
(1981) 09 CAL CK 0007
In the Calcutta High Court
Case No : Matter No. 79 of 1978

The India Jute Co. Ltd.

APPELLANT

Vs

The Assistant Collector, Central Excise and Others

RESPONDENT

Date of Decision : 19-09-1981

Acts Referred:

Citation : (1981) ECR 545D

Hon'ble Judges : Padma Khastgir, J

Bench : Single Bench

Judgement

Padma Khastgir, J.—The petitioner India Jute Company since 9th of November, 1965 carried on and still carries on business inter alia of manufacturing blended yarn containing 60% and above cotton and the balance of staple fiber of cellulosic origin of 1.5 denier above. The petitioner's factory is situated at Serampore. The petitioner does not manufacture the staple fiber of cellulosic origin used by the petitioner in the manufacture of blended yarn and the petitioner purchases the same from the market. The staple fibre purchased by the petitioner from the market at all material times was and still is excisable under Item 18 of the First Schedule of the Central Excise and Salt Act, 1944 and at the time such articles were purchased by the petitioner they have already been charged excise duty payable under item 18 of the first schedule to the said Act.

2. The petitioner has discovered that it has been paying duty under a wrong impression and belief that blended yarn of the kind manufactured by the petitioner was subject to excise duty under item 18A of the first schedule to the said Act In the year 1972 item No. 18E has been introduced to the first schedule of the said Act. On 19th of June, 1965 by a notification dated 19th of June, 1965 staple fiber of cellulosic origin of 1.5 denier and above falling under item 18 was exempted from such duty of excise duty leviable under the said act which was in excess of 10 paise per kilogram provided the procedure as laid down under Rule 56A of the Central Excise Rules was followed while spinning such yarn. By

notification dated 10th February, 1968 the effective rate was changed from 10 paise to 50 paise per kilogram. It is only in the year 1968 by notification the goods falling under item 18A were brought within the purview of Chapter 7A. The respondents at all material times proceeded on the basis that the blended yarn manufactured by the petitioner fell under item 18A and were covered by the Notifications dated 19th June, 1975 and 10th of February, 1968 and the petitioner also was under the same impression and belief and proceeded accordingly". Under Rule 56A as also Rule 173K provisions have been made for giving credit to duty already paid on materials received in a factory for the purpose of manufacture of finished products. In the account maintained in Form R.G. 23 part I and part II the petitioner has credited from time to time amounts of excise duty already paid on staple fibre utilised by the petitioner in the manufacture of its finished products i.e. blended yarn in accordance with Rule 56A of the rules. By notification dated 29th May, 1971, the notification dated 19th of June, 1965 was rescinded. As on 29th of May, 1971 the petitioner had in stock blended yarn manufactured prior to 6th February 1971 in respect of which there was a credit balance of 4826.77 in the R G.-23 accounts. It is the petitioner's case that the petitioner has a further Stock of blended yarn as on 29th May, 1971 manufactured during the period of 6th February, 71 up to 21st of May, 1971 with the duty paid staple fibre in respect of which the petitioner was entitled to a credit of 59.221.72 in the same R.G. 23 accounts". These facts have been duly checked and confirmed by the Excise Officers supervising the petitioner's manufacture and clearances. "Although under the notification No. 115/71-C.E. dated 29th of May, 1971 all further credit was disallowed, the said notification according to the petitioner cannot in any way effect the amounts which have already been credited in the R.G.-23 accounts in respect of staple fibre which have already been utilised in the manufacture of blended yarn. According to the petitioner a sum of Rs. 64048.49 represents the duty paid on the staple fiber used in the manufacture of blended cotton yarn prior to 29th of May, 1971. Hence the same has been utilised before the concession allowed, was withdrawn by the notification. In fact under the earlier procedure no credit could be taken until and unless the staple fiber was in fact utilised in the process of manufacture. Hence the petitioner was entitled to utilise the balance credit towards the payment of duty if any on the blended yarn manufactured prior to 29th May, 1971 and in fact between 29th to 31st May, 1971 the petitioner has adjusted the sum of Rs. 4533. 35 p. in the said R.G.-23 balances credit against duties payable by the petitioner for the clearance of 11,548.12 kilogram of blended yarn manufactured prior to 29th of May, 1971 but the Excise Officer wrongfully and illegally prohibited the petitioner from utilising any further credit on account of duty paid staple fibre towards payment of duty of any further clearance of such stock manufactured before 23rd of May, 1971 and lying in the petitioner's factory on 29th of May, 1971. The petitioner objected to the said direction of the officer and submitted a statement to the excise authorities showing the rebate the petitioner was entitled to for the staple fibre consumed by the petitioner till 5 p.m. on 28th of May, 1971. By letter dated 4th of April,

1972 the Inspector, Central Excise forwarded an extract of order passed by the respondent No. 1 Assistant Collector of Customs to the effect that the petitioner may credit relevant amount to the petitioner's R.G. 23 account in respect of the staple fibre used by the petitioner from 6th February 1971 upto 21st of May, 1971 upto 700 hrs. for the manufacture of blended yarn. It was stated that the said amount would not be available to the petitioner for payment of any duty of any commodity manufactured by it. According to the petitioner no copy of the said order of the respondent No. 1 was ever served on the petitioner. The said order according to the petitioner is illegal and contrary to the provisions of the Act and the rules framed thereunder. By a notice dated 27th of June, 1973 the petitioner was asked to show cause as to why penalty should not be imposed on the petitioner under Rule 173 read with Rule 9 (2) by reason of the petitioner having removed the blended yarn from the petitioners factory at Serampore between 29th of May, 1971 and 31st of May, 1971 after debiting a total amount of Rs. 4533.35 p. from the R.G. 23 accounts of the petitioner. According to the respondents the said removal was unauthorised and amounted to a contravention of the provisions contained in Rule 173G read with Rule 9 (1) of the said rules. Thereafter a personal hearing was granted to the petitioner. At the hearing on 28th of November, 1973 the respondent No. 1 held, that after 28th May, 1971 the petitioner was not entitled to utilise any credit whatsoever and that utilisation of the credit to the extent of Rs. 4533.35 was wrongful. Under those circumstances the petitioner agreed to pay the said sum without prejudice to the petitioner's right to claim a refund of the same. On demand made on 11th March, 1974 the petitioner deposited the said sum of Rs. 4533.35 p. at the Sub Treasury Office, Serampore, Hooghly. The petitioner demanded the refund of the said amount from the respondent by letter dated 14th of March, 1974. Thereafter the respondents refused to permit the petitioner to clear any blended yarn from the factory which was manufactured prior to 29th May, 1971 until the petitioner paid excise duty on such blended yarn without utilising any credit whatsoever.

3. Under those circumstances the petitioner was compelled to clear the goods on payment of duty alleged to have been payable as claimed by the respondents. Hence according to the petitioner the respondents have illegally and wrongfully recovered those excise duty in violation of the notifications. Hence they are bound for refund the same to the petitioner. On 7th of March, 1974 the petitioner made an application for refund of the said sum of Rs. 59,515.14 which according to petitioner the petitioner was compelled to pay under the circumstances as indicated earlier. By an order dated 27th of May, 1974 the respondent did not consider the petitioners claim for refund of the said amount on 5th of June, 1974. The respondents No. 1 without giving an opportunity of showing cause or a personal hearing, have rejected the petitioners claim for refund of the said sum of Rs. 59,515.14 in violation of the principles of natural justice and in violation of the provisions of the rules framed under the Excise Act. Thereafter the petitioner preferred an appeal but without giving any hearing to the petitioner the

respondents has disposed of the appeal on 1st of February, 1975 and rejected the petitioners claim for refund. The said appeal of course permitted the petitioner to utilise the balance proforma credit particulars of payment of duty on the finished products made in combination of staple fibre falling under the same tariff as on 29th May, 1977 but however no refund was permitted. Thereafter a revision petition was filed to the Joint Secretary Government of India by the petitioner. The said revision petition was rejected on 15th of October, 1976. The respondents Nos. 3 & 4 i.e. Appellate Collector as also the Joint Secretary accepted the fact that the petitioner was entitled to utilise the credit in respect of the blended yarn manufactured prior to 29th May, 1971 in which duty paid staple fibre has been utilised yet wrongfully and reasonable failed to give an order for refund of that proportion of duty which was actually paid by the petitioner. If the petitioner was given an opportunity of utilising the credit earned prior to 29th May, 1971 what prevented the authorities from granting the order for refund relying on the same principle on the same basis on which the department permitted the petitioner to utilise the credit earned. The mere fact that the goods have already been cleared by payment of duty under the circumstances as stated above would not entitle the department to retain that portion of the duty which was not payable. Hence the petitioner feels that the respondents are under an obligation to refund the same.

4. The respondents proceeded on the basis that the petitioner was subject to excise duty under Item 18A of the first schedule to the said act but it appears that Item 18A is only confined to cotton yarns only. Hence blended yarn manufactured by the petitioner could not come within the description of item 18A. By the Finance Act of 1972 a new Item being Item 18E has been introduced in the first schedule for the first time covering "yarn all sorts" not elsewhere specified. By Notification No. 62/72-CE dated 17th March, 1972 it was notified that the blended yarn would henceforth be chargeable to excise duty under the tariff Item 18E and on and from 17th March, 1972 the respondent commenced to levy the excise duty on the blended yarn manufacture by the petitioner under Item 18E. Hence according to the petitioner blended yarn was not excisable until 17th of March, 1972. However under the mistaken belief and impression that the petitioner was liable to pay excise duty on the blended yarn the petitioner paid excise duty on such yarn under Item 18A since 19th of November 1965. Hence according to the petitioner all recovery of duty on that basis from the petitioner in respect of blended yarn manufactured from 9th November, 1965 upto 17th March, 1972 was wrongful. It is the petitioners case that it is only in the year 1977 that the petitioner has come to know for the first time through legal advise that the petitioner has been paying excise duty under an erroneous and mistaken belief an 1 impression which in fact and in law the petitioner was not entitled to pay.

5. According to the petitioner blended yarn was not excisable until 17th March, 1972 so under the mistaken belief and impression the petitioner paid excise duly on blended yarn under Item 18A ever since 19th November, 1965. Hence the

recovery of duty by the excise authorities according to the petitioner is illegal and as those duties have been paid under mistaken belief those are refundable to the petitioner as indicated earlier. It is the petitioner's case that the petitioner has come to know only in the year 1977 as per legal advice, in view of the judgement passed by the Gujarat High Court on 15th of June, 1975 in *Ahemadabad Manufacturing Calico Printing Co. Ltd. v. Union of India* where it has been held that such blended yarn was not excisable either under Item 18 or under 18A of the first schedule. Thereafter the petitioner immediately applied for refund of the excise duty paid but the same prayer was rejected by the order dated 26th April, 1978.

6. In the affidavit filed by Bimal Kanto Ghosh the Assistant Collector of Central Excise the entire procedure for payment of excise duty have been stated specially the procedure where-under the exemption was granted in respect of staple fibre of cellulosic origin of 1 5 denier and have used for spinning yarn provided the rule laid down in 56A was followed. The credit earned was entered in the R.G. 23 register under the rules. Thereafter by the notification dated 19th June, 1965 the said exemption was narrowed down.

7. Blended yarn containing cotton to the tune of 60% and above and the rest staple fibre manufactured by the petitioner was classified under Item 18A as the cotton contents of the said blended yarn as were appreciably high and according to the respondents confirmed to the specification of cotton yarn as given in Trade Notice No. 88 Cotton Yarn-4/1963 dated September 30, 1963 issued by the Collector of Central Excise and Customs, West Bengal. This has been accepted by the trade and industry at all material times. It has been admitted categorically that there was no residuary item in the schedule for classification of blended yarn during the year 1965-71. Now this has been seriously challenged by the petitioner on the ground that until and unless it is provided in the statute for inclusion of a particular item in the statute itself as classified in the schedule, by the Trade Notice on item can be brought within the ambit of the statute until and unless the statute is amended and the schedule is modified.

8. The description of the products under Items 18 and 18A of the First Schedule at all material times were as set out hereinbelow : -

-----	Item	No.	Description
-----	18.	Rayon and Synthetic	Fibres and yarn. Explanation : "Rayon and Synthetic Fibres and yarn" shall be deemed to include man made fibre and yarn made out of man made fibres.
	18A.	Cotton Twist, yarn and thread, all sorts, seized or un- seized, in all forms, included skeins, hanks, cops, cones, bobbing, pirns, spools, reels, cheeses, balls or on warp beams in or in relation to the manufacture of which any process is ordinarily carried on with the aid of power. (1) of counts 29 or more (2) of counts less than 29	Explanation : (1) "Count means the size of grey yarn expressed as the number of 1000 metre hanks per one-half kilogram. (2) For multiple-fold yarn, "Count" means the Count of the basis

single yarn. (h) By a notification No. 115/ 71 dated May, 29. 1971 the notification No. 96/65 dated 19.9 65 (as amended) was re- scinded indicating thereby complete withdrawal of the exemption hitherto extended under the notification dated 19 6.65 for using of duty paid staple fibre in the manufacture of yarn in ad-mixture with cotton. (i) By Finance Bill 1972. which subsequently became Finance Act, 1972, certain changes in the tariff description of goods as appearing in the said First Schedule in respect of certain items including item Nos. 18 and 18A were effected. The description of the products under the said item Nos. 18 and 18A of the said First Schedule (as amended) are set out below.

-----	Item	No.	Description
-----	18.	Rayon and Synthetic	
fibres and yarn, in or in relation to the manufacture of which any process is ordinarily carried on with the aid of power. Explanation : "Rayon and Synthetic Fibres and Yarn" shall be deemed to include (i) man made fibres (ii) Spun (discon- tinuous) yarn containing not less than 90% by weight man made fibres calculated on the total fibre content : (iii) man- made filament continuous) yarn ; and (iv) man-made metallic yarn. 18A. Cotton twist, yarn and thread all sorts, containing not less than 90% (ninty per cent) by weight of cotton calculated on the total fibre content, whether seized or unsized, in all forms including skeins, hanks, cope, cones, bobbins, pirns, spools, reels, cheeses, balls or on ware beams, in or in relation to the manufacture of which any process is ordinarily carried on with the aid of power- (1) of counts 29 or more. (2) of counts less than 29.			

Explanation:

(1) "Count means the size of grey yarn (excluding any sizing material expressed as the number of 100 metre hanks per one half kg.

(2) For multiple-fold yarn, "count" means the count of the basic single yarn.

(j) By the said Finance Bill/ Act the residuary item namely, item 18E was inserted in the said First Schedule. The description of the said item 18E is set out below .-

Yarn, all sorts, not elsewhere specified in or in relation to the manufacture of which any processes ordinarily carried on with the aid of power and containing any two or more of the following fibres, namely ; (i) cotton (ii) silk, (iii) wool ; (iv) jute (including Bimlipatam jute or mesta fibre) : and (v) man made fibres.

(k) Before the introduction of the said Finance Bill, 1972 the sub-head E-VI of Chapter V of the said Rules related to "Cotton Yarn and Wollen Yarn special procedure." By Notification No. 61/72 dated March 17, 1972 the said subhead E-VI of Chapter V was substituted as under:

E. VI: Cotton yarn, Woollen yarn, and yarn falling under item 18E of the said first schedule.

By the said Notification after the words "Cotton Yarn" wherever occurring in Rules 96V and 96W the words, figures, brackets and letters "or yarn falling under item 18E of the First Schedule" were inserted. Rule 96W related and/or relates to the discharge of liability for duty on payment of certain sums by manufacturers of goods falling under the said residuary item 18E.

(1) In pursuance of the provisions of the said Rule 96W the Central Government by a Notification namely, Notification No. 62/72 dated March 17, 1972 directed that the rate of duty in respect of yarn containing partly more than 40% by weight of cotton and partly any other fibre or fibres, the wool or silk content being less than 40% by weight of such yarn (where such yarn contains wool or silk) and falling under item 18B of the First Schedule to said Act and of the description specified in column 2 of the table annexed to the said Notification should attract duty at the rates specified in column 3 of the said table provided the manufacturer elected to avail himself of the special provisions contained in the said Rule 96W.

(m) By a Notification namely, Notification No. 163/73 dated August 25, 1973, the Central Government substituted the hitherto existing provisions of Clause (VI) of Sub-rule 3 of Rule 56A of the said Rules. The substituted Clause (VI) of the said Sub-rule 3 is set out below : -

VI (a) The credit of duty allowed in respect of any material or component parts may be utilised towards payment of duty on any finished excisable goods for the manufacture of which such material or component parts were permitted to be brought into the factory under Sub-rule (2) or where such material or component parts are cleared from the factory as such, on such material or component parts.

(b) No part of such credit shall be utilised save as provided in Sub-clause (2) or shall be refunded in cash or by cheque.

VI-A (a) The credit of duty allowed in respect of any material or component parts used in the manufacture of finished excisable goods exported under bond and lying un-utilised immediately before the commencement of the Central Excise (Ninth Amendment) Rules, 1973, in the account of the manufacturer may be utilised after such commencement towards payment of duty on any finished excisable goods cleared for home use provided the same type of material or component parts used in the manufacture of finished excisable goods exported under bond are used in the manufacture of the finished excisable goods cleared for home use.

(b) The Credit of special excise duty or regulatory duty allowed in respect of any material or component parts and lying un-utilised immediately before the commencement of the Central Excise (Ninth Amendment) Rules, 1973 in the account of the manufacturer may be utilised after such commencement towards payment of duty on any finished excisable goods for the manufacture of which such material or component parts were permitted to be brought into the factory under Sub-rule (2).

9. After withdrawal of concession of proforma credit on duty paid staple fibre for the purpose of using the same in the manufacture of dutiable blended cotton yarn, the petitioner earned the proforma credit to the extent of Rs. 59, 515.14 in the R.G. 23 register Part II and the petitioner wanted to utilise the same for Other purpose. It is the respondents case that there is no provision for refund of the said amount hence such prayer was disallowed. Under Rule 56A (3) (vi) the adjustment was permissible in P.L.A. or R.G. Part-II but it did not allow any cash refund. By the Notification dated 25th August, 1973 56A the authority permitted such utilisation of balance credit and the respondents permitted the credit to be utilised towards payment of duty on the finished products with staple fibre as on May 29, 1971 on any amount of staple fibre lying in stock but not used in the manufacture of yarn before the budget date, could not be allowed to be utilised by the petitioner. Even in the revision application the petitioner wanted to utilise the credit for clearance of blended cotton yarn under 18E for home consumption. The petitioner's grievance is that by order it should not have been restricted to 29th May, 1971 but the petitioner should have been allowed to utilise the R.G. 23 credit for adjustment purpose with other materials. According to the respondents, at all material times cotton yarn manufactured by the petitioner containing staple fibre fell under Item 18 and cotton twist yarn or thread or all sorts fell under 18A of the first schedule of the said Act and relying on the clarification given by the Central Board of Excise and Customs the Collector Central Excise and Customs West Bengal issued a Trade Notice No. 88-Cotton Yarn-4/ 1963 dated 30th September, 1963 bringing it to the Notice of the trade and industry that assessment of blended yarn containing various proportions of different fibre contents should be classified under different tariff description as appearing in the first schedule in accordance with the proportion of natural, man made fibre contained to the finished yarn as specified therein. According to the said trade notice, staple fibre yarn falling under Item 18 was a yarn which contained more than 90% by weight of staple fibre. Some of the blended yarns were to be treated as cotton yarns falling under Item 18A to the First Schedule if the same contained;

(a) Not less than 60 per cent by weight of Cotton when mixed with wool and/or silk.

(b) If it contained not less than 40 per cent by weight of cotton when mixed with jute.

(c) If it contained not less than 10 per cent by weight of cotton when mixed with staple fibre and

(d) If it contained less than 40 per cent by weight of wool and/or silk and/or 60 per cent or less by weight of jute and/ or 90 per cent or less by weight by staple fibre when mixed with cotton.

10. Because of the revolutionary change having taken place in textile technology the necessity of blended yarn of various compositions were accepted by the

Trade and industry for the purpose of improvement of fabric and also for the purpose of finding out a staple alternative and/ or substitute for the natural product. Hence according to the respondents such trade notification was accepted by the trade without any protest or demur. Any yarn containing 60% and above cotton staple and the balance amount with staple fibre was treated as cotton yarn under item 18A of the First Schedule. Not only the petitioner but also the other traders also accepted the said position. Because of the advancement and popularity of large varieties of blended yarn of different compositions the Central Government by the Finance Bill 1972 which became the Finance Act, 1972, inserted residuary item 18E in the First Schedule, which covered yarn not elsewhere specified in or relation to manufacture of which any process is carried on without aid of power and contains any two or more of the following types viz. (1) Cotton (2) Silk (3) Wool (4) Jute (5) Man-made fibre. Such classification came into force from 1972. Pursuant to the trade notice dated 30th September, 1963 the yarn produced by the petitioner was classified under 18A of the First Schedule. The petitioner not only accepted the said position but also availed of the exemption allowed under notification dated 9th June, 1965 by following the procedure as laid down in Rule 56A. According to the respondents the petitioner having accepted the said decision and taking advantage of the said procedure, is not entitled to contend at this stage that it acted on erroneous impression of law. Hence it is entitled to take the benefit of it. According to the respondents, because of predominance of cotton contents in the yarn manufactured by the petitioner with blended yarn blended with cellulosic fibre it was classified under Item 18A, as there was no residuary item for classification of such blended yarn and also according to the respondents such blended yarn was known in the trade as cotton yarn. Hence the said resultant product was classified as cotton fabric and it was considered to be covered under 18A. In fact, the petitioner had taken advantage of the proforma credit granted in R.G. 23. According to the respondents, the blended yarn with cotton content of 60% and above, with the mixture of staple fibre as produced by the petitioner was known the market as cotton yarn. 18A at all material times was not confined to cotton yarn only. According to the respondents 18A also covered yarns manufactured by blending it with the other synthetic fibres.

11. From the notification dated 30th September, 1963 as annexed to the said affidavits of the respondents, it would appear that doubts have been raised and expressed regarding cotton yarns which are spun out of mixed fibres and which contained, in addition, other fibres such as wool, cotton, tereylene, nylon or decron fibres. Hence by the said notification the term "fibre", staple fibres" were clarified for the purpose of assessment and also yarns made out of the mixed fibres, Cotton yarn was defined as "Cotton fib re" if it:

(a) If it contains not less than 60% by weight of Cotton when mixed with Wool and/Silk.

(b) If it contains not less thin 40% by weight of Cotton when mixed with jute.

(c) If it contains not less than 10% by weight of Cotton when mixed with Staple fibres.

(d) If it contains less than 40% by weight of Wool and/or Silk and/or 60% or less by weight of jute and/or 90% or less by weight of Staple fibre when mixed with Cotton.

12. The main contention of the petitioner is that the products manufactured by the petitioner did not fall either under Item 18 or 18A as 18 dealt with Rayon and Synthetic Fibres and yarn and Rayon and Synthetic Fibres. Yarn has been defined to include man made fibre and yarn made out of man made fibres. Hence the petitioners products could not come under 18 nor it could come under 18A which includes cotton twist, yarn and thread, all sorts, sized and un-sized, in all forms. Hence the petitioners, products could not also be considered to be cotton inasmuch as it was mixed with fibre of cellulosic origin of 1.5 denier and the cotton content was 60%. So it could not be considered to be cotton. Secondly, it would appear that had these two items 18 and 18A been sufficient to cover the products manufactured by the petitioner then it would not have been necessary for the legislature to introduce a change in the year 1972 by inserting 18E by the Finance Act which envisaged yarn, all sorts, not elsewhere specified, in or relation to the manufacture of which any process is ordinarily carried out with the aid of power, and containing two or more of the following fibres (1) Cotton, (2) Silk, (3) Wool, (4) Jute, (5) man-made fibres. Hence products manufactured by the petitioner fall fairly and squarely under item 18E of the first Schedule. Although the respondents have relied on a trade notification, but instead of amending the statute as it has been done in the year 1972 by introducing 18E, the Excise authorities could not alter the position by trade notification. Hence the submission that Trade Notification has been accepted by the trade is of no avail when it is challenged in a Court of law on the ground that there is no provision in the statute and the schedule annexed thereto for such imposition. As it is well known and well established that by any trade notification or by any executive order the said change cannot be brought about in a statute.

13. The respondents submission that no technical construction should be given an ordinary construction, popular in common parlance, as also in the commercial world should be given so that the products manufactured by the petitioner would fall under 18A i.e. under the category of cotton, but it is difficult to accept such construction in view of the fact that the products manufactured by the petitioner is not 100% pure cotton as it has been mixed with cellulosic of 1-5 denier with 60% and above cotton. Hence clearly the petitioner's products do not come under 18A. There has been difficulties in construing such products. Hence the legislature thought it fit to introduce 18E to cover all those cases.

14. In the case reported in 1976 Cen-Cus page 25D a division bench of the Gujarat High Court held that levy of excise duty on blended yam under Item 18 or Item 18A for cotton yarn was ultra vires. According to the said decision blended yarn became excisable for the first time on 17th March, 1972 when the

legislature introduced Hem No. 18? to cover blended yarn. By introducing 18E the legislature has definitely made it clear that earlier to the introduction of 18E there was no provision for levying the excise duty on articles which come within the definition of 18E. After the blended yarn become well established in this country the new item has been introduced. The manufacture of the petitioner could not satisfy the description as given in 18 and 18A. There is no reason why, the product which is composed of mixed items, should be considered to be the one consisting of materials which predominates. Hence although the products manufactured by the petitioner has the quantity of cotton which predominates even then it could not be considered to be cotton yarn. Blended yarn cannot be considered as cotton yarn. Trade notice can never take the place of a charging entry. Those trade notices are only indicative to the interpretation and meaning given by the department in implementing the provisions. As it has been observed by the Supreme Court in *Union of India (UOI) and Others Vs. The Tata Iron and Steel Co. Ltd.*, that in a fiscal legislation the Court should adopt a clear definition of an excisable item otherwise it will give rise to controversy. It is only when a taxing law provides for a clear and unequivocal test for determination as to whether a particular product would fall under a particular item it would not be proper to come to a decision on any other basis. It is always better to clearly define the products for the purpose of excise duty in appropriate terms and unless that is done it would amount to arbitrary assessment. No such test has been given either under Item 18A or 18 to identify the particular items mentioned therein. No test has been laid down in the said act for finding out the predominance in weight of cotton in such manufactured products. In the absence of identifiable standards it is difficult to bring the said products under 18A. In view of these difficulties the Finance Act of 1972 introduced in clear, unambiguous, unequivocal language 18E which covers goods which are produced by the mixture of two or more fabrics man made and natural. If the products of the petitioner did not fall under 18 or 18A any assessment, levy and collection of duty by the authorities were definitely contrary to law. In view of that it appears that the petitioners are entitled to get a refund on that basis. In the case reported in *Labhchand Dhanpat Singh Jain Vs. The State of Maharashtra*, the Learned Judges have held that while exercising discretion for refund claims, the Court should keep in mind the limitation period in a civil suit which is of three years; Hence in view of the said observation made by the learned Judges it is not necessary to confine to the statutory rule for statutory refund and the Court may grant refund for three years. Although it is true that the petitioner has been paying excise duty on the basis of trade notice but In view of the fact that it is now being held that such levy and payment of duty under 18 and 18A were not permissible under law, hence the petitioner is entitled to ask for refund on that basis.

15. In the case reported in *D. Cawasji and Co. and Others Vs. State of Mysore and Another*, it has been held that :

Where a suit would lie for recovery of monies paid under a mistake of law, a writ

petition for refund of duty within the period of limitation prescribed i.e. within three years from the date of the knowledge of the mistake would also lie. For filing a writ petition to recover the money paid under a mistake of law, this Court has held that the starting point of limitation is from the date on which the judgement declared as void the particular law under which the tax was paid as that would normally be the date on which the mistake becomes known to the party. If any writ petition is filed beyond three years after that date, it will almost always be proper for the Court to consider that it is unreasonable to entertain that petition, though, even in cases where it is filed, within three years, the Court has a discretion, having regard to the facts and circumstances of each case, not to entertain the application.

We are aware that the result of this view would enable a person to recover the amount paid as tax even after several years of the date of payment, if some other party would successfully challenge the validity of the law under which the payment was made and if only a suit or writ petition is filed for refund by the person not within three years from the date of declaration of the invalidity of the law, that might both be inexpedient and unjust so far as the State is concerned.

A tax is intended for immediate expenditure for the common good and it would be unjust to require its repayment after it has been in whole or in part expended, which would often be the case, if the suit or application could be brought any time within three years of a court declaring the law under which it was paid to be invalid, be it a hundred years after the date of payment. Nor is there any provision under which the Court could deny refund of tax even if the person who paid it has collected it from his customers and has no subsisting liability or intention to refund it to them, or for any reason, it is impracticable to do so.

16. The respondents's submission that "Cotton yarn all sorts" includes not only pure cotton but also mixed varieties is unacceptable to this Court. It is true that it has been held by the Supreme Court in the case reported in Commissioner of Sales Tax, Madhya Pradesh Vs. Jaswant Singh Charan Singh, that:

While interpreting items in statutes like sales tax resort should not be made to scientific or technical meaning to such terms but their popular meaning or attached to them by those dealing in that is to say their commercial sense that is to say construction of words is to adopt the said principle of construction, cotton yarn cannot include blended yarn and in view of the difficulties faced for such construction being given to 18A to include blended yarn the legislature in its wisdom thought fit to introduce 18E, which would clearly, unambiguously, unequivocally include the item which is blended in nature. The definition or description given to 18 & 18A have not been clear, so far the purpose of clarifying the same, trade notification was given.

17. Mr. N.C. Roy Chowdhury appearing on behalf of the respondents submitted that 18E was introduced by way of caution. It is difficult to appreciate that submission in view of express provision being made under 18 and 18A and

without any guidelines or test being laid as to which would amount "Cotton" and "Cotton of all sorts" it is difficult to include blended yarn under the said category.

18. In the case reported in 1976 S.C. Page 2243 it has been held that:

Refund of illegal taxes stands on a different footing from claiming refund of surcharge paid under terms and conditions of permits. The only basis of tax is legislative sanction and if the legislative sanction fails, the collection of tax cannot be sustained.

19. Under the Limitation Act the period of limitation does run until the plaintiff has discovered the mistake or could with reasonable diligence have discovered it. In a case where payment is made under a mistake of law mistake becomes known to the party only when a court makes a declaration as the invalidity of the law though a party could with reasonable diligence discovered a mistake of fact even before a Court makes a pronouncement. It is seldom that a person can even with a reasonable diligence, discover a mistake of Jaw before a judgement adjudging the validity of law is passed. The very fact that the trade notification states that "doubts have been expressed" that would show that the public and the people of commerce were in doubt regarding the same;

20. Finding these difficulties and ambiguity the legislature thought it fit to introduce 18E to cover blended products including the products manufactured by the petitioner. Before the introduction of 18E, I am of the view that, under the circumstances as stated earlier, the respondents were not entitled to levy excise duty and collect the same from the petitioner. Hence I make the Rule absolute.