

(2011) 04 GUJ CK 0045

In the Gujarat High Court

Case No : Special Civil Application No. 15713 of 2003

Smartchem Technologies Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 19-04-2011

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A, 2
Constitution of India, 1950 — Article 226

Citation : (2011) 272 ELT 522

Hon'ble Judges : R.M. Chhaya, J; Harsha Devani, J

Bench : Division Bench

Advocate : Paresh M. Dave, for the Appellant; Gaurang H. Bhatt and Purvish J. Malkan, Standing Counsels, for the Respondent

Judgement

Harsha Devani, J.—This petition under Article 226 of the Constitution of India has been filed with the following substantive prayers :-

(1) That Your Lordships may be pleased to issue a Writ of Mandamus or a writ in the nature of Mandamus or any other appropriate writ, direction or order, quashing and setting aside seizure of records and documents as well as goods vide panchnamas dated 31-3-2003 (Annexure-"H") and 11-6-2003 (Annexure-"J") respectively :

(AA) That Your Lordships may be pleased to issue a writ of prohibition or any other appropriate writ, direction or order, completely and permanently prohibiting the respondents, their servants and agents from taking any action against the petitioner company in pursuance of notice F.No. V(Ch.31) 15-109/OA/2003, dated 1-11-2003 (Annexure : L) and be further pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, direction or order quashing and setting aside demand notice V.(Ch.31) 15-109/OA/2003, dated 1-11-2003 (Annexure : L).

(2) That Your Lordships may be pleased to issue a Writ of Certiorari or any other

appropriate writ, direction or order, holding and declaring that Prilled Ammonium Nitrate (PAN) obtained from Ammonium Nitrate Melt (ANM) was not excisable goods and process of prilling/evaporating moisture was not "manufacture" under the Central Excise law;

(3) That Your Lordships may be pleased to issue a Writ of Prohibition or any other appropriate writ, direction or order, completely and permanently prohibiting the respondents, their servants and agents from taking any action against the petitioner company on the basis that PAN was an excisable goods and process of prilling/evaporating moisture was "manufacture" under the Central Excise law;

(4) That Your Lordships may be pleased to issue a Writ of Mandamus or a writ in the nature of Mandamus or any other appropriate writ, direction or order, directing the respondents herein to forthwith restitute amounts recovered as Excise duties from the petitioner company with interest at rate of 18% per annum from the date of recovery till the date of actual restitution in the petitioners" favour.

2. The facts as appearing in the petition are that the petitioner No.1, a public limited company is inter alia engaged in the business of obtaining a product called Prilled Ammonium Nitrate (PAN). The petitioners buy Ammonium Nitrate Melt from the open market, normally from G.N.F.C. which is cleared by the respective manufacturers on payment of duties at appropriate leviable rates thereon. Ammonium Nitrate Melt is classified under Heading No. 3102 of the first Schedule to the Central Excise Tariff Act. The petitioners obtain Ammonium Nitrate Melt, a chemical having composition of NH_4NO_3 and remove by process evaporation/prilling extra moisture from the Ammonium Nitrate Melt which according to the petitioners does not result in any change in the chemical composition at all of the duty paid Ammonium Nitrate Melt purchased by the petitioners from the open market. Prilled Ammonium Nitrate is used for mining and stone quarrying industries for blasting purposes although, by itself Prilled Ammonium Nitrate is not an explosive but it acquires capability of exploding in conjunction with some reacting agent. It is the case of the petitioners that as a result of removal of extra moisture from Ammonium Nitrate Melt by evaporation/prilling process, no new product with distinctive name, use or characteristics comes into existence.

3. The Tribunal in the case of 1986 (6) ECR 375, held that mere improving the quality and purity of Ammonium Nitrate Melt was not manufacture of new or different goods and accordingly. Prilled Ammonium Nitrate was not "excisable goods" liable to, excise duty once again. Pursuant to the aforesaid decision of the Tribunal, the Central Board of Excise and Customs issued a Circular being Circular No. 44/89 dated 19th July, 1989 informing the Trade that no excise duty could be lawfully charged or be required to be paid on such Prilled Ammonium Nitrate obtained from Ammonium Nitrate Melt and therefore, all Central Excise officers should ensure that no excise duty was paid on such Prilled Ammonium Nitrate obtained from Ammonium Nitrate Melt and no Modvat credit of such duty,

even if paid, was allowed.

4. It appears that the predecessor of the petitioner Company, that is, Bhagwati Nitrate Pvt. Ltd. was discharging duly liability on Prilled Ammonium Nitrate till 1989. However, based upon the decision of the Tribunal in the case of Anil Chemicals (P) Ltd. as well as the Circular issued by the Government, Bhagwati Nitrate was forced by the Excise Department to stop paying excise duty on Prilled Ammonium Nitrate from the year 1981 onwards and to surrender and cancel the excise registration. The petitioner Company, therefore, when it took over the running business of the said company with effect from 1st November, 2001, was also not liable to pay any excise duty on Prilled Ammonium Nitrate obtained from Ammonium Nitrate Melt. The petitioner Company, however, filed a letter with the Assistant Commissioner of Central Excise, in charge of the petitioners' factory on 12th December, 2001 informing the said officer that the petitioner Company had taken over the running business of Bhagwati Nitrate Pvt. Ltd. and also placed on record that the Central Excise authorities had refused to issue a registration certificate to the petitioner Company as there was no manufacture involved nor had any liability for discharging excise duty arisen on such Prilled Ammonium Nitrate. Since there was no reply or denial from the Central Excise authorities to the above referred letter, the petitioner Company continued to remove Prilled Ammonium Nitrate without discharging any duty liability thereon.

5. Subsequently, in another case of 1993 (68) ELT 589, the Tribunal examined the issue as to whether conversion of Ammonium Nitrate Melt into Ammonium Nitrate Flakes was manufacture or not and held that such conversion was "manufacture" because Ammonium Nitrate Melt on the one hand and Ammonium Nitrate Flakes on the other hand, were having different physical characteristics as well as commercial names and applications. Even after the said decision, the petitioners or any other similarly situated units who were obtaining Prilled Ammonium Nitrate from Ammonium Nitrate Melt were not directed by the Central Excise authorities to obtain registration as manufacturer and to pay excise duties on Prilled Ammonium Nitrate obtained from Ammonium Nitrate Melt. It is the case of the petitioners that the trade as well as the excise authorities had accepted that the issue decided by the Tribunal in the case of M/s. I.D.L. Chemicals Ltd. v. Collector of Central Excise (supra) was different and, therefore, the decision of the Tribunal had not application to the activities of obtaining Prilled Ammonium Nitrate from Ammonium Nitrate Melt. The Circular dated 19th July, 1989 issued by the Board was also not withdrawn by the Board or the Government. The petitioner Company continued to remove Prilled Ammonium Nitrate from its factory in the normal commercial way, that is, under the bills and challans but without paying excise duty thereon. Subsequently, in another case of Supreme Chemical Works, the Bench of the Tribunal felt that there was some conflict between the decisions of the Tribunal in the case of Anil Chemicals (P) Ltd. and I.D.L. Chemicals Ltd. The case was, therefore, referred to a Larger Bench of the Tribunal. The Tribunal in the case of 2000 (72) ECC 502, held that the principle laid down in Anil Chemicals (P) Ltd. was incorrect and the

principle laid down in M/s. I.D.L. Chemicals Ltd. was the correct one. Even after rendering of the above referred judgment by the Larger Bench of the Tribunal, no objection was raised by the Central Excise authorities against the petitioners clearing Prilled Ammonium Nitrate without payment of duty and the Circular dated 19th July, 1989 issued by the Board also remained in force. The petitioners, therefore, continued to remove Prilled Ammonium Nitrate obtained from duty paid Ammonium Nitrate Melt without payment of excise duty. The petitioner company took over the business of the unit from 1st November, 2001 after the decision in the case of Supreme Chemicals Works v. Collector of C. Ex., Jaipur was rendered by the Larger Bench of the Tribunal. The petitioner company also approached the Central Excise authorities by a specific letter dated 12th December, 2001 requesting or clarification if there was any change in the legal position about payment of duty on Prilled Ammonium Nitrate obtained from Ammonium Nitrate Melt. It is the case of the petitioners that having discussed personally with the officers of the Central Excise Department for seeking guidance as to whether the petitioner Company was obliged to obtain a registration certificate and discharging duty liability on Prilled Ammonium Nitrate, all along, the Range as well as Divisional Officers have informed the petitioners that there was no need to obtain a Central Excise Registration or for paying duty on Prilled Ammonium Nitrate as Circular dated 19th July, 1989 was still in force. The petitioners, therefore, continued to remove Prilled Ammonium Nitrate without payment of any excise duty thereon in accordance with the practice being followed for last several years. On 5th October, 2002, a Central Excise team from Vigilance Section of the Daman Division visited the petitioners' category to know the process of conversion employed therein. According to the petitioners, even after the said enquiry by the Central Excise authorities, the petitioner company was not directed to pay duty on Prilled Ammonium Nitrate or to obtain excise registration for that activity. The petitioners thereafter filed a declaration on 17th January, 2003 before the Assistant Commissioner of Central Excise declaring therein that the process undertaken by the petitioner Company was not manufacture and the product in question was not excisable, to which there was no direction or response from the Central Excise authorities to the petitioners for paying excise duty on Prilled Ammonium Nitrate or for obtaining Central Excise registration for the process of obtaining Prilled Ammonium Nitrate from duty paid Ammonium Nitrate Melt. On 31st March, 2003, Preventive Officers of the Central Excise Department from Vapi visited the petitioners' unit and seized records and documents lying in the factory under panchnama dated 31st March, 2003. Thereafter, the petitioner Company filed a declaration under Rule 9 of the Rules on 14th May, 2003 with the Assistant Commissioner of Central Excise once again declaring that the process undertaken by the petitioners was not manufacture and Prilled Ammonium Nitrate was not excisable goods. It appears that once again the Superintendent of Central Excise (Preventive) visited the petitioners' factory on 11th June, 2003 and seized the stock of finished products lying in the factory alongwith some other record under a panchnama dated 11th June, 2003. The petitioners were asked to obtain

Central Excise registration and start paying duty on Prilled Ammonium Nitrate. The petitioner Company, therefore, obtained Central Excise registration under protest and started paying excise duty on Prilled Ammonium Nitrate obtained from duty paid Ammonium Nitrate Melt.

6. It is at this stage that the petitioners have filed the present petition seeking the reliefs noted hereinabove except the relief prayed for vide paragraph 9(AA). Subsequently, it appears that by a show-cause notice dated 1st November, 2003 issued by the Commissioner. Central Excise & Customs, Vapi, the extended period of limitation came to be invoked against the petitioners and Central Excise duty on Coated Prilled Ammonium Nitrate came to be demanded, alongwith penalty and interest. The petitioners, therefore, moved an amendment and were permitted to challenge the aforesaid show-cause notice.

7. By an order dated 20th January 2004 Smartchem Technologies Ltd. Vs. Union of India (UOI), , rule came to be issued in the petition and the Court after examining the case on merits for the purpose of grant of interim relief, passed a detailed order expressing a prima fade view that the process carried on by the petitioner is different from the manufacturing activity referred to in MO Circular No. 23/98. The Court also look note of the fact that the MO Circular No. 23/98, in fact, does not even refer to prilling. The Court thereafter recorded as follows and granted interim relief in the following terms :

9. In the above view of the matter and also in view of the fact that in the past the department had itself examined the case when the petitioners predecessor was running the factory making the same product that the process in question did not amount to manufacture, the petitioners have made out a strong prima facie case for grant of interim relief against recovery of past dues prior to 11th June, 2003. Since the petitioners have already started paying excise duty from 11th June, 2003 onwards, we are not granting the relief for the period on and from 11th June, 2003.

10. Accordingly, there shall be interim relief in terms of para 9(FF) with a clarification that this interim relief is confined to the stay off the impugned notice dated 1-11-2003 at Annexure "L " to the petition and that this interim relief does not extend to any demand for the period after 11-6-2003.

8. Mr. Paresh Dave, learned advocate appearing on behalf of the petitioners, at the outset submitted that the relief prayed for vide paragraph 9(A) would not survive inasmuch as the seized records and documents have already been returned to the petitioners.

8.1 Mr. Dave further submitted that insofar as the issue as to whether the process of prilling amounts to manufacture or not, the Tribunal in the case of 1986 (6) ECR 375 , after considering the process in detail, had held that the same does not amount to manufacture which position had been accepted by the Department, it was submitted that the Central Board of Excise and Customs had vide Circular No. 44 of 1989 clarified that the conversion of Ammonium Nitrate

Melt into Ammonium Nitrate Prilled is not a process of manufacture since Prilled Ammonium Nitrate is not different from Ammonium Nitrate Melt but only a higher concentration as held by the tribunal in the case of C.C.E., Aurangabad v. Anil Chemicals (P) Ltd. The Board under the said Circular desired that every jurisdictional Collector of Central Excise should strictly ensure that no Central Excise duty is paid on such Prilled Ammonium Nitrate as obtained from Melt Ammonium Nitrate and no Modvat credit of such duty, even if paid, is allowed. It was submitted that the said Circular held the field even on the date of filing of the petition and subsequent thereto inasmuch as despite the decision of the Tribunal in the case of I.D.L. Chemical Ltd. v. Collector of Central Excise as well as in the case of Supreme Chemical Works v. Collector of Central Excise, Jaipur (supra), the revenue had not changed its stand and had continued with the above referred Circular. It was submitted that all along it was the view of the respondents that the petitioners are not liable to pay central excise duty on Ammonium Nitrate obtained by it from Ammonium Nitrate Melt as it did not amount to manufacture. It was submitted that the change in the view of the respondents was based upon the decision of the Larger Bench of the Tribunal in the case of Supreme Chemical Works v. Collector of Central Excise, Jaipur (supra) and that the impugned show-cause notice was also based upon the said decision of the Tribunal.

8.2. Inviting attention to the decisions of the Tribunal in the above referred cases, it was submitted that the principle about "manufacture" and emergence of a new excisable goods as a result of such manufacture is very well settled now, and in view of the principle, the Tribunal has held in the case of Anil Chemicals (P) Ltd. (supra) that mere improving quality or purity was not manufacture as there was no creation of new and different goods by obtaining Prilled Ammonium Nitrate from Ammonium Nitrate as Prilled Ammonium Nitrate was nothing but Ammonium Nitrate with higher concentration. According to the learned advocate, it is a settled legal position that mere improving quality of a product or concentration in case of chemicals and compounds, was not manufacture because no new product with distinctive name, use or characteristics emerges as a result thereof. It was urged that there is no evidence brought on record of the present case by the respondent authorities to show that Prilled Ammonium Nitrate obtained from Ammonium Nitrate by the petitioner company was a different product and it was recognised as well as brought and sold as a distinctive good in the trade and as such it was not open to the respondent authorities to treat Prilled Ammonium Nitrate as excisable goods. On behalf of the petitioners it was further contended that in the case of IDL, Chemicals Ltd. (supra) and Supreme Chemical Works (supra) the process or the product involved were not the same as in the present case. Referring to the said decisions, it was submitted that it is apparent that neither of them deals with a process by which concentration of Prilled Ammonium Nitrate was increased without any change in the chemical or physical properties of Ammonium Nitrate. Therefore, these decisions have no application of whatsoever nature to the issue

as to whether prilling/evaporation of moisture of Ammonium Nitrate Melt was manufacture under the Central Excise law or not. According to the learned advocate, the observation made in para 16 of the Larger Bench decision in the case of Supreme Chemical Works (supra) was clearly per incuriam as the issue decided in the case of Anil Chemicals Pvt. Ltd. (supra) was not even involved or attracted in the case before the Larger Bench. It was pointed that in the case of I.D.L. Chemicals Ltd, what weighed upon the Tribunal was the fact that the assessee therein had been clearing part of the Ammonium Nitrate Flakes produced out of Ammonium Nitrate Melt on payment of duty for being sent to their Hyderabad unit and that duty was paid by the assessee on the Ammonium Nitrate Fakes cleared for being despatched to their Hyderabad unit in terms of the classification lists approved by the Department from time to time, it was submitted that it was in the background of the said facts, viz., the product namely Ammonium Nitrate flakes emerging after processing of the melt in the assessee's factory had different physical characteristics and commercial name that the Tribunal held that the conversion of Ammonium Nitrate Melt into Ammonium Nitrate flakes amounts to manufacture within the meaning of Section 2(f) of the Central Excise and Salt Act, 1944. Referring to the decision of the Tribunal in the case of Supreme Chemical Works (supra), it was pointed out that the process which was employed in the said case was much different from the process of prilling employed by the petitioners. In the said case the duty paid inputs used for procuring Ammonium Nitrate products were crude lumps of Ammonium Nitrate, damaged Calcium Ammonium Nitrate and Ammonium Nitrate melt. All these were mixed in water in order to remove impurities like mud etc. The solution was then transferred to the tanks where Ammonium Bicarbonate was added in order to remove Calcium Carbonates. The said solution was thereafter transferred to pans and given heat till the water had evaporated which resulted in production of solid cake of Ammonium Nitrate which was then broken into pieces and fed into the grinding machines for obtaining powder particles. It was submitted that from the process employed in the said case, it is apparent that what was used by way of inputs was crude lumps of Ammonium Nitrate, Calcium Ammonium Nitrate and Ammonium Nitrate Melt. There is nothing to indicate that the Ammonium Nitrate Melt or the crude lumps of Ammonium Nitrate were of the same level of purity as the Ammonium Nitrate Melt which was used by the petitioners while obtaining Prilled Ammonium Nitrate from Ammonium Nitrate Melt. Inviting attention to the decision of the Tribunal in the case of Anil Chemicals (P) Ltd., it was pointed out that in the said case, the Prilled Ammonium Nitrate which was a form of Ammonium Nitrate having higher purity of 99.5% was obtained from Ammonium Nitrate Melt solution having 75%-82% content and it was in the light of the said facts that the Tribunal held that there is no authority whatsoever for saying that concentrating a product will by that fact alone produce a different product. It may, perhaps, be said that there has been processing and a manufacture but if the result is the production of the same good, even of higher purity, then the manufacture/processing cannot have the effect of making the purer product liable by that fact alone to excise

duty. The Tribunal was of the view that a manufacture under the Central Excises and Salt Act is required to be manufacture that creates an "excisable good". A manufacture that does not have this effect is of no interest to central excise. It was submitted that in the case of Supreme Chemical Works (supra), the crude lumps of Ammonium Nitrate. Calcium Ammonium Nitrate and Ammonium Nitrate Melt were different in nature from the final product namely Ammonium Nitrate which was produced as a result of the process carried thereon and that the inputs as well as the process carried on in the case of Supreme Chemical Works was totally different from the inputs as well as the process carried on in the case of Anil Chemicals (P) Ltd., which is similar to the process carried on by the petitioners. It was accordingly submitted that considering the facts of the said case, the Tribunal while deciding the said case was not Justified in holding that the settled law laid down in CCE, Aurangabad v. Anil Chemicals (P) Ltd. was incorrect.

8.3 Next, it was submitted that despite the different decisions of the Tribunal, the respondents had still continued with the Circular dated 19th July, 1989 and the same had not been rescinded. It was submitted that the officers of the Department are bound by the Circulars issued by the Board and till the Circulars stand, the officers cannot take a different view, in support of the said submission, the learned advocate for the petitioners placed reliance on the decisions of the Supreme Court in the case of M/s. Ranadey Micronutrients etc. Vs. Collector of Central Excise, , in the case The Paper Products Ltd. Vs. Commissioner of Central Excise, and in the case of Collector of Central Excise, Vadodra Vs. Dhiren Chemical Industries, .

8.4 The learned advocate invited attention to Circular No. 848/06/2007-CX., dated 18th April, 2007 whereby, the Board had decided to accept the order of the Larger Bench of the Tribunal in the case of Supreme Chemical Works v. CCE Jaipur (supra) and had decided to withdraw the Circulars No. 44/89-CX.3, dated 19th July, 1989 and 56/89-CX.3, dated 21st September, 1989 on the ground that they were inconsistent with the settled position of law. It was submitted that in any case till 18th April, 2007, the earlier circular of 1989 was still subsisting and as such, the respondents could not have demanded duty on Prilled Ammonium Nitrate obtained by the petitioners from Ammonium Nitrate Melt till the date of the said Circular. In the circumstances, the impugned show-cause notice having been issued contrary to the Circular of the Department was without jurisdiction inasmuch as it is not open for the respondent authorities to take a different view than that stated in the Circular issued by the Board and which was governing the field at the relevant date, inviting attention to the show-cause notice, it was submitted that the respondents have sought to invoke the larger period of limitation and that in the facts and circumstances of the case, it is apparent that the same could not have been invoked as the ingredients of the proviso to Section 11A of the Act would not be satisfied. It was, accordingly, submitted that the impugned show-cause notice deserves to be quashed and set aside and the petitioners are entitled to the reliefs prayed for in the petition as well

consequential reliefs.

9. Opposing the petition. Mr. Gaurang Bhatt, learned standing counsel appearing on behalf of the respondents submitted that in the light of the decision of the Tribunal in the case of Supreme Chemicals Works, the decision of the Tribunal in the case of Collector of Central Excise, Aurangabad v. Anil Chemicals (P) Ltd. no longer held the field and as such, the revenue authorities were bound by the subsequent decision of the Tribunal. It was submitted that in view of the subsequent decision of the Tribunal in the case of Supreme Chemical Works, the Circular issued by the Board on 19th July, 1989, became redundant, non-est and non-operative and as such reliance placed upon the same by the petitioners is misconceived. It was submitted that the revenue authorities are not required to blindly follow the Circular issued by the Department even if the same is based upon an earlier decision which has subsequently been set aside by a subsequent decision. It was submitted that in the light of the subsequent decision of the Larger Bench of the Tribunal in the case of Supreme Chemicals Works (supra), it cannot be said that the earlier Circular dated 19th July, 1989 holds the field till the issuance of the subsequent Circular dated 18th April, 2007. The learned counsel invited the attention of the Court to the affidavit-in-reply filed on behalf of the respondents, and more particularly to paragraph 6 thereof wherein the process adopted by the predecessor of the petitioner has been set out to submit that the process itself indicates that the petitioners were carrying out manufacturing activities.

9.1 Insofar as the contentions raised on the merits of the case namely, that the decision of the Tribunal in the case of Anil Chemicals (P) Ltd. was based upon a different process than that which was under consideration before the Tribunal in the case of Supreme Chemical Works, the learned counsel submitted that the Supreme Court in the case of Union of India & Others v. Delhi Cloth General Mills 1977 (1) E.L.T. (J199) which has been referred to by the Tribunal in the said decision held that the word "manufacture" is generally understood to mean as bringing into existence a new substance merely to produce some change in a substance, therefore, "manufacture" implies a change but not every change is a manufacture and yet every change of an article is result of treatment, labour and manipulation. But something more is necessary and there must be transformation, a new and different article must emerge having a distinctive name, character or use. It was submitted that the Tribunal after considering the various decisions of the Supreme Court had found that a new distinct substance having a distinctive name and character in the commercial market had been produced.

9.2 Referring to the decision of the Tribunal in the case of I.D.L. Chemicals Ltd. (supra), it was submitted that the facts of the said case were similar to the facts of the present case wherein, the Tribunal had found that conversion of Ammonium Nitrate Melt into Ammonium Nitrate Flakes amounts to manufacture as the Ammonium Nitrate Flakes emerging after processing of the melt

undeniably had different physical characteristics and commercial name, it was submitted that in the process adopted by the petitioners also, the Ammonium Nitrate Melt was converted into a product having different physical characteristics and different commercial name inasmuch as the product was in a solid form and was commercially known as Prilled Ammonium Nitrate instead of Ammonium Nitrate Melt from which it was obtained. It was submitted that in the circumstances, the issue involved in the case of the petitioners is directly covered by the subsequent decisions of the Tribunal and as such, the prilling carried out by the petitioners on Ammonium Nitrate Melt to obtain Prilled Ammonium Nitrate would amount to manufacture and as such, there is no warrant for holding that the process adopted by the petitioners does not amount to manufacture. It was submitted that in the circumstances, the respondent No. 2 was Justified in issuing the show-cause notice in question and that the product of the petitioners is liable to central excise duty in respect of the manufacturing activity carried on by it and, therefore, no interference is warranted by this Court.

10. From the facts noted hereinabove, it is apparent that pursuant to the decision of the Tribunal in the case of Collector of Central Excise, Aurangabad v. Anil Chemicals (P) Ltd., Aurangabad, the Board had issued Circular dated 19th July, 1989 accepting the said decision wherein it has been held that conversion of Ammonium Nitrate Melt into Ammonium Nitrate Prilled was not a process of manufacture since Prilled Ammonium Nitrate was not different from Ammonium Nitrate Melt, but only of higher concentration. The Board also desired every jurisdictional (Collector of Central Excise to strictly ensure that no central excise duty was paid on such Prilled Ammonium Nitrate as obtained from Melt Ammonium Nitrate and no Modvat credit on such duty, even if paid, was allowed.

11. Subsequently, despite the decision of the Tribunal in the case of I.D.L. Chemicals Ltd. v. Collector of Central Excise (supra) as well as the decision of the Larger Bench of the Tribunal in the case of Supreme Chemical Works v. Collector of C.Ex., Jaipur (supra), the Board did not rescind the aforesaid Circular and continued with it. In the circumstances, it can be safely assumed that the Board never intended to withdraw the said Circular at the relevant time presumably for the reason that the process of conversion of Ammonium Nitrate Melt into Ammonium Nitrate Prilled carried on by the petitioners was different from the processes referred to in the said decisions. While the Circular held the field, the officers of the Department had required the predecessor of the petitioners to get its central excise registration cancelled and ensure that no excise duty was paid on Prilled Ammonium Nitrate. Thereafter, various communications and declarations had been submitted by the petitioners to the Department stating that the process undertaken by the petitioners was not manufacture and that the Prilled Ammonium Nitrate obtained by the petitioners from Ammonium Nitrate Melt was not excisable goods. At any stage at the relevant time, the Department had not required the petitioners or their predecessor to obtain central excise registration. Even after the Central Excise team from the Vigilance Section of the Daman Division visited the petitioners' factory on 5th October, 2002 and noted

the process of conversion employed therein, the petitioners were not directed to pay duty on the Prilled Ammonium Nitrate or to obtain Central Excise registration for that activity. Thereafter, the Preventive Officers of the Central Excise Department visited the petitioners' unit on 31st March, 2003 and seized records and documents lying in the factory after which quite a lot of correspondence ensued on the subject of excisability of Prilled Ammonium Nitrate. It was only after the Superintendent of Central Excise (Prev.) visited the petitioners' factory on 11th June, 2003, that the petitioners were informed to obtain Central Excise registration and start paying duty on Prilled Ammonium Nitrate pursuant to which the petitioner company obtained Central Excise registration under protest and also started paying excise duties on the Prilled Ammonium Nitrate obtained by it from duty paid Ammonium Nitrate Melt. However, the petitioner company was not allowed to avail Cenvat credit of duties paid on Ammonium Nitrate purchased by it even though Ammonium Nitrate and Prilled Ammonium Nitrate were covered under the Cenvat Scheme. Being aggrieved by the action of the respondents in requiring the petitioner company to pay excise duties on Prilled Ammonium Nitrate which according to the petitioners is not a product distinct from the duly paid Ammonium Nitrate from which the former product is obtained only by evaporation/prilling process for removal of extra moisture, the petitioners approached this Court by way of the present petition. In the meanwhile, by the impugned show-cause notice, the respondent No. 2 demanded central excise duty on the Prilled Ammonium Nitrate as well as penalty and interest thereon.

12. A perusal of the impugned show-cause notice indicates that the same had been issued on 1st November, 2003, that is, prior to the date of the issuance of the subsequent Circular dated 18th April, 2007 by the Board withdrawing the earlier circular dated 19th July, 1989 issued by it whereby it had directed the Jurisdictional Collectors of Central Excise to ensure that no central excise duty was paid on such Prilled Ammonium Nitrate as obtained from Melt Ammonium Nitrate.

13. The Supreme Court in the case of *Ranadey Micronutrients v. Collector of Central Excise (supra)* held that the whole objective of issuance of circular by the Board is to adopt a uniform practice and to inform the trade as to how a particular product will be treated for the purposes of excise duty. It does not lie in the mouth of the revenue to repudiate a circular issued by the Board on the basis that it is inconsistent with a statutory provision. Consistency and discipline are of far greater importance than the winning or losing of court proceedings. In *The Paper Products Ltd. Vs. Commissioner of Central Excise*, the Supreme Court held that Circulars issued by the Board are binding on the Department and that the Department is precluded from challenging the correctness of the said Circulars even on the ground of the same being inconsistent with the statutory provision. The Court held that the ratio of the decisions of the Supreme Court cited in the said decision further precludes the right of the Department to the an appeal against the correctness of the binding nature of the Circulars. Therefore, it is clear that so far as the Department is concerned, whatever action it has to

take, the same will have to be consistent with the Circular which is in force at the relevant point of time. The Court held that the show-cause notices impugned therein and consequential demand were ab initio bad inasmuch as the same were contrary to the existing circulars of the Board and as such, could not be sustained. In the case of Collector of C.Ex., Vadodara v. Dhiren Chemicals (supra) a Constitutional Bench of the Supreme Court has gone to the extent of saying that regardless of the interpretation placed by the Supreme Court on a particular phrase, if there are circulars which have been issued by the Central Board of Excise and Customs which place a different interpretation upon the said phrase, that interpretation will be binding upon the revenue.

14. From the principles propounded in the aforesaid decisions, it is apparent that it is not permissible for the officers of the Central Excise department to act contrary to the Circulars issued by the Board. In the facts of the present case, of the Circular No. 44/89 dated 19th July, 1989 the Board had desired that every jurisdictional Collector of Central Excise should strictly ensure that no Central Excise duty is paid on such prilled ammonium nitrate as obtained from melt ammonium nitrate and no Modvat Credit of such duty, even if paid is allowed. The said Circular continued to hold the field despite the subsequent decision of the Tribunal in I.D.L. Chemicals Ltd. v. Collector of Central Excise (supra) as well the decision of the Larger Bench of the Tribunal in Supreme Chemical Works v. Collector of C.Ex. Jaipur (supra) till the same came to be withdrawn by Circular No. 848/06/2007-CX., dated 18th April, 2007. In the circumstances, in the light of the law laid down by the Apex Court in the above referred decisions, it was not permissible to the respondents to act contrary to the Circular dated 19th July, 1989 till the same came to be withdrawn on 18th April, 2007. In the circumstances, the action of the respondents in requiring the petitioners to obtain central excise registration and pay excise duties on the Prilled Ammonium Nitrate obtained by it from Ammonium Nitrate melt as well as in issuing the impugned show-cause notice seeking to recover central excise duty in respect of the Prilled Ammonium Nitrate obtained from it from Ammonium Nitrate Melt prior 18th April 2007, are clearly contrary to the then existing Circular of the Board, viz., the Circular No. 44/89-CX.3, dated 19th July, 1989 and as such, as held by the Apex Court in the case of Paper Products Ltd. (supra), the show- cause notice and the consequential demand are ab initio bad and as such, cannot be sustained.

15. However, insofar as the relief prayed for vide paragraph 9(B) of the petition whereby the petitioners seek a declaration that Prilled Ammonium Nitrate (PAN) obtained from Ammonium Nitrate Melt (ANM) was not excisable goods and the process of prilling/evaporating moisture was not "manufacture" under the Central Excise law is concerned, as to whether a particular process amounts to manufacture or not would entail recording of findings of fact based upon appreciation of the evidence led by the respective parties. These foundational facts are required to be recorded by the fact finding authorities under the Act. It is not possible for this Court to decide the said issue in a petition under Article 226 of the Constitution of India inasmuch as the facts regarding the process

carried on by the petitioners are not before this Court so as to enable the Court to undertake such an exercise.

16. However, a perusal of the decision of the Tribunal in the case of Collector of Central Excise v. Anil Chemicals (P) Ltd. (supra) shows that the Tribunal has considered the process carried on by the assessee therein in extenso and has arrived at the conclusion that considering the inputs used by the assessee, namely. Ammonium Nitrate Melt 75%- 82% which was converted into a higher concentration in a prilled form having a higher purity of 99.5%. no new or fresh excisable goods have come into existence different from the raw material from which it was made. The Tribunal, accordingly, held that to prill and coat Ammonium Nitrate does not make it a manufacture for the purpose of preparing and fitting it into a new item, for Prilled Ammonium Nitrate. The Prilled Ammonium Nitrate remains Ammonium Nitrate, a good not elsewhere specified. In I.D.L. Chemicals Ltd. v. Collector of Central Excise (supra), the process adopted by the assessee therein does not appear to be by way of prilling and the nature of inputs and the final product used therein are also not clear. Insofar as the decision of the Larger Bench of the Tribunal in the case of Supreme Chemical Works is concerned, as rightly contended by the learned advocate for the petitioners, the process employed for producing the product Ammonium Nitrate in the said case as well as the inputs used for procuring the Ammonium Nitrate product were much different from the process as well as the inputs used in the case of Collector of Central Excise v. Anil Chemicals (P) Ltd. (supra), which is similar to the case of the petitioners, in the said decision, duty paid inputs used for procuring Ammonium Nitrate product were crude lumps of Ammonium Nitrate, damaged Calcium Ammonium Nitrate and Ammonium Nitrate Melt. Thus, three types of inputs were mixed together in water and processed thereafter. From the very nature of inputs used therein, it is evident that the inputs as well as the final product were not the same inasmuch as damaged Calcium Ammonium Nitrate and crude lumps of Ammonium Nitrate cannot be equaled with the end product viz., Ammonium Nitrate in the form of fine powder particles, which appears to be product different both in characteristics and well as name from the inputs used for manufacture thereof.

17. In the aforesaid premises, considering the fact that the process of obtaining Ammonium Nitrate which was subject matter of consideration before the Tribunal in the case of Supreme Chemicals Works v. Collector of C.Ex., Jaipur (supra) was different from the process employed in the case of Anil Chemicals (P) Ltd., prima facie it appears that the Larger Bench of the Tribunal while holding that the statement of law laid down in C.C.E. Aurangabad v. Anil Chemicals (P) Ltd. (supra) is incorrect, has not examined the aforesaid facts. In the circumstances, insofar as the relief prayed for vide paragraph 9(B) is concerned, the petitioners shall be at liberty to raise the issue before the appropriate forum which shall be considered in the light of the observations made hereinabove.

18. For the foregoing reasons, the petition succeeds to the following extent and

is accordingly allowed to that extent. The impugned show-cause notice dated 1st November, 2003 (Annexure "V to the petition) is hereby quashed and set aside. It is held that till the date of subsequent circular dated 18th April 2007, it was not permissible for the respondent authorities to recover Central Excise duty from the petitioner Company in respect of the prilled Ammonium Nitrate obtained by it from Ammonium Nitrate Melt. Consequently, the petitioners shall be entitled to restitution of the amount recovered as excise duty from the petitioners till the date of the issuance of the Circular dated 18th April, 2007, in accordance with law. In relation to the relief prayed for vide paragraph 9(B) of the petition, the petitioners shall be at liberty to raise the issue before the appropriate forum which shall be considered in the light of the observations made hereinabove. Rule is made absolute accordingly to the aforesaid extent with no order as to costs.