

(2014) 06 GUJ CK 0026

In the Gujarat High Court

Case No : Special Civil Application Nos. 10607 of 1995, 152, 154 and 157 of 1996

Shivam Engineering Company

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 11-06-2014

Acts Referred:

Central Excise Tariff Act, 1985 — Section 3
Constitution of India, 1950 — Article 14, 19, 246(1)
Customs Act, 1962 — Section 12
Customs Tariff Act, 1975 — Section 2, 3, 3(1), 3(3), 9A

Citation : (2014) 310 ELT 641 : (2016) 37 GSTR 95

Hon'ble Judges : Mukesh R. Shah, J;Kaushal Jayendra Thaker, J

Bench : Division Bench

Advocate : Paresh M Dave, Advocate for the Appellant; Ketan Dave and Amee Yajnik, Advocate for the Respondent

Judgement

Mukesh R. Shah, J.—As common question of facts and law arise in this group of petitions, all these petitions are disposed of by this common judgment and order.

2. In all these petitions, the respective petitioners have prayed for appropriate writ, order and/or direction striking down heading No. 89.08 of the Central Excise Tariff Act, 1985 (5 of 1986) as unconstitutional and ultra vires Entry No. 84 of the Union List of the Seventh Schedule to the Constitution of India and also ultra vires Articles 14 and 19 of the Constitution of India.

2.1. It is also prayed for appropriate writ of prohibition completely and permanently prohibiting the respondents, their servants and agents from levying and collecting Additional Customs Duty from the petitioners as per the rates prescribed under heading No. 89.08 of the Central Excise Tariff Act, 1985.

3. For the sake of convenience, facts of Special Civil Application No. 10607 of 1995 are considered and said Special Civil Application is treated as lead matter.

3.1. That the petitioner firm is inter-alia engaged in the activity of ship-breaking. That the petitioners purchased old discarded and un-seaworthy ships from Indian as well as foreign sources and bring them at the plot allotted to them for breaking up of such old and scrap ships at Sosiya, Alang. It is the case on behalf of the petitioners that when the old and scraped vessels are purchased from the international market, the petitioners have to pay the Customs duty thereon under section 12 of the Customs Act, 1962. That in addition to the above customs duty which is commonly known as Basic Duty of Customs, an importer is also liable to pay a duty equal to the Excise for the time being leviable on a like article if produced or manufactured in India. That such additional duty is prescribed under section 3(1) of the Customs Tariff Act, 1975 (hereinafter referred to as "the Act"). That the additional duty as per section 3(1) of the Act is being charged at the rates prescribed under heading No. 89.08 of the Schedule to the Act, 1985 which covers vessels and other floating structures for breaking up. That when the petitioners, thus, import many ships or vessel in India for breaking up, the respondents levy and recover additional duty as per the rate prescribed against heading No. 89.08 of the Tariff. Hence, the petitioners have preferred all these Special Civil Applications for striking down heading No. 89.08 of the Act as unconstitutional and ultra vires to the Constitution of India as well as section 3 of the Customs Tariff Act, 1985 and consequently to issue writ of prohibition against the respondents and restraining the respondents from levying and collecting additional customs duty from the petitioners as per the rates prescribed under heading No. 89.08 of the Central Excise Tariff Act, 1985.

4. Mr. Paresh Dave, learned advocate appearing on behalf of the petitioners has vehemently submitted that as per section 3 of the Act, 1985, in addition to the Basic Duty of Customs, an importer is also liable to pay a duty (additional duty) equal to the excise duty for the time being leviable on a like article if produced or manufactured in India. It is submitted that the words "equal to excise duty" as appearing in section 3(1) of the Act, 1985, thus, provide a measure of additional duty. It is submitted that for the purpose of such measure, the respondents press into service heading No. 89.08 of the Schedule to the Central Excise Tariff Act, 1985 which covers vessels and other floating structures for breaking up. It is submitted that there is no dispute on the fact that the imported goods in addition to the Basic Duty be liable to the additional duty under section 3(1) of the Act, 1985 which would be equal to the excise duty for the time being leviable on a like article if produced or manufactured in India. It is submitted that, therefore, additional duty could be levied and recovered only as per the rates prescribed under the tariff for the like article if produced or manufactured in India.

4.1. Mr. Paresh Dave, learned advocate appearing on behalf of the petitioners has further submitted that as such the vessels and other floating structures are covered under heading 89.01 to 89.07 of the tariff. It is submitted that when these goods are meant for breaking up, they would not be classifiable under heading No. 89.08 of the Tariff. It is submitted that however, there is no conversion of any raw material into a new substance when any of the vessels and

floating structures covered under any of the heading No. 89.01 to 89.07 is brought at a breaking yard and as a result of purchase of such vessel for breaking up by the persons like the petitioners, no new and different article having distinctive name, character or use emerges. It is submitted that there is no process by which the vessels and floating structures of heading Nos. 89.01 to 89.07 are converted into a new article falling under heading No. 89.08 and thus, the latter heading No. 89.08 of the Tariff seeks to cover fully manufactured goods classifiable under other heading only because the purchaser desires to break up such floating structure. It is submitted that there being no process of manufacture involved in such activity of purchasing a vessel or a floating structure for breaking up, the excise duty under heading No. 89.08 of the Tariff cannot be legally and validly levied and this heading is, therefore, unconstitutional to the Entry No. 84 of the Union List of Seventh Schedule to the Constitution as well as section 3 of the Customs Tariff Act, 1985.

4.2. Mr. Paresh Dave, learned advocate appearing on behalf of the petitioners has further submitted that as such it is not the case on behalf of the revenue-respondents that the vessels and other floating structures for breaking up can be said to be "manufacture". It is further submitted that it is not the case of the respondents that on manufacture of vessels and other floating structures or like article if produced or manufactured in India, any excise duty is levied. It is further submitted that as such if pliable vessels and other floating structures are imported, the same are not subjected to any additional duty under any of the headings under Chapter 89 of the Tariff Act, 1985. It is submitted that merely because vessels or other floating structures are imported for the purpose of breaking up, additional duty is being charged/levied under heading 89.08 of Chapter 89 of the Tariff Act, 1985. It is submitted that therefore, as such there is no production and/or manufacture of vessels and other floating structures for breaking up and therefore, no excise duty is being payable and/or levied, there is no question of any additional duty under section 3 of the Tariff Act, 1985. It is submitted that therefore, as such heading 89.08 of Chapter 89 of Central Tariff Act, 1985 is beyond section 3 of Act, 1985 and is as such unconstitutional to section 3.

4.3. Mr. Paresh Dave, learned advocate appearing on behalf of the petitioners has further submitted that as such in the Affidavit-in-reply the respondents have heavily relied upon the decision of the Hon''ble Supreme Court in the case of Khandelwal Metal & Engineering Works Versus Union of India, by submitting that though the said decision of the Hon''ble Supreme Court in the case of Khandelwal Metal & Engineering Works (supra) has been referred to in the Larger Bench by the decision of the Hon''ble Supreme Court given in the case of Hyderabad Industries Ltd. V/s. Union of India, reported in 1995(78) ELT 461, so long as the judgment given in the case of Khandelwal Metal & Engineering Works (supra) is not overruled, the same remains binding. It is submitted that, however, subsequently by the judgment, the Hon''ble Supreme Court has partly overruled the decision of the Hon''ble Supreme Court in the case of Khandelwal Metal &

Engineering Works (supra) to the extent holding that additional duty of customs is leviable on the import of the article even if it is not manufactured or produced in India. It is submitted that, therefore, as such the issue/controversy raised in the present Special Civil Applications is squarely covered by the decision of the Hon"ble Supreme Court in the case of Hyderabad Industries Ltd. Versus Union of India.

Making above submissions and relying upon above decisions, it is requested to declare Entry No. 89.08 of Chapter 89 of the Central Excise Tariff Act, 1985, by which the additional duty is levied on import of vessels and other floating structures for breaking up, as unconstitutional and/or beyond the scope of section 3 of Central Excise Tariff Act, 1985 and permanently prohibit the respondents from levying and recovering additional duty under head No. 89.08 of the Tariff on import of vessels and other floating structures for breaking up.

5. Ms. Ameer Yajnik, learned advocate has appeared on behalf of the respondents-revenue. She has heavily relied upon the Affidavit-in-reply filed on behalf of the respondent No. 3. It is submitted that under heading No. 89.08, import of vessels and other floating structures for breaking up is subjected to additional duty at the rate of 15%. It is submitted that as such Chapter heading of the Central Excise Tariff is required to be referred to only for the purpose to ascertain the rate of duty leviable as additional excise duty on the ships imported by the petitioners for breaking up. It is submitted that, therefore, the petitioners' challenge against the validity of Central Excise Duty is without locus and is misconceived. It is further submitted by Ms. Yajnik, learned advocate appearing on behalf of the respondents that heading 89.08 cannot be said to be ultra vires to Entry No. 84 of the Union List of the Seventh Schedule to the Constitution of India and/or ultra vires Articles 14 and 19 of the Constitution of India.

5.1. It is submitted that as such the duty leviable on the ships for breaking up imported by the petitioners is Customs Duty. It is submitted that corresponding Central Excise Chapter Heading of the Central Excise Tariff is required to be looked at only for the purpose of ascertaining measure of the additional customs duty leviable on the ship imported for breaking up. It is submitted that, so far as the customs duty is concerned, the Parliament has undoubted powers to enact law relating to customs in view of Article 246(1) of the Constitution of India read with Entry No. 83 of List-I in Schedule VII to the Constitution of India. It is submitted that even if the measure of the additional duty is to be ascertained from the corresponding Chapter Heading in the Central Excise Tariff, the said duty remains a Customs Duty only. It is submitted that section 3 of the Customs Tariff Act, 1975 providing for Additional Duty leviable on the goods imported has been enacted by the Parliament under the legislative powers relating to a Central subject namely the Customs Duty. It is submitted that therefore, heading No. 89.08 cannot be said to be ultra vires to Entry No. 84 of the Union List of the Seventh Schedule to the Constitution of India and also ultra vires to Articles 14 and 19 of the Constitution of India.

5.2. It is submitted that therefore, the petitioners are liable to pay additional duty at the rate mentioned under heading 89.08 of Chapter 89 of the Central Excise Tariff Act, 1985 on import of vessels and other floating structures for breaking up.

5.3. However, Mr. Amee Yajnik, learned advocate appearing on behalf of the respondents is not disputing that the decision of the Hon"ble Supreme Court, relied upon by the respondents in the Affidavit-in-reply, in the case of Khandelwal Metal & Engineering Works (supra), has been subsequently partly overruled to the extent only holding that additional duty of customs is leviable merely on the import of the article even if it is not manufactured or produced in India.

Making above submissions it is requested to dismiss the present Special Civil Applications.

6. Heard the learned advocates appearing on behalf of the respective parties at length.

6.1. What is challenged in the present Special Civil Applications is heading No. 89.08 of the Central Excise Tariff Act, 1985 by which Additional Customs Duty at the rate of 15% is sought to be levied on the vessels and other floating structures imported for breaking up. It is required to be noted that levy of Additional Custom Duty is prescribed under section 3(1) of the Customs Tariff Act, 1975, which reads as under:

"Section 3. Levy of additional duty equal to excise duty.--

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

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

6.2. Section 3 of the Act provides as to how the value of the imported goods should be calculated. As per section 3 of the Act any article which is imported into India shall, in addition, be liable to a duty (additional duty) equal to the excise duty for the time being leviable on a article if produced or manufactured in India and if such excise duty on a like article is leviable at any percentage of its value, additional duty to which the imported article shall be so liable shall be

calculated at that percentage of the value of the imported article. The expression "excise duty for the time being leviable on a like article if produced or manufactured in India", as mentioned in section 3, has been explained in explanation to section 3 and it means the excise duty for the time being in force which would be leviable on a like article if produced or manufactured in India, or, if a like article is not so produced or manufactured, which would be leviable on the class or description of articles to which the imported article belongs, and where such duty is leviable at different rates, the highest duty.

6.3. At the outset, it is required to be noted that in the present case, as such, it is not the case of the department that the vessels and other floating structures imported for breaking up are produced and/or manufactured in India and/or even outside India. It is also not the case on behalf of the department that any article is produced or manufactured in India and/or outside the India. It is also required to be noted that if vessels or other floating structures which are plyable are imported, in that case, no additional duty is leviable. It is also required to be noted that even vessels and other floating structures manufactured in India (plyable) are non-excisable. It is also required to be noted that it is not the case of the department that any excise duty is leviable on manufacture of vessels and other floating structures imported for breaking up. Considering the above facts and circumstances of the case, the controversy raised in the present Special Civil Applications is required to be considered.

6.4. It is required to be noted that in the Affidavit-in reply, the department has heavily relied upon the decision of the Hon''ble Supreme Court in the case of Khandelwal Metal & Engineering Works (supra). In the Affidavit-in-reply it is further submitted that though the decision of the Hon''ble Supreme Court in the case of Khandelwal Metal & Engineering Works (supra) has been referred to the Larger Bench, decision of Khandelwal Metal & Engineering Works (supra) would be applicable as the said judgment stands. However, it is required to be noted that the decision of the Hon''ble Supreme Court in the case of Khandelwal Metal & Engineering Works (supra) upon which the department has relied upon, has been partly overruled by the Hon''ble Supreme Court in the case of Hyderabad Industries Ltd. Versus Union of India, to the extent holding that additional duty of customs is leviable merely on the import of the article even if it is not manufactured or produced in India. Therefore, as such the controversy raised in the present Special Civil Application is squarely covered by the decision of the Hon''ble Supreme Court in the case of Hyderabad Industries Ltd. Versus Union of India.

6.5. Identical question came to be considered by the Hon''ble Supreme Court in the case Hyderabad Industries Ltd. Versus Union of India and in the said decision the Hon''ble Supreme Court has considered in detail the levy of additional customs duty (Countervailing Duty) under section 3(1) of the Customs Tariff Act, 1975 and its purpose. While considering section 3(1) of the Customs Tariff Act, 1975, which provides levy of additional duty and its object and purpose and

while considering the decision of Khandelwal Metal & Engineering Works (supra), the Hon"ble Supreme Court has observed and held in para 10 to 17 as under:

"10. Section 3(1) of the Customs Tariff Act, 1975 provides for levy of an additional duty. The duty is, in other words, in addition to the customs duty leviable under Section 12 of the Customs Act read with Section 2 of the Customs Tariff Act. Secondly this duty is leviable at a rate equal to the excise duty for the time being leviable on a like article to the one which is imported if produced or manufactured in India. The explanation to this sub-section expands the meaning of the expression the excise duty for the time being leviable on a like article if produced or manufactured in India. The explanation to Section 3 has two limbs. The first limb clarifies that the duty chargeable under sub-section (1) would be the excise duty for the time being leviable on a like article if produced or manufactured in India. The condition precedent for levy of additional duty thus contemplated by the explanation is that the article is produced or manufactured in India. The second limb to the explanation deals with a situation where a like article is not so produced or manufactured. The use of the word so implies that the production or manufacture referred to in the second limb is relatable to the use of that expression in the first limb which is of a like article being produced or manufactured in India.

11. The words if produced or manufactured in India does not mean that the like article should be actually produced or manufactured in India. As per the explanation if an imported article is one which has been manufactured or produced then it must be presumed, for the purpose of Section 3(1), that such article can likewise be manufactured or produced in India. For the purpose of attracting additional duty under Section 3 on the import of a manufactured or produced article the actual manufacture or production of a like article in India is not necessary. As observed by this Court in Thermax Private Limited Vs. Collector of Customs, Bombay at page 452-453 that Section 3(1) of the Customs Tariff Act specifically mandates that the CVD will be equal to the excise duty for the time being leviable on a like article if produced or manufactured in India. In other words, we have to forget that the goods are imported, imagine that the importer had manufactured the goods in India and determine the amount of excise duty that he would have been called upon to pay in that event. To our mind the genesis of Section 3(1) of Customs Tariff Act has been brought out in the aforesaid observations of this Court, namely, for the purpose of saying what amount, if any, of additional duty is leviable under Section 3(1) of the Customs Tariff Act, it has to be imagined that the articles imported had been manufactured or produced in India and then to see what amount of excise duty was leviable thereon.

12. Section 12 of the Customs Act levies duty on goods imported into India at such rates as may be specified in the Customs Tariff Act, 1975. When we turn to Customs Tariff Act 1975, it is Section 2 which states that the rates at which duties of customs are to be levied under Customs Act 1962 are those which are

specified in the First and Second Schedules of the Customs Tariff Act, 1975. In Section 12 of the Customs Act there is no reference to any specific provision of the Customs Tariff Act 1975. In other words for the purpose of determining the levy of customs duty on goods imported into India what is relevant is Section 12 of the Customs Act read with Section 2.

13. On the other hand levy of additional duty under Section 3 is equal to the excise duty for the time being leviable on the like article which is imported into India if produced or manufactured in India. The rate of additional duty under Section 3(1) on an article imported into India is not relatable to the First and the Second Schedule of the Customs Act but the additional duty if leviable has to be equal to the excise duty which is leviable under the Excise Act. This itself shows that the charging section for the levy of additional duty is not Section 12 of the Customs Act but is Section 3 of the Customs Tariff Act, 1975. This apart sub-sections (3), (5) and (6) of Section 3 refer to additional duty as being leviable under sub-section (1). In sub-section (5), for instance, it is clearly stated that the duty chargeable under Section 3 shall be in addition to any other duty imposed under this Act or under any other law for the time being in force.

14. There are different types of customs duty levied under different acts or rules. Some of them are; (a) a duty of customs chargeable under Section 12 of the Customs Act, 1962; (b) the duty in question, namely, under Section 3(1) of the Customs Tariff Act; (c) additional duty levied on raw-materials, components and ingredients under Section 3(3) of the Customs Tariff Act; and (d) duty chargeable under Section 9A of the Customs Tariff Act, 1975. Customs Act 1962 and the Customs Tariff Act, 1975 are two separate independent statutes. Merely because the incidence of tax under Section 3 of the Customs Tariff Act, 1975 arises on the import of the articles into India it does not necessarily mean that the Customs Tariff Act cannot provide for the charging of a duty which is independent of the customs duty leviable under the Customs Act.

15. The Customs Tariff Act, 1975 was preceded by the Indian Tariff Act, 1934. Section 2A of the Tariff Act, 1934 provided for levy of countervailing duty. This section stipulated that any article which was imported into India shall be liable to customs duty equal to the excise duty for the time being leviable on a like article if produced or manufactured in India. In the notes to clauses to the Customs Tariff Bill 1975 with regard to clause 3 it was stated that Clause 3 provides for the levy of additional duty on an imported article to counter-balance the excise duty leviable on the like article made indigenously, or on the indigenous raw materials, components or ingredients which go into the making of the like indigenous article. This provision corresponds to Section 2-A of the existing Act, and is necessary to safeguard the interests of the manufacturers in India. Apart from the plain language of the Customs Tariff Act, 1975 even the notes to clauses show the legislative intent of providing for a charging section in the Tariff Act 1975 for enabling the levy of additional duty to be equal to the amount of excise duty leviable on a like article if produced or manufactured in India was

with a view to safeguard the interests of the manufacturers in India. Even though the impost under Section 3 is not called a countervailing duty there can be little doubt that this levy under Section 3 is with a view to levy additional duty on an imported article so as to counter-balance the excise duty leviable on the like article indigenously made. In other words Section 3 of the Customs Tariff Act has been enacted to provide for a level playing field to the present or future manufacturers of the like articles in India.

16. In the case of Khandelwal Metal & Engineering Works the applicability of Section 3(1) of the Customs Tariff Act arose in connection with the import of brass scrap. The contention of the importers was that no additional duty could be levied because imported brass scrap which consisted of damaged articles like taps and pipes was not manufactured in India or elsewhere. It was submitted that additional duty of customs under Section 3(1) could be levied only if the article which was imported into India was manufactured or produced here. Dealing with this contention this Court held that the charging Section was Section 12 of the Customs Act and not Section 3(1) of the Tariff Act. At page 627 it observed that The levy specified in Section 3(1) of the Tariff Act is a supplementary levy, in enhancement of the levy charged by Section 12 of the Customs Act and with a different base constituting the measure of the impost. In other words, the scheme embodied in Section 12 is amplified by what is provided in Section 3(1). The customs duty charged under Section 12 is extended by an additional duty confined to imported articles in the measure set forth in Section 3(1). Thus, the additional duty which is mentioned in Section 3(1) of the Tariff Act is not in the nature of the countervailing duty. At page 628 it held that We are unable to accept the argument of the appellants that Section 3(1) of the Tariff Act is an independent, charging section or that, the additional duty which it speaks of is not a duty of customs but is a countervailing duty. After referring to the explanation to Section 3(1) the Bench at page 630 held that These provisions leave no doubt that the duty referred to in Section 3(1) of the Tariff Act does not bear any nexus with the nature and quality of the goods imported into India. On this aspect the Court then concluded by observing at page 630 that For these reasons, we must reject the argument of Mr. Sorabjee and of the other learned counsel for the appellants that Section 3(1) of the Tariff Act is not attracted because, the damaged articles, which are in the nature of brass scrap, are outside the scope of that since, such articles are not and cannot be produced or manufactured. The basis of this conclusion, therefore, was that additional duty was a customs duty, Section 12 of the Customs Act being the charging section, which was leviable on the import of goods into India and it had no nexus with the nature and quality of goods so imported. Another reason which was given by the Bench while upholding the levy was that the brass scrap which was imported was a bye-product and was, therefore, in any case a manufactured product.

17. The decision in Khandewal Metal & Engineering Works case to the effect that additional duty of customs is leviable merely on the import of the article even if it is not manufactured or produced in India does not appear to be correct inasmuch

as the said conclusion is based on the premise that Section 12 of the Customs Act, and not Section 3(1) of the Tariff Act, is the charging section. As we have already observed on a correct interpretation of the relevant provisions of the two acts there can be no manner of doubt that additional duty which is levied under Section 3(1) of the Tariff Act is independent of the customs duty which is levied under Section 12 of the Customs Act. Secondly, it has been held by the Three Judge Bench in this case that excise duty is leviable if the article has undergone production or manufacture. The observation in Khandelwal Metal & Engineering Works case which seems to suggest that even if no process of manufacture or production has taken place the imported articles can still be subjected to the levy of additional duty does not appear to be correct inasmuch as the measure for levy of additional duty is the quantum of excise duty leviable on a similar article under the Excise Act. Duty under the Excise Act can be levied, as has been held earlier, if the article has come into existence as a result of production or manufacture. In other words when articles which are not produced or manufactured cannot be subjected to levy of excise duty then on the import of like articles no additional duty can be levied under the Customs Tariff Act. The levy of additional duty being with a view to provide for counter balancing the excise duty leviable, we are clearly of the opinion that additional duty can be levied only if on a like article excise duty could be levied. The decision in Khandelwal Engineering Works case to the extent it takes a contrary view, does not appear to lay down the correct law. Sh. Vaidyanathan contended that this Court should be reluctant to reconsider a judgment which has held the field for a long time, but in our opinion public interest requires that law be correctly interpreted more so in a taxing statute where the ultimate burden may fall on the common man. We hasten to add that we are not over-ruling the Khandelwal Metal & Engineering Works case in its entirety because the Court also held in that case that brass scrap was in any case an item which was manufactured and, therefore, excise duty was leviable. We have not examined, in the present cases, whether brass scrap can or cannot be regarded as a manufactured item for that question does not arise in the present cases."

Thus, in the aforesaid decision of Hyderabad Industries Ltd. (supra), the Hon"ble Supreme Court has held that decision the case of Khandelwal Metal & Engineering Works (supra) goes to the effect that additional duty of customs is leviable merely on the import of the article even if it is not manufactured or produced in India, does not appear to be correct inasmuch as the said conclusion is based on the premise that section 12 of the Customs Act, and not section 3(1) of the Tariff Act, is the charging section. It is further observed and held by the Hon"ble Supreme Court that on a correct interpretation of the relevant provisions of the two Acts, additional duty which is leviable under section 3(1) of the Tariff Act is independent of the Customs Duty which is leviable under section 12 of the Customs Act. It is further observed and held that the observations in Khandelwal Metal & Engineering Works (supra) seems to suggest that even no process of manufacture or production has taken place the imported articles can still be

subjected to the levy of additional duty, does not appear to be correct inasmuch as the measure for levy of additional duty is the quantum of excise duty leviable on a similar article under the Excise Act. It is further observed that duty under the Excise Act can be levied, as has been held earlier, if the article has come into existence as a result of production or manufacture. It is further observed that in other words when articles which are not produced or manufactured cannot be subjected to levy of excise duty, then on the import of like article no additional duty can be levied under the Customs Tariff Act. It is further observed and held by the Hon''ble Supreme Court that levy of additional duty being with a view to provide for counter balancing the excise duty leviable, we are clearly of the opinion that additional duty can be levied only if on the like article excise duty could be levied.

6.6. Now applying the ratio of the law laid down by the Hon''ble Supreme Court in the case of Hyderabad Industries Ltd. Versus Union of India, referred to hereinabove to the facts of the case on hand, and with respect to the additional duty sought to be levied under heading No. 18.09 (sic) at the rate of 15% on the vessels and other floating structures for breaking up which are not manufactured in India and therefore, no excise duty is leviable on "vessels and other floating structures for breaking up". No additional duty can be levied under section 3(1) of the Tariff Act on the "vessels and other floating structures for breaking up". Under the circumstances, aforesaid heading 89.08 which provides levy of additional duty at 15% on the vessels and other floating structures for breaking up would be contrary to and/or ultra vires to section 3(1) of the Tariff Act and therefore, we are of the opinion that the vessels and other floating structures imported into India for breaking up, additional duty under section 3(1) of the Customs Tariff Act is not liable to be levied.

7. In view of the above and for the reasons stated above, all these petitions succeed and it is held that no additional duty is leviable on the vessels and other floating structures imported into India for breaking up, under section 3(1) of the Customs Tariff Act, 1975, as per the rate prescribed under heading No. 89.08 of the Central Excise Tariff Act, 1985. Consequently, demand, if any, of such additional duty with respect to respective Bills of Entry is hereby quashed and set aside. Rule is made absolute to the aforesaid extent in each of the petitions. In the facts and circumstances of the case, there shall be no order as to costs.