

**Sail Vs. Cce**

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**Court :** Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

**Decided On :** Jul-19-2000

**Reported in :** (2001)(74)ECC159

**Judge :** S Kang, S S Sidharath

**Appellant :** Sail

**Respondent :** Cce

**Judgement :**

1. The present appeal is against the orders of the Commissioner classifying the "Pitch Creosote Mixture" (PCM) and Road Tar under sub-heading 2708.11 of the schedule to Central Excise Tariff and "Pitch" under 2708.19 and consequent confirmation of demand of duty Under Rule 9(2) of the Central Excise Rules, 1944 read with Section 11A of CEA, 1944 and a penalty of Rs. 30 lakhs Under Rules 9(2) and 173Q (2) of the Central Excise Rules on M/s. SAIL, BHILAI Steel Plant Bhilai 490-001 M.R who are primarily manufacturers of steel for which they use coal and in the process of converting the coal for use in the manufacture of steel, they obtain products, inter alia, Pitch Creosote Mixture (PCM), Road Tar and Pitch.

2. The SCN was issued, as it was alleged that in order to avail the benefit of NIL or lower rate of duty they had declared their products as Pitch blending with Tar Oils like Creosote oil, Anthracene oil etc.

and in respect of PCM and Road Tar they declared it as 'Tars/reconstituted tars'. This misclassification has resulted in lesser duties as Under:S. No. Name of the Classification rate Proposed Product of duty claim1.

PCM 2706 Nil 2708.11 Rs. 100 PMT2.

Road Tar 2706 Nil 2708.11 Rs. 100 PMT3.

Pitch 2708.11 2708.19 Rs. 100 PMT 15% Adv.It was further alleged that as the noticee had resorted to evade duty, through wilful mis-statement and suppression of facts, the extended period of Section 11A was applicable for demanding duty.

I have gone through the case records, facts and evidence on record and have also carefully considered the submissions made by the noticee.

1. The facts of the case, in brief, are that, the noticee, a Public Sector Undertaking of Govt. of India, working under Record Based Control, had classified their products, 'Pitch' under chapter heading 2708.11 leviable to duty @ Rs. 100 PMT declaring it as blending with Tar oils like creosote oil, anthracene oil etc., PCM & Road Tar was declared as reconstituted tars and accordingly classified the same under chapter heading 2706 at NIL rate of duty in their classification list No. 2/86 w.e.f. 1.3.86 onwards.

1.1. The Preventive Officers of C. Ex. during their visit to the factory of the noticee on 12/13.10.90 found that the noticee were manufacturing pitch, Pitch Creosote Mixture (PCM) and Road Tar but they had declared their products in the classification list as Pitch obtained by blending with creosote oil or other coal tar distillates under chapter heading 2708.11 & PCM & Road Tar were declared as Reconstituted Tars. However, it was found that no process of blending is undertaken during the manufacture of pitch, whereas PCM & Road Tar are manufactured by blending of Pitch and Tar oils.

1.2. A case was, therefore, registered against the noticee alleging that they have misdeclared the products which resulted into misclassification & short payment/evasion of C. Ex. duty.

1.3. A SCN was issued on 7/12.12.90 proposing classification of 'Pitch' under chapter heading 2708.19 @ 15% adv. & PCM & Road Tar under chapter heading 2708.11 @ Rs. 100 PMT rejecting the noticees claim for classification of the disputed goods under chapter heading 2708.11 @ Rs. 100 PMT & 2706 at NIL rate of duty respectively.

(ii) Tars consist predominantly of aromatic constituents such as benzene, toluene, xylene, naphthalene, phenol etc. but the product PCM & Road Tar do not contain such aromatic constituents; rather these aromatic constituents are already extracted out during the course of distillation process.

(iii) Tars are mainly used in further distillation which produces a series of oils and other coal tar products; but the instant product PCM & Road tar do not have such uses; rather PCM is used as fuels & Road Tar is used for making & repairing roads. Thus, the products viz. PCM & Road Tar have a distinct name, character & use and therefore, these cannot be treated as reconstituted tars.

No process of blending is done by the noticee for manufacturing pitch. The tar oils contained in the pitch remain in the natural course of distillation & no tar oils are added/blended. Therefore, the said product pitch, PCM & Road Tar merit for classification under sub-heading No. 2708.19, 2708.11, 2708.11 respectively instead of 2708.11, 2706.00, 2706.00 respectively, as claimed by the noticee.

In the background of facts mentioned above, I find that the issue to be decided relates to the correct classification of 'Pitch', PCM & Road Tar.

2. Before proceeding to decide the classifications of the disputed goods, I find it expedient to ascertain the difference between 'Tar' & 'Pitch'.

Tar:--Tar distilled from coal from lignite or from peat; chapter heading No. 2706.

Pitch:-- Pitch & pitch coke obtained from coal tar or from other mineral tars; chapter heading No. 27.03.

2.1 From the above description it may be observed that while Tar is obtained from the distillation of coal, lignite or peat, Pitch is obtained from the distillation of Tar.

Thus Pitch & Tar are recognised as separate goods, having separate identity & separate classification.

3. From the process of manufacture of pitch, FCM & Road Tar as stated by Shri Kuljit Singh, Chief Supdt., Bye-product Plant, in his statement recorded under Section 14 of the CESA, 1944 on 13.10.90 is also as described in the defence replies submitted by the noticee, I find that to manufacture/obtain pitch, PCM & Road Tar, hot molten tar is distilled. Thus, it is now an established fact that pitch, PCM & Road Tar and the residue product remaining after the distillation of Tar.

4. The fact that coal tar pitch is distinct from coal tar has also been decided in the cases of Indian Aluminium Co. Ltd. v. Collector of Customs, Cochin & STP Ltd. v. Collector of C.Ex.

5. I further find that the noticee has pleaded that since pitch is not defined in CETA, meaning of term 'Pitch' has to be taken as it is known to the trade & ISI specifications. They have relied upon the decision laid down by the Supreme Court in the case of CCE, Kanpur v. Krishna Carbon Paper Co.

5.1. I do not find any force in the arguments put forth by the noticee in their defence. The tariff description in itself is very clear & tariff description read with Sub-rule (3) of the Rules of interpretation, the classification of PCM & Road Tar can be determined and it does not require the assistance of ISI specification or trade & commercial understanding. I find support in the following decisions: (i) ISI definition has no relevance for determination of classification of excisable goods when tariff defines the expression.

(ii) Once the definition incorporated in the C. Ex. Tariff are satisfied ISI specification need not be specified. (Indian Oil Corporation Ltd. v. CCE, Patna (iii) Classification of goods--statutory definition as per Section note, chapter note etc. prevails over trade & commercial understanding, [1994 (73) ELT (Tri.) Sharpmax. Engg. v. Collector, C. Ex., Rajkot.

(iv) Definition when provided in the statute to be preferred over commercial/trade understanding or definition given in any other statute. .

6. Now, to determine the appropriate classification of the disputed goods, I find it necessary to reproduce the tariff entry of pitch which is as follows: 2708 Pitch & pitch coke obtained from coal tar or from other mineral tar.2708.11 Obtained by blending with creosote Rs.100 PMToil or other coal tar distillates.2708.19 others 15% adv.2708.20 Pitch coke NIL.

The above tariff description of chapter sub-headings No. 2708.11 & 2708.19 is very clear & specific Pitch obtained by blending with creosote or other coal tar distillates are classifiable under chapter sub-heading No. 2708.11 & all other pitch are classifiable under chapter sub-heading No. 2708.19 as 'others'.

7. The noticee has claimed classification of 'Pitch' under chapter sub-heading No. 2708.11 on the plea that they manufacture 'Pitch' by 'fluxing back' process, which is nothing but blending of pitch with tar oils. In their support they have relied upon ISI specification No. IS: 216-1961 for coal tar Pitch, which distinguishes residue pitch obtained by direct distillation as against pitch obtained by fluxing back with high boiling coal tar distillation and on the book 'Materials & Technology', Volume-IV by Dr. J.F. Van Oss, wherein 'straight run pitches' are described as those obtained directly as the residue, which are distinguishable from "cut back" or a "fluxed back" pitch. They have also relied upon their reply dated 10.11.84 to the Asstt. Collector's letter dated 3.7.84, wherein they had given the process of manufacture of pitch.

8. To examine the issue in the light of queries raised by the jurisdictional Asstt. Collector vide his aforesaid letter dated 3.7.84, I reproduce below the relevant portion of his query. 7.

As per ISI specification (I.S. 216 -1981) coal tar pitch is classified into four grades viz. soft pitch (softening point 45<sup>o</sup> to 55<sup>o</sup>C soft medium pitch (softening point 58<sup>o</sup> to 68<sup>o</sup>C), Hard medium pitch (softening point 70<sup>o</sup> to 80<sup>o</sup>C) & Hard Pitch (softening point 82<sup>o</sup> to 92<sup>o</sup>C). The above specification stipulates that the material is obtained either (a) as residue of the direct distillation of crude tar by the high temperature carbonisation of coal in coke ovens or (b) by fluxing back such pitch residue with high boiling coal tar distillates to give the products the desired softening point. If the distillation of coal tar residue is contained to the desired

point, then the residue is known as "straight pun coal tar pitch". On the other hand if the distillation is carried to a point where the residue is harder and more infeasible than desired and is thereupon fluxed to the desired consistency and fusing point, either with certain fractions of the distillates or a flux of different origin usually of little value commercially or with other tars, then the pitch is known as cut back pitch 'High boiling coal tar distillation include creosote oil anthracene oil etc. "Fluxing back is nothing but blending of anthracene oil etc.

8.1. In reply to the above query of Asstt. Collector, the noticee had replied vide their letter dated 10.11.84, contending inter alia that: The distillation of coal tar at Bhilai Steel Plant is done in such a way that continuous fluxing of pitch and oil is going on in the distillation columns. The quality of pitch is controlled in such a way that a fair percentage of oil remain in the pitch.

9. From the process of manufacture of 'Pitch' as stated by Shri Kuljit Singh, in his statement recorded on 13.10.90 & from the process as described in the defence reply submitted by the noticee, I find that during the fractional distillation of Tar in the second stage evaporater column duly heated upto 360<sup>o</sup>--400<sup>o</sup>C, most of the tar oils are driven out and the residue product is pitch. During the course of distillation, some of the oil vapours transform into drops and drip back/trickle back to the thick pitch.

9.1. I find that the noticee has construed the dripping back/trickling back of oils during the course of natural distillation of tars, as fluxing back process.

10. As per New Websters English Dictionary, the meaning of fluxing and blending is as below: Flux--The state of flowing; constant change or movement; a flow or discharge; to cause flow; to make fluid; to fuse by melting; to flow.

Blend--To mix or mingle; mix thoroughly or intimately; combine so that the things mixed or the line of division cannot be distinguished; mix in as different sorts of a commodity in order to produce a particular kind or quality.

This flux/flow is definitely different from dripping back/trickling back of tar oils.

In the letter of Asstt. Collector dt. 3.7.84, it is mentioned that, 'if the distillation is carried to a point where the residue is harder and more infeasible than desired and is thereupon fluxed to the desired consistency and fusing point, either with certain fraction of the distillates or a flux of different origin or with tare, then the pitch is known as cut back pitch.

11. In the instant case, the pitch is not fluxed with any tar distillates. The oil vapour which arise during the course of tar distillates drip back/trickle back to the pitch residue. Thus, the said oil remains in the natural course of distillation and is not fluxed back. Therefore, to be classified under chapter sub-heading No. 2708.11 which reads as, 'Pitch obtained by blending with creosote oil or other coal tar distillates', the pitch should contain creosote oil or other coal tar distillates.

12. To confirm the noticee's claim that the pitch manufactured by them is a blend of creosote oil or other coal tar distillates, samples of the granulated pitch/pitch lumps were sent to the Chemical Examiner, C.Ex., New Delhi vide C. No. CEX/PLM/91/177/ 949 dated 10.1.92 & CEX/PLM/91/178/945 dated 10.1.92 to get the contents of pitch manufactured by the noticee varified.

139/Chem/Misc./I/91/CL-I/Misc./60 dated 18.8.93 submitted the report which is reproduced below: The sample is in the form of black coloured brittle cylindrical places some of which are hollow and others are solid. It is mainly composed of pitch.

12.2 From the Chemical Examiner's report it is crystal clear that the tar oil vapours which drip/trickle back to the pitch, remain in the natural course of distillation which are so negligible that it cannot be identified as blended with pitch. No extra tar oils are fluxed back or blended with the pitch so manufactured. Thus, the description of the 'Pitch' that has been declared by the noticee does not commensurate with the 'Pitch' that the noticee is actually manufacturing because nothing is blended or added while manufacturing pitch in their distillation plant.

13. Copies of the Chemical Examiner's report were sent to the noticee for their comments/defence, if any, vide this office letter of even No.3793-94 dated 3.2.94. Since no reply was received from the noticees, reminder letters were issued and

finally when no reply was received, a letter was issued to Shri Tata Raman Murthy, Sr. Manager (Fin. & Taxation), by regd. A.D. dated 16.6.94 informing therein that if no reply is received by 8th July, 1994, it will be presumed that they have no comments to offer in respect of the said test report.

13.1. Since the noticee did not submit their comments/defence even after receipt of the said letter, I take their silence as acceptance that the tar oils which drip back into the pitch, remain in the natural course of distillation in the pitch. I, therefore, come to the conclusion that the noticee by misdeclaring their product, 'Pitch' as 'obtained by blending with creosote oil or other coal tar distillates; have wilfully mis-stated the description of their product which resulted in misclassification under Tariff sub-heading No. 2708.11 wherein the rate of duty is Rs. 100 PMT. The Pitch as manufactured by the noticee does not merit classification under sub-heading No. 2708.11 because no process of blending is undertaken for the manufacture of Pitch; rather the tar oil remain in the pitch in the natural course of distillation of Tar. Therefore, the 'Pitch' manufactured by the noticee is correctly classifiable under chapter sub-heading No. 2708.19 @ 15% adv. They have deliberately misclassified 'Pitch', under chapter sub-heading No. 2708.11 @ Rs. 100 PMT causing revenue loss. Held accordingly.

14. Regarding the classification of PCM (Pitch Creosote Mixture) & Road Tar, I find that the noticee have declared their product viz. PCM & Road Tar, as Tars" of Reconstituted Tars" and claimed classification of the said product under Chapter sub-heading No. 2706 at NIL rate of duty. The tariff description of chapter sub-heading No. 27.06 is reproduced below: Tar distilled from coal, from lignite or from peat and other mineral tars, whether or not dehydrated or partially distilled, including reconstituted tars.

15. It is an established fact that pitch and tar are separate items.

While tar is obtained by distillation of materials like coal etc. & various types of tars are described by prefixing the name of material from which these have been produced like coal, lignite, peat, shale etc., pitch is the residue obtained from the distillation of tar.

16. From the evidence on record, I find it an admitted fact that pitch, PCM and Road tar are obtained by the distillation of tar. Hence, I find no weight in the noticee's plea that pitch is that which is solid at room temperature unlike PCM & Road Tar which are liquid at room temperature and thus PCM and Road tar are reconstituted tars prepared by mixing various components supposed to be present in tar.

17. In their written submissions, the noticee has given the manufacturing process of PCM and Road Tar as below: Coal Tar which is obtained from the distillation of coal, is heated to a temperature of 350-400°C and is fractionally steam distilled in the second stage evaporator to drive out most of the tar oils. A number of organic compounds such as Benzene, Toluene, Xylene, Naptha, Phenol Tar Oils etc. as contained in the coal tar are extracted out by fractional distillation. The residue left behind is 'Pitch'. This pitch is taken to a mixer in the noticees PCM preparation unit where it is mixed with pitch and various tar oils such as creosote oil, anthracene oil etc. The resultant product is known as 'Pitch creosote Mixture' or PCM Road Tar is also a blend of Pitch and tar oils and is manufactured in accordance with the process as is applied to the manufacture of PCM. The only difference lies in the ratio of Pitch and tar oils. The ratio of Pitch and tar oils as contained in Road Tar is 4:1.

Thus, it is amply clear from the above that both the products 'PCM' and 'Road Tar' are obtained by blending pitch and tar oils and therefore, both the products merit for classification under tariff sub-heading No.2708.11.

17.1 From the above manufacturing process as submitted by the noticee, I find that they have deliberately given a misleading declaration to the effect that tar oils are readded to tar to produce reconstituted tars whereas the noticee have themselves admitted that when tar is heated most of the oils and other compounds are taken out. Thus, the residue product containing negligible quantity of tar oils which remain during the natural course of distillation, is 'Pitch' and not tar. I find that tar oils is added to this 'Pitch' in a mixer to produce pitch blended with creosote oils and Road Tar.

18. I further find that the noticee in para 3.2.2 of the reply to SCN dated 16.2.91 and in the statement of Shri Kuljeet Singh recorded on 13.10.90 in answer to Question No. 4 have also admitted that PCM and Road Tar are blends of pitch of tar oils and that the noticee has provisions for mixing of pitch and various tar oils.

19. However, to ascertain the noticee's claim that PCM and road tar are reconstituted tars or pitch blended with creosote oil or other coal tar distillates, samples of PCM were sent to Chemical Examiner, New Delhi to get its contents examined. The report of the Chemical Analysis of PCM as submitted by the Chemical Examiner is reproduced below: The sample is in the form of black coloured viscous liquid composed of pitch and creosote oil. However, actual manufacturing process may be verified i.e. whether it is obtained as a residue on distillation or it is manufactured by blending of pitch and creosote oil.

20. As discussed at para 14 above, copies of the Chemical Examiners report were sent to the noticee for their comments/defence, if any, to which they failed to reply. Even the letter sent by name to Shri Tata Raman Murthy, Manager, (Finance) of the noticee was not replied. Hence, the noticee's silence is obviously construed as their acceptance that the PCM (Pitch Creosote Mixture) and Road Tar are blends of Pitch and creosote oil and, are, therefore, correctly classifiable under chapter sub-heading No. 2708.11 @ Rs. 100 PMT. Held accordingly.

21. Further, I find that the Noticee has claimed during personal hearing that road tar is fully exempted under Notification No. 126/78 dated 27.5.78, as amended. I find that the Notification is conditional.

The said Notification exempts solution of asphalt, bitumen, tar or pitch in volatile solvents from the whole of duty provided that the manufacturer files, at least twenty-four hours before such solution are removed from his factory or such longer period as the Asstt. Collector, C. Ex. may in each case allow, a written declaration that such solution are solution of asphalt, bitumen, tar or pitch in volatile solvents which, 1. are meant for road surfacing, filling, cracks, bonding, aggregates, stabilising soil for use as adhesives; 2. are not meant for use as paint or varnish or for manufacture of paints and varnish; 3. do not contain any added pigment or colouring ingredient or oil or natural or synthetic resinous materials or resin

forming materials.

Since the Noticee did not file any such declaration before removal of such products from their factory, the conditions have not been fulfilled, the benefit of the Notification cannot be allowed to the Notice 22. As regards their claim that the benefit of Notification No. 23/89 dated 1.3.89 is applicable to PCM, I find that the said Notification fully exempts goods of Chapter 27 if they are used for the manufacture of other goods or as well as fuel for the manufacture of such goods. In the instant case, I find that though the noticee has claimed that most of the PCM is used as fuel in the factory, they have not produced any evidence regarding the exact quantity used during the said period.

Therefore, in absence of such evidence I am unable to accept their plea.

23. Now, coming to the Noticee's plea that there has not been any mis-statement or concealment of facts, therefore, the extended period of limitation cannot be invoked. They argued that the process of manufacture was clarified as early as in 1984, therefore, the Deptt.

had full knowledge of the same.

24. From the evidence on record, I find that the Asstt. Collector, Bhilai vide his letter No. IV/16/30-I/83A/Val/Pt.-I/7317 dated 3.7.84 had requested the Noticee to examine the manufacturing process of coal-tar pitch.

In reply to which the noticee vide their letter No.EM/(F)/SAS/EX/84/2111. Bhilai dated 10.11.84 replied that "the distillation of coal tar at Bhilai Steel Plant is done in such a way that continuous fluxing of pitch and oil is going on in the distillation column. The quality of pitch is controlled in such a way that a fair percentage of oil remains in the pitch and further, depending upon the quality of pitch oil in the distillation range of 0-300<sup>o</sup>C is -1-2% oil in the distillation range 300-380<sup>o</sup>C is maintained from 3-8%. In addition, oil in the boiling range higher than 360<sup>o</sup>C also remains in pitch. As such our pitch is not straight run pitch as produced in batch distillation stills but is a mixture of pitch and coal tar oils prepared in a controlled condition and falls under the category of partially distilled Tars falling under Tariff

items 11(5).

24.1. I find that on the basis of the above declaration of the noticee, the products pitch, PCM and Road Tar were approved under the erstwhile Tariff item No. 11 (5) and thereafter from 1.3.86 under chapter sub-heading No. 2708.11 & 2706.00 respectively.

24.2. In view of the foregoing discussion and conclusions regarding the correct classification of Pitch, PCM and Road Tar, I find the declaration of the noticee dated 10.11.84 supra as false, misleading and clearly amounting to suppression of the facts. I also find that based on such false declaration and also on the basis of wrong description of the goods on the body of the C.Ls., Pitch PCM and Road Tar were approved by the Asstt. Collector. However, it was only on the visit of the Preventive team on 12th/13th-10.90 to the factory as it was revealed that no mixing/blending of creosote oil or other tar distillates was done during the manufacture of pitch whereas PCM and Road Tar were being manufactured by mixing Pitch with creosote oil.

(b) On no estoppel to reopen approved classification list and power to do so he relied upon Elson Machine (P) Ltd. and .

(c) On the invoking of extended period under Section 11A(1) proviso, he concluded that since it is proved beyond doubt that the noticee had misdeclared their products which resulted in misclassification and evasion" the extended period was applicable and relied on 1983 (14) ELT 408, , , 1984 (18) ELT 612 and the following observation in para 26: 26. Regarding the noticee's claim that their classification lists approved upto 28.2.89 cannot be re-opened, I find that the noticee has misdeclared the products; Pitch, PCM and Road Tar, which resulted in misclassification of the same. Being a RBC Unit of the declaration on record. I, therefore find that the approved classification lists can be reopened by the deptt., when new facts came to the notice of the Deptt. Elson Machine (P) Ltd. v. CCE 1988 (38) 571 (SC) have held that: Estopped--Classification List--Excise authorities not estopped from taking a view different than in the approved C.L.--No estopped against law. Rule 173B of the C.Ex. Rules, 1944 and Section 11A of the C. Ex. Act. 1944 1. Classification list--approved Deptt. not estopped from taking a

different view. Rule 17B of C. Ex. Rules 1944 1992 (58) ELT 508 (Cal) 2. Classification List--approved--Excise authorities not being estopped from taking a different view 3. Classification List--Estopped--Excise authorities not estopped from taking a view different from that in approved classification list--No estopped against law--Rule 173B of C. Ex. Rules 4. Change in approved classification List permissible--Excise authorities not estopped from taking a view different than in the approved classification list (d) No specific reasons have been arrived at for imposition of the penalty by the Collector in the impugned order.

I. FOR THAT, it would be borne out from the records that the appellant declared in its Classification Lists correct description of the product PCM, Road Tar and Pitch claimed classification as shown in the Classification List as at Annexure A to the best of its judgment based on the manufacturing process.

II. FOR THAT, the particulars required to be furnished to the authority approving the Classification Lists have all been furnished and met the queries made besides the processes adopted and still being adopted for the manufacture of impugned products which were also made known to the approving authority long before the material period and as such there was no reason to allege that there was any misrepresentation and misstatement of facts/mis-declaration of the products and/or suppression of any material facts.

III. FOR THAT, there is no dispute that the proper authority approved the classification lists after due enquiry, examination, investigation and verification and that the appellant cleared its impugned product on determination and payment of duty due on the basis of the approved classification on list and that every month as required under the law, the appellant furnished monthly Return in RT 12 submitting relevant documents required under the law which have been assessed by the proper officer after due scrutiny, examination and verification. It attained the status of established practice from March 1986 in terms of the Central Excise Tariff Act, 1985 and prior to this under T.I. 11A. IV. FOR THAT, the impugned purported Notice to Show Cause issued by the Learned Collector on 7.12.90 purportedly demanding alleged differential duty pertain to the period from March 1986 to September 1990 on the purported allegation of misdeclaration and suppression of

facts which according to the notice the noticee mislead (sic) the authority approving the Classification List.

V. FOR THAT, the learned Collector issued the Notice calling upon the appellant to Show Cause as to why alleged differential duty should not be recovered from it purportedly under Rule 9(2) of the Rules read with Section 11A of the Act applying the extended period of time limit but did not call for any explanation as to why the classification already approved should not be revised and approved differently attracting higher rate of duty on the basis of which the purported demand of alleged differential duty has been raised. The Collector has thus reopened the assessments already completed without following the process of law.

VI. FOR THAT, it is established law that once classification Lists are approved, allegations as to mis-statement and/or suppression of facts, is not at all sustainable and further, once it is approved by an Order that order is revisable no doubt, but in accordance with the due process of law, otherwise it would defeat the very purpose of Section 35E of the Act.

VII. FOR THAT, the Learned Collector, maker of the Notice made futile attempt to establish misdeclaration which according to law is not at all tenable after admitting the fact of approval accorded by the competent authority on the classification in terms of Rule 173 B(2) of the Rules.

VIII. FOR THAT, again assuming but not admitting that the impugned products would be liable to be classified as has been done by the Collector pursuant to the purported Noticee without direction to that effect such classification for the purpose of assessment should have effect prospectively i.e.. from the date of Notice to Show Cause for revision of the Classification List and for that matter demand for the past period is not at all recoverable.

IX. FOR THAT, from the foregoing clauses, it would be very much suggestive that the impugned purported demand is time barred and the Learned Commissioner confirmed time barred demand which is not maintainable as a time barred demand is not legally recoverable nor payable, liable to fall through when the allegation of misdeclaration, misstatement and suppression of facts, remain unestablished,

legally and factually. The learned Commissioner has utterly failed or neglected to establish that the appellant, a Government of India Undertaking, by reason of any fraud, collusion or wilful mis-statement or suppression of fact with intent to evade payment of duty has claimed wrong classification. Therefore, the appellant submits that the proviso to Section 11A(1) of the Act cannot be applied to invoke longer period. Once the longer period is not invocable the Show Cause Notice becomes without jurisdiction and hence not enforceable.

(X) FOR THAT, it is pertinent that the mode of assessment if required to be changed that change in mode of assessment adopted by Excise should be prospective and not retrospective. It is never the contention of the appellant before the Learned Commissioner that if there by any wrong classification that would continue in perpetuity but what was contended by the appellant before the Learned Commissioner in that such revision and/or modification ought to have been done following the procedure established by law and that effect the Apex Court in several cases one of such case is Collector of Customs and Anr. v. Oriental Timber Industries (XI) FOR THAT, the preliminary ground on the point of law, the impugned purported order is not sustainable and as such for deciding this appeal which is simply restricted in the purported demand of alleged differential duty, the purported revision of classification wrongly done without any authority of law is not rational and thereafter deserves to be set aside on this ground alone.

(XII) FOR THAT, S.A.I.L. produces Tars in its Durgapur Steel Plant (DSP), Rourkela Steel Plant (RSP), and Bokaro Steel Plant (BSP) as by-products, proceedings were initiated in the matter of classification of Tars in different form in RSP and BSP The Collector, Central Excise (Appeals), Calcutta in its Order-in-Appeal No. 65/BBSR/93 dated 12.10.90 wherein he has directed that all Tars Viz., Crude Tar, Road Tar and special Tar should be classified under 2706.00 and Pitch all sorts are classifiable under 2708.11.

(XIII) FOR THAT, the impugned purported Order appealed against is liable to be quashed, vacating the purported demand of alleged differential duty which has been raised by a Notice dated 7.12.90 pertaining to the period from March 1986 to

September 1990, applying the extended period of time which in the facts and circumstances is not at all applicable. It is, therefore, contendable the impugned purported demand fails through, being barred by limitation, other grounds apart.

(XIV) FOR THAT, penalty is not imposable in the facts and circumstances of the case particularly keeping in view the fact that the appellant removed impugned goods on payment of duty in terms of the approved C.L. over a period of 4 years. A Govt. of India Undertaking cannot have any intention to evade payment of duty.

Penalty of Rs. 30,00,000.00 has been imposed under Rule 9(2) and Rule 173Q of the Rules, where the goods have been cleared in terms of approved Classification List, the provisions of Rule 9(2) is not invocable. The appellant having not violated the provisions of Sub-Rule 173Q(1), penalty is not imposable under Rule 173Q(2).

Penalty imposed on the appellant is not proper in the facts and circumstances of the issue and therefore deserves to be set aside.

(XV) FOR THAT, thus, impugned purported order appealed against in whatever is looked into, is not at all sustainable liable to be quashed and/or set aside.

5. We have heard both sides after considering the written and oral submissions made and the material on record we find: (a) As regards the classification of Pitch, obtained by 'fluxing back' as in this case by distillation of Tar is required to be classified. The heading read as: 2708 Pitch and Pitch cake obtained from coal tar or from other mineral tar.

2708.11 Pitch obtained by blending with Creosote oil or other coal tar distillate.

Therefore, to upset the claimed and approved classification under heading 2708.11 and place it in the residual heading of 2708.19 all that is required by the Revenue is to bring material on record that the entity under consideration was not 'obtained by blending with Creosote Oil or other Coal tar distillates' to rule out classification under 2708.11 and thereafter it shall have to be classified under residuary omnibus item 2708.19 of other Pitch obtained from coal tar. Since it is nobody's case that it is not obtained from Coal tar. Therefore, examining the process of manufacture adapted, which is termed and accepted it is to be

determined whether 'fluxing' would be 'blending' as envisaged under heading 2708.11. The adjudicator has relied upon the dictionary meaning of the words 'fluxing' and 'blending' and the test report dated 8.8.93, which states that the sample is mainly composed of Pitch, but does not state that whether or not it contains 'Creosote'. He has also relied on silence of the appellants as no comments were offered on chemical examiners report dated 18.8.93. It was thereafter concluded that 'it is accepted that the tar oils which drip back into the Pitch, remain in the material covered by distillation in the Pitch" therefore he confirmed the classification under 2708.19. The Commissioner has disregarded the understanding of the process of fluxing given by Chief Chemist and accepted by Board vide Circular No. 88/1/83-CX 3 dated 9.4.1984 wherein it was prescribed.

The matter was further examined in consultation with the Chief Chemist. The Chief Chemist observed that, for Coltrar Pitch, there is an I.S.I. Specification (I.S. 216-1981) according to which Coltar Pitch is classified into four grades viz. Soft Pitch (Softening Point 45<sup>o</sup> to 55<sup>o</sup>C), Soft Medium Pitch (Softening Point 58<sup>o</sup> to 68<sup>o</sup>C), Hard Medium Pitch (Softening Point 70<sup>o</sup>C to 80C) and Hard Pitch (Softening Point 82<sup>o</sup>C). The above Specification stipulates that the material is obtained either (a) as residue of the direct distillation of Crude Tar by the high temperature carbonisation of coal in coke events or retorts, or (b) by fluxing back such pitch residue with high boiling coaltar distillates to give the products the desired softening point. If the distillation of Coaltar Residuals is continued to the desired point, then the residue is known as "straightrun Coaltar Pitch". On the other hand, if the distillation is carried to a point where the residue is harder and more infusible than desired and is thereupon fluxed to the desired consistency and fusing point, either with certain fractions of the distillates or a flux of different origin--usually of little value commercially or with other Tars, then the Pitch is known as "Cutback Coaltar Pitch", High boiling coaltar distillates include creosote oil, as well as anthracene oil etc. 'Fluxing back' is nothing but blending of pitch with either creosote oil, coaltar distillation products and anthracene oils etc. The statutory wordings of the Tariff Item 11(5) are such that Coaltar Pitch obtained by blending Pitch of higher consistency with either creosote oil or high boiling tar distillate would fall under its purview. Item 68 of CET is a residuary Item.

Therefore, only such Coaltar Pitches, as are obtained without blending or fluxing with creosote oil or with other coaltar distillation products (Straight-run Coaltar Pitch) during the course of their manufacture, would be covered by Item 68 of CET, and those obtained by blending with creosote oil or other coaltar distillates could be covered by T.I. 11(5) of CET and Assistant Collectors letter dated 5.7.84, issued as a follow up to this instructions informing the appellants that the process 'fluxing back' amounts to 'blending' and Pitch is to be classified accordingly. No change in the manufacturing process had since taken place, nor had any authority senior to Chief Chemist and or Board had upset the above view. Therefore even if the Tariff has undergone a change, the process not changing and classification remaining dependent on blending, this clarification on fluxing would be binding on the department. Ignoring of the same, in this impugned order, exhibits a predetermined mind. Following this Boards classification, we would find 'fluxing' to be understood and covered by word 'blending' used in item 2708.11 and would classify the resultant Pitch accordingly.

(b) As regards classification of PCM and Road Tar from the details given in the manufacturing process, we find PCM to be Pitch obtained from distillation of coal to be mixed in ratio of 1:1 with creosote to get PCM and ratio of 80:20 to get road Tar. The reason given by Revenue that these products are obtained by blending and are therefore creosote under heading 2708.11 ignores the fact that they are not commercially understood as Pitch or even technically as pitch, since admittedly they are further down stream products from Pitch, which is obtained from distillation of coal. The Revenues argument, also ignores that 'reconstituted--Tars' would be covered under 2706 as the heading reads, irrespective of process of manufacture. Therefore, when commercially and technically it is no longer pitch and it cannot be covered under 2708 and it is 'reconstituted--Tar' and understood to be Road Tar, its classification under 2706 would be appropriate. To come to our finding we also rely on the HSN notes under 2806 and the decision in appellants own case by the S.C., in Supreme Court held PCM to be tar under erstwhile Tariff Heading 11(5) this would reaffirm the classification under heading 2706 as the product was always understood as Tar and irrespective of process of manufacture employed would be classified under 2706.

(c) We find that the Commissioner has relied upon Tribunal case, Indian Aluminum 1988 (38) ELT 560 and STP Ltd. which have been reversed by S.C. in STP case 1998 (97) ELT 16 (SC).

Therefore, the order of Commissioner cannot be upheld. (d) When we find that the issues of 'fluxing' to be 'blending', were within the knowledge of the department, and Asstt. Collector had directed and admitted the same, ignoring them, without any fresh material on record will not justify allegations of the grave nature, as are being made in this case to invoke the larger period of proviso to Section 11A(I). much less come to a conclusion of mis-statement as alleged and found in this case.

(e) When we find no misstatement or incorrect classifications, we find no reason to uphold the demands for duty and or penalty imposed.

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