two or more fertilisers, envisaged in the relevant Notification should be by

physical action and without chemical reaction and the fertilisers, manufactured by the petitioners are definitely complex fertilisers obtained by

chemical reaction and hence they cannot be considered as simple mixtures to attract the exemption in the notification. The said notification does not

lay down any such conditions and only requires that the mixture can be obtained

with the aid of power and the mixed fertilisers should contain not more than one nutrient. Thus the order in appeal is not a proper speaking order on the issue involved and is set aside. The exemption under the said notification is allowed if the conditions thereof are fulfilled.

7. Subsequently the then Assistant Collector of Central Excise gave effect to this revisional order of the Government of India by his order dated 5-

3-1976 observing :

You have been permitted to avail the exemption under Notification 25/70-C.E., dated 1-3-70 in accordance with the decision taken by the

Government of India in their Order 276/76, dated 18-2-76 on your Revision Petition, provided the following conditions are fulfilled;

(1) Duty is paid on two base fertilisers, viz., Urea and Muriate of Potash which are used in the NPK Mixtures VIJAY n:17:17.

(2) No credit under Rule 56-A is taken for the countervailing duty paid on the imported Muriate of Potash used in the mixtures VIJAY 17:17:17.

(3) The existing stock, if any, Of the imported Muriate of Potash for which credit under Rule 56-A has been already taken and the same

accounted in RG-23, could be used in the Mixture VIJAY 17:17:17. only on payment of appropriate duty on them.

8. However, the same Assistant Collector issued a show cause notice dated 7-6-1976 to the petitioners stating that-

in actual working it is observed that while M/s. Madras Fertilisers Limited are availing the exemption under Notification 25/70-C.E., dated 1-3-

70, the conditions required therein have not been fulfilled. Muriate of Potash and Urea are claimed as the two duty paid base fertilisers used in their

complex fertilisers. While Muriate of Potash as an imported item and on which countervailing duty has been paid, is used as an independent base

fertiliser, Urea is used only as an intermediary product in a continuous process of manufacture of the final product, viz , the complex fertilisers. Duty

on Urea is paid in the intermediary stage only to satisfy the conditions in the aforesaid notification to avail the exemption therein. Urea is therefore

not used as an independent base fertiliser in the complex fertiliser. Further, a mixed fertiliser as explained in the Notification means only mixture of

fertilisers of either two or more and it does not include in its process of such mixing, formation of ,a third fertiliser, viz. Ammonium Phosphate by

admixture of such raw materials as Ammonia and Phosphoric acid and that duty is not paid on such a fertiliser so formed. Besides Ammonia

cleared free of duty under Notification No. 145/71-CE. dated 26-7-71 of Tariff 14-H, for use in fertilisers, is utilising in the formation of

Ammonium Phosphate which is cleared without payment of duty after getting mixed with the complex fertiliser, viz., VIJAY 17:17:17".

The Assistant Collector called upon the petitioners by that notice to show cause why the approval given for availing the exemption under

Notification No.20/70-CE, dated 1-3-1970 for their produce NPK Mixture VIJAY 17:17:17 should not be withdrawn and why they should not

be required to pay duty on the above product removed from 5-3-1976. The petitioners submitted their reply dated 10-6-1976 stating inter alia

that Urea is a fertiliser covered by the Fertiliser Control Order, that Ammonia is not a fertiliser under that Order, that all the points now sought to

be raised in the show cause notice had been raised and considered not only by the Assistant Collector but also by the Appellate Collector and the

Central Government, that the said revisional order of the Central Government dated 18-2-1976 is final with regard to the interpretation of the

Notification in relation to their product, that no authority subordinate to the Central Government can seek to reopen the matter with regard to the

application of the notification to their Complex Fertiliser and that the action proposed to be taken in the show cause notice is, therefore, without

jurisdiction. However, the Assistant Collector of Central Excise passed the impugned order dated 7-1-1977 observing inter alia that after the

classification list submitted by the petitioners was approved by his predecessor-in-office on 4-3-1976, a review of the process of manufacture was

undertaken and it was found that the conditions of the Notification No. 25/70 have not been fulfilled. It was further stated in that order that-

In effect all the base fertilisers which go into the manufacture of the complex fertiliser should have suffered the duty element. In the present case

the NPK Mixture/Complex fertiliser is manufactured out of combination of Urea, Muriate of Potash, Phosphoric Acid, Ammonia, Filler and

Coating agents and the end product is not a mixture but a combination of several other ingredients which can be termed as a complex/compound

fertiliser and that Ammonium Phosphate which is formed with the chemical reaction of Ammonia and Phosphoric Acid had not suffered the duty

element while only the other two base fertilisers, viz., Urea and Muriate of Potash had discharged the duty liability. It is significant to note that the Ammonium Phosphate which goes into the composition of NPK is also a well known fertiliser and the fact that it had not discharged the duty liability is a factor to reckon with while granting the exemption under the said notification The said notification further defines the term "Mixed Fertilisers" as "Mixture of fertilisers containing more than one nutrient (Nitrogen, Phosphate or Potash) and does include single nutrient fertilisers like super phosphate manufactured from rock phosphate". What is manufactured by the assessee, viz., Vijay 17:17:17 is not a mixture of fertilisers as defined under the Notification No. 25/70, but is a compound/complex fertiliser manufactured out of Urea, Muriate of Potash, Phosphoric Acid, Fillers and Coating agents, involving chemical reaction.... Mixed fertiliser only denotes manures/chemical fertilisers containing more than one fertilising ingredient made by mixing together two or more manures/chemical fertilisers of a special character in suitable proportion.... But the NPK complex fertiliser manufactured by the assessee is not such mixed fertiliser. The Explanation to the Notification No. 25/70 makes it clear that the mixture of fertiliser containing more than one nutrient is mixed fertiliser for the purpose of the notification. So what the notification contemplates is a simple mixture of fertiliser with the aid of power. It does not purport to postulate manufacture of mixed fertiliser through chemical transformation of so many commodities as in the case of NPK complex fertiliser manufactured by the assesseeIn other words, when various substances are combined they do not lose their identity as such in the mixture. This is not the case with NPK complex fertiliser manufactured by the chemical process by the assessee, since what emerges out is a new complex fertiliser wherein Urea, Muriate of Potash and Ammonium Phosphate have lost their individual identity The elaborate process of manufacture of the NPK complex fertiliser (Vijay) 17:17:17 has been described in the paragraph supra. They cannot, therefore, be called mixture of fertiliser as stated in the explanation to the Notification No. 25/70.

Regarding the petitioner's contention that the Assistant Collector has no jurisdiction, what is stated in the impugned order is this :

In this case the classification list filed by the party on 3-3-1976 has been approved by my predecessor. As it has been found that the classification

list approved was not correct and the product in question manufactured by the assessee is not eligible for exemption, naturally the classification list

is sought to be reviewed after issue of a show cause notice and after the assessee is also heard in person. It is, thus, clear that the action proposed

and being taken by me is within my jurisdiction and within my powers"".

9. The Assistant Collector has finally held that the order granting exemption to the petitioners be withdrawn and that they should pay duty on their

product removed from the factory from 5-3-1976 onwards and also file a revised classification list and price list in proper form in respect of the.

product.

10. As stated earlier, W.P. No. 152 of 1977 has been filed to quash this impugned order dated 7-1-1977 and W.P. No. 455 of 1977 has been

filed for refund of the duty paid on the Complex Fertiliser upto 5-3-1976, after making adjustments of the duty payable on the urea used in the

manufacture and credit taken for the countervailing duty paid on the imported muriate of potash used in the manufacture of the Mixture. The

grounds urged in both the writ petitions are :

1. The revisional order dated 18-2-1976 of the Central Government, given effect to by the Assistant Collector by his order dated 5-3-1976

operate as res judicata and bars the re-opening of the question by the Assistant Collector and he has become functus officio after issuing the letter

dated 5-3-1976 permitting the petitioners to avail the exemption.

2. The impugned order of the Assistant Collector is without jurisdiction.

3. Even on merits the chemical produced in the slurries in the process of manufacture of the complex fertilisers is not ammonium phosphate known

to the trade and does not, therefore, attract any duty.

11. It has been stated in the affidavit filed in W.P. No. 152 of 1977 that the petitioners have exhausted the appeal to the Collector and the revision

to the Central Government and any further appeal to the same authorities will not serve any purpose. In the affidavit filed in W.P. No. 455 of 1977

it is stated that the Assistant Collector of Central Excise is bound to refund the duty paid on the Complex NPK Fertilisers manufactured by the

petitioners up to 5-3-1976, after adjusting the duty payable on the urea used in the manufacture and the credit taken for the countervailing duty

paid on the muriate of potash used in the manufacture of the NPK Fertilisers.

12. In the common counter affidavit filed in both the writ petitions it is contended that the order dated 18-2-1976 passed by the Central

Government is only an order of remand for considering the petitioner's claim in the light of that order and not a final decision holding that the

petitioners are entitled to the exemption claimed by them under the Notification No. 25/70, dated 1-3-1970 and that the Assistant Collector of

Central Excise therefore went into the question and found that the petitioners are not eligible for the exemption. The notification requires the

components to have been subjected to excise duty or countervailing duty, but Ammonia and Phosphoric Acid, which also have been used in the

manufacture of the NPK Fertilisers, have not been subjected to excise duty or countervailing duty and the NPK Mixtures are manufactured with

the urea, muriate of potash, phosphoric acid, ammonia, fillers and coating agents and the manufacture of NPK fertilisers is, therefore, not with the

use of two or more fertilisers alone and therefore the petitioners are not entitled to the exemption. In the course of the manufacture of the NPK

fertilisers, ammonia and phosphoric acid produce in the slurries ammonium phosphate which by itself is a fertiliser, though ammonia and phosphoric

acid by themselves are not fertilisers individually, and therefore the petitioners are not entitled to the exemption claimed by them. The petitioners

could have gone on appeal and revision to the Appellate Collector and the Central Government under Sections 35 and 36 of the Central Excises

and Salt Act, 1944, and the writ petitions filed, without availing the alternative remedy, are not maintainable.

13. Mr. Utham Reddi, the learned counsel for the petitioners, submitted that the order dated 18-2-1976 of the Central Government is a final order

holding that the petitioners are entitled to the exemption under the Notification No. 25 of 1970 dated 1-3-1970 and the exemption was granted by

the Asst. Collector of Central Excise by his letter dated 5-3-1976, referred to above, and the petitioners had satisfied all the three conditions

mentioned in that letter and cleared the NPK fertilisers from 5-3-1976 up to January, 1977, paying duty on the urea or countervailing duty on the

muriate of potash, as the case may be, and that it was not open to the Assistant Collector of Central Excise subsequently to go back on the order

dated 5-3-1976 and take into consideration the very same objections which had been taken by his predecessor in office in his order dated 16-7-

1974 and the Appellate Collector of Central Excise in his order dated 23-11-1974, ignoring the said revisional order dated 18-2-1976 of the

Central Government.

14. On the other hand, Mr. U.N.R. Rao, the learned counsel for the respondents, submitted that the order dated 23-11-1974 of the Appellate

Collector is not a speaking order on the issues involved, that the order dated 18-2-1976 of the Central Government is only an order of remand

setting aside the order of the Appellate Collector and that the order dated 18-2-1976 must be construed to be an order entitling to the exemption

if the conditions in the Notification No. 25/70, dated 1-3-1970 are satisfied. But he frankly conceded that if the order dated 18-2-1976 of the

Central Government is held to be a final order, the Assistant Collector of Central Excise will have no jurisdiction to go into the matter afresh and

that W.P. No. 152 of 1977 has to be allowed. No doubt several objections had been taken by the Assistant Collector of Central Excise in his first

order dated 16-7-1974 passed on the petitioners' request made by their letter dated 21-12-1972 for extending the exemption granted by

Notification No. 25/70, dated 1-3-1970 in respect of the NPK fertilisers manufactured by them. But in the appeal before the Appellate Collector

of Central Excise only one aspect of the matter was considered. The contention urged before the Appellate Collector was that the petitioners'

plant is not built for the manufacture of ammonium phosphate and ammonium phosphate was not produced in the process in a solid or visually

identifiable form and therefore the view of the Assistant Collector that as no duty is paid on the ammonium phosphate produced in the slurries duty

is payable on the NPK complex fertilisers, is not correct. The Appellate Collector considered that objection and held that according to the

Notification No. 25/70 dated 1-3-1970 "mixed fertilisers" are exempt only when they are produced by blending or mixing or granulating two or

more duty paid fertilisers by physical action and without any chemical reaction, that the fertilisers manufactured by the petitioners are complex

fertilisers which are obtained by chemical reaction and such complex fertilisers cannot be considered as simple mixtures to attract the exemption

granted in the Notification and that the petitioners are, therefore, not entitled to the benefit of the Notification in respect of the complex fertilisers

produced by them, and he dismissed the appeal. In the revision before the Central Government the point considered by the Appellate Collector of

Central Excise alone was considered and it has been held that the Notification does not lay down any condition that there should be only physical

action without chemical reaction and it only requires that the mixture can be obtained with the aid of power and the mixed fertilisers should contain

not more than one nutrient. The Government of India set aside the order of the Appellate Collector observing that it is not a speaking order on the

issue involved, and it has clearly stated that the exemption under the said Notification is allowed to the petitioners if the conditions thereof are

fulfilled. The conditions have been set out by the Assistant Collector of Central Excise by his letter dated 5-3-1976 in which he has clearly stated

that the petitioners have been permitted to avail the exemption under the Notification dated 1-3-1970 in accordance with the Central

Government's order dated 18-2-1976 passed on their revision petition, provided the conditions mentioned in that letter are fulfilled. The conditions

mentioned in that letter are :

1. Duty is paid on the two base fertilisers, viz. urea and muriate of potash which are used in the NPK mixtures VIJAY 17:17:17.

2. No credit under Rule 56-A is taken for the countervailing duty paid on the imported muriate of potash used in the mixtures VIJAY 17:17:17.

3. The existing stock, if any, of the imported muriate of potash for which credit under Rule 56-A has been already taken and the same accounted

in RG-23, could be used in the mixture VIJAY 17:17:17, only on payment of appropriate duty on them.

15. It is not the case of the respondents that these three conditions have not been fulfilled by the petitioners. It is not possible to uphold the

contention of the respondents or agree with their learned counsel that the order dt. 18-2-1976 of the Central Government is an order of remand

merely because it is stated therein that the order of the Appellate Collector "is not a proper speaking order on the issue involved and is set aside".

The order of the Central Government clearly states that the exemption under the said Notification is allowed to the petitioners if the conditions

thereof are fulfilled. The conditions mentioned in the Notification are that the fertiliser could be manufactured with the aid of power from two or more fertilisers on all of which appropriate amount of duty of excise or, as the case may be, additional duty u/s 2-A of the Indian Tariff Act, 1934, has already been paid, and only these two conditions along with another are mentioned in the said letter dated 5-3-1976 of the Asst. Collector of Central Excise, in which it is stated that the petitioners have been permitted to avail the exemption under the Notification provided those conditions are fulfilled. In these circumstances, I agree with the learned counsel for the petitioners that the order dt. 18-2-1976 of the Central Government is a final order allowing the exemption to the petitioners subject to the conditions mentioned therein and referred to in the letter dt. 5-3-1976 of the Assistant Collector of Central Excise.

16. It may be that if the matter was *res Integra* and not concluded by the Central Government's revisional order dt. 18-2-1976 the view held by the Asstt. Collector of Central Excise in the impugned order dt. 7-11-1977 is correct, for, such a view has been taken by a Division Bench of the Andhra Pradesh High Court in the judgment dt. 24-9-1976 in Writ Petition Nos. 1400 to 1403 of 1976 (*Coromandal Fertilisers Limited v. Union of India and Ors.*), 1979 ELT J 501, in respect of the same Notification. The learned Judges have observed :

The first point to be considered, which would immediately arise is about the true and natural meaning of the notification gathered from the language used therein. We have fully extracted the notification above. The exemption is given to "mixed fertilisers" which fall under item No. 14-HH of the First Schedule to the Act. The explanation gives the meaning of the term "mixed fertilisers" as "mixtures of fertilisers" containing more than one nutrient (nitrogen, phoshate or potash) and does not include single nutrient fertilisers like super phosphate manufactured from rock phosphate".

Therefore, by the expression "mixed fertilisers" the Government of India meant "mixture of fertilisers containing more than one nutrient". These mixtures of fertilisers should be manufactured with the aid of power from two or more fertilisers. If appropriate amount of excise duty has already been paid on all the fertilisers used in the manufacture, then alone the end manufactured product will be exempt from the whole of the duty of

excise leviable thereon. Why the Government of India granted this exemption is easily discernible. What is sought to be exempted is a mixed

fertiliser manufactured from two or more fertilisers on all of which duty has already been paid. If excise duty is imposed on the end product also,

then it would be double taxation. That is why the Government of India desired to avoid double taxation and gave the exemption.

What is exempted is "mixed fertilisers" falling under item No. 14-HH of the First Schedule to the Act. Item 14-HH refers to "Fertilisers, all sorts,

but excluding natural, animal or vegetable fertilisers when not chemically treated." It is, therefore, manifest that the notification is concerned with

only "fertilisers" and not with any other commodity. This idea is further demonstrated from the words "manufactured... from two or more fertilisers

... When the notification once again uses the word "fertilisers" its intention to emphasise that the exemption would be available only to mixtures of

fertilisers becomes patent. This meaning is further made clearer by the explanation which gives the meaning of the term "mixed fertilisers" as

"mixtures of fertilisers". Therefore, there cannot be any hesitation to understand the meaning of the notification as purporting to grant exemption

only to mixed fertilisers manufactured from two or more fertilisers. It is not its purpose to grant exemption to mixtures of fertilisers and other

commodities as well.

Mr. Setalval for the petitioner-company strongly urged that if two or more fertilisers are used in the manufacture of mixed fertilisers, such mixed

fertilisers would be entitled to exemption despite the use of other commodities like sulphuric acid and ammonia. According to him, what all the

notification required is the use of two or more fertilisers in the manufacturing of mixed fertilisers and it does not matter, in addition to two or more

fertilisers, some other commodities are also used. He also pointed out that had the Government of India wanted to limit the exemption in the

manner in which the learned Government Pleader construed, then it would have used the word "only" before "two or more fertilisers". Since that

word does not occur, the exemption would be available even if other commodities are used in the manufacture of fertilisers. If that were the

intention of the notification, then it could have easily said manufactured from two or more fertilisers or other substances. Not only it omitted to say

that, but on the other hand the notification throughout emphasises on the use of fertilisers and fertilisers alone. The absence of the word "only"

before "two or more fertilisers" does not stand in the way of understanding the real intention of the Government of India If other commodities are

also used in manufacturing the mixed fertilisers, then the said mixed fertilisers will fall out of the exemption.

We have already noted the averments in paragraph 8 of the writ petition describing the process of manufacture of NPK 14:35:14 and the fertilisers

and commodities used therein. The petitioner company itself stated that NPK 14:35:14 is manufactured by mixing with aid of power from the two

imported fertilisers, viz., rock phosphate and muriate of potash. The manufacturing process, according to the averments in the writ petition, consists

of treating rock phosphate with sulphuric acid, which treatment produces phosphoric acid. The phosphoric acid that is thus produced is further

treated with ammonia as a consequence of which mono and di-ammonium phosphate in slurry form comes into existence. Let us not think at the

present of the phosphoric acid and mono and di-ammonium phosphate which come into existence in the process of manufacture. Let us

concentrate on the basic commodities used in the manufacture of these fertilisers. From the averments in para 8 of the Writ Petition it is obvious that

not only the two fertilisers, i.e., rock phosphate and muriate of potash are used, but also sulphuric acid and ammonia are used. The sulphuric acid

and ammonia used in the manufacture of NPK 14:35:14 are not created in the process of manufacture. They are brought from outside and utilised

in the process of manufacture just like the two fertilisers rock phosphate and muriate of potash. This much is evident from para 8 of the Writ

Petition.

Undoubtedly sulphuric acid is an acid. That can be seen not only from the very name it has, but also from the list of acids given in item No. 14-G of

the First Schedule under the head "Acids". Ammonia, as can be seen from item 14-H which is under the head "gases" is a gas. Sulphuric acid and

ammonia are independent commodities which are by themselves excisable to excise duty. When the Act itself makes distinction between

fertilisers, including mixed fertilisers, on one hand and acids like sulphuric acid and gases like ammonia is pointed out and maintained, it is futile to

argue that Notification No. 25/70 grants exemption to mixed fertilisers which are manufactured from two or more fertilisers and acids and gases.

To say that is only to

introduce something which is not in the notification. We are, therefore of the view that Gromer NPK 14:35:14 is not within the exemption given

under the notification.

The question has been finally decided by the Central Government in their order dated 18-2-1976 and it is not open to fresh consideration by the

Assistant Collector at any subsequent stage.

17. Coming to the respondent's objection regarding the maintainability) of the writ petitions, reliance was placed by the learned counsel for the

respondents on the following two decisions of the Supreme Court in Champalal Binani Vs. The Commissioner of Income Tax, West Bengal and

Others, and Suganmal v. State of Madhya Pradesh and Ors. (1965) I.S.C.J. 443 : (1965) 16 S.T.C. 398. Section 35 of the Central Excises and

Salt Act, 1944, provides for an appeal to the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963,

or, in such cases as the Central Government directs, to any Central Excise Officer not inferior in rank to an Assistant Collector of Central Excise

and empowered in that behalf by the Central Government, against any decision or order passed by a Central Excise Officer under that Act or the

Rules made thereunder not being an order passed u/s 35-A of the Act, within the period mentioned in that Section. Section 35-A provides for

revision by the Central Board of Excise and Customs on its own motion or otherwise of a decision or order passed under the Central Excises and

Salt Act, 1944, or the rules made thereunder by the Collector of Central Excise, not being a decision or order passed on an appeal u/s 35, for the

purpose of satisfying itself as to the correctness, legality or propriety of such a decision or order, and also for a revision by the Collector of Central

Excise on his own motion or otherwise of any decision or order passed under the Act or the rules made thereunder by a Central Excise Officer

subordinate to him, not being a decision or order passed on appeal u/s 35, for the purpose of satisfying himself as to the correctness, legality or

propriety of such decision or order. Section 36(1) provides for any person aggrieved by any decision or order passed under the Act or the rules

made thereunder by any Central Excise Officer or by the Central Board of Excise and Customs, on which no appeal lies, to apply to the Central

Government to revise the order. Section 36(2) of that Act provides for the Central Government, of its own motion or otherwise, calling for and

examining the records of any proceeding in which any decision or order has been passed u/s 35 or Section 35-A of the Act, for satisfying itself as

to the correctness, legality or propriety of such decision or order and passing such order thereon as it thinks fit, subject to the proviso thereto. The

learned counsel for the respondents submitted that it is open to the petitioners to file an appeal against the impugned order to the Appellate

Collector of Central Excise u/s 35 of the Act and that the petitioners not having availed of that alternative remedy, are not entitled to invoke the

extraordinary jurisdiction of this court for filing a writ petition under Article 226 of the Constitution. In *Champalal Binani Vs. The Commissioner of*

Income Tax, West Bengal and Others, their Lordships of the Supreme Court have observed ?

...the Income Tax Act provides a complete and self-contained machinery for obtaining relief against improper action taken by the departmental

authorities, and normally the party feeling himself aggrieved by such action cannot be permitted to refuse to have recourse to that machinery and to

approach the High Court directly against the action. The assessee had an adequate remedy under the Income Tax Act which he could have

availed of. He, however, did not move the Income Tax Appellate Tribunal which was competent to decide all questions of fact and law which the

assessee could have raised in the appeal including the grievance that he had not adequate opportunity of making his representation and invoked the

extraordinary jurisdiction of the High Court. In our judgment no adequate ground was made out for entertaining the petition. A writ of certiorari is

discretionary; it is not issued merely because it is lawful to do so. Where the party feeling aggrieved by an order of an Authority under the Income

Tax Act has an adequate alternative remedy which he may resort to against the improper action of the Authority and he does not avail himself of

that remedy the High Court will require a strong case to be made out for entertaining a petition for a writ. Where the aggrieved party has an

alternative remedy, the High Court would be slow to"" entertain a petition challenging an order of a taxing authority which is ex .facie with

jurisdiction. A petition for a writ of certiorari may lie to the High Court, where the order is on the face of it erroneous or raises question of

jurisdiction or of infringement of fundamental rights of the petitioner.

I have already found that the revisional order dated 18-2-1976 of the Central Government is a final order and that the Assistant Collector of

Central Excise had no jurisdiction to pass the impugned order. Therefore I hold that the writ petition raises a question of jurisdiction of the

Assistant Collector of Central Excise to pass the impugned order and it is, therefore, maintainable.

18. In the order decision in *Suganmal v. State of Madhya Pradesh and Ors.* (1965) 1 S.C.J. 443 : (1965) 16 S.T.C. 398 where the question for

consideration was whether the petition under article 226 of the Constitution praying solely for the refund of money alleged to have been illegally

collected by the State as tax is maintainable. Their Lordships of the Supreme Court have observed :

On the first point, we are of opinion that though the High Courts have power to pass any appropriate order in the exercise of the powers

conferred under article 226 of the Constitution, such a petition solely praying for the issue of a writ of mandamus directing the State to refund the

money is not ordinarily maintainable for the simple reason that a claim for such a refund can always be made in a suit against the authority which

had illegally collected the money as a tax. We have been referred to cases in which orders had been issued directing the State to refund taxes

illegally collected, but all such cases had been those in which the petitions challenged the validity of "the assessment and for consequential relief for

the return of the tax illegally collected. We have not been referred to any case in which the courts were moved by a petition under Article 226

simply for the purpose of obtaining refund of money due from the State on account of its having made illegal exactions. We do not consider it

proper to extend the principle justifying the consequential order directing the refund of amounts illegally realised, when the order under which the

amounts had been collected "has been set aside, to cases in which only orders for the refund of money are sought. The parties had the right to

question the illegal assessment orders on the ground of their illegality or unconstitutionality and therefore could take action under Article 226 for the

protection of their fundamental rights and the courts, on setting aside the assessment orders, exercised their jurisdiction in proper circumstances to

order the consequential relief for the refund of the tax illegally realised. We do not find any good reason to extend this principle and, therefore, hold

that no petition for the issue of a writ of mandamus will be normally entertained for the purpose of merely ordering a refund of money to the return

of which the petitioner claims a right.

19. The learned counsel for the respondents submitted that W.P. No. 455 of 1977 has been filed merely for the issue of a writ of mandamus

directing the refund of a duty alleged to have been illegally collected in contravention of the notification, the benefit of which the petitioners claim to

be entitled, and it is therefore not maintainable. It is not possible to apply the ratio of the decision in this case to the facts of the present case where

the petitioners have filed W.P. No. 153 of 1977 for quashing the impugned order, but for which the petitioners would be entitled to the amount

sought to be refunded in W.P. No. 455 of 1977. Moreover, the learned counsel for the petitioners invited my attention to the decision of the

Supreme Court in *Patel India Private Limited Vs. Union of India and Others*, in support of the contention that a writ of mandamus in W.P. No.

455 of 1977 is maintainable. In that case the writ petition was filed on the ground that Section 40 of the Sea Customs Act, 1878, had no

application, that the Union of India had no right to appropriate or retain the excess duty and that the petitioner-company had a legal right to the

return of the excess duty and there was an error apparent on the face of the record in the order refusing to return the excess duty. The petitioners

therein filed a writ petition to quash the order of refusal to refund excess duty and for an order directing the return of the excess duty. Their

Lordships have observed :

Section 40 on which the Union of India relied in its return, provides that no customs duties or charges which have been paid, and of which

repayment wholly or in part, is claimed in consequence of the same having been paid through inadvertence, error or misconstruction, shall be

returned unless such claim is made within three months from the date of such payment. The section clearly applies only to cases where duties have

been paid through inadvertence, error or misconstruction, and where refund

application has to be made within three months from the date of such payment.

As rightly observed by the High Court, the present case was not one where the excess duty was paid through any of the three reasons set out in S.

40. The excess duty was demanded on the ground that the invoice price was not the real value of the imported goods and payment under protest

was also made on that footing. The ultimate result in the appellant-company's revision was that charging of excess duty was not warranted under

the Act, and that the value on which duty should have been assessed was the invoice price and nothing else. That being the position, Section 40 did

not apply and could not have been relied upon by the customs authorities for refusing to refund the excess duty unlawfully levied on the appellant-

company

The only provision relied on by the customs-authorities was Section 40 of the Act. Indeed, their refusal to refund the "excess duty both in their

return and in the High Court was on the ground of the omission of the appellant company to apply for the refund within the time provided by that

section. It is necessary to emphasise that it was not their case that the invoice price of the items in question was not the real value or that the excess

duty was lawfully levied or that the appellant-company was not entitled to the refund thereof for any reason except the omission to apply for it

within the time prescribed by S. 40. But since Section 40 did not apply to the facts of the case, the respondents could not retain the excess duty

except upon the authority of some other provision of law. No other provision was pointed out by them which would disentitle the appellant-

company to the refund on the ground of its right being time-barred or otherwise. No such provision other than Section 40 which "disentitled the

appellant-company to the refund having been put forward and the customs authorities not being entitled to retain the excess duty, there was a legal

obligation on the part of the respondents to return the excess duty and a corresponding legal right in the appellant-company to recover it

For the reasons aforesaid, we are satisfied that the High Court was not right in refusing the relief, in spite of its being satisfied that the excess duty

was charged without any basis in law and also that the respondents could not lawfully retain the excess duty.

20. The respondents in the present case can have no objection to their liability to refund the excess duty except that the petitioners are not entitled to the benefit of the notification No. 25/70, dated 1-3-1970, to which the petitioners have been found to be entitled. They are, therefore, not entitled to retain the excess duty and there is a legal obligation on their part to return the same, and there is a corresponding legal right in the petitioners to recover the same. The petitioners have filed a separate petition, W.P. No. 152 of 1977 for quashing the order and it is not a case of there being only a prayer for the issue of a writ of mandamus. Therefore, I agree with the learned counsel for the petitioners that W.P. No. 455 of 1977 is maintainable.

21. Regarding the maintainability of W.P. No. 152 of 1977 notwithstanding the fact that the alternative remedy provided for under Sections 35 and 36 of the Central Excises and Salt Act, 1944 had not been availed of the learned counsel for the petitioners invited my attention to some decisions to which I will refer presently. In *State of U.P. v. Mohammad Nooh* AIR 1958 S.C. 86 their Lordships of the Supreme Court have observed:

The fact that the aggrieved party has another and adequate remedy may be taken, into consideration by the superior court in arriving at a conclusion as to whether it should, in exercise of its discretion, "Issue a writ of certiorari to quash the proceedings and decisions of inferior Courts subordinate to it and ordinarily the superior Court will decline to interfere until the aggrieved party has exhausted his other statutory remedies, if any. But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies. In the *King v. Postmaster General: (Ex parte Carmichael, 1928 I KB 291 (E))*, a certiorari was issued although the aggrieved party had an alternative remedy by way of appeal.... Likewise, in *Khurshed Mody Vs. Rent Controller*, it was held that the High Court would not refuse to issue a writ of certiorari merely because there was a right of appeal. It was recognised that ordinarily the High Court would require the petitioner to have recourse to his ordinary remedies, but if it found

that there had been a breach of fundamental principles of justice, the High Court would certainly not hesitate to issue the writ of certiorari"".

22. In the present case it has been found that the Assistant Collector of Central Excise had no jurisdiction to pass the impugned order after the

matter had been concluded by the revisional order dated 18-2-1976 of the Central Government. In the course of the arguments the learned

counsel for the respondents brought to my notice the proceeding of the authorities superior to the Assistant Collector of Central Excise that the

view similar to the one expressed by him the impugned order dated 7-1-1977 is possible and the Assistant Collector may consider the question.

Therefore, even if the petitioners have filed any appeal against the impugned order before the Appellate Collector of Central Excise, it would have

been only an exercise in futility.

23. A Division Bench of this Court in *The Collector of Central Excise Vs. V.K. Palappa Nadar*, has observed :

As pointed out by the Supreme Court in *New Prakash Transport Co. Ltd. Vs. New Suwarna Transport Co. Ltd.*, these tribunals exercise quasi-

judicial powers. Though there are no specific rules for their procedure, they have got to observe the rules of natural justice. In the present case, the

statute has defined their powers, and the tribunals have to act strictly under the terms of the statute. The provisions of Section 35, the gist of which

has been given above, show that, when an appeal is filed before the Central Board of Revenue, the entire proceedings are taken out of the

jurisdiction of the original Tribunal which imposed the penalty, and are brought entirely within the jurisdiction of the Appellate Tribunal. The

Appellate Tribunal has been given powers of the widest character, which will certainly include, as pointed out by the learned Judge (Ramachandra

Iyer, J.) a power of remand. Finality also attaches to the order of the Appellate Tribunal subject only to the orders passed by the Revisional

Authority. This would clearly show that, after the disposal of the matter by the Appellate Tribunal jurisdiction can be revived in the original Tribunal

only if there are specific directions in the appellate order to that effect. If the appellate order merely annuls the original order without containing any

other directions as frankly conceded by the counsel for the appellant there will be no power in the original Tribunal to initiate de novo proceedings.

In that case, the writ petition was filed by the party aggrieved by the fresh proceedings commenced against him by the Collector of Central Excise, notwithstanding the order of the Central Board of Revenue passed in appeal, for the issue of a writ of prohibition restraining the Collector from making any further enquiry in pursuance of the show cause notice. The Writ Petition was allowed and the order was confirmed in writ appeal filed under the Letters Patent. In the present case also it has been found that the revisional order dated 18-2-76 of the Central Government is a final order and there is nothing therein to show that the jurisdiction of the original Tribunal, the Assistant Collector of Central Excise, in respect of the, matter is revived. Therefore, the Assistant Collector of Central Excise had no jurisdiction to pass the impugned order and the petitioners are entitled to file the writ petition for quashing the same.

24. In *Coffee Board, Bangalore Vs. Joint Commercial Tax Officer, Madras and Another*, their Lordships of the Supreme Court have observed :

We have already held that demand of a tax, not backed by a valid law, is a threat to property and thus gives rise to a right to move this Court

under Article 32. The petitioner in such circumstances is not compelled to wait or go through the lengthy procedure of appeals, references, etc. He

may move the Supreme Court for the enforcement of the fundamental rights so threatened. This, however, is not an "absolute right. This Court will

limit the petitioner to establishing a breach of fundamental right. It will not allow a petitioner to use the provisions of Article 32 to do duty as an

Appeal".

This decision of the Supreme Court is referred to in the decision of a Full Bench of the Gujarat High Court in *Abad Cotton Mfg. Co. Ltd. etc. v.*

Union of India and Ors. AIR 1977 Guj. 113, where the learned Judges have observed :

... the last question which remains is as to cases of enforcement of fundamental rights falling within Article 226(1), Clause (A) where there is no

fetter of this alternative remedy for entertaining such a petition under Article 226(3). That question is no longer *res Integra* because on the identical

provision in Article 32, the question is concluded by the decision in *Coffee Board, Bangalore Vs. Joint Commercial Tax Officer, Madras and*

Another, where their Lordships laid down the ratio as under :-

In Smt. Ujjam Bai's case AIR 1962 SC 1921 the question was whether assessment of Sales Tax under a valid Act was open to challenge under

Article 32 on the ground of misconstruction of the Act or a notification under it. It was held that the answer was in the negative. That case has

given some trouble in view of the different opinions expressed in it. It is, therefore necessary to state,

"Simply the propositions which are settled by this Court. The ruling recognises the existence of a right to move this Court under Article 32. where

the action is taken under an ultra vires statute, or where, although the statute is intra vires the action is without jurisdiction or the principles of

natural justice are violated. Errors of law or fact committed in the exercise of jurisdiction founded on a valid law do not entitle a person to have

them corrected by way of petitions under Article 32".

Further, proceeding at P. 877 it is held that the Court would limit the petitioner to establishing a breach of fundamental right and would not allow a

petitioner to use the provisions of Article 32 to do duty as an appeal.

"A clear enough case as laid down in Ujjam Bai's case AIR 1962 SC 1961 must be made out. A threat to property unbacked by a valid law or a

want of jurisdiction or a breach of the principles of natural justice must be clearly made out to entitle one to the assistance of this Court. If that is

successfully done then the provisions for other remedies do not stand in the way"".

.... This decision settles the legal position so far as the question of entertainment of such petitions is concerned on the ground ""of invasion of

fundamental rights where the aforesaid ration would clearly conclude the question"".

If the impugned order of the Assistant Collector of Central Excise is not let aside, it would result in invasion of the fundamental rights of the

petitioners to own property, as the petitioners would have to pay the excess duty which they are not liable to pay in view of the exemption granted

in the Notification No. 25/70, dated 1-3-1970. The petitioners are therefore, entitled to file the writ petition.

25. In Union of India (UOI) Vs. Tarachand Gupta and Bros, their Lordships of the Supreme Court have observed :

The principles thus is that exclusion of the jurisdiction of the civil courts is not to

be readily inferred. Such exclusion, however, is inferred where the statute gives finality to the order of the tribunal on which it confers jurisdiction and provides for adequate remedy to do what the Courts would normally do in such a proceeding before it. Even where a statute gives finality, such a provision does not exclude cases where the provisions of the particular statute have not been complied with or the tribunal has not acted in conformity with the fundamental principles of judicial procedure. The word "jurisdiction" has both a narrow and a wider meaning. In the "sense of the former, it means the authority to embark upon an enquiry; in the sense of the latter it is used in several aspects, one of such aspects being that the decision of the tribunal is in non-compliance with the provisions of the Act. Accordingly, a determination by a tribunal of a question other than the one which the statute directs it to decide would be a decision not under the provisions of the Act, and therefore, in excess of its jurisdiction".

26. In the present case, the Assistant Collector of Central Excise has exceeded his jurisdiction in reopening the matter under Rule 10 read with

Rule 173-J of the Central Excise Rules, ignoring the facts that the matter had been finally concluded by the revisional order dated 18-2-1976 of

the Central Government, where it has been held that the petitioners are entitled to the exemption subject to the conditions mentioned in the

Notification regarding their liability to pay excise duty or countervailing duty on the fertilisers forming the components of the NPK complex

fertilisers manufactured by them. The petitioners are, therefore, entitled to invoke the jurisdiction of this court under Article 226 of the Constitution

of India for quashing the impugned order. Having regard to the aforesaid decisions, I agree with the learned counsel for the petitioners that W.P.

No. 152 of 1977 also is maintainable, notwithstanding that the alternative remedy provided for under Sections 35 and 36 of the Central Excises

and Salt Act, 1944, has not been resorted to.

27. For the reasons aforesaid both the writ petitions are allowed with costs.