

(1991) 12 BOM CK 0031
In the Bombay High Court
Case No : Writ Petition No. 2026 of 1982

Vijay Prataprai Mehta

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 03-12-1991

Acts Referred:

Central Excise Rules, 1944 — Rule 8, 8(1)
Customs Act, 1962 — Section 12, 14, 2(14), 2(15), 2(23)

Citation : (1992) 59 ELT 382

Hon'ble Judges : S.P. Kurdukar, J; S.H. Kapadia, J

Bench : Division Bench

Advocate : Shri Sushil Kumar B. Halwasia and Mr. P.T. Mehta, for the Appellant;
Shri H.V. Mehta and Shri J.P. Devadhar, for the Respondent

Judgement

Kapadia, J.—The question which arises for our consideration in this petition under Article 226 of the Constitution of India is whether an exemption notification issued under the Central Excises and Salt Act, 1944 (hereinafter referred to as "Excise Act") giving certain benefits of exemption to the assessee under Excise Act stands automatically extended to imports under the provisions of the Customs Act, 1962.

For deciding the above question a few facts are briefly required to be stated :-

(a) On 1st July 1982, the petitioner herein entered into a contract with the foreign seller for import of copper scrap and waste purporting to be used in the manufacture of copper oxychloride.

(b) On 16th July 1982, Letter of Credit was opened by the Bank of the petitioner.

(c) On 24th August 1982 material was shipped and the Bill of Landing was received.

(d) On 13th September 1982 Bill of Entry was filed with the Customs Authorities by the petitioner who in the meantime had sold the said goods on High Seas to

M/s. Mehta Industrial Corporation. It is claimed by the petitioner that under the Power of Attorney given by M/s. Mehta Industrial Corporation to the petitioner, the goods were cleared by the petitioner as an Importer.

(e) On 17th September 1982 the petitioner gave notice to the Customs Authorities informing them that the copper scrap was imported for the manufacture of copper oxychloride.

(f) On 21st September 1982, the above writ petition was filed inter alia challenging the levy of additional customs duty on scrap as one of the main grounds of challenge.

2. In view of the above facts, the petitioner has sought to challenge in this petition the levy of the basic customs duty at 80% ad valorem as well as the levy of additional customs duty as mentioned above.

It was contended that since the copper scrap is not excisable as it was not a product of manufacture, the excise duty could not have been levied by the Excise Authorities on the said scrap and therefore, according to the petitioner, since the scrap is not excisable, no additional duty could have been levied under the Customs Act, 1962. Secondly, it was submitted in the alternative that even assuming that copper scrap is excisable nonetheless in view of the Notification No. 35/81-C.E., dated 1st March 1981 issued under Rule 8 of the Central Excises Rules, 1944 no additional duty could have been imposed or levied under the Customs Act, 1962. To complete chronology of events it may be mentioned that by Section 48 of the Finance Act, 1981 Item No. 26A of the First Schedule to the Central Excises & Salt Act, 1944 came to be amended and a specific Item No. (1b) came to be inserted covering scrap and waste. It may be also mentioned that by a general notification bearing No. 169/80-C.E., dated 1st November 1980, the effective rates of excise duty for waste and scrap were made leviable at Rs. 3000/- per Metric Tonne and special excise duty at the rate of 10% of the effective duty was also levied and accordingly additional duty in the present case equal to the excise duty leviable at the relevant time was imposed at the rate Rs. 3,300/- per Metric Tonne. The contention of the petitioner is that the said amount of Rs. 3,300/- per Metric Tonne by way of additional duty could not have been levied in view of the exemption Notification No. 35/81-C.E., dated 1st March 1981.

3. As regards the first contention of the basic customs duty, the parties agreed that pursuant to the subsequent valuation and classification done by the Customs Authorities, the basic customs duty as contended by the petitioner was accepted at the rate of 45% ad valorem and therefore the said controversy no more survives in the present petition.

4. As regards the second contention regarding excisability of copper scrap and waste, the parties agree that in view of the judgment of the Supreme Court of India in the case of Khandelwal Metal and Engineering Works and Another Vs. Union of India (UOI) and Others, , it is now well settled position inter alia that

the copper scrap and waste are excisable under the provisions of the Central Excises & Salt Act, 1944. Further in view of the amendment to Item No. 26A of the First Schedule to the said Excise Act of 1944 specifically including the waste and scrap in the said Item No. 26A by way of special Item No. (1b), the second question raised in the petition also does not survive. Therefore, the only question which arises for our consideration in the present petition as to whether the exemption Notification No. 35/81-C.E., dated 1st March 1981 issued under the Excise Act applies automatically to the levy of additional duty u/s 12 of the Customs Act, 1962 read with Section 3(1) of the Customs Tariff Act, 1975.

5. Before dealing with the legal submissions, the above facts indicate that the petitioner sold the goods on High Seas to a company by the name M/s. Mehta Industrial Corporation. The said M/s. Mehta Industrial Corporation has not filed the writ petition. The said M/s. Mehta Industrial Corporation has not also filed any affidavit on the basis of which it can be claimed that the petitioner intended to use the imported material for the manufacture of copper oxichloride. In fact, no material whatsoever has been shown by the petitioner till this date indicating that M/s. Mehta Industrial Corporation had used the imported material for the manufacture of copper oxychloride. In fact, there is no averment in the petition that the petitioner has complied with the statutory conditions before claiming exemption under exemption Notification No. 35/81-C.E., dated 1st March 1981 issued under Rule 8 of the Central Excise Rules, 1944. This fact is very material because even if the petitioner's contentions on legal submissions are accepted, even then the petitioner on facts is not entitled to the benefit of the said exemption Notification No. 35/81-C.E., dated 1st March 1981.

6. Before going into the above contention, a broad conceptual clarification based on the various provisions of the Customs Act of 1962 is required to be made.

7. The Customs Act, 1962 is an Act to consolidate and amend the Law relating to the customs. Section 2(14) defines the expression "dutiable goods" to mean any goods which are chargeable to duty and on which duty has not been paid Section 2(15) defines the word "duty" to mean a duty of customs leviable under the Customs Act, 1962. Section 2(23) defines the work "import" to mean bringing into India from a place outside India. Section 2(25) defines the words "imported goods" to mean any goods brought into India from a place outside India but does not include goods which have been cleared for home consumption. Section 2(26) defines the word "importer" in relation to any goods at any time between their importation and the time when they are cleared for home consumption includes any owner or any person holding himself out to be the importer. For the purposes of deciding the above questions, material sections of the Customs Act, 1962 are the sections which are reproduced herein below :

"12. (1) Except as otherwise provided in this Act, or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under the Customs Tariff Act, 1975 or any other law for the time being in force, on goods imported into, or exported from, India.

(2) The provisions of sub-section (1) shall apply in respect of all goods belonging to Government as they apply in respect of goods not belonging to Government."

Under Section 12 of the Customs Act, it is clear that as regards levy of customs duty, duties of customs shall be levied, if the goods are imported into India and secondly duties of customs shall be levied at such rates as may be specified under the Customs Tariff Act, 1975.

"14. (1) For the purposes of Customs Tariff Act, 1975, or any other law for the time being force whereunder a duty of customs is chargeable on any goods by reference to their value, the value of such goods shall be deemed to be the price at which such or like goods are ordinarily sold, or offered for sale, for delivery at the time and place of importation or exportation, as the case may be, in the course of international trade, where the seller and the buyer have no interest in the business of each other and the price is the sole consideration for the sale or offer for sale :

Provided that such price shall be calculated with reference to the rate of exchange as in force on the date on which a bill of entry is presented u/s 46, or a shipping bill of export, as the case may be, is presented u/s 50.

(1A) Subject to the provisions of sub-section (1), the price referred to in that sub-section in respect of imported goods shall be determined in accordance with the rules made in this behalf.

(2) Notwithstanding anything contained in sub-section (1) or sub-section (1A) if the Central Government is satisfied that it is necessary or expedient so to do it may, by notification in the Official Gazette, fix tariff values for any class of imported goods or export goods, having regard to the trend of value of such or like goods, and where any such tariff values are fixed, the duty shall be chargeable with reference to such tariff value.

(3)"

The above provisions of Section 14 of the Customs Act, 1962 are also relevant, inasmuch as the section lays down that for the purpose of Customs Tariff Act whereunder a duty of customs is chargeable, the value of such goods shall be assessed at the price at which such goods are ordinarily sold or offered for sale at the time and place of importation.

Section 25 of the Customs Act, 1962 empowers the Central Government to issue a notification in the public interest and to exempt generally either absolutely or subject to such conditions as may be specified in the notification goods of any specified description from the whole or any part of duty of customs leviable thereon.

8. At this stage, since the Customs Act, 1962 read with Customs Tariff Act, 1975 constitutes a completed Code by itself in the matter of levy of customs duty, it would also be relevant to refer to certain provisions of the Customs Tariff Act,

1975. Section 2 of the Customs Tariff Act, 1975 deals with the rates at which duties of customs shall be levied under the Customs Act, 1962 specified in the First and Second Schedules. Section 3, which deals with levy of additional duty equal to excise duty is material for the purpose of deciding this petition. Section 3 of the Customs Tariff Act, 1975 reads as under :

"3. Levy of additional duty equal to excise duty. - (1) Any article which is imported into India shall, 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 be would be leviable on a like article if [produced or manufactured in India or, if... sic] 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.

(2) For the purpose of calculating under this section the additional duty on any imported article, where such duty is leviable at any percentage of its value, the value of the imported article shall, notwithstanding anything contained in Section 14 of the Customs Act, 1962, be the aggregate of -

(i) the value of the imported article determined under sub-section (1) of the said section 14 or the Tariff value of such article fixed under sub-sec. (2) of that section, as the case may be; and

(ii) any duty of customs chargeable on that article u/s 12 of the Customs Act, 1962, and any sum chargeable on that article under any law for the time being in force as an addition to, and in the same manner as, a duty of customs, but not including the duty referred to in sub-section (1).

(3) If the Central Government is satisfied that it is necessary in the public interest to levy on any imported article whether on such article duty is leviable under sub-section (1) or not such additional duty as would counter-balance the excise duty leviable on any raw materials, components and ingredients of the same nature as, or similar to those, used in the production or manufacture of such article, it may, by notification in the Official Gazette, direct that such imported article shall, in addition, be liable to an additional duty leviable on such portion of the excise duty leviable on such raw materials, components and ingredients as, in either case, may be determined by rules made by the Central Government in this behalf.

(4) In making any rules of the purposes of sub-section (3), the Central

Government shall have regard to the average quantum of the excise duty payable on the raw materials, components or ingredients used in the production or manufacture of such like article.

(5) The duty chargeable under this section shall be in addition to any other duty imposed under this Act or under any other law for the time being in force.

(6) The provisions of the Customs Act, 1962, and the rules and regulations made thereunder, including those relating to drawbacks, refunds and exemption from duties, shall, so far as may be, apply to the duty chargeable under this section as they apply in relation to the duties leviable under that Act."

Section 3 of the Customs Tariff Act, inter alia, lays down that article which is imported into India for the being leviable on a like 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. Explanation to Section 3(1) of the Customs Tariff Act is also material. Broadly, it lays down that even if an article is not produced or manufactured in India, still for the purposes of additional duty the rate of excise duty having nexus with the class or description of articles to which the imported article belongs can constitute a measure for calculating additional duty under the Customs Act.

9. The above sections of the Customs Act, 1962 read with sections of the Customs Tariff Act, 1975 broadly, therefore, indicate that the Customs Act, 1962 read with Customs Tariff Act, 1975 constitutes a complete Code in respect of the levy of customs duty both basic as well as additional and that the exemption which the Government may grant u/s 25 of the Customs Act can only apply to customs duties chargeable u/s 12 of the Customs Act of 1962. Secondly, it also lays down that the taxable events for the levy of the customs duty including additional duty including additional duty shall be importation of the goods into India. Therefore, the incidence of taxability for the purpose of customs duty levied on import of the goods into India is quite different from incidence in the case of manufacture of goods under the Central Excises and Salt Act, 1944 and keeping this concept in the mind, the controversy in the present petition can be solved on the first principles. It may also be mentioned that as regards the additional duty of customs, the charging section is Section 12 of the Customs Act, 1962 read with Section 3 of the Customs Tariff Act, 1975.

10. The above view also finds support in the judgment of the Supreme Court in the case *Khandelwal* (supra). Before coming to the ratio laid down by the Supreme Court in the said judgment, it may be mentioned that at one point of time prior to the said judgment an argument was sought to be advanced that the additional duty is equal to the countervailing duty and therefore the additional duty did not fall under the Customs Act, 1962. The said view did not favour in the above judgment in the case of *Khandelwal Metal & Engineering Works v. Union of India*. In the said judgment, the Supreme Court inter alia laid down that

the charging section for the purposes of additional customs duty is Section 12 of the Customs Act, 1962 read with Section 3 of the Customs Tariff Act, 1975. It has been laid down that the additional duty mentioned u/s 3(1) of the Customs Tariff Act partakes of the same character as the customs duty since it is an addition to the duty which is leviable u/s 12 of the Customs Act, 1962 the rates of which prescribed by Section 2 of the Customs Tariff Act, 1975. It is specifically laid down that the additional duty u/s 3(1) of the Customs Tariff Act, 1975 is not a countervailing duty. Further it is also laid down that Section 3(1) of the Customs Tariff Act, 1975 provides for a measure to calculate the additional duty, which has to be "equal to the excise duty" leviable on a like article if produced or manufactured in India and therefore, the duty referred to in Section 3(1) of the Customs Tariff Act, 1975 is leviable even if the goods are not capable of being manufactured or produced in India or are not in fact manufactured or produced in India. The expression "excise duty for the time being leviable on a like article if produced or manufactured in India" which occurs in Section 3(1) of the Customs Tariff Act, was interpreted by the Supreme Court to mean "excise duty" which could 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. Therefore, in view of the ratio laid down by the Supreme Court in the above judgment, it is clear that when the additional duty is required to be computed on the basis of excise duty for the time being leviable, the excise duty which is leviable is a measure for the purposes of calculating additional duty. It is clearly laid down in the said judgment of the Supreme Court that measure for calculating additional duty does not warrant a change in the nature of tax. If the excise duty for the time being leviable provides only a measure to calculate the additional duty under the Customs Act, 1962, then one fails to understand as to how exemption granted under Central Excises & Salt Act, 1944 read with Rule 8 of the Central Excise Rules, 1944 would automatically exempt the additional duty u/s 12 of the Customs Act, 1962 read with Section 3(1) of the Customs Tariff Act, 1975. Looking at the same proposition from another angle. The Legislature could have stipulated additional duty to be calculated as the percentage of value of the goods, instead of providing that the additional duty would be equal to excise duty. In such an event, it was not open to the petitioner to argue that the exemption under the Central Excises & Salt Act, 1944 would automatically apply to the additional duty under the Customs Act, 1962. Therefore, looking at the same problem from a different perspective, it is clear that when the additional duty is equal to excise duty the latter is only a yardstick to calculate the additional duty under the Customs Act and the exemption under the Central Excises & Salt Act, 1944 cannot automatically exempt the additional duty under the Customs Act, 1962.

11. In the present case, Mr. Halwasia, the learned counsel appearing for the petitioner, has submitted that the Notification No. 35/81-C.E., dated 1st March 1981 applies to the present case, inasmuch as the Central Government has

exempted waste and copper scrap amongst other items falling under Item 26A of the First Schedule to the Central Excises & Salt Act, 1944 from the whole of the duty of excise leviable thereon. At this stage, it would be necessary at some advantage to quote in its entirety the said notification :-

"WASTE & SCRAP T/I-26A, 26B, 27 & 27A

35/81-C.E., dt. 1-3-1981.

Waste and scrap of copper, zinc, aluminium and lead are exempt if used in the manufacture of chemicals.

In exercise of the power conferred by sub-rule (1) of Rule 8 of the Central Excise Rules, 1944, the Central Government hereby exempts waste and scrap of copper, zinc, aluminium and lead, falling under Item Numbers 26A, 26B, 27 and 27A, respectively, of the First Schedule to the Central Excises and Salt Act, 1944 (1 of 1944), from the whole of the duty of excise leviable thereon :

Provided that -

(i) it is approved to the satisfaction of an officer not below the rank of an Assistant Collector of Central Excise that the said waste or scrap is intended to be used in the manufacture of chemicals, and

(ii) in respect of such use elsewhere than in the factory of production of the aforesaid waste or scrap, the procedure set out in Chapter X of the Central Excise Rules, 1944 is followed."

Now, bare reading of the said Notification No. 35/81-C.E., dated 1st March 1981 read with the facts mentioned hereinabove shows that the copper scrap and waste were included under Item No. 26A(1b) by Section 48 of the Finance Act, 1981. For the purpose of clarity and at the cost of repetition, it may be mentioned that by Section 48 of the Finance Act, 1981, Schedule to the Excise Act stood amended and special Item No. (1b) as well as Explanation II was included to make copper waste and scrap excisable. The said amendment to the Schedule to the Excise Act initially provides for excise duty of Rs. 5600/- per Metric Tonne. However, by virtue of Notification No. 32 of 1981 dated 1st March 1981 read with the Notification No. 169/80-C.E., dated 1st November 1980 the rate of excise duty was reduced from Rs. 5600/- per Metric Tonne to Rs. 3000/- per making a total of Rs. 3300/- per Metric Tonne. The petitioner herein has not annexed the Notification No. 32 of 1981 dated 1st March 1981. However, in the case of *Khandelwal v. Union of India* decided by the Delhi High Court, which was subsequently approved by the Supreme Court of India as mentioned above, has referred to the above notification in extenso and in order to clarify the position, in the present petition also we hereby quote the above Item No. 26A of the First Schedule to the Central Excises & Salt Act, 1944 as duly amended by Section 48 of the Finance Act, 1981 read with Notification No. 32 of 1981 dated 1st March 1981.

"Item No. 26A of the First Schedule to the Central Excises and Salt Act, 1944 is as under :-

26A - Copper and Copper alloys containing not less than fifty per cent by weight of copper.

(1) In any crude form including One thousand and five ingots, bars, blocks, slabs, hundred rupees per billets, shots and pellets metric tonne. (1a) Wire bars, wire rods and castings, not otherwise specified. (2) Manufactures the following, Two thousand rupees per namely - plates, sheets, metric tonne. circles, strips and foils in any form or size. (3) Pipes and tubes. Ten per cent ad valorem."

By Section 48 of the Finance Act, 1981 the schedule to the Excise Act has been amended and a sub-item (1b) and Explanation II has been included as follows :

"(1b) Waste and scrap.

Explanation I - "Copper" shall include any alloy in which copper pre-dominates by weight over each of the other metals.

Explanation II - "Waste and scrap means waste and scrap of copper fit only for the recovery of metal or for use in the manufacture of chemicals, but does not include slag, dross, scalings, ash and other spurious residues."

In the present petition, therefore, the controversy is, whether the additional duty calculated at the rate of Rs. 3300/- per Metric Tonne under the Customs Act, 1962 stood totally exempted by virtue of the Notification No. 35/81-C.E., dated 1st March 1981 issued under the Central Excises and Salt Act, 1944, read with Rule 8 of the Central Excise Rules, 1944; and not the reduction from 5600/- per M.T. to Rs. 3300/- per M.T.

A bare reading of the above notification indicates firstly that the said notification has been issued under the provisions of Rule 8 of Central Excise Rules, 1944 and not u/s 25 of the Customs Act, 1962. The taxable event in the case of excise duty is the manufacture of the goods whereas in the case of the customs duty it is importation of the goods. Secondly, as laid down in the notification itself it is the manufacturer of the goods who is liable to pay excise duty under the Central Excises & Salt Act, 1944 and is alone entitled to benefit of the exemption under the said Notification No. 35/81-C.E., dated 1st March 1981. The said notification applies only if the conditions mentioned in the proviso are fulfilled. In the present case there is no averment of whatsoever nature in the petition that the conditions mentioned in the proviso mentioned in the said notification are fulfilled. In fact, if one goes through in the petition itself, it is very clear that although the petitioner has imported the goods in India, he has sold the material on the basis of High Seas to M/s. Mehta Industrial Corporation for the manufacture of copper oxychloride and therefore the petitioner is not the manufacturer of the said chemical and he cannot in any event claim the benefit of the exemption notification. In view of the said averment it is not possible to accept the contention of Mr. Halwasia for the petitioner that the goods have been

used or that they have been intended to be used for the manufacture of chemical as laid down in the First Proviso to the impugned notification. In fact no material has been shown to the effect that the petitioner has manufactured the said chemical. In fact, there is no such averment in the petition to the effect that both the conditions mentioned in the Proviso to the notification dated 1st March, 1981 have been fulfilled by the petitioner. As it may be, even assuming for the sake of argument that the said goods were intended to be used for the manufacture of the chemical, a benefit of the said exemption notification could be given only under the Proviso. No provision whatsoever has been shown by the learned counsel appearing for the petitioner to show that the benefit of the said exemption notification should automatically be extended to the goods imported by the petitioners in the matter of computation of levy or chargeability of additional duty under the Customs Act, 1962. The result is that there is no notification issued u/s 25 of the Customs Act, 1962 and in view of what is stated above the said notification dated 1st March 1981 issued under the Central Excises and Salt Act, 1944, cannot per se be extended to cover the additional duty imposed under the Customs Act, 1962. It may be pointed out at this stage that at the time of when the matter was being argued, Mr. Halwasia for the petitioner had tendered Notification No. 89/82-Cus., dt. 25th March 1982. The said notification has not been referred to by the petitioner in the present petition and therefore the argument advanced on the basis of the said notification cannot be allowed. In the absence of any averment in the present petition, a new ground is sought to be argued across the Bar and therefore, we are not inclined to entertain the said submission made by Mr. Halwasia based on the said notification dated 25th March 1982.

12. As regards the judgments cited at the Bar, the first judgment which is relevant on both aforesaid points would be the judgment of the Delhi High Court in the case of Khandelwal Metal and Engg. Vs. Union of India and others, , which judgment was affirmed by the Supreme Court as mentioned hereinabove. In the said case before the Delhi High Court one of the arguments of the Advocate appearing for the petitioner company was the same argument which has been advanced by Mr. Halwasia. It was argued in the said case by the advocate for the petitioner that the additional duty of customs was not leviable inasmuch as the Notification No. 34 dated 1st March 1981 issued under Rule 8 of the Central Excise Rules the waste and scrap of copper, aluminium and brass falling under Items 26A and 27 of the Schedule to the Excise Act have been "exempted from the whole of the duty of excise leviable". The argument was that since the brass scrap involved in that case was exempted under Rule 8 of the Central Excise Rules, the additional duty was also not leviable under the Customs Act, 1962. The said contention was rejected by the Delhi High Court. In the said judgment the Delhi High Court rejected the above argument by observing that the reliance on the notification issued by the Government under the Central Excises and Salt Act, 1944 is inapposite as it relates to exemption from the payment of duty of excise and has no relevance for the purpose of payment of

additional duty of customs under the Customs Tariff Act, 1975. We respectfully agree with the ratio of the said judgment of the Delhi High Court, which, as stated above, was subsequently approved by the Supreme Court of India in the case of *Khandelwal v. Union of India* (supra). In view of the said decision of the Delhi High Court, with which we agree with respect, it is clear that the exemption from payment of duty of excise under the Central Excises & Salt Act, 1944 does not stand automatically applicable to the additional duty levied under the Customs Act, 1962.

13. As regards the contention of Mr. Halwasia that his client has fulfilled the conditions mentioned in the said notification dated 1st March 1981, the same argument was also advanced before the Delhi High Court in the said *Khandelwal*'s case dealing with the said conditions and Delhi High Court specifically ruled that the notification under the Central Excises & Salt Act, 1944 deals with the certain conditions and if those conditions are not fulfilled then the question of benefit of Excise Act also per se is not applicable even to the excise duty calculated under the Excise Act. In the present case, it is very clear that the conditions mentioned in the said notification dated 1st March 1981 are not fulfilled inasmuch as there is nothing to indicate that the waste and/or scrap imported by the importer has been at all intended to be used in the manufacture of chemical or that they have been used for the manufacture of chemical. Secondly, there is no material before us to indicate that on importation of the waste and/or scrap goods have been, in fact, used for the manufacture in the factory of production of the aforesaid waste or scrap. In the present case, in the absence of any material to show that the petitioner has fulfilled the conditions mentioned in the said notification and also in view of the averments in the petition that the petitioner has been a importer of the said copper scrap, which in turn he has sold to a company called M/s. Mehta Industrial Corporation, it is doubtful on the face of the record itself as to whether the conditions mentioned in the said proviso to the Central Excise notification dated 1st March 1981 could be said to have been fulfilled. In fact, in the petition at page 13 the petitioner has averred that :

"... the imported materials are to be used in manufacturing metal articles, and therefore, also no additional duty can be legally levied on such metal scrap materials which have been duly imported."

In view of the said conflicting averments and also in view of the specific averment that the imported goods have been sold on High Seas and in the absence of any material, the petitioner could not be said to have complied with the conditions laid down by the proviso to the said Notification dated 1st March 1981.

3rd December 1991

14. The above view taken by us finds support also from the judgment of the Division Bench of the Bombay High Court in the case of *Ashok Traders Vs. Union*

of India and another, . The facts of the said case were as follows :-

The petitioner in that case was a proprietary firm carrying on business of importing goods. On February 26, 1983, the petitioner imported 51 Metric Tonnes of High Density Polyethylene Moulding Power (HDPE) from foreign seller and the C.I.F. value was 670 Dollars per Metric Tonne. Bill of Entries were filed on 26th February 1983. In respect of the import of the the said goods, basic customs duty was payable at 50% auxiliary duty at 25% and the additional duty at 42%. The petitioner had no dispute in that case regarding the customs duty and auxiliary duty, but the petitioner challenged the rate of additional duty inter alia on the ground that additional duty which was in substance countervailing duty, cannot be charged at the rate of 42% but it should be reduced to 27% because according to the petitioner in that case additional duty which was charged was not a customs duty under the Customs Act, 1962 but in fact, it was a countervailing duty which did not fall within the ambit of the Customs Act, 1962. It was contended on behalf of the petitioner that the additional duty was charged under the Customs Tariff Act, 1975 and not under the Customs Act, 1962 and therefore, it was submitted that following the earlier judgment of the Bombay High Court in the case of Century Enka Limited and others Vs. Union of India and Two others, , the additional duty should be treated as countervailing duty and not as an independent duty under the Customs Act, 1962. This argument of the petitioner was rejected by the Division Bench of the Bombay High Court in view of the above judgment of the Supreme Court in Khandelwal's case (supra). It was specifically held by the Division Bench in the case of Ashok Traders (supra) that the additional duty was not a countervailing duty, inasmuch as, the additional duty was chargeable u/s 12 of the Customs Act, 1962 read with Section 3(1) of the Customs Tariff Act, 1975 and that the additional duty was a duty of customs. In the said judgment, the Division Bench while rejecting the above argument of the petitioner laid down that the liability to pay the customs duty under the Customs Act, 1962 includes the payment of basic customs duty, auxiliary duty as well as additional duty. It was laid down that all the above duties are broadly brought under the title "Customs Duty". It was further laid down that the Legislature has prescribed different modes for arriving at the assessable value for the levy of basic customs duty as well as countervailing duty as well as the additional duty. It was also observed that there were several Statutes wherein different modes were prescribed for levy of different duties and that the method of calculating, the method of assessment as well as levy of each duty must be treated as a separate item. In view of the above observations of the Division Bench of the Bombay High Court in Ashok Traders" case (supra), it is quite clear that the additional duty is quite distinct from the countervailing duty and so also the additional duty cannot be equated to excise duty. As stated above, the additional duty u/s 12 of the Customs Act, 1962 read with Section 3(1) of the Customs Tariff Act, 1975 is equal to the excise duty for the time being leviable which presupposes that the reference to excise duty is only by way of a measure and it cannot alter the nature of the tax

i.e. additional duty under the Customs Act, 1962. In the above case of Ashok Traders (supra) one of the contentions raised by the petitioner was that the petitioner was entitled to the benefit of exemption notification issued under the Central Excises & Salt Act, 1944. It was found by the Division Bench of the Bombay High Court on facts that there was no material before the Court to indicate due compliance with the said notification and therefore, in any event, it was held that the benefit of exemption notification could not be claimed by the petitioner in that case. The same position also takes place in the present case. There is nothing to indicate even in the present case that the petitioner has complied with all the statutory conditions. In fact, the buyer of the goods on High Seas basis i.e. M/s. Mehta Industrial Corporation is not before the Court and no affidavit or any material has been shown to justify the contention of the petitioner that the conditions mentioned in the exemption notification are duly complied with.

15. Mr. Halwasia, the learned counsel for the petitioner drew our attention to the judgment of the Division Bench of the Bombay High Court in the case of Century Enka Limited and others Vs. Union of India and Two others, as also the judgment of the Bombay High Court in the case of Hordillia Chemicals Ltd. and another Vs. Union of India and others, . It may be at the outset stated that both the aforesaid judgments were delivered prior to the judgment of the Supreme Court in Khandelwal's case as well as prior to the judgment in Ashok Traders" case (supra). It may be seen from the said two judgments in the cases of Century Enka Ltd. as well as Hordillia Chemicals Ltd. case, that an argument was advanced to the same effect viz. that the additional duty was the same as countervailing duty and that the additional duty was not a duty of customs but it was a countervailing duty chargeable only u/s 3 of the Customs Tariff Act, 1975. This view initially was accepted by the Bombay High Court in the aforesaid cases of Century Enka Ltd. and Hordillia Chemicals Ltd. (supra). However, in view of the Supreme Court's judgment in Khandewal's case as well as in view of the Division Bench's judgment of the Bombay High Court in Ashok Traders" case (supra), the above contention of the petitioner cannot be accepted. We hereby make it clear that the judgment of the Division Bench of the Bombay High Court in the case of Century Enka Limited and others Vs. Union of India and Two others, and Hordillia Chemicals Ltd. and another Vs. Union of India and others, are not more a good law, and therefore, the petitioner in the present case cannot place reliance on the aforesaid two judgments.

16. Mr. Halwasia, the learned counsel for the petitioner, also drew our attention to the unreported judgment of the Division Bench of the Bombay High Court in Write Petition No. 1402 of 1988 decided on 22nd October 1991 [reported in Solar Pesticides Pvt. Ltd. Vs. Union of India (UOI), , by the Division Bench of the Bombay High Court to which one of us (Kapadia, J.) was a party. We do not see any relevancy of the said judgment in Write Petition No. 1402 of 1988 decided on 22nd October 1991 to be unjust of the present case. In the aforesaid write petition, the contention that was advanced by the petitioner was that exemption

Notification No. 35/81-C.E., dated 1st March 1981 stipulates two conditions by way of proviso. It was argued that the second condition mentioned in the proviso, on the facts, was not possible to be complied with. In that case, it was further argued that the petitioner had complied with the condition No. 1 in the proviso to the exemption Notification No. 35/81-C.E., dated 1st March 1981 but the petitioner was not in a position to fulfil the second condition. Reliance was placed on certain judgments of the Central Excise and Gold (Control) Appellate Tribunal in support of the contention of the petitioner that even in the absence of non fulfillment of the second condition if an assessee has complied with the first, condition mentioned in the proviso to the exemption notification, then in that event, the refund could be granted in appropriate cases. In the present case, however, there is nothing to show whether any of the conditions mentioned in the proviso to the notification dated 1st March 1981 have been fulfilled. No material whatsoever has been shown in respect of compliance of both the conditions mentioned in the proviso to the exemption Notification No. 35/81-C.E., dated 1st March 1981. No averment whatsoever has been made in the petition to the extent of compliance of both the conditions mentioned in the proviso to the notification. On the other hand, as mentioned hereinabove the averment in the petition shows that the goods imported were sold on High Seas basis to M/s. Mehta Industrial Corporation and therefore, in the circumstances, one fails to appreciate the contention of the petitioner based on the said judgment dated 22nd October 1991 of this Court in Writ Petition No. 1402 of 1988. The second question which arose in the said case evolved on the interpretation of the provisions of Central Excise and Customs Laws (Amendment) Act of 1991. In the circumstances, the reliance placed by the petitioner on the said unreported judgment of this Court dated 22nd October 1991 is totally ill-founded.

17. To sum up our conclusions :-

(a) that the exemption granted by the Central Government, either fully or partially, under Rule 8(1) of the Central Excise Rules, 1944 does not automatically stand extended to "additional duty" chargeable u/s 12 of the Customs Act, 1962 read with Section 3(1) of the Customs Tariff Act, 1975.

(b) that the exemption notifications issued under the Central Excises and Salt Act, 1944 read with Rules 8 of the Central Excise Rules, 1944, will apply only to exemptions under the Central Excises & Salt Act, 1944 and unless there is specific notification regarding additional duty under the Customs Act, 1962, the petitioner cannot claim automatically the benefit of exemption notification issued under the Central Excises and Salt Act, 1944, inasmuch as, the additional duty under the Customs Act refers to the excise duty only as a measure or yardstick to calculate the additional duty, u/s 12 of the Customs Act, 1962 read with Section 3(1) of the Customs Tariff Act, 1975.

(c) In view of the judgment of the Supreme Court in Khandelwal Metal and Engineering Works and Another Vs. Union of India (UOI) and Others, and in view of the judgment of the Division Bench of the Bombay High Court in the case of

Ashok Traders Vs. Union of India and another, , the law earlier laid down in the case of Century Enka Limited and others Vs. Union of India and Two others, and in the case of Hordillia Chemicals Ltd. and another Vs. Union of India and others, is no more good law.

(d) Even otherwise, on facts of the case, there is nothing to indicate due compliance with the provisions of the conditions mentioned in the Proviso to Notification No. 35/81-C.E., dated 1st March 1981 by the petitioner and therefore, the petitioner herein cannot get benefit of exemption in respect of the additional duty under the Customs Act, 1962.

18. In the circumstances, writ petition stands dismissed. Rule is discharged with costs.

19. At the time of the admission of the petition, the petitioner had given hundred per cent Bank Guarantee as well as executed a bond in respect of the additional duty charged by the Customs Authorities, As the petitioner has failed in the present petition, the respondents are entitled to encash the said bank guarantee as well as on enforce the bond.

As regards the basic customs duty, we are informed that the Customs Authorities have accepted the contention of the petitioner in the matter of basic customs duty at the rate of 45% ad valorem and therefore to the extent of differential duty, the personal bond executed by the petitioner regarding basic customs duty stand discharged.

20. Mr. Halwasia, the learned counsel for the petitioner applies for 8 weeks" time to move the Supreme Court Mr. Devdhar, the learned counsel for the respondents opposes the same. In the circumstances, we direct the respondents not to encash the bank guarantee till 5th February 1992. We also direct the respondents not to enforce the above bond till 5th February 1992.