

Srf Limited and ors. Vs. Commissioner of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Tamil Nadu

Decided On : Apr-21-1998

Reported in : (1998)(61)ECC687

Judge : V Gulati, Vice, T Nambiar, S Peeran

Appellant : Srf Limited and ors.

Respondent : Commissioner of Central Excise

Advocate for Pet/Ap. : Shri. Lakshmikumaran

Judgement :

1. These appeals arise out of a common order of the Ld. lower authority. Under the impugned order duty of Rs. 4,92,66,826/-has been demanded from the appellant company on various counts invoking the longer period of limitation under Section 11(A) of the Central Excise Act, 1944 and appellant company as also two employees of the company have also been levied personal penalties for the evasion of duty as held above.

2. The appellants are manufacturers of industrial fabrics of different varieties and had filed the classification list as also price lists in respect of the same from time to time. The issues that arise for consideration relate to the classification of various items as set out in the order of the Ld. lower authority as also whether the longer period of limitation was invocable in the facts and circumstances of the case and the appellants liable to penalty as levied.

(1) Processed and un-processed fabrics of cotton and made filament yarn and fibre, The other issues that arise for consideration are the limitation period applicable in terms of Section 11(A) and the relevant date or provision for demand of duty i.e. whether provisions of Section 9A(5) will be applicable for demanding duty. Plea made is that the relevant date applicable would be the date on which duty was quantified. Each of the issues raised is taken for discussion separately.

1st issue: Correct classification of unprocessed fabrics of cotton and man-made fibre and filament yarn. The appellants claim the .

classification under Chapter 52, 54 or 55 depending upon the material used for the fabric while revenue seeks the classification under Heading 5909. Unprocessed fabrics falling under Chapters 52, 54 or 55 were exempt from payment of duty. This exemption is not available in case the assessment is held under Chapter 59.09. The period of demand is May, 1988 to October, 1990 and the amount involved is Rs. 58,74,584/-. The fabrics in question are admitted to be industrial fabrics which are used for various purpose such as for manufacture of U-Belts, Chafer, as Filter cloth in various industries spindle tape. The Ld. lower authority giving by the Section and Chapter notes in Section XI has held that since the fabrics are used for industrial purposes, the Chapter Heading 59.09 would be preferable. He has relied on the judgment of the CEGAT in the case of Simplex Mills reported in 1993(49) ECR] 47 classifying similar products under Heading 59.09. The other reasons as set out in the Ld. lower authority's order are that Chapters 52 to 55 cover apparel type of fabrics and Chapter Heading 52.08 excludes fabrics for technical use.

4. The Ld. Advocate for appellant Shri Lakshmikumaran pleaded that taking into consideration the scheme of the tariff, Section rules under Section XI of the tariff and Chapter notes particularly under tariff heading 59.09, the appellants goods could not be held to fall under TI 59.09. In any case he pleaded the demand was barred by limitation as the appellants had filed the necessary classification lists for the goods from time to time revealing the full particulars in respect of the same. The demand he pleaded came to be issued only after the judgment of the Tribunal in the case of Simplex Mills case reported in 1993(49) ECR 147 (Tri.) came to be

passed. He pleaded after this decision the Board issued a notification under Section 37B of Central Excise Act, 1944 to ensure uniformity of assessment while taking note of the judgment above notifying the classification cotton canvas cloth, Cotton Dack and Cotton Tyre Cord Fabric which were used for industrial purpose as under 52.05. In regard to the ground on limitation following points have been urged before us: A. 18 The nomenclature, construction and use of the fabrics have already been declared to the Department. When the Central Excise Tariff Act, 1985 was brought into force, the proposed classification was called for by the department. The appellants declared to the department, the proposed description, proposed classification and declared for each type of fabrics, the name of the fabric the types of purchase manufacturers, and the end used of such products.

A. 19 The following pages' of the paper book have also been placed before the Commissioner in his regard.

A. 20 In the classification list filed in January, 1984, the classification was claimed under Tariff Item 22 describing the nature of the fabric as chafer fabrics, filter fabrics, luggage fabrics, belting fabric, impression fabric, clading shelter and giving the code numbers and also the construction of the various fabrics. (Pages 5 to 47 of Paper Book 3 containing classification lists refers). On 18.2.1986 the Inspector directed SRF to file the revised classification list consequent to the introduction of new Central Excise Tariff Act, 1985. SRF informed the Superintendent by their letter dated 21.2.1986, giving the proposed classification, proposed nomenclature, manufacturing process, name of the fabric, purchaser/ manufacturer and the end-use for Chapters 52, 54 and 55 (Pages 387 to 393 of Paper Book 2 refers). Name of the fabric and the code numbers, etc. have already been disclosed in May, 1984 (Pages 394 to 398 of Paper Book 2). The classification lists filed from 1.3.86 to March 1992 for Chapters 52,54 & 55 are at pages 170 to 402 of Paper Book 3. While prior to December 1987 the classification list were filed for each of the codes, consequent to the advice of the Department, a consolidated classification list has been filed without separate code numbers etc. Copy of the letter for such change in filing the classification lists addressed to the Assistant Collector is at pages 58 and 330 of Paper Book 3.

A. 21 The fact that these fabrics are for industrial use and also the industry in which they are to be used for already been disclosed. This is the only factor which is relied upon by the Commissioner for changing the classification from chapters 52, 54, 55 to chapter 59. It is very clear from the records of: the case that this change in the view- seems to have been guided by the decision of the Appellate Tribunal in the case of Simplex Mills. The justification given by the Commissioner for reclassification is also entirely relying upon Simplex Mills decision. Since the fact which is relevant has already been disclosed in unmistakable terms and the classification list having been approved fully aware of the facts, the allegation of suppression for invoking the extended period of limitation cannot at all survive. The entire demand is therefore time barred.

A. 22 Further, Simplex Mills decision was delivered by the Tribunal on 28th February 1992 and the same was communicated by the Registry in the month of May 1992 to the Simplex Mills. The investigation in this case started after the Tribunal's decision in this case.

A. 23 The appellants factory is known as "SRF Limited, Industrial Fabrics Division. All letter-heads of the company and visiting cards of the company officials predominantly add "Industrial Fabric Division" in all the correspondence. Central Excise Licence was given to SRF Limited, Industrial Fabric Division. Thus, the factory was known in the entire locality of Trichy and the Sector Officer, Range Officer including the Divisional Office and the Commissioner as a factory manufacturing industrial fabrics. It is too late in the day to allege that the Department did not know that SRF Limited, Industrial Fabric Division were manufacturing industrial fabrics.

A. 24 Further there was an adjudication order of the Additional Collector of Central Excise No. 24/89 dated 31.8.89 (Page Nos. 248 to 262 of Paper Book 2) wherein it has been very specifically noted that the appellants manufacture industrial fabrics in their unit at Varalimalai. The said show cause notice was issued after a detailed investigation by the Directorate of Anti-evasion, Madras.

A. 25 The Assistant Collector passed an adjudication order dated 7.11.89 (Pages 422 to 424) wherein among various industrial fabrics manufactured by the

appellants only filter fabrics was taken up for consideration and decided that such filler fabrics would be classifiable under Heading 59.09.

A. 26 BONA FIDE BELIEF--The Department approved the classification lists from time to time under Chapters 52, 54 & 55 fully aware of the description of the fabric, the nature of the fabric, the types and uses, and the industry in which it is used. Further, the Central Board of Excise and Customs issued instructions for classification of such fabrics under base fabric chapters in 1988--1988(37) ELT T22-- a copy of the Trade Notice issued by Bombay Collectorate. This view was further confirmed in 1993 by Section 37B order .

A. 27. Because of the bona fide belief and because all the relevant facts had already been given to the Department only the normal period of limitation can apply and the allegation of suppression cannot be sustained. Reliance is placed on the following decisions:Electrical Manufacturing Co. (P) Ltd v. CCE 5. The Ld. SDR for the department arguing on the aspect of limitation urged as under: As stated earlier, the appellant manufacture specificfabrics i.e.

only when there is specific orders from the specified customer, they manufacture. When they stop manufacturing a fabric, when they resume production of that fabrics were not disclosed to the department.

With the introduction of new CEX Tariff, the appellant had mentioned in the CL as under: Unprocessed fabrics of man made filament yarn processed fabrics of man made filament yarn unprocessed fabrics of cotton, processed fabrics of cotton.

It is only from their private records for which the officials have no access, it is found that they manufacture the specific variety of fabrics.

The chart enclosed herewith shows the description of goods indexed, the description furnished in the classification list, that in GP, etc.

From the above it is clear that the appellant had already suppressed the material facts relevant for deciding the classification.

In this connection, it is submitted that once it was pointed out that they had manufactured filter fabrics, the appellants had reported that they had stopped manufacturing that fabrics.

In view of the peculiar circumstances prevailing in this case, extended period on account of suppression was rightly invoked.

It is submitted that in the classification list filed by the appellant after the registering of the case. They has mentioned the description of the fabrics as under: This is in contrast to the description furnished in the classification list filed earlier i. e. in 1986 to 1992, they had simply mentioned unprocessed/ processed fabrics of cotton and so on.

6. We have considered the plea made by both the sides on the aspect of limitation. We had during the hearing perused the classification lists filed from time to time and also the copies of the correspondence filed in regard to the classification of the goods during the relevant period. It is seen that the jurisdictional inspector of Central Excise by his letter dated 18.2.86 (page 387 of Paper Book filed) informed the appellants about the coming into effect of the new tariff and asking them to file revised classification list. The appellants vide their letter dated 21.2.86 (page 388 of Paper Book 2) enclosed a detailed write up giving proposed classification and nomenclature of the fabrics manufactured by them. The write up etc. as enclosed with this letter figures at pages 389 to 393. To illustrate the manner in which the information was furnished one of the annexure for one set of fabrics is reproduced below: Manufacturing Process: The twisted continuous filament yarn of nylon, polyester of rayon of combination of the above are wound on a beam to the required number of ends. The beam is then mounted on a loom a loan and the individual ends are suitably positioned on the loom so that picks can be inserted in a direction perpendicular to the ends. The resulting fabric is suitably wound and packed.

Fabric Purchasers/ End Use Manufacturer1. Impression Fabric V Belt To leave an "impres3. Filter Dealers/ Cement min- An a reinforcement on4 Luggage ing-Ceramic and the rim of the tyre.

oil To separate the cake5. Show Uppers Industries.

from the slurry by7. Revetment Soft luggage Shoe manufactures8. Pleat Shoe Defence Contractors9. Belting Fabric Shelters for Defence Defence Contractors Deienceusage Defence Contractors Inflatable floate & Conveyer Balte , The receipt of the above letter and information is not denied by the revenue. The appellants we notice also filed classification lists with tariff description and code numbers of the fabrics in question and which had been made known to the department. In this question the page 394 of the paper book II which was referred to by the Ld. Advocate that code numbers had been indicated vide their letter dated 11.5.84. The receipt of this letter is not denied. The relevant portion of the letter and annexure I of the same is reproduced below for convenience of reference: We manufacture, apart from belting fabrics, fabrics which fall under the following heads In general, most of the above referred fabrics are not in the 'heavy duty' category.

It is a very valid observation that non-heavy duty type fabrics are normally heat-sqt on a stenter. In fact, there is a large number of items produced by us which are so heat-set. As per the description given under TI. 22(1)b, these are to be treated as heat set fabrics and as much we have classified these as processed fabrics and have been paying AED as applicable while clearing these items. A list of all items which are heat set on the stenter by us, hence has been classified as PROCESSED FABRICS as given in the annexure I. ANNEXURE I Items not dipped but only processed on stenter and hence classified as PROCESSED FABRICS under TI22(1)b

ITEM	DESCRIPTION	CL	NO	SL	NO
Filter Fabrics	ISK= 105 10 30 "	ISK= 137 10 30 "	SF= 338/105 20 50 "	SF= 118/105 22 60 "	SF= 398/915 20 50 "
			SF= 118/187 22 60 "	SF= 120 17 36 "	SF= 120/102 15 21 "
			SF= 157/105 23 66 "	SF= 129/102 23 66 "	SF= 188/91 21 54 "
			SF= 188/102 15 21 "	SF= 169/102 23 66 "	SF= 368/97 21 54 "
			SF= 389/96.5 20 50		
Cladding Shelter	SZ- 127/150 22 61 "	SZ= 127/116 22 60 "	SZ= 156/150 23 65		
Float Fabric	SZ= 137/140 26 83	Tarpaulin	SZ= 166/150 23 67	Luggage Fabric	

7. We observe that the appellants unit is named as SRF Industrial Fabrics and the range of fabrics as was declared by them through the information furnished above in the correspondence cited and furnished in the classification list cumulatively taken together leaves no room for doubt that the necessary particulars regarding the nature of the goods manufactured had been made known to the departmental authorities.

In this background there is, in our view, no circumstance of suppression on the part of the appellants. The demand as it is was made after the judgment in the case of Simplex Mills. The Board also felt the necessity to issue a Section 37B notification to notify the classification of certain cotton fabrics for Industrial use. This notification was issued as per the stipulation in Section 37B of Central Excise Act, 1944 for ensuring uniformity. This thus admits of divergent practice in regard to classification of Industrial fabrics.

The appellants bona fide in the matter of classification cannot be doubted. We- in the circumstances hold that there was no warrant to hold that there was any suppression on the part of the appellants so far as these fabrics in question are concerned with the intent to evade payment of duty. The longer period of limitation of five years in terms of Section 11A therefore could not have been invoked. Since the demand for the period March, 1988 to March, 1991 was raised only on 5.6.93 i.e. beyond the period of six months the same is therefore barred by limitation.

8. As to the merits of the classification, the appellants referred us to the Section note 6 to Section XI under which it is set out that Chapter headings 56 to 60 are to be preferred over to Chapter headings 52 to 55 and also to the scope of the coverage of the category of items covered under Heading 59.09.. In this connection he referred us to Chapter note 6 to Chapter 59. His plea is that even though Chapter heading 59.09 is residuary in nature it has restrictive coverage i.e.

the residuary items covered are such as are specified thereunder. The said Chapter note is reproduced below for convenience of reference: 7. Heading No. 59.09 applies to the following goods, which do not fall in any other heading of

Section XI: (a) Textile products in the piece, cut to length or simply cut to rectangular (including square) shape (other than those having the character of the products of heading nos. 59.07 and 59.08), the following only: (i) Textile fabrics, felt and felt-lined woven fabrics, coated, covered or laminated with rubber, leather or other material, of a kind used for card clothing, and similar fabrics of a kind used for other technical purposes; (iii) Straining cloth of a kind used in oil presses or the like, of textile material or of human hair; (iv) Flat woven textile fabric with multiple warp or weft, whether or not felted, impregnated or coated, of a kind used in machinery or for other technical purposes; (v) Textile fabrics reinforced with metal, of a kind used for technical purposes; (vi) Cords, braids and the like, whether or not coated, impregnated or reinforced with metal, of a kind used in industry as packing or lubricating materials; (b) Textile articles (other than those of Heading Nos. 59.07 and 59.08) of a kind used for technical purposes [for example, textile fabrics and felts, endless or fitted with linking devices, of a kind used in paper making or similar machines (for example, for pulp of asbestos cement), gaskets, washers, polishing discs and other machinery parts].

He however fairly conceded that the issue is covered against the assessee by the ratio of the decision of the Tribunal in the case of Simplex Mills reported in 1993(49) ECR 147 (Tri). He however urged that it was no longer good law as the reliance placed by the Tribunal while coming to conclusions on another judgment of the Supreme Court was no longer sustainable inasmuch as the judgment rendered by the Apex Court in the case of Multiple Fabrics reported in 1987 (29) ELT 481 had been judgment in the case Fenoplast . He in this connection urged various arguments. We observe that the Tribunal in its order considered the scope of the coverage of the items under Chapter 59.09 and took note of following factors as urged by the Ld.

Advocate: (a) Products like PVC belting would not come under Chapter 52 inasmuch as CEGAT earlier in the case of Multiple Fabrics, reported at decided the classification of such PVC belting cloth under Tariff Item 68 in preference to Tariff Item 19(1). The CEGAT further approvingly quoted, the observations of its earlier decision, in the Simplex Mills case that only those fabrics which are capable of being draped or worn by human-beings (apparel use) would come under Tariff

Item 19 and hence industrial fabrics like PVC coated belting fabrics would be correctly classifiable under Tariff Item 68. Extensive technical materials relied upon in Multiple Fabrics decision were approvingly quoted by the CEGAT in the Simplex Mills case. The CEGAT further noted that the decision of the Tribunal in the case of Multiple Fabrics case was affirmed by the Supreme Court reported' at 1987(29) ELT 481.

(b) Heading 59.09 was analysed by the CEGAT in the Simplex Mills case and gave the following finding in para 30 of the decision.

30. The example of "articles of a kind suitable for industrial use given are textile fabrics, combined with one or more layers of rubber, leather or other material," and that there is "bolting cloth, endless felts of textile fabrics, straining cloth". There is comma(,) after textile fabric and also after the words 'other material, and after each item 'bolting cloth' and preceding 'straining cloth'. Therefore, it cannot be presumed that these items textile fabric', 'bolting cloth' 'straining cloth' should be in 'cut piece' and be in only 'coated'.

9. We observe that the Tribunal in this order has in para 30 as above has clearly held that the fabrics as such are covered by the range of items as described in the Chapter note to heading 59.09. We observe that 59.09 is a residuary item and the scope of the heading as per the chapter note for this heading states 'Heading 59.09 applies to the following goods, which do not fall in any other heading of Section XI'.

It is seen from the scheme of the Chapters under Section XI that Chapter 59 covers impregnated, coated and laminated fabrics; Textiles Articles of a kind suitable for Industrial use. Under this Chapter tariff heading 59.02 covers Tyre cord fabrics of high tenacity yarn i.e.

fabric which is not coated impregnated is also covered under this heading. The Chapter heading 59.09 carries the description-- All other textiles products and articles of a unit suitable for industrial use (for example, textiles fabrics, combined with one or more layers of rubber, leather or other material, bolting cloth, endless felts of textile fabrics, straining cloth.' 10. The above clearly shows that apart from

other items fabrics as such are also covered under the Heading 59.09. In note 6 to chapter 59 in 6a (i) the description starts with Textile Fabrics and then there is a comma thereafter and the next item is felt and felt lined woven fabrics and then different varieties which may be coated or covered with other materials. In our view the reading of the coverage of items under Chapter 59, it would cover Industrial fabrics as such which may not be otherwise covered under any other heading of Chapter XI and not merely cut pieces of types in rectangle or squares urged by the Ld. Advocate.

We find no reason to depart from the reasoning of the Tribunal as above. We therefore on merits hold that the Fabrics in question have been rightly held to be classifiable under Chapter 59.09.

2nd issue: Under the impugned order the Ld. lower authority has demanded additional duty of Excise under the Additional Duties of Excise (Goods of Special Importance) Act in respect of one sided coated fabrics which according to the appellant emerge at the intermediate stage in the course of manufacture of double side coated fabrics. The Ld. Advocate for the appellant pleaded that the one sided coated fabric was not marketable and various operations like trimming and embossing and quality control had to be done before it could be rendered so. He pleaded that in the form in which it emerged it was not excisable. He pleaded that the burden is on the department to show that the goods were marketable. He pleaded that just because a process of coating has been done a marketable commodity has emerged. He cited in this connection the following judgment *Union Carbide v. UOI* 1986 (29) ELT 169 and referred to para 7 of the judgment.

11. He pleaded that the product required to be embossed before it could be used. Trimming on the trimming machine was also a requirement before seizing quality control checks. The fabrics in question he pleaded were not subjected to the above processes. His plea is that coated fabric as known in the market did not emerge. He pleaded during the relevant period an issue regarding classification of appellants goods did arise in the context of classification under heading 59.03 or 39.20 of the tariff and Notification issued under Rule 57A under which basic Central Excise duty was exempt under Notification 217/86. Additional duty in

question was however payable. He pleaded that the demand in question for the period from March, 1988 to October, 1992 raised was as it is barred by limitation as the appellant had not kept anything away from the purview of the department. By letter dated 14.9.89, appellants had finished the manufacturing process of coated fabrics which is filed at pages 332 to 334 of paper book 2. The manufacturing process as set out at page 334.

The coating line consists of a Let-off station, an entry accumulator, a coating head, a 3 zone oven, another coating head, a 5 zone oven, an embossing station, a set of cooling rollers, an exit accumulator and a wind up.

The nylon fabric is fixed on the Let-off station and after passing through the entry accumulator rollers comes to the first coating head where it is given a prime coat with PVC paste (a paste of PVC resin, Stabilizers, Plasticizers, fillers and bonding agent). The prime coated fabric then passes through the 3 zone oven and comes to the second coating head where the top coat is given to the fabric using PVC paste. The coated fabric then passes through the 5 zone oven, embossing station and exit accumulator rollers before being wound on a frame at the Wind up station.

The finished coated fabric is- then cut into different lengths/ fabricated into different forms as per the requirements of the customer.

He also referred us to the classification list filed prior to 1989 and stated that at page 137 in 1987 one sided coated fabrics were mentioned in the same. He pleaded that after the letter of 14.9.89 the demand raised after the period of six months would be barred by limitation.

12. The Ld. SDR for the department pleaded that one side coated fabric was a finished product and as it is it was fit for use captive. He referred us to a standard literature in which coating of fabrics on side is set out as a process. The following submissions have been made in this regard: The single side coated fabrics emerging at the intermediate stage is a distinct product with a new name, character and use. By Notification No. 217/86 dt. 2.4.86 Basic Excise Duty is not leviable. This notification does not exempt from the levy of ADE under ADE (GSI) Act. This the appellant have not paid and this is demanded in the Order-in-

Original.

- (i) there is no single case of sale of single side coated fabrics without embossing.
- (iii) without side trimmings it is not goods capable of being marketed. (ID) since they are not goods, the question of levy of excise duty does not arise.
- (iii) Single side coated fabrics without embossing is available in the market.
- (iv) embossing is done only at the instance and requirement of the customers.
- (vi) Once the goods re-capable of being bought and sold i.e. capable of marketing, it is excisable and its side trimming is a simple process and covered under interpretative Rule 2(a) any goods unfinished, semi-finished, incomplete, not complete, disassembled, unassembled will be classified under the heading appropriate on the goods when complete, finished or assembled. Hence, the single side coated fabrics are goods attracting excisability under heading 5903 and Addl. Duty of Excise (GS1) is leviable.

The question to be decided is whether the goods unfinished or semi finished has the essential characteristics of the finished goods.

This is decided by the Larger Bench of the Tribunal in the case of BHEL v. CC, . The Hon'ble Tribunal has observed thus: It is to be determined whether the article in question has the essential character of the complete article, has attained the approximate shape or outline of the finished article and could be used only for the completion into the finished article especially with reference to the nature of material, bulk quantity, weight or value In this case, the only process required to bring the goods to fully finished and complete article is trimming the sides.

In this connection, the judgment of the Hon'ble Supreme Court in the case of Union Carbide India Ltd. v. UOI, and Ors., may be referred.

The Hon'ble supreme Court said that articles in crude or elementary form not dutiable as they are merely intermediate products and not goods. The aluminium cans at the point of levy of excise duty exists in a crude and elementary form incapable of being employed at that stage as a component in a flashlight. The

cans have sharp uneven edges and in order to use them as a component in making flash light case, the cans have to undergo various processes such as trimming, threading and redrawing, after the cans are trimmed, threaded and redrawn, they are reeled, beaded and anodized or painted. It is at that point only they become a distinct and complete component capable of being used as flash light case.

In the instant case, the only process required is trimming of the sides. The department had taken into account only those quantities of fabrics which have gone into manufacture of fully finished doubleside coated fabrics and articles and not entire production of goods. That is only those fabrics which were declared fully finished were taken into account. In those cases, the single side coated fabrics have cleared all quality tests etc.

13. We have carefully considered the pleas made by both the sides. We observe that there is no dispute that single side coated fabrics emerge at the first stage of the manufacture of the double side coated fabrics. The same in the appellants are used captively. The appellants plea that there has been no instance of sale of these goods from their factory is not controverted. We had asked both the sides to furnish evidence regarding marketability or otherwise of the fabrics. The plea of the appellants is that to render the fabrics in question usable these require embossing and trimming etc. We observe the question to be answered is whether embossing changes the character of the product in a manner to render it usable and without that the goods cannot be used.

This requires detailed examination taking into consideration the opinion of expert, technical literature and the nature of the goods as manufactured by the appellants. We had asked both the sides to produce evidence in this regard. We find that it has not been possible at this stage to bring on record technical opinion and nor it is feasible to get market enquiries to be caused. The evidence filed is not conclusive. It is settled position in law as held by the Hon'ble Supreme Court in a number of judgments and the judgments cited by the appellants that burden is on the department to establish marketability for levy of excise duty purposes. The appellants plea on limitation will also have to be viewed in the background of this

plea apart from other circumstances. So far as the demand for the period after the receipt of the letter dated 14.9.89 is concerned the same in our view is barred by limitation inasmuch as the appellants had come on record about the manufacturing process and all stages of manufacture are mentioned therein. No mala fides or suppression of fact with intent to evade payment of duty can be attributed to them.... The portion 'of the judgment is not visible.... after that.

We while holding that demand for the period after the receipt of the letter of 14.9.89 by the authorities is barred by limitation, remand the matter for de novo consideration in the respect, of the period prior to that in the light of our observations above including the question.... The portion 'of the judgment is not visible...and after affording the appellants opportunity of hearing.

14. The third issue relates to the demand in respect of materials manufactured out of single sided coated fabrics. He pleaded so far as this demand of about Rs. 3.76 lakhs is concerned he accepts the order of the Ld. lower authority.

15. The fourth and the fifth issue relates to the products namely Tarpaulins and other articles manufactured out of double sided coated fabrics. The demand on this count is Rs. 3,83,08,728/-. He pleaded that the issue involved relates to classification as also limitation. He.

pleaded that there is no dispute as to the classification of the fabric i.e. double sided coated fabric out of which the goods are manufactured. The same has been correctly held to be assessable under T.I. 3920. He pleaded the classification of the articles i.e.

Tarpaulins etc. is sought by the assessee under tariff heading 3926 as against under 63.01 held by the Ld. lower authority in the impugned order.

16. In this connection he referred us to note 1 of Chapter 39 which is reproduced below for convenience of reference: 1. Throughout this Schedule, the expression plastics means those materials of heading Nos. 39,01 to 39.14 which are or have been capable, either at the moment of polymerisation or at some subsequent stage, of being formed under external influence (usually heat and pressure, if

necessary with a solvent or plasticiser) by moulding, casting, extruding, rolling or other process into shapes which are retained on the removal of the external influence.

Throughout this Scheduled, any reference to 'plastics' also includes vulcanised fibre. The expression, however does not apply to materials regarded as textile materials of Section XI.17. In this connection he referred us to the judgment of Hon'ble Supreme Court in the case of Fenner India under which cotton base impregnated PVC has been held to be classifiable under tariff heading 3926.90. He also referred us in this connection to the notes in the HSN on which the Central Excise tariff is based to show that the belting where PVC predominated by weight is covered under that heading. He pleaded on the same logic since in the case of tarpaulins the PVC predominated by weight in the fabric out of which it was made out. TI 3926.90 would cover tarpaulins also within its ambit. In this connection he also relied on the judgment of the Madhya Pradesh High Court MP under which HDPE bags have been held to be falling under Chapter 39. He pleaded starting material in the case of HDPE bags was plastic and tapes etc.

formed out of the same were woven into a fabric and which was stitched out into bags. In the present case also he pleaded the position was similar as the instead of Polyethylene the starting material was another type of plastic. He pleaded that benefit of exemption Notification 217/86 has not been allowed as the Chapter heading 63,01 is not covered under this notification.

18. Even if the duty is held to be payable he pleaded that since the goods were consumed captively and the question of removal of goods from the factory the relevant rules for demanding duty would be 9 A (5) i.e.

the date on which duty is demanded. On that date he pleaded there was no levy on the goods and therefore the demand fails. He cited the following judgments in support of his this plea.

19. He has pleaded that during the relevant period the appellants had paid duty through the PLA under tariff heading 3926 and while demanding duty this amount paid has not been given set off as would be seen from the work sheet attached to

the show cause notice. He pleaded for this payment to be adjusted against the duty demand.

20. He also prayed for benefit of modvat credit to be allowed in respect of inputs used for the manufacture of PVC coated nylon sheets which were used for the fabrication of tarpaulins.

21. Adverting to the limitation aspect the Ld. Advocate pleaded that the appellants had filed the classification lists for double side coated fabrics falling under tariff heading 39.20 and they had also furnished the process of manufacture of the same to the authorities and referred us to their letter at page 332 of the paper book under which at page 334 it was furnished and which we have reproduced in our earlier paragraphs. He also referred us to the price lists which have been filed in the paper book. These price lists pertain to the period 1987 onwards. It is seen from pages 336 onwards that the appellants had given the description of the goods as Tarpaulins, covers, tents etc.

These have been approved by the competent authority. The classification of the goods set out for the items in question is under 3926.90. Price lists at page 336, 338, 340 filed in paper book 2 are enclosed as annexure.

The code number of the goods, classification list numbers under which classification of goods had been given. In this background, he pleaded the charge of suppression of any facts with intent to evade payment of duty would not arise.

22. The Ld. SDR for the department pleaded as under in regard to the above.

These fabrics are used in the manufacture of Tarpaulins, tents and other articles.

The appellants have classified these articles under Heading 3926 as articles of plastics and the department considered that they merit classification under heading 6301 of Central Excise Tariff.

3926--other articles of plastics and articles of other materials of heading No. 3901 to 3926.

6301--Made up article and when not cleared to specified including blankets other than of wood, tarpaulins, tents, sails for boat.

The doubleside coated fabrics were cut into different sizes/shapes, the cut pieces were joined together by heat setting or welding and eyelets fixed along the sides to make it a tarpaulin/awning depending upon the requirements of the customer. Straps are also fixed if required by the Customers.

In all their private correspondence inter office memo and other documents, these articles were described as Tarpaulins. Besides in the tenders floated by various Public Sector units and other customers, and participated by the appellants, the description furnished was Tarpaulin. But in all central excise documents, they have been described as Nylon covers.

(i) When the raw material is falling under heading 3920 is finished article cannot falling under 6301 but only fall under 3920.

(ii) Note (h) of Section XI of C. Ex. Tariff clearly manipulates that woven, knitted, crocheted fabrics, felt or non-wovens, impregnated coated, covered or laminated with plastics and articles thereof of chapter 39 are not covered by Section XI, i.e. textiles and textile articles.

(iii) Pre impregnated cotton conveyor belting and PVC impregnated flame resistant colliery conveyor belting classifiable under sub-heading 3922.90/3926.90 of C. Ex. Tariff and not as strips under sub-heading 3920.

(iv) Composite articles made out of combination of plastics and not plastic material ...nylon of plastics Eagle Flask Industries v. C.C.E. (v) HDPE fabrics follow tabular at the desired lengths not suitable to be made up textile fabrics, fabrics only semi-manufactured not having essential shape of finished goods--Hence not made up articles.

(vi) The double side coated fabrics were not cleared outside but consumed captive and hence the rate used date of payment of duty under Rule 9A is Rule 9A (5) and not Rule 9A (1) (ii).

(1) The rate of duty and tariff valuation if any applicable to any excisable goods shall be the rate and valuation in force.

(ii) In the case of goods removed from the factory or aware house, subject to be Rule (2)(3) and...on the date of actual removal of such goods from such factory or ware house.

(5) In all other cases, the rate of duty and tariff valuation, if any, applicable to excisable goods shall be the rate and valuation in force on the date on which the notice for demand of duty is issued or on the date on which duty is paid on the date of passing of the order in original, heading 6301 is covered under MODVAT and exemption for captive consumption and the rate...it and hence there is no demand of this count.

(i) The basic raw material is fabric of man-made filament yarn. Over this fabrics, coating of chemicals and plastics is done on oneside and then on the other side.

In his case, the denier of the yarn is chosen with reference to the specific nature of vise, they are plied and twisted again as per the specification of the customer and nature of use and then woven in flat looms.

Chemicals and plastics are coated and the fabrics in this case is not to reinforce the chemicals and plastics. Here is a case when the plastic and chemicals and coated over the fabrics so as to protect from weather conditions, rain or sun. To illustrate, the plastic are used for coating to make it waterproof and for the longevity of the life of the article.

Thus it is a fabric over which coating is done for specific purpose and it is lightly called as coated fabrics. By virtue of the predominance of weight of plastic, it cannot be considered as a plastic material and hence anything made out of these are article of plastic.

The basic and essential material being a fabric and to increase the use and effective non-coating is done, it is the fabric that has the essential characteristic. Hence the article made out of such fabrics are made up textile article.

Admittedly, there is no dispute about the applicability of definition for made up.

In this context the description section in HSN Explanatory Notes may be seen. The extract is reproduced for ready reference: 3926--other articles of plastics and articles of other materials of Heading 3901 to 3914.

The heading covers articles, not elsewhere specified or included, of plastics as defined in Note 1 to the Chapter or of other materials of heading 3901 to 3914.

7. Transmission, conveyor or elevator belts endless or cut to length and joined end to end or coated with. The portion of the judgment is not visible.

Transmission conveyor belts or belts of any kind presented with the machine or apparatus for which they are designed, whether or not actually mounted, are classifiable with that machine or apparatus (e.g. Chapter XVI). In addition, this heading does not cover transmission or conveyor belts or belting of textile material, impregnated, coated, covered or laminated with plastics (Section XI E.g heading 5910).

From the above it is clear that heading 3926 does not cover articles made of textile material, impregnated coated, covered or laminated with plastics.

In the instant case, the raw materials used for manufacture the article is coated fabrics in manmade fabrics, a textile material coated with plastics. In the light of the above explanatory note, these goods do not merit classification under heading 3926.

In the same explanatory notes Section XI 1-6306 page 947, under heading 6306-Tarpaulins, awnings and sunblind, tents sails for boat, . sail boards or landcraft, camping goods, the following is seen: The heading covers a range of textile articles usually made from strong, close woven canvas.

(1) Tarpaulins These are used to protect goods stored in the open or loaded on ships, wagons, lorries etc. against bad weather. They are generally made of coated or uncoated manmade fibre fabrics, or heavy to fairly heavy canvas (of hemp, jute or cotton). They are waterproof. Those made of canvas are usually

rendered waterproof or ... proof by treatment with tar or chemicals. Tarpaulins are generally in the form of rectangular sheets, trimming along the sides, and may be fitted with eyelets, cords, straps, etc.

Tarpaulins which are specially shaped (e.g. for covering hay ricks, decks of small vessels, lorries etc.) also fall in this heading provided they are flat.

Tarpaulins should not be confused with lorry covers for motor cars, machines etc. made of tarpaulin material to the shape of these articles, nor with flat protective sheets of lightweight materials.

made up in similar manner of tarpaulins.

Awnings, Sun brands (for shops and sales etc). These are designed for protection against the Sun they are generally made of strong plain or striped canvas, and may be mounted on roller or folding mechanisms. They remain classified in this heading even when provided with frames as in sometimes the case with sunblinds.

(4) Tents, are shelters made of light weight to fairly heavy fabrics of man made fibres, cotton or blended textile materials, whether or not coated, covered, laminated or of canvas. They usually have a single or double roof and sides or walls (single or double), which permit the formation of an enclosure. The heading covers tents of various sizes and shapes, e.g. marquees and tents for military camping (including backpack tents), circus, beach use. They are classified in this heading, whether or not they are presented complete with their tent poles, tent pegs, guy ropes or other accessories.

Caravan awnings (sometimes known as Caravan assnevel) which are tent like structures are also regarded as tent. They are generally made of manmade fibre fabrics or fairly thick canvas. They consist of three walls and a roof and are designed to augment the heavy space provided by the caravan.

From the above, it is clear that the fabrics made out of manmade filament yarn whether coated, covered or laminated with other materials, chemicals and the tarpaulins made out of such goods are rightly classifiable under heading 6301 of Central Excise Tariff.

It is also submitted that there are certain sheets exclusively made out of plastic material and they are used as protective covers and they may be classified under heading 3926 and articles of plastics.

It is further submitted Hon'ble Tribunal in the case of Wiltech India Ltd. v. CCE held that plastic razor has not wholly made of plastics but of plastics and iron rod, and it is not exempted as "articles of plastics" vide notification No. 82/82 C.E. These are article which is not made wholly of plastic, is not a plastic article.

The Hon'ble Supreme Court in the case of Geep Flashlight Industries Ltd. v. GOI 1985 (22) ELT 39. held that :-- (i) Plastic torches classifiable under T I. 68 and not under T I 15A (2) of C.E. Tariff prefix "Plastics" merely describes the quality of torch as distinguished from other types of torches-- "Articles of plastics" does not mean articles made from plastics along with other material.

(i) "Articles of Plastics" means article made wholly of commodity commercially known as plastics and not articles made from plastics along with other material of the contention of the petitioner that the plastic torch was covered by item 15A (2) were to prevail, one can bring any item not otherwise covered except the residuary T I 68 by merely putting a small plastic tube in the manufacture of the items and contend that it is an article made of plastic.

In the instant case it is a textile material coated with plastic and the basic character being of textile material, the coating material serving the purpose of making waterproof and thus the article are not made wholly of plastic and hence it cannot be classified under heading 3926 of the Central Excise Tariff.

A chart showing the description furnished in the price lists, that in the classification list that in the Purchase Order, is furnished in the Annexure.

As may be seen from the chart that as against the description furnished in the Purchase Order "Nylon Tarpaulin" in classification list, price list, gate passes, the same was described as Nylon fabricated covers.

The copies of Purchase Orders furnished by the appellants to the department along with the price list and copies of those purchase orders recovered from the

customer during investigation are also produced for perusal.

23. We have considered the pleas made by both the sides. We first proceed to examine the issue of limitation. We observe that as seen from the record that the appellants had been filing classification lists and price list regularly. The copies of some of the price lists have been filed before us for the period 1987 onwards as referred to in the pleadings of the Ld. Advocate. The price lists carry the description of the goods by name, code number of their product, the classification and the reference of the classification list, the purchase order number of the customer. All these have been approved by the Assistant Collector from time to time.

24. We observe that the RT 12 returns in respect of goods cleared showing the duty paid would also have been approved from month to month. There is nothing to show that any objection was taken either at the time of approval of classification under TI 39.26 or at the time of approval of price lists which carried this classification or at the time of assessment of RT 12 returns. The gate passes and invoices would have been also seen by the authorities at the time of scrutiny of RT 12 returns. There is no attribution that the appellants had not described the goods in the invoices as per the customers orders. The authorities can be taken to have been satisfied about the classification of the goods under TI 39.26.

25. In the above view of the matter it cannot be held that the appellants had suppressed any information with the intent to evade duty for classifying the goods under TI 39.26 which carried a lower rate of duty as against that payable under TI 63.01. We therefore hold so far the duty demand in respect of these goods is concerned the same is barred by limitation. We therefore set aside the demand raised on grounds of limitation.

26. As the merits of classification we first examine the scope of tariff heading 39.26. This heading carries the following description.

'Other articles of plastics and articles of other materials of heading 39.01 to 39.14.'
In our view the scope of the heading covers only such articles as are made out of materials which are in the nature of plastics or other materials falling under tariff

heading 39.01 to 39.14. In chapter note 1 to Chapter 39 following is set out: 'Throughout this Schedule, the expression plastics means those materials of heading nos. 39.01 to 39.14 which are or have been capable, capable either at the moment of polymerisation or at some subsequent stage, of being formed of external influence (usually heat and pressure, if necessary with a solvent or plasticiser) by moulding, casting, extruding or rolling or other process into strips which are retained on removal of external influence.' 27. The tarpaulins are made out of double side coated fabrics which fall under tariff heading 39.20. The articles made out of this are clearly not covered by the description of this tariff item. No external aid is required so far as classification under heading 39.26 is concerned when articles covered thereunder are such as are made out of the materials falling under tariff heading 39.01 to 39.14. The plea of the Ld. Advocate that fabric is manufactured out of Nylon a material falling under a tariff heading as above and thereafter coating is also of one such material, therefore the fabric should be equated with the materials of 39.01 to 39.14 for the purpose of classification under tariff heading 39.26 by reason of trickle down effect on face of it cannot be accepted. It would tantamount to adding Chapter heading 39.20 into the entry of materials in addition to 39.01 to 39.14 mentioned therein. The Tribunal cannot assume the legislature function by holding so. We therefore on first principles hold the goods tarpaulin is not covered by tariff heading 39.26. We observe that tariff entry 63.01 specifically includes this item under that heading. No doubt under Section note 1(d) of Section XI under which tariff entry 63.01 figures the articles of coated fabrics which fall under Chapter 39 are not to be classified under this section but since the item in question as we have held, above is not covered under this heading, this section note does not come in the way of the item being classified under this heading. The description under tariff heading 63.01 is as under : 'Made up Textiles articles not elsewhere specified including blankets (other than of wool), tarpaulins, tents, sails for boats'.

Tarpaulins are specifically covered under this heading. In terms of Rule 3(a) of Rules of Interpretative of the schedule the heading that provides the most specific description is to be preferred to the heading which provides factual description. Going by this rule the classification under tariff heading 63.01 is sustainable. Even otherwise under Rule 4 where the other Rules do not apply the classification has

to be done under the heading appropriate to the goods to which these are most akin. Even based on this rule classification under 63.01 would be more appropriate as the tarpaulins even though these are made of product falling under heading 39.20 not falling under any textile heads of Chapter 52 to 59, being tarpaulins will fall under this heading.

29. Inasmuch as we have set aside the demand on grounds of limitation, we do not feel called upon to address ourselves to other issues.

30. As to the levy of penalty, we observe that part of the demand has been upheld as the appellants have accepted the liability. We have remanded the matter for de novo consideration in respect of one side coated fabrics and set aside the remaining demand on grounds of limitation, we hold that heavy penalty levied on the company is not warranted and the penalty to be levied would depend upon total demand of duty after order in the de novo proceedings is passed; 31. Taking into consideration this fact, we set aside the order of levy of penalty on the appellants company for reconsideration as above. As to others in the facts and circumstances of the case and in view of what we have held above we are of the view that ends of justice will be served by the levy of penalty if any in the de novo proceedings on the company and the levy of penalty on the two appellants under Rule 209A is set aside. We order accordingly.

32. The appeals of the individuals are allowed and that of the company partially allowed in the above terms.

33. I have perused the orders passed by the learned Vice-President. As far as the first issue is concerned, I agree with the orders passed by the learned Vice-president holding that the demand is barred by limitation.

34. As far as the classification issue is concerned, the learned Vice-President had held that the goods in question are classifiable under 59.09. In this connection it should be noted that the case decided by the Tribunal in Simplex Mills case reported in 1993 (49) ECR 147 was passed on the principles laid down by the Hon'ble Supreme Court in Multiple Fabrics case. However, the correctness of the decision in the case of Multiple Fabrics was doubted by the Hon'ble Supreme

Court and it was specifically overruled in the case of Collector of Central Excise v. Fenoplast (P) Ltd. decision rendered in Multiple Fabrics Put. Ltd. case of the Tribunal cannot be held to be a good law in view of the decision . This aspect of the case was not taken into consideration while Simplex Mills case was decided as the decision in the case of Fenoplast was not available at that time.

35. It is further seen that the learned Advocate Shri Lakshmikumaran appearing for the appellants has contended before us that the CBEC had issued a Circular under Section 37B after referring to the decision of the CEGAT in Simplex Mills case to maintain uniformity within India as also to fall in line with classification of similar products all over the world. It was submitted by him that the departmental circulars are binding on the authorities. Therefore there cannot be any deviation from the circulars issued by the Department and in this, connection he has relied on the following decisions: *Ranadey Micronutrients v. Collector of Central Excise* (ii) 1992 (97) ELT 674 (Cal) in the case of *Birla Jute & Industries Ltd. v. ACCERajan Ramakrishna v. Commissioner, Wealth 13*. There can be no doubt whatsoever, in the circumstances, that the earlier and later circulars were issued by the Board under the provisions of Section 37B and the fact that they do not so recite does not mean that they do not bind Central Excise officers or become advisory in character. There can be no doubt whatsoever that after 21st November, 1994, Excise duty could be levied upon micronutrients only under the provisions of Heading 31.05 as "other fertilisers". If the later circular is contrary to the terms of the statute, it must be withdrawn. While the later circular remains in operation the Revenue is bound by it and cannot be allowed to plead that it is not valid.

14. We reject the submission to the contrary made by learned Counsel for the Revenue and in the affidavit by M.K. Gupta, working as Director in the Department of Revenue, Ministry of Finance. One should have thought that an officer of the Ministry of Finance would have greater respect for circulars such as these issued by the Board, which also operates under the aegis of the Ministry of Finance, for it is the Board which is by statute, entrusted with the task of classifying excisable goods uniformly. The whole objective of such circulars 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.

15. The argument that the later circular has only prospective operation and that it cannot apply to these appeals because the Tribunal had already decided them must also be rejected. It is not open to the Revenue to raise a contention that is contrary to a binding circular issued by the Board. It cannot but urge the point of view made binding by the later circular.

36. In order to appreciate the contentions of the learned Advocate the Circular issued by the Board is reproduced below: Grey Cotton Canvas Cloth, Cotton Ducks, Cotton Tyre Cord Fabrics and Cotton Belting Fabrics--[Heading 52.05] The Trade has represented on the issue of lack of uniformity in the classification of Grey Cotton Canvas, Cotton Ducks, Cotton Tyre Cord Fabrics and Cotton Belting Fabrics. Such products have been classified either under Chapter Heading No. 52.05 or under Heading No. 59.09 of the Central Excise Tariff Act, 1985 (henceforth referred to as tariff).

2. Lack of uniform classification of goods has brought in disparity in the pricing of the commodity by the manufacturers of such goods with consequent impact on sales and the market economy. Keeping in view the settled principle of law and pending final decision by Hon'ble High Court against the decision of CEGAT in the case of Simplex Mills Co. Ltd. v. Collector (Order No. E/150 to 161/92-D. dated 28.2.1992) and the fact that there is no uniformity in the classification of these goods, it would be expedient in the interest of administration of taxing statute to bring out uniformity in the assessment practice.

3. Now, therefore, in exercise of the powers conferred under Section 37B of the Central Excises and Salt Act, 1944 (1 of 1944) (henceforth referred to as the Act) and for the purpose of ensuring uniformity in the classification of the said goods, the Central Board of Excise and Customs hereby orders that Grey Cotton Canvas, Cotton Ducks, Cotton Tyre Cord Fabrics and Cotton Belting Fabrics shall henceforth be classified under Heading No. 52.05 of the CET. 4. This order shall

not change the position of the past closed assessments.

[Nagpur Collector's Trade Notice No. 31/93. dated 8.12.1993, Parallel Rajkot No. 56/93, dated 1.12.1993] This Circular was issued by the Board and they have stated in that Circular that pending final decision by Hon'ble High Court. against the decision of CEGAT in Simplex Mills case and that there is no uniformity in the classification. of these goods Grey Cotton Canvas, Cotton Ducks, Cotton Type Cord Fabrics and Cotton Belting Fabrics henceforth be classified under Heading 52.05 of the CET. This Circular was relied on by the appellants before the adjudicating authority. The adjudicating authority was bound to follow the Circular issued by the CBEC under Section 3.7B of Central Excises and Salt Act. In the decision the Hon'ble Calcutta High Court at paras 18 and 19 held as follows: 18. In my view the principles that emerge from the aforesaid decisions read in the light of Section 37B of the Act are : (1) There is a distinction between a decision in a particular assessment by a quasi-judicial authority and a decision on principle by the Board. While an instruction issued under Section 37B cannot be binding upon a quasi-judicial authority under the Act, the departmental officers conducting the is before such quasi-judicial authority cannot take a stand contrary to the directive/instruction issued.

(2) The instructions which may be binding on the Central Excise Officers are not binding on the Assessee who may question the correctness of the same before a quasi-judicial authority and before a Court. Both the quasi-judicial authority and fortiori, the Court, can question the correctness of the instructions.

(3) An assessee has on the other hand the right to claim and the court may compel compliance with such instructions as are for the benefit of the assessee by the Central Excise Officers.

19. Applying the aforesaid principles I am of the view that it is not open to the respondents to contend contrary to the circular that the yarn is classifiable under sub heading 5504.39 and not sub-heading 5504.32 of the Schedule to the Act.

37. However, in the case reported in 1981 (127) ITR 1 (Guj), the Hon'ble Gujarat High Court at pages 5, 6 and 7 held as follows: As to what is the effect of the

circular issued by the Board of Direct Taxes under the provisions similar to Section 13(1) of the W.T. Act, we have a series of cases. The first of those cases was that of the Supreme Court in *R.C. Milter & Sons v. CIT* (1959) 36 ITR 194. In that case, Hidayatullah J., as he then was, observed in the last paragraph of the judgment at page 205 of the report: I entertain, however, some doubt as to whether the instrument sought to be registered should be in existence in the accounting year, before registration can be claimed. There is nothing in the Act which says this specifically. My brother has reasoned from the contents of the Act and the Rules that such a condition is implied.

While I entertain some doubts, I am not prepared to record a dissent, more so as the Board of Revenue has issued instructions that all firms should be registered, whether the documents under which they were constituted existed in the accounting year or not, provided the Income-tax Officer was satisfied about the genuineness of the firms.

Thus, though Hidayatullah J. doubted the correctness of the conclusions otherwise, in view of the circulars and instructions issued by the Board of Revenue, he was prepared to agree with the rest of the learned judges of the Supreme Court on the interpretation of the Act and the Rules, and thus the indication given by Hidayatullah J. was that the circular issued by the Board would prevail. In *Navnit Lal C. Zaveri v. K.K. Sen*, AAC (1965) 56 ITR 198, the Supreme Court considered the effect of the circular issued by the Board and the effect of that decision in *Navnit Lal C. Zaveri's* case was thus summed up in the subsequent decision in *Ellerman Lines Ltd. v. CIT* (1971) 82 ITR 913 by the Supreme Court observing as follows at page 921 of the report: Now, coming to the question as to the effect of instructions issued under Section 5(8) of the Act, this Court observed in *Navnit Lal C. Zaveri v. K.K. Sen*, Appellate Assistant Commissioner (1965) 56 ITR 198, 203: 'It is clear that a circular of the kind which was issued by the Board would be binding on all officers and persons employed in the execution of the Act under Section 5(8) of the Act. This circular pointed out to all the officers that it was likely that some of the companies might have advanced loans to their shareholders as a result of genuine transactions of loans and the idea was not to affect such transactions and not to bring them within the mischief

of the new provision.' The directions given in that circular clearly deviated from the provisions of the Act, yet this Court held that the circular was binding on the Income-tax Officer.

These two decisions of the Supreme Court in *Navnit Lal .C. Zaverts* case (1965) 56 JTR 198 and in *Ellerman Lines Ltd. 's* case (1971) 82 ITR 913 were considered by this Court in *Bechardas Spg. & Wvg. Mills Co. Ltd. v. CIT* (Income-tax Reference No. 153 of 1976, decided on 1.1th March 1977) by the Division Bench consisting of J.B. Mehta, Acting C.J. and D.A. Desai J. There it was observed: We need not reiterate that the position of such benevolent, circulars issued under Section i 19 of the Act for meeting such cases of extreme hardship stands well settled after the decision of their Lordships in *Navnil Lal C. Zaveri v. K. K. Sen* (1965) 56 ITR 198 (SC), at page 203, and in *Ellerman Lines Ltd. v. CIT* (1971) 82 ITR 913 (SC), at page 923. There their Lodships pointed out that the directions in such benevolent circulars, even though they may be deviating from the provisions of the Act, would be binding on the Income-tax Officers.

This position is well accepted and there are several decisions of the different High Courts in India, namely, the decisions of the Bombay High Court in *Tata Iron & Steel Co. Ltd. v. N.C. Upadhyaya*; (1974) 96 ITR 1 and in *Navnitlal Ambalal v. CIT* (1976) 105 ITR 735, the decision of a Full Bench of the Kerala High Court in *CIT v. B.M. Edward* (1979) 119 ITR 334 and of the Karnataka High Court in *M. M. Annaiah v. CIT* (1970) 76 ITR 582 (Mys), and in *Dr. T.P. Kapadia v. CIT* (1973) 87 ITR 511 (Mys). Thus, the legal position is that benevolent circulars are binding on all ITOs and WTOs, as the case may be, and on all the persons employed in the execution of the W.T. Act.

38. It is thus seen that the instructions issued by the Central Board of Excise & Customs are bound on the authorities. These instructions are issued in order to have uniform practice all over India. This aspect was not at all discussed in the impugned order. The learned Vice-President has not discussed this aspect of the matter in his order. It is further seen that the learned Advocate has contended that this Circular was issued under Section 37B after referring to the CEGAT decision in *Simplex Mills* case to maintain uniformity within India and also to fall in line with

classification of similar goods all over the world. He also pointed out that the learned SDR working under Central Board of Excise and Customs also cannot argue against the circular. In this connection he relied on the decision of the Supreme Court . In the case of Ranadey Micronutrients v. CCE.This aspect of the matter should have been taken into consideration by the learned adjudicating authority. Therefore, in my view, though the Simplex Mills case is against the case of the appellants, still in that case the Circular in question was not dealt with by the Tribunal as the Circular was not in existence. Further it is seen that the Tribunal placed reliance in the case of Multiple Fabrics case decided by the Tribunal which was upheld by the Hon'ble Supreme Court. However, the Supreme Court had overruled this decision in the case of Fenoplast . In that view of the matter. I am of the view that this case requires to be remanded, to the Commissioner to decide the case in terms of the Circular issued by the Board under Section 37B and in the light of the principles laid down by the Hon'ble Supreme Court and the Calcutta High Court as well as the Gujarat High Court which are mentioned above.

39. As far as the second issue is concerned, under the impugned order the learned lower authority has demanded additional duty of excise under the Additional Duties of Excise (Goods of Special Importance) Act. In respect of one side coated fabrics which has, according to the appellants, emerged at the intermediate stage in the course of manufacture of double side coated fabrics. The learned Vice-President has extracted the arguments of both the sides at paras 11 and 12 of the order and there is no necessity for me to repeat the same. It has been held by the learned Vice-President that the demand for duty after the receipt of the letter dated 14.9.1989 is barred by limitation. I agree with this finding. However, it was further held that the matter is to be remanded for de novo consideration in respect of the period prior to that and to find out whether these are goods. I am respectfully not able to agree with this finding of the learned Vice-President for the following reasons.

40. It is now seen that the case of the appellants is that the single side coated fabrics coming at the intermediate stage of manufacture of double side coated fabrics is not goods. In the absence of marketability there is no duty liability. The Commissioner in the impugned order agreed with the submissions made by the

appellants that certain processes and operations are not carried out on the single side coated fabrics which are used in the manufacture of double side coated fabrics within the factory. However, he held that the marketability has to be determined with respect to the "capability of being marketed" instead of actual marketing. In my view, this approach of the Commissioner is not in accordance with law. The test of marketability has been laid down by the Hon'ble Supreme Court in the case of Union Carbide of India v. UOI . In the said case, the aluminium canes and charged batteries are produced by extrusion processes and the same was neither sold nor marketable because the canes have uneven edges and only after certain processes are carried out it can be become distinguished and a complete component capable of being used in the flash light. It was held therein that it is not the test of capable of being marketed which is relevant. It was held that the question is whether the aluminium canes manufactured by the appellants are capable of selling to a consumer. It was also held in that decision that the excise duty is an indirect tax in which the burden of the imposition is passed on to the ultimate consumer.

Therefore it was held that the "goods manufactured or produced" must refer to articles which are capable of being sold to a consumer. In order to become goods, an article must be something which can ordinarily come to the market to be bought and sold. Therefore it was held that the burden is on the Revenue to show that the above said goods are capable of being marketed. The appellants have always claimed that the same are not marketable and no evidence has been placed by the Revenue to counter the claim made by the appellants that in the condition in which the one side coated fabrics emerged at intermediate stage they are marketed are known in the market. Similar view was also taken by the Hon'ble Supreme Court in the case of Bhor Industries v. Collector of Central Excise, UOI and Anr.

v. Delhi Cloth & General Mills Co. Ltd. and Anr., reported in 1997 (20) RLT 367 at para 8 held as follows: 8. Learned Counsel for the appellant submitted that Tariff Entry 14AA(1) was attracted, whatever might be the fitted portion that the calcium Chloride manufactured by the respondent might have to find any way of purification offer that would not be tantamount to further manufacture We are

unable to. The portion of the judgment is not visible. simple reason that the commodity.... The portion of the judgment is not visible. be a commodity that is marketable.... The portion of the judgment is not visible. and not a commodity that may be.... The portion of the judgment is not visible. processing be made marketable.

Therefore the decision of the Commissioner holding that one side coated fabrics are goods is without any evidence in this regard.

41. Once when the burden was on the Department to prove the same, and when no such evidence is produced by the Department, the question of remand also does not arise. In similar circumstances the Hon'ble Supreme Court in the case of Hindustan Ferodo Ltd. v. Collector of Central Excise reported in 1996 (17) RLT 807 (SC) at paras 3 to 7 held as follows: Other than supposition, there is no material no record that suggests that a small scale or medium scale manufacturer of brake linings and clutch facings "would be interested in buying" the said rings or that they are marketable at all. As to the brittleness of the said rings, it was for the Revenue to demonstrate that the appellants averment in this behalf was incorrect and not for the Tribunal to assess their brittleness for itself. Articles in question in an appeal are shown to the Tribunal to enable the Tribunal to comprehend what it is that it is dealing with. It is not an invitation to the Tribunal to give its opinion thereon, brushing aside the evidence before it. The technical knowledge of members of the Tribunals makes for better appreciation of the record, but not its substitution.

5. The Revenue sought to make the said rings dutiable as asbestos articles. The affidavit evidence of a dealer in asbestos was of some relevance. So was the Affidavit evidence that explained the character and use of the said rings. It was wrong of the Tribunal to find that the deponents of these affidavits were "not the right persons to give opinion on the type of products" with which it was concerned.

6. Regretably, the Tribunal's order under appeal shows that it was not fully conscious of the dispassionate judicial function it was expected to perform, and it must be quashed.

7. Learned Counsel for the Revenue submitted that the-matter be remanded to be Tribunal so that the evidence on record may be reappreciated. As we have stated, no evidence was led on behalf of the Revenue. There is, therefore, on goods reason to remand the matter.

8. It is not dispute before us, as it cannot be. that the onus of establishing that the said rings fell within Item 22-F lay upon the Revenue. The Revenue led no evidence. The onus was not discharged.

Assuming therefore, that the Tribunal was right in rejecting the evidence that was produced on behalf of the appellants, the appeal should, nonetheless, have been allowed.

9. It is not the function of the Tribunal to enter into the arena and make suppositions that are tantamount to the evidence that a party before it has failed to 42. Therefore when the Revenue has not made any enquiry or has not produced any evidence and when the burden was on them to prove the same the question of remand also does not arise. Therefore in my view this demand as made in the impugned order is not sustainable and I set aside the above said demand on this behalf.

43. As far as point No. 3 is concerned, the learned Vice-President has held in the order that this issue was not contested by the appellants and the demand is to be re-confirmed. As far as this issue is concerned, it was the claim of the appellants that the classification of one side PVC coated fabrics should be under Heading 59.09 as textile articles. The classification list was filed in May, 1992 and was not approved and the notice was issued by the Assistant Commissioner proposing re-classification of the same under Heading 63.01. The demand confirmed by classifying this article under Heading 63.01 in the impugned order is Rs. 3.29,289/- for the period from May 1992 to October 1992. The demand is raised on the ground that Heading 63.01 in which it is proposed to be re-classified is not a declared final product for filing exemption under Notification 217/86-CE and Notification 177/86 CE or MODVAT Credit and therefore on the one side coated fabrics the duty as required is to be paid. Since this issue was not contested before us during the course of the arguments. I also concur with the views of the

learned Vice-President that the duty on this account is to be confirmed. Accordingly I confirm the duty of Rs. 3,29,289/- for the period from May 1992 to October, 1992 in this regard. As admitted by the appellants themselves this demand is not hit by limitation. Therefore this demand is confirmed.

44. As far as the fourth and fifth issues are concerned, the same relate to the production of Tarpaulins and other articles manufactured out of double side coated fabrics. The demand on this account is Rs. 3,83,08,728/-. The learned Vice-President has already held that this demand is barred by limitation. The reasonings are mentioned in paras 24 and 25. I agree with this findings "that this demand is barred by limitation.

45. As far as the classification is concerned, the learned Vice-President held that the goods are rightly classified under Heading 63.01. I respectfully do not agree with the above findings of the learned Vice-President for the following reasons.

46. In the impugned order it has been ordered by the Commissioner that articles like fabrics covers, tarpaulins, awnings, scooter cover etc.

made out of double side PVC coated materials are to be classified under Heading 63.01 and not under 3936.90 as claimed by the appellants.

Similarly the pre-fabricated buildings which were classified by the appellants under Heading 94.06 are classifiable under Heading 63.01.

Consequent on the above classification under 63.01 the demand of Rs. 3,83,08,728/- for the period from May 1988 to September 1992 is raised on this count. It is now seen that there is no dispute about the classification of double side PVC coated fabrics under Heading 39.20.12. But the Commissioner's findings is that originally the fabrics falling under Chapter 54 are now covered under Heading 59.09 when they are coated PVC on both sides by virtue of Chapter Note 2(a)(3) of Chapter 59 and they become classifiable under Heading 39.20.12. But any article made out of such double side PVC coated fabrics would still come under Heading 63.01. In order to justify this conclusion in the impugned order reliance was placed on the Explanatory Note under Heading 63.09 to contend that the

Heading 63.09 can cover not only textile products but also the products made out of other materials. It was also mentioned in the impugned order that Tarpaulins is specifically mentioned under Heading 63.01 and therefore it is classifiable under Heading 63.01.

47. But it is seen that there is no dispute about the classification of double side coated fabrics under Heading 39.20.12. This heading reads as under: Other plates, sheets, film, foil and strip, of plastics, non-cellular, whether lacquered or metallised or laminated, supported or similarly combined with other materials or not.

48. In this connection the double side PVC coated product is considered as sheet of plastic combined with materials like textiles and accordingly it is classifiable under Heading 39.20. It is therefore clear that Tariff Heading declares the product as sheets of plastic combined with textile materials notwithstanding the description of Heading 39.20 it cannot be argued that the same is still a textile product. Similarly Chapter Note 2(a)(3) of Chapter 59 takes away the product from Chapter 59 and brings the same into the ambit of Heading 39.20. Therefore it is seen that once the product is declared by the Tariff as sheets of plastic combined with textile materials, the same should come under Chapter 39.20 only.

49. In this connection it is necessary to look into Note 1(d) of Section. 11 which reads as under: Woven, knitted or crocheted fabrics, felt or nonwovens, impregnated, coated, covered, or laminated with plastics, and articles thereof, of Chapter 39.

It is thus seen that this Section Note states not only the woven fabrics, coated, covered or laminated with plastics, under Chapter 39.

but also the articles thereof. Heading 63.01 in so far as it mentions Tarpaulins therefore can cover only those Tarpaulins which are made out of fabrics which are not covered, coated or laminated with plastics.

But the reasonings of the Commissioner which is reiterated by the learned SDR is that Chapter 63 would cover articles made of other items also, cannot be accepted

as correct because there is a specific Heading 63.09 in HSN to cover worn out articles. These were original made out of leather, straw, plastics, rubber etc. These worn out articles were classified under the same heading because for customs purposes they have to be classified and Heading 63.09 was chosen. But that cannot be a reason to say that fresh or new fabricated and manufactured article out of double side coated fabrics would fall under Heading 63.01.

50. In this connection our attention was drawn to the judgment of the Hon'ble Supreme Court in the case of Fenner (India) Ltd. . In that case PVC beltings were classified under 3922 before 1987 and under 3926 after 1987 after noting the Hon'ble Supreme Court's earlier decision. In that particular case the Hon'ble Supreme Court referred to Chapter Notes and Explanatory Notes to Chapter 39 and held that the composite goods containing plastics and textiles and the articles made of the composite goods consisting of plastic and other materials like textiles would come under Heading 3926. The same view was taken by the Tribunal in the case of Eagle Flask Industries Pvt.

Ltd. v. Collector of Central Excise . It is therefore seen that Section Note 1(d) of Section 11 specifically states that the whole of Section 11 cannot be covered fabrics, impregnated, coated covered or laminated with plastics. The second portion of interpretative Rules makes it clear that the interpretative rules cannot be used to classify product under a chapter against the chapter note prohibiting classification under that heading. In this case the Tarpaulins and articles of plastics in question are made by coating PVC compound on both sides of nylon fabrics. Nylon fabrics were made out of nylon strips. Thus the resin and nylon falling under Heading 39.08 on being drawn into filaments and is made into fabrics was classifiable under Heading 54.08 of coated on both sides with PVC compound the classification of such double side PVC coated fabrics reaches back to Heading 39.20 as sheets of plastics. Any article made out of the whole plastic materials has to necessary fall under Chapter 39.26. In this view of the matter the classification claimed by the appellants under Heading 39.26 has to be upheld.⁵¹ In this connection the learned Advocate for the appellants had also relied upon the decision of the Hon'ble Madhya Pradesh High Court in the case of Raj Pack Well Ltd. v. VOL In that particular case HDPE strips less than 5 mm was classified

under Chapter 39 and so also the fabrics made therefrom. HDPE sacks made out of such fabrics were classified as articles of plastics and not as made out textile articles under Heading 63.01. In that particular case the Revenue has contended that the stripes of fabrics themselves would come under Chapter 54 and the articles should come under Chapter 63.01. But this argument was not accepted by the Hon'ble High Court. Therefore the principles enunciated in that case also supports the arguments advanced on behalf of the appellants. In the premises, I hold that the same is classifiable under Heading 39.26 as claimed by the appellants.

52. I also agree with the views of the learned Vice-President that the penalty imposed on the individuals are not called for and I set aside the same. But as far as the penalty on the company is concerned, I am of the view that the same is required to be considered by the adjudicating authority after the de novo adjudication proceedings in the light of the above observations and in view of the fact that I have ordered that the case should be remanded to the adjudicating authority with respect to determination of the issue No. 1. In that view of the matter the penalty imposed on the company is set aside and the question of imposing penalty is required to be reconsidered by the adjudicating authority in the light of his decision on issue No. 1 which is remanded for de novo adjudication.

(i) Whether in the facts and circumstances of the case as per issue No. 1, whether the goods are to be classified under Chapter Heading 59.09 as held by the Hon'ble Vice-President; Whether the matter requires to be remanded to the Commissioner to decide the case in terms of the Circular issued by the Board under Section 37B and in the principles laid down by the Hon'ble Supreme Court and High Court of Gujarat as mentioned in para 38 of the orders passed by Member (Judicial); (ii) Whether in the facts and circumstances of the case, as per issue No. 2, whether the matter requires to be remanded for de novo adjudication in respect of the period prior to 14.9.1989 and in the light of the observations mentioned in the order passed by the Hon'ble Vice-President including the question of limitation, as held by the Hon'ble Vice-President; Whether the demand in this regard is not sustainable and is liable to be set aside as held by member (judicial); (iii) Whether in the facts and circumstances of the case, as per issue Nos. 4 and 5, whether the

goods in question are to be classified under Heading 63.01 as held by the learned Vice President; Whether the goods in question are classifiable under Heading 39.26 as held by Member (Judicial).

1. The difference of opinion between the Vice-President and Member (Judicial) in terms of the points of difference at pages 52 and 53 was heard by me.

2. The Ld. Advocate Shri V. Lakshmikumaran submitted his arguments on behalf of the appellants and Ld. CDR, Shri M.G. Sharma, defended the revenue in the matter.

3. I shall be proceeding to give my reasonings on issue wise determined by both Members and during the course of my reasoning I would touch upon the arguments raised by both sides without recording the individual submissions made before me.

4. The first issue pertains to classification of unprocessed fabrics of cotton, MM filament yarn and fibre. The appellants had been classifying this product under Chapter Heading 52, 54 and 55 after filing the classification list and after following all the necessary formalities under the relevant rules. The Tribunal determined classification of cotton fabrics used as an industrial fabric as in the case of *Simplex Mills v. CCE* reported in 1993 (49) ECR (147) and held that the goods which came up for determination before the Bench were classifiable under Tariff Heading 59.09 of the Central Excise Tariff. After this judgment was delivered, proceedings were initiated against the appellants by reopening classification and it was urged in the show cause notice that in terms of the judgment of the Tribunal, the goods are re-classifiable under Chapter Heading 5909 and not under the respective Chapters 52, 54 or 55 of the Central Excise Tariff. Demands were also raised by invoking larger period. There is no point of difference as regards the demands being time barred, both by the Hon'ble Vice-President and Hon'ble Member (J). The Ld. Vice-President has held that the items in question were rightly classifiable under Heading 59.09 in terms of the judgment rendered by the Tribunal in the case of *Simplex Mills*. While proceedings were still pending before the Commissioner, a representation from the trade had been made to the Central Board of Excise and Customs (CBEC) and the CBEC after due consideration issued an order under

Section 37B. Following the said order, Nagpur Collectorate issued a Trade Notice dated 8.12.93 and an parallel Trade Notice was issued by Rajkot Collectorate No. 56/93 dated 01.12.93. The said Trade Notice had been extracted in para 36 of the order. The appellants had specifically contended before the Commissioner that in terms of this Circular issued by the Board under Section 37B of Central Excise Act, the classification is required to be adopted under Heading No. 52.05 of the Central Excise Tariff. Specific arguments were also raised before the Commissioner. However, the Commissioner has not dealt with this point and to that extent the order on this point is silent and non-speaking. The Ld. Vice-President has also not expressed his opinion on this point but has proceeded to deal with the classification issue and held the same to be classifiable under Chapter 59. However, the Ld. Member (J) has not expressed any opinion on the classification but has held in para 35 after relying on one judgment of the Hon'ble Supreme Court and other two judgments of High Court that the matter is required to go back to the Commissioner for redetermination in the light of the circular as the circular has a binding effect.

5. I have heard arguments of both sides on this point. The Ld. Advocate stressed the point that the Vice-President ought to have also applied his mind and should have expressed his opinion with regard to the applicability of circular issued by the Board under Section 37B. He submits that the Third Member is now left with no option but to agree with the Member (J) on this point as Commissioner has also not expressed his opinion. I have heard the Ld. CDR also on this point.

6. In my considered opinion, the matter is required to go back to the Commissioner for determining the applicability of Trade Notice in terms of the judgments noted by the Hon'ble Member (J) in para 34 and 35 of his order.

7. The Ld. Advocate also submitted that the Simplex case has since been confirmed by the Supreme Court. However, Ld. Member (J) has noted that certain points have not been considered in Simplex Mills and after so saying, has not expressed his opinion on classification. Therefore, in the remand proceedings, it is for the Commissioner to consider all the points pertaining to the circular, which was in force as well as to the applicability of Simplex Mills case, in view of several

factor, the judgments having been held as not good law in the case of CCE v.Fenoplast supra.

8. The Ld. CDR pointed out that the circular in question does not refer to the goods in question but it refers only to cotton fabrics, while the appellant's products are not so.

9. This point is required to be looked into by the Commissioner as the Third Member at this point cannot determine the applicability or non-applicability of the circular and it is for the authority before whom the circular was, to have considered this point. As the Commissioner has not looked into this aspect, in my opinion, the opinion expressed by the Ld. Member (J) for remand is proper and also for the reason that the Ld. Vice-President has not expressed any opinion on the circular.

10. It is also interesting to note that. the Board has again revised its stand in earlier circular, which was adopted in Trade Notice 62/ 93. The Board under Section 35B Order No. 48/27/97-CX dated 17.4.97 has expressed a different opinion and has held that cotton duck not having technical use, shall hence forth be classified under Chapter 52 of Central Excise Tariff, while all other items they have suggested under Chapter 59.11 or under Heading 59.10 subject to Note 6 to Chapter 59.

11. The Ld. Counsel submitted that for the relevent period the matter is required to be guided by Trade Notice 62/93 and the Board circular dated 17.4.97 does not have a retrospective effect in view of the Supreme Court judgment in the case of H.M. bags Manufacturer v. CCE .

12. All these aspects of the matter are left open to the Commissioner for determination on remand. Hence, 1 agree with the proposition of Ld.

Member (J) for remand of the matter on the first issue.

13. As regards the issue No. 2 pertaining to the classification of one sided cotton fabrics Ld. Vice-President in para 13 has observed that: We observe the question to be answered is whether embossing changes the character of the product in a manner to render it usable and without that the goods cannot be used. This

requires detailed examination taking into consideration the opinion of expert, technical literature and the nature of the goods as manufactured by the appellants. We had asked both the sides to produce evidence in.

this regard. We find that it has not been possible at this stage to bring on record technical opinion and nor it is feasible to get market enquiries to be caused. The evidence filed is not conclusive.

It is settled position in law as held by the Hon'ble Supreme Court in a number of judgments and the judgments cited by the appellants that burden is on the department to establish marketability for levy of excise duty purposes.

Thereafter, the Ld. Vice-President has remanded the matter for de novo consideration.

14. This point has been deferred to by the Ld. Member (J) and has held that the conclusion after this finding should be that the department has not proved their case on marketability and that the revenue not having discharged the same, the appeal has to be accepted on this point. In this connection, Ld. Member (J) has relied on the ruling rendered by the Supreme Court in the case of Hindustan Ferodo Ltd. v.CCE, Bombay reported in 1997 (89) ELT 16 (SC) as can be seen from his finding arrived at para 40 and 41 of his order.

15. I have heard both the sides on this point. On this point I am agreeable with the Ld. Member. (J) that a lacuna which was there on the show cause notice cannot be availed by the department to carry out an investigation and then commence fresh proceedings. This has been the well settled position as has been held by the Supreme Court in the case of State of U.P. v. Manbodhan Lal Srivastava 922. The Tribunal in similar circumstances relied on several Supreme Court judgments to hold that the department cannot produce documents not confined to charges in the show cause notice as that would amount to making out a fresh case as held in the case of CCE v. Bhupendra Steels Put. Ltd., . As the revenue has not discharged the burden the point has to be answered in favour of assessee, as the Supreme Court time and again has been discharging such cases, and giving the benefit to the assessee.

16. As noted by Ld. Member (J), I am agreeable with the findings, that the department has not proved their case. This finding has also been given by the Ld. Vice President and as noted above, the Vice-President has also held that an opportunity has been given to the department to produce evidence and they have not produced any conclusive one during the course of proceedings. If that be the case, the only conclusion that has to be arrived is that the department has not discharged the onus and hence the benefit should go to the party instead of remanding the matter for collection of evidence which is against the spirit of the judgments rendered by the Supreme Court.

17. As regards limitation, I agree with the view expressed by Member (J).

18. As regards the issue No. 3, there is no contest made by the party and there is no difference of opinion and hence, there is no question of my deciding the same.

19. As regards the issue 4 and 5, the same deals with classification of articles of double side coated fabrics. This particular item had been assessed under Chapter Heading 39.26 as articles of plastics. However, the department issued show cause notice for reclassifying the same under Chapter Heading 63.01. The Ld. Vice-President has held the item is to be classified under Chapter Heading 63.01, while the Ld. member (J) has held the article to be classifiable under Heading 39.26 of the Tariff. However, both the Members have agreed that the demands raised are barred by time.

20. As regards the classification of this item, I agree with the final conclusion of the Vice-President for different reasons, that the item is required to be classified under Chapter Heading 63.01. The items in question are "tarpaulins, awnings". Both these items have got a specific tariff description under Chapter Heading 63.06. In terms of Note 1 of Rules for the interpretation of the tariff the classification has to be determined according to the terms of the headings and in relation to the section and chapter notes. By applying this Rule, the classification adopted by the department under Chapter Heading 63.01 appropriate and is required to be accepted. 21. The Ld. Counsel submits that the item is made from fabrics coated on both sides by PVC and it is his contention that Chapter 39.20 covers other plates, sheets, film foil and strips and such item is specific to this and any articles

made therefrom would fall under 39.26.

22. I am not agreeable to this argument as Chapter 63 deals both with plastic articles as well as textile articles as there is a specific heading for tarpaulins and awning, therefore, they cannot be brought under a general Heading on 39.26 of other articles of plastics and articles of other materials. Even the Explanatory Notes on HSN also does not support the plea raised by the Ld. Advocate.

23. In that view of the matter, I agree for classification of these items under Heading 63.01.

(a) the classification of un-processed fabrics of cotton, MM filament yarn and fibre is remanded to the original authority.

(b) the item one side coated fabrics is held to be not marketable and not dutiable.

(c) the articles of one side coated is classifiable under Heading 63.01 of the Central Excise Tariff.

(d) articles of double side coated fabrics falls under Chapter Heading 63.01 of Central Excise Tariff.

(e) the demands at issue No. 1,2,4 and 5 are held to be barred by time.

2. These appeals are disposed of in the above terms. Majority order pronounced in open court on 24.4.98.

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