

Collector of Central Excise Vs. G. Claridge and Co. Ltd.

Collector of Central Excise Vs. G. Claridge and Co. Ltd.

SooperKanoon Citation : sooperkanoon.com/5248

Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Oct-17-1989

Reported in : (1990)(25)ECC101

Appellant : Collector of Central Excise

Respondent : G. Claridge and Co. Ltd.

Judgement :

1. As these appeals involve inter alia a common issue regarding classification of the products manufactured by the appellants, these have been heard together and are being disposed of by this common order.

2. In appeals No. E/1883/85-C and E/2031/85-C, the facts are that the respondents were manufacturing "(i) egg filler flats, (ii) egg cartons, (iii) tube light packing trays, (iv) duck egg trays and (v) apple trays". They filed a classification list for the above goods effective from 1-4-1981 classifying the products under Item 68 of the Central Excise Tariff. The classification list was approved by the Range Superintendent on 20-5-1981 and the respondents paid duty at the appropriate prevailing rate under Item 68. After the budgetary changes from 28-2-1982/1-3-1982, the respondents filed a revised classification list effective from 1-3-1982 for the aforesaid five products claiming classification under Tariff Item 17(4) as "articles of paper packing containers" and claiming full exemption from Central Excise duty under Notification No. 66/82-C.E., dated 28-2-1982. This classification list was approved by the Assistant Collector of Central Excise, Pune Division on 11-3-1982. Subsequently, the Range Superintendent of Central Excise directed

the respondents to file supplementary classification list for "pulp" manufactured by them in their factory, but they did not comply with the direction on the ground that they did not manufacture "pulp". Range Superintendent re-examined the classification of those five products and he felt that those did not merit classification under Item 17(4), but under Item 68 of the Tariff.

He asked the respondents to furnish information regarding production and sales value of the "pulp" and other five products for the period from 1-3-1982 to 31-12-1983, but they did not furnish the data. Then the Range Superintendent issued a show cause notice on 4-5-1984 demanding duty of Rs. 24,84,104.22 vide his letter BFR/DD/G.Claridge/83/545 under proviso to Section 11A(1) of the Central Excises and Salt Act. The respondents were also charged for contravention of Rule 173B of the Central Excise Rules for mis-classification and wrongful availment of exemption under Notification No. 66/82-C.E., dated 28-2-1982. After considering the reply to show cause notice and a note on the manufacturing process submitted by the respondents and after giving them personal hearing, the Assistant Collector of Central Excise, Pune Division V adjudicated the case. The process of manufacture of the respondents' products, as discussed in the order-in-original No. V(17)(4)15-35/TA/84/562, dated 28-1-1985 read with the impugned order-in-appeal dated 30-4-1985, is that waste paper is mixed with water and chemicals and disintegrated in hydriapulper to the required consistency and then passed through high density cleaner and deflaker to clean and deflake the disintegrated "furnish". This "furnish" or slurry in the liquid form is fed into moulds from where the moulded products are released on to a carrier which makes them pass through a dryer for the purpose of drying. After drying, the goods are ready for use. The Assistant Collector has held that this slurry or furnish is "pulp" in liquid form and is dutiable under Central Excise Tariff Item 68. He has also held that after the waste paper is converted into slurry, the paper loses its identity and thereafter paper falling under Item 17 of the Tariff does not come into existence. Egg tray is manufactured directly from the slurry (i.e.

liquid pulp), and hence the egg tray is an article of pulp falling under Tariff Item 68 and not an article of paper under Item 17(4). He has, therefore, disallowed the exemption under Notification No.66/82-C.E. He has, however, held that there was

no wilful mis-statement on the part of the respondents and he confined the demand for duty for six months prior to issue of the show cause notice, i.e. from 4-11-1983. He has also directed the respondents to file revised classification list with effect from 4-11-1983 for all types of egg trays. On appeal filed by the respondents, the Collector of Central Excise (Appeals), Bombay set aside the order-in-original of the Assistant Collector. Collector (Appeals) has held that slurry cannot be regarded as pulp and it is not dutiable under Item 68 of the Tariff. He has also held that the five final products of the respondents are packing containers and are classifiable under Item 17(4) of Central Excise Tariff as articles of paper and paper board and are fully exempted under Notification No. 66/82-C.E., dated 28-2-1982. The order-in-appeal of the Collector (Appeals) has been challenged by the Revenue by filing the present appeals before this Tribunal.

3. In appeal No. E/1468/88-C, the facts are that the respondents filed classification list No. 61/86 effective from 3-7-1986 in respect of their products "(i) egg containers, sizes 15 1/2 and 17, (ii) retail egg containers, (iii) tube light packing containers, (iv) duck egg containers and (v) apple containers" at "nil" rate of duty under Tariff Heading 4818.19 consequent on the changes effected by the Central Excise Tariff Act, 1985. The above Classification List was approved by the proper officer provisionally on 9-10-1986. After going through the process of manufacture of the products, a show cause notice was issued to the respondents on 16-10-1986 proposing to classify the goods under Heading 4818.90 at the rate of 12% ad valorem. After considering the reply to show cause notice and giving necessary personal hearing the Assistant Collector of Central Excise held that the products were not containers, but were articles of pulp and finally classified the goods under Heading 4818.90 vide his order-in-original No. VGN(30) 18/VC/86/3010, dated 1-5-1987. The respondents herein were aggrieved by the decision of the Assistant Collector and filed appeal before the Collector of Central Excise (Appeals), who set aside the Assistant Collector's order and classified the impugned products under Heading No. 4818.19. Hence, this appeal of the Revenue before this Tribunal.

4. In Appeal No. E/1986/88-C, the facts are that in respect of the five products mentioned in paragraph-3 above, the respondents obtained L-4 licence on 4-7-

1986 under protest and paid central excise duty under protest under Heading 4818.90 from 17-7-1986 onwards. During the period from 28-2-1986 to 16-7-1986, they cleared those goods without payment of duty and without following the proper central excise procedure. The Range Superintendent of Central Excise issued a show cause notice to the respondents on 18-8-1986 alleging contravention of the provisions of Rules 9, 52A, 173G and 174 of the Central Excise Rules, 1944 and demanding central excise duty of Rs. 8,74,504.80 calculating duty at the rate of 12% ad valorem under Heading 4818.90 for the period from 28-2-1986 to 16-7-1986. In his order-in-original No.V(48)15-69/TA/86/2995, dated 1-5-1987 the Assistant Collector confirmed the above demand for . duty. This order was challenged by the respondents before Collector (Appeals) by filing an appeal. By the impugned order-in-appeal No. AMP-323/PN-178/88, dated 9-6-1988 the Collector (Appeals) set aside the order of the Assistant Collector and allowed the appeal. By the present appeal before this Tribunal the Collector of Central Excise, Pune has challenged the order of Collector (Appeals).

5. In his opening arguments before us Shri Sunder Rajan, for the Revenue, has stated that Appeals No. E/1883/83-C and E/2031/85-C relate to the old Central Excise Tariff as in force prior to 1-3-1986 and the order two appeals bearing Nos. E/1468/88-C and E/1986/88-C relate to New Central Excise Tariff introduced from 1-3-1986. The periods covered by these appeals are from 1982 to 28-2-1986 and from 1-3-1986 to 1987 respectively. He has argued that these cases are fully covered in favour of Revenue by this Tribunal's decision in Mohan Paper Moulding Ltd. v. Collector of Central Excise, Chandigarh, reported in 1988 (36) E.L.T. 161 (Tribunal). It was held by the Tribunal in that case that egg tray fell under Item 68 of the old Central Excise Tariff and Heading 4818.90 under the new Tariff as against the assessee's claim for classification under Tariff Item 17(4) and 4818.19 respectively. He has also stated that in the first two cases, the plea of limitation was raised before Collector (Appeals), but he did not give any findings on limitation. If these appeals are decided in favour of Revenue, then these should be remanded to the lower authorities to decide the question of limitation.

6. For the respondents, the gists of the arguments of Shri Lodha are as follows:- (i) The decision of the Tribunal in Mohan Paper Mouldings case is applicable if the

egg containers, apple containers etc. are made directly from pulp. In the present case these are manufactured from waste paper. The above decision is not applicable as the articles would be articles of paper. During the process of manufacture of the products of the respondents pulp as known in the trade does not come into existence. For the meaning of pulp, he has filed extract from the glossary of Terms used in Paper Trade & Industry (IS : 4661-1986). He has also drawn our attention to the copy of affidavit of Shri Dadasahib Nadat, Director, Hand Made Paper Institute, which is at pages 87 to 89 of the paper-book filed by the respondents. It has been argued that if the starting raw-material is paper, as in the present case, the product will be article of paper. What is relevant is the raw-material and not the intermediate stage of the process. In support of this argument, Shri Lodha has relied on the following judgments:- (a) 1987 (32) E.L.T. 541 (Raj.) in the case of Union of India v. Raish Plastic and Others.

(b) 1981 E.L.T. 653 (Guj.) in the case of/a/a/ Plastic Industries and Others v. Union of India and Others.

(c) 1983 E.L.T. 1827 (Tribunal) in the case of Shellya Industries, Bangalore v. Collector of Central Excise, Bangalore.

In 1981 E.L.T. 653 (Guj.), the Hon'ble Gujarat High Court held that articles made of plastics meant articles for the manufacture of which plastic material had been used as a raw material and it did not suggest a non-plastic raw material which had undergone polymerisation process in the course of manufacturing process. In paragraph 10 of the judgment reported in 1987 (32) E.L.T. 541, Rajasthan High Court has quoted the above findings of Gujarat High Court and has held a similar view. In the decision reported in 1983 E.L.T. 1827 (Tribunal) this Tribunal has expressed the view that HDPE woven sacks is an article made of high density polythelene which is a plastic material. As per popular meaning it is an article made of plastic and hence satisfies the judicial test of "articles made of plastics". Since Item 15A(2) is more specific to cover HDPE sacks, they cannot be consigned to the residuary Item 68.

(ii) The respondent's slurry which is an intermediate stage in the process of manufacture of their egg tray, apple tray etc. is not pulp. It is unstable and is not

marketable. Hence, it is not goods according to the ratio laid down in the following judgments:-Union Carbide India Ltd. v. Union of India and OthersGeep Industrial Syndicate Ltd. v. Central Government and Others (c) 1988 (33) E.L.T. 117 (Tribunal) in the case of Ambalal Sarabhai Enterprises (P) Ltd. v. Collector of Central Excise, Baroda.

In 1986 (24) E.L.T. 169 (S.C.) the Hon'ble Supreme Court held that in order to attract excise duty, the manufactured product must be capable of sale to a customer. To become "goods", an article must be something which can ordinarily come to the market to be brought and sold. In 1987 (31) E.L.T. 865 (S.C.) the Hon'ble Supreme Court has held that the goods not capable of being bought and sold are not liable to duty. In the case reported in 1988 (33) E.L.T. 117, this Tribunal held that "starch hydrolysate" produced as an intermediate product by complete hydrolysis of starch was not an excisable commodity in the sense of goods known in the market. The respondents' intermediate product slurry is, therefore, not excisable as this is not marketable.

(iii) As the goods manufactured by the respondents are articles of paper and they are containers, they are specifically covered by Item 17(4) of the old Central Excise Tariff operative prior to 1-3-1986 and the products cannot be classified under the residuary Item 68 in terms of the ratio laid down in the Supreme Court judgment reported in 1983 (13) E.L.T. 1566 (S.C.) (Dunlop India Ltd. and Madras Rubber Factory Ltd. v. Union of India and Others) under the new Central Excise Tariff effective from 1-3-1986, the impugned goods are classifiable under Heading 4818.19 and not 4818.90 as these are not made from pulp.

(iv) The respondents' classification list effective from 28-2-1982 was approved by the Assistant Collector on 11-3-1982 under Tariff Item 17(4) read with Notification No. 66/82-C.E., dated 28-2-1988.

No appeal was filed under Section 35E of the Central Excises and Salt Act, 1944 against the approval of that classification list. It became final. The classification list once approved could not be reviewed by the same officer or his successor. The power of review cannot be exercised unless it is specifically provided. In support of these arguments, the following judgments have been relied upon:-Harbhajan

Singh v. Karam Singh and Others; Patil Narshi Thakershi and others v. Pradyumansinghji Arjunsinghji; Madras Rubber Factory Ltd. v. Assistant Collector of Central Excise, Madras and (d) 1983 E.L.T. 34 (Mad.) in the case of Indian Organic Chemicals Ltd. v. Union of India and others; Ajanta Iron and Steel Company Pvt. Ltd. v. Union of India and others; Mahindra Re-Rolls Industries and Another v. Union of India and others (g) 1985 (21) E.L.T. 182 (Tribunal) in the case of Collector of Central Excise, Bangalore v. Guest Keen Williams Limited.

(v) The classification list referred to in sub-para (iv) above was modified by the Assistant Collector without giving a show cause notice to the respondents. The show cause notice-cum-demand notice dated 4-5-1984 did not propose to change the classification. The show cause notice dated 4-5-1984 proposed to recover duty for the period from 1-4-1982 to 31-12-1983. This show cause notice was time-barred and it was without jurisdiction. The demand for duty was on ad hoc basis and not on actual basis. Show cause notice to change the classification was issued on 24-11-1984. In the case of Union of India and Others v. Madhumilan Syntex Pvt. Ltd., reported in 1988 (35) E.L.T. 349 (S.C.) the Hon'ble Supreme Court observed that the show cause notice merely asked the assessee to show cause against calculations or determination of the amount of short-levy and not against the alteration in the classification list on the basis of which short levy was alleged for the period from 15-8-1983 to 6-2-1984. The Hon'ble Supreme Court held in that case that the notice could not be regarded as a show cause notice against the modification of the classification list in respect of the aforesaid period, and the show cause notice was bad in law and of no effect.

The respondents' case is squarely covered by this judgment of the Supreme Court.

(vi) In exceptional circumstances, like change in the manufacturing process, change of law etc., modification of classification is permissible after issuing necessary notice to the assessee and after considering his viewpoint. No such circumstances arose for changing the approved classification list effective from 1-3-1982. No show cause notice was also issued before revising the said classification. Onus of correct classification lies on the Department. Reliance is

placed on the following judgments:- (a) 1979 (4) E.L.T. (J 543) (Bom.) Sanghvi Non-Ferrous Metal Industries v. Union of India & Others.

(b) 1980 (6) E.L.T. 268 (Bom.) Colgate Palmolive (India) Ltd. v. Union of India and Others.

(c) 1980 (6) E.L.T. 249 (Bom.) Garware Nylons Ltd. v. Union of India & Others.

(d) 1980 (6) E.L.T. 696 (Bom.) Sandoz India Ltd. v. Union of India & Others.

(e) 1981 (8) E.L.T. 432 (Bom.) Advani-Oerlikon Ltd. & Another v. Union of India and Others.

(f) 1981 (8) E.L.T. 913 (Bom.) Navin Chimanlal Sutaria v. Union of India & Others.

(g) 1982 (10) E.L.T. 445 (Bom,) Swan Mills Ltd. and Another v. Union of India & Others.

(h) 1983 (14) E.L.T. 1685 (Ker.) Heveacrub Rubber (P) Ltd. v. Supdt. of Central Excise.(C.E.G.A.T.) Mysore Industrial Plastic Corporation v. Collector of Customs, Madras.(Tribunal) Indian Tool Manufacturers Ltd., Nasik v. Collector of Central Excise, Pune.(Tribunal) Indian Petrochemicals Corporation Ltd. v. Collector of Central Excise, Baroda.(Tribunal) Larsen & Toubro Ltd. v. Collector of Customs, Bombay.(Tribunal) Hindustan Lever Ltd., Bombay v. Collector of Central Excise, Bombay.

(n) 1985 (21) E.L.T. 663 (Bom.) Bombay Paints and Allied Products Ltd. v. Union of India and Others.(Tribunal) Bakelite Hylam Ltd., Bombay and Another v. Collector of Customs, Bombay & Another.

7. In his reply to the arguments of Shri Lodha, Shri Sunder Rajan has stated that broke and waste paper are raw materials for the manufacture of paper. Paper is made by the process of "forming" whereas the egg tray is manufactured by the process of moulding. The process of moulding is unknown in the paper industry. The paper mills manufacture pulp in wet form and not in sheets. Waste paper and brokes are both converted into wet pulp in the process of manufacture of paper. On merits, the Tribunal's decision in Mohan Paper Mouldings' case fully covers the

present case. He has also argued that after participating in the proceedings before the lower authorities the respondents cannot now say that the show cause notice was void. He has argued that after the classification list was approved, demand for duty can be raised by invoking Section 11A of the Central Excises and Salt Act. In support of this argument he has relied on the latest judgment of the Supreme Court in the case of Elson Machines Pvt. Ltd. v. Collector of Central Excise, reported in 1988 (38) E.L.T. 571 (S.C.) and on Calcutta High Court's judgment reported in 1988 (34) E.L.T. 473 (Cal.) in the case of Indian Tobacco Co. He has also relied on the Tribunal's decision reported in 1988 (36) E.L.T. 346 (Tribunal) in the case of Sudhakar Litho Press.

On the point of limitation, Shri Sunder Rajan has stated that the Tribunal should not go into the point of limitation and remand the question of limitation to the lower authority. He has stated that the show cause notice dated 4-5-1984 was for change of classification and demand for duty. This argument has been challenged by Shri Lodha stating that a show cause notice for change of classification was issued on 24-11-1984; so, the show cause notice dated 4-5-1984 was not for re-classification. Shri Sunder Rajan has, however, conceded that the demand for duty on slurry is not sustainable.

8. We have considered the records of the case and the arguments of Shri Lodha and Shri Sunder Rajan. Shri Lodha has argued on a few propositions. The respondents' final products, whose classification is under dispute, are "egg filler flats, egg cartons, tube light packing trays, duck egg trays, apple trays, egg containers, tube light containers, duck egg containers and apple containers". Shri Sunder Rajan has argued that the classification of egg tray was already decided by the Tribunal in the case of M/s. Mohan Paper Moulding Pvt.

Ltd. v. Collector of Central Excise, Chandigarh, reported in 1988 (36) E.L.T. 161 (Tribunal). It has been held by the Tribunal in the said case that neither paper nor paper board came into existence in the process of manufacture of egg tray and hence, it could not be said that egg tray was an article made of paper or paper board. It was/therefore, held by the Tribunal that egg tray was classifiable under Item 68 of the CET as it existed prior to 1-3-1986. So far as its classification under

the First Schedule to the Central Excise Tariff Act, 1985 effective from 1-3-1986 is concerned, the Tribunal held that sub-heading 4818.19 was a residue sub-heading of "cartons, boxes, containers and cases (including flattened or folded boxes and flattened or folded cartons), whether in assembled or unassembled condition". Egg tray was not covered by any of these articles and hence it was not covered by sub-heading 4818.19. The Tribunal held that the article fell under sub-heading 4818.90. Shri Sunder Rajan has argued that the classification of the aforesaid final products of the respondents is fully covered by the above decision of the Tribunal. The contention of Shri Lodha is that the Tribunal's decision mentioned supra is applicable only in cases where the starting raw-material is pulp. Since in the present case the starting raw material is waste paper, the aforesaid decision of the Tribunal is not applicable to the cases of the respondents. His contention, therefore, is that the respondent's final products were classifiable under Item 17 of the CET prior to 1-3-1986 as "other packing containers of paper" and from 1-3-1986 these are classifiable under Heading 4818.19 of the Central Excise Tariff Act, 1985.

9. During the period from 1-4-1982 to 28-2-1986, Item 17 of Central Excise Tariff read as follows:- Paper and paper board, all sorts (including paste-board, mill board, straw board, cardboard and corrugated board) and articles thereof specified below, in or in relation to the manufacture of which any process is ordinarily carried on with the aid of power - (1) Uncoated and coated printing and writing paper (other than poster paper) (2) Paper board and all other kinds of paper (including paper or paper boards which have been subjected to various treatments such as coating, impregnating, corrugation, creping and design printing), not elsewhere specified.

(a) All sorts of paper commonly known as Kraft paper, including paper and paper board of the type known as Kraft liner or corrugating medium, of a substance equal to or exceeding 65 gram per square metre in each case.

(3) Carbon and other copying papers (including duplicator stencils) and transfer papers, whether or not cut to size and whether or not put up in boxes.

(4) Boxes, cartons, bags and other packing containers (including flattened or folded cartons, whether or not printed and whether in assembled or unassembled conditions." "ITEM No. 17 - PAPER AND PAPER BOARD AS IT WAS IN FORCE DURING THE YEARS 1983-84,1984-85, and 1985-86 Paper and Paper Board, all sorts (including paste-board, mill board, strawboard, cardboard and corrugated board), and articles thereof specified below, in or in relation to the manufacture of which any process is ordinarily carried on with the aid of power - (1) Paper and paper board (including paper or paper boards, which have been subjected to various treatments such as coating, impregnating, corrugation, creping and design printing), not elsewhere specified.

(2) Carbon and other copying papers (including duplicator stencils) and transfer papers, whether or not cut to size and whether or not put up in boxes.

(3) Boxes, cartons, bags and other packing containers (including flattened or folded boxes and flattened or folded cartons), whether or not printed and whether in assembled or unassembled condition." New Central Excise Tariff under the Central Excise Tariff Act, 1985 was introduced w.e.f. 1-3-1986. Tariff Heading 48.18 and the sub-headings and sub-classifications thereof, as introduced from 1-3-1986, read as follows:- "48.18 Other articles of paper pulp, paper, paperboard, cellulose wadding or webs of cellulose fibres flattened or folded boxes and flattened or folded cartons), 4818.12 -- Printed cartons, boxes, containers and cases, made wholly out of paper or paper-board of heading No. or sub-heading No. 48.04, 4805.11, 4805.19, 4807.91, 4807.92, 4818.20 - Toilet tissues, handkerchiefs and cleansing tissues of paper 10. Under Item 17 of the erstwhile Central Excise Tariff, Paper and Paper Board, all sorts and "specified articles" thereof were classifiable. During the period from 1-3-1982 to 28-2-1983, specified articles of paper and paperboard, viz., "boxes, cartons, bags and other packing containers (including flattened or folded cartons) whether or not printed and whether in assembled or unassembled condition" were assessable to central excise duty under Item 17(4) of the Central Excise Tariff. During the period from 1-3-1983 to 28-2-1986, such articles of paper and paperboard were classifiable under Item 17(3) *ibid*. "Other packing containers" of paper were, therefore, classifiable under sub-item (4) & (3) respectively of Item 17 *ibid* during the

aforesaid periods. Shri Lodha has argued that the respondent's final products are "packing containers of paper" and therefore the same were covered by Tariff Item 17 prior to 1-3-1986. In support of his argument that these products are containers, he has relied on the definition of "container" given in IS : 4261-1967, Glossary of Packing Terms, Webster's New Collegiate Dictionary, 1975 and Chambers' 20th Century Dictionary. He has also relied on the circular No. A-3/2740/85, dated 15-7-1985 issued by the Office of the Commissioner of Commercial Taxes, Andhra Pradesh, Hyderabad and this Tribunal's decision reported in 1988 (37) E.L.T. 426 in the case of Ajay Electrical Industries Ltd. v. Collector of Central Excise. In Indian Standard, Glossary of Terms, IS : 4261-1967 "container" is defined as "any receptacle which holds, restrains or encloses any article or commodity or articles or commodities to be stored or transported". In Webster's New Collegiate Dictionary, 1975, "container" is described as "one that contains; a receptacle or flexible covering for shipment of goods". In the said dictionary 'receptacle' has been defined as "one that receives or contains something". In Chambers' 20th Century Dictionary the meaning of "container" has been given as "that which contains: that in which goods are enclosed for Transport". The meanings of the words "contain" and "enclose/enclosed" are given in the dictionaries relied on, in the following terms:- Contain : 1. to hold (Syn) 2. To comprise, to have in it 5. To enclose.

Enclose: Include (Syn) 1. to surround 2. to insert within a frame, case, envelope, receptacle or the like.

Contain: To keep within limits; hold back or hold down: restrain, control; check, halt.

11. The final product of the respondent, viz., egg tray, apple tray etc. did not satisfy the above definitions of "container" since it is not capable of holding, restraining or enclosing the contents when a single egg tray is reversed or turned upside down or tilted sideways vertically at 90 angle. The contents, viz., apples, eggs etc. will fall down if the trays or so-called containers are tilted sideways at 90 angle or reversed. We are, therefore, of the view that the products of the respondents are not containers. The learned advocate has relied on one circular

dated 15-7-1985 issued by Andhra Pradesh Sales Tax Authorities. This circular was issued in the context of classification under Entry No. 19 of the First Schedule to the Andhra Pradesh General Sales Tax Act, 1957. The classification made by the State Government Authorities for the purpose of Sales Tax under the Sales Tax Act is not applicable to the classification under the Central Excise Tariff. We are, therefore, unable to accept the classification given in that circular for the purpose of classification under the Central Excise Tariff. Shri Lodha has also relied on this Tribunal's decision, reported in 1988 (37) E.L.T. 426 (Tribunal), in the case of Ajay Electrical Industries Ltd. In the said case the classification of paper drums under Central Excise Tariff was in dispute. After consider the definition given in the Indian Standard, Glossary of Terms relating to paper and paper-based packing materials (IS : 4261-1967) and Indian Standard, Glossary of Terms relating to paper and flexible packaging (IS : 7186-1973), the Tribunal observed that the container cannot be said to come into existence after the contents are put in. It was not a carton before the bulb was put in because admittedly it was only a paper drum with both ends open. The Tribunal held that those drums were not cartons falling within the mischief of Item 17(3) of the CET. This decision of the Tribunal does not, therefore, support the contention that the respondents' products are containers.

Shri Lodha has contended that the respondents' final products are known as containers in the trade parlance and according to the ratio of the Supreme Court judgment reported in 1983 (13) E.L.T. 1566 (S.C.) = (Dunlop India Ltd. and Madras Rubber Factory Ltd. v. Union of India and Others), following the trade parlance their products should be classified under Item 17(4) of the erstwhile Central Excise Tariff prior to 1-3-1986 and under Tariff sub-heading 4818.19 w.e.f. 1-3-1986.

In the said judgment the Hon'ble Supreme Court held that the articles should be classified on the basis of popular sense and not in scientific and technical sense. In support of his argument on trade parlance, Shri Lodha has relied on the affidavits of Shri Dadasaheb, Director of Hand Made Paper Institute, Pune-5 (copy at pages 87 to 89 of the paper-book relating to Appeals No. E/1883/85-C and No.E/2031/85-C), Shri Vasant, Partner of M/s. Poshu Pakshi Aushadhalaya, Pune

(pages 90 & 91 of the paper-book), Shri Aspi, Wholesale Engineering Merchant of Pune and Member of National Egg Corporation (pages 92 and 93 of paper-book), Shri Chand Yasin Mulla, a Partner of M/s. Chand Yasin and Brothers engaged in the buying and selling of egg trays (pages 94 of the paper-book), Shri A. Latif Mohd. Yusuf Mulla, a partner of M/s. Latif & Brothers engaged in the business of buying and selling eggs, chickens, egg trays etc. (pages 95 and 96 of paper-book), Shri Naranjan Singh, Proprietor of M/s. S.P. Sales Corporation, a firm dealing in egg trays etc. (page 97 of the paper-book), Shri Ramphal, a partner of Delhi Egg Sales engaged in the business of buying and selling egg trays and other containers (page 98 of paper-book), Shri Pankaj Sahni of M/s. Engineering Traders, Delhi, dealing in egg and egg trays etc. (page 99 of paper-book) and Shri Ashok Kumar, Partner of M/s. New Egg Traders engaged in the business of buying and selling egg trays, apple trays etc. (page 100 of the paper-book) . In these affidavits, the products have been described as egg trays, apple trays, etc. and not as "paper containers" although it has been stated therein that these are regarded as paper containers in the trade. Even in the classification list the respondents have described the goods as "egg filler flats, egg packs, tube light trays, duck egg trays and apple trays etc.". This shows that these products are known in the trade by their own names, viz., egg trays, apple trays, etc. In the circumstances, we are not convinced by the statements made in the affidavits that these are regarded as paper containers. It is self-evident from the classification list and the affidavits that in the trade parlance these are known as egg trays, apple trays, etc. and not as "paper containers".

12. Therefore, since these products of the respondents are not "containers", classification under Item 17(4) during 1982-83 and Item 17(3) of the Central Excise Tariff during 1983-84 to 1985-86 is ruled out. In the result, the goods were correctly classifiable under Tariff Item 68 ibid during the aforesaid periods.

13. For the purpose of classification of the impugned products under the new Central Excise Tariff effective from 1-3-1986, we have given extract of Tariff Heading 48.18 with sub-headings and sub-classifications in paragraph-9 (supra). Heading 48.18 reads as "Other articles of paper pulp, paper, paperboard, cellulose wadding or webs of cellulose fibres". This heading is divided into three broad sub-

headings, viz., the following:- " - Cartons, boxes, containers and cases (including flattened or folded boxes and flattened or folded 4818.20 - Toilet tissues, handkerchiefs and cleansing tissues of paper 4818.12 -- Printed cartons, boxes, containers and cases, made wholly out of paper or paperboard of heading No. or sub-heading No. 48.04, 4805.11, 4805.19, 4807.91, 4807.92, 48.08 or 4811.10, It, therefore, follows that for the purpose of classification under sub-classification "4818.19 -- Other" a product must fall within the category of cartons, boxes, containers or cases. It is nobody's case that the impugned egg trays, apple trays, etc. are cartons, boxes or cases. The contention of the respondents is that these are "containers" of papers. We have already held supra that these articles are not "containers". Hence, they cannot come within the sub-classification below "containers". Accordingly, these products are not classifiable under sub-classification 4818.19 of the Central Excise Tariff Act, 1985. The learned counsel for the respondents has argued that the starting raw-materials in this case is waste paper and hence the final products, egg trays etc., are articles of paper falling within the Tariff Heading 48.18. His contention is that the "slurry" which is an intermediate stage in the process of manufacture should not govern the classification. In support of his argument he has cited two judgments of Gujarat and Rajasthan High Courts as stated in the paragraph 6(i) of this order. No contrary judgment has been cited before us. In the absence of any contrary judgments brought to our notice, we have to follow the ratio of those two judgments of High Courts. Then also the final products will fall under sub-heading "4818.90 - Other" of the Tariff Heading 48.18, which covers articles of paper and also of paper pulp.

Notification No. 66/82-C.E., dated 28-2-1982 issued under Rule 8(1) of the Central Excise Rules, 1944 exempts articles of paper or paperboard falling under sub-item (4) of Item 17 of the First Schedule to the Central Excises and Salt Act, 1944, except printed boxes and printed cartons, from the whole of Central Excise duty leviable thereon. Since we have already held that the products of the respondents are not classifiable under Item 17(4) of the First Schedule to the Central Excises and Salt Act, 1944, this exemption is not available to their products.

14. The next point of dispute relates to question of charging central excise duty on the "slurry" which is an intermediate stage in the process of manufacture of egg tray, apple tray etc. The contention of the respondents is that this 'slurry' is unstable and is not marketable and hence no excise duty is payable thereon. In support of this proposition, Shri Lodha has relied on three judgments, as cited in paragraph 6(ii) supra. Hon'ble Supreme Court has held that in order to become excisable the products must be marketable, i.e., capable of being bought and sold in the market. The Revenue has not produced any material to show that the respondent's slurry is marketable. On the other hand, during the hearing before us, the learned DR has conceded that the demand for duty on slurry is not sustainable. In the circumstances, respectfully following the judgement of the Hon'ble Supreme Court, we hold that the respondent's intermediate product "slurry" is not liable to central excise duty. The demand for duty on the slurry is, therefore, set aside.

(a) the respondents' classification list effective from 28-2-1982 under Tariff Item 17(4) read with Notification No. 66/82-C.E., which was approved by Assistant Collector on 11-3-1982, became final in the absence of any appeal filed by the Revenue under Section 35E of the Central Excises and Salt Act, 1944; (b) Assistant Collector modified the said classification list without issuing any show cause notice; (c) there was no exceptional circumstances like change in law, change in the manufacturing process etc. warranting the change of the classification; (d) there is no provision of law empowering the Assistant Collector to review his own order or the order of his predecessor; and (e) Assistant Collector's action was not permissible in view of the various judgements cited in sub-paragraphs (iv), (v) and (vi) of paragraph 6 of this order.

Shri Sunder Rajan has argued that the show cause notice No.BFR/DD/G.Claridge/B3/545, dated 4-5-1984 was for modification of the classification and also for recovering duty. We have perused the show cause notice and we observe that the said show cause notice did not propose to modify the classification, but it proposed to recover the duty indicated therein. By the said show cause notice the respondents were asked to explain why the central excise duty amounting to Rs. 24,84,104.22 short-paid during the period from 1-3-1982 to

31-12-1983 should not be recovered from them under proviso to Section 11A(1) of the Central Excises and Salt Act and why action should not be taken against them under Rule 173 of the Central Excise Rules, 1944. We also observe that a show cause notice for modifying the classification was issued by the Assistant Collector of Central Excise, Pune V Division, vide F.No. VGN(68) 99/VC/84/6675, dated 24-11-1984. In the relevant order-in-original No. F.No. V(17)(4)15-35/TA/84/562, dated 28-1-1985 the Assistant Collector of Central Excise, Pune V Division did not deal with this show cause notice dated 24-11-1984. By the said order-in-original he disposed of the show cause notice dated 4-5-1984 and he also decided that the products of the respondents were correctly classifiable under Tariff Item 68 of the CET. The respondents' contention that the approved classification was modified without issuing the show cause notice is, therefore, correct. In the case of *Union of India and Others v. Madhumilan Syntex Pvt. Ltd.*, decided on 3-5-1988 and reported in 1988 (35) E.L.T. 349 (S.C.), the Hon'ble Supreme Court in paragraph 6 of the judgement held that the show cause notice, which merely asked the assessee to show cause against calculation or determination of the amount of short-levy and not against the alteration in the classification on the basis of which short-levy was alleged, could not be regarded as a show cause notice against the modification of classification list. The facts being similar in the present case, this judgment of the Supreme Court is applicable to the show cause notice dated 4-5-1984.

16. Shri Lodha has argued that in the absence of any provision in law, the Assistant Collector of Central Excise had no power to review the approved classification list and in support of this argument he has relied on several judgments as listed in paragraph 6(iv) supra. In the judgments reported in AIR 1966 S.C. 641 and AIR 1970 S.C. 1273, the Hon'ble Supreme Court held that the power of review must be conferred by law either specifically or by implication and it is not an inherent power. In its judgements reported in 1981 (8) E.L.T. 565 (Mad.) and 1983 (12) E.L.T. 34 (Mad.), Hon'ble Madras High Court has held that Central Excise Act and the Rules do not confer any power on the Central Excise Officers to review their own orders, because it is settled law that there is no inherent power of review in an authority while acting judicially or quasijudicially unless the power of review is conferred expressly or by necessary implication by the provisions of a

statute.

In the judgment reported in 1986 (23) E.L.T. 318 (Del.), Hon'ble Delhi High Court has held that a classification list once approved, cannot be reviewed by the same or another Assistant Collector. Shri Sunder Rajan has argued that the judgments cited by the learned advocate stand superseded in view of paragraph 8 of the latest judgment of Supreme Court in the case of Elson Machines Pvt. Ltd. v. Collector of Central Excise (decided on 15-11-1988), reported in 1988 (38) E.L.T. 751 (S.C.) and that after the classification list was approved, demand for duty can be raised by invoking Section 11A of the Central Excises and Salt Act. Paragraph 8 of the said judgement of Supreme Court is reproduced below:- "8. The next submission on behalf of the appellants is that the classification lists had been approved earlier and the Excise Authority was estopped from taking a different view. Plainly there can be no estoppel against law. The claim raised before us is a claim based on the legal effect of a provision of law and, therefore, this contention must be rejected." He has also relied on Calcutta High Court judgment reported in 1988 (34) E.L.T. 473 (Cal.) in the case of I.T.C. Limited & Another v. Union of India & Another (decided on 24-12-1987), in which it was held that Sections 11A and 11B of the Central Excises and Salt Act are applicable even if no appeal is filed against approval of the classification list or price list and that the provisions for appeal under Sections 35A and 35EE of the Act do not over-ride Sections 11A and 11B *ibid*. In the case of Collector of Central Excise v. Sudhakar Litho Printers, 1988 (36) E.L.T. 346 (Tribunal), this Tribunal, following the judgment of Karnataka High Court in the case of Shyam Sunder U. Nichani v. Assistant Collector of Central Excise, Bangalore and Another [reported in 1986 (22) E.L.T. 751 (Karnataka)], has held that Section 11A of the Central Excises and Salt Act is not only recovery provision but it also enables the original authority to re-open the approved classification list and re-assess the goods. In the said judgment, Karnataka High Court considered the judgment of Supreme Court reported in 1985 (20) E.L.T. 212 (S.C.) in the case of D.R. Kohli and Others v. Atul Products Ltd. (decided on 12-2-1985) and in paragraph 24 of its judgment the Hon'ble High Court observed that "In D.R. Kohli's case, the Supreme Court was considering the scope of Rules 10 and 10A and observed that any error committed at the time of granting approval to the classification list can be corrected by invoking powers

under Rule 10A". In paragraph 16 of the judgment in D.R. Kohli's case, the Hon'ble Supreme Court observed as follows:- "We think that Rule 10 should be confined to cases where the demand is being made for a short-levy caused wholly by one of the reasons given in that rule so that an assessment has to be re-opened." In Sudhakar Litho Printers' case, this Tribunal considered two judgments of Delhi High Court, reported in 1981 (8) E.L.T. 328 (Delhi) and 1986 (23) E.L.T. 318 (Delhi), but preferred to follow the judgment of Karnataka High Court for the reasons stated in paragraphs 10 and 14 of the Tribunal decision. The judgment of Karnataka High Court was followed by this Tribunal in a number of cases including the case of M/s. Malwa Vanaspati and Chemical Co. Ltd. v. Collector of Central Excise, Indore, 17. The scope of Sections 11A and 11B vis-a-vis Sections 35A, 35E and 35EE of the Central Excises and Salt Act was discussed in great details by Calcutta High Court in paragraph 29 of its judgment [1988 (34) E.L.T. 473] in the case of I.T.C. Limited (supra). For facility of ready reference, we reproduce the said paragraph below:- "With regards to the next contention of Mr. Nariman about the scope and ambit to provision of Section 11A of the Central Excises and Salt Act, 1944 it appears to me that Section 11A of the said Act provides provision for recovery of duties not levied or not paid or short levied or short paid or erroneously refunded. It is evident that whenever the excise duty has not been levied or not paid or has been short levied or short paid, the power under Section 11A could be invoked, but before an order is passed, a show cause notice has to be issued, in other words, it is the requirement of law that only after giving a notice and hearing, a party who has not paid proper excise duty, can be made liable to pay the said duty. In this context, reference be made to the provision of Section 11B of the said Act, which provides claim for refund of duty and on plain reading of Section 11B of the said Act it appears that any person claiming refund of any duty of excise may make an application for refund of such duty before the expiry of six months. This power under Section 11B of the said Act is independent of the case when such refund is allowable as a result an order passed in appeal or revision under the Act. Mr. Nariman referred to the proviso to sub-section (3) of Section 35A of the said Act, wherein it was provided that where the Collector (Appeals) is of the opinion any duty of excise has not been levied or has been short levied or short paid etc., no order requiring the appellant to pay any duty not levied or not paid, short levied

or short paid etc., shall be passed unless the appellant is given a notice within the time limit specified in Section 11A to show cause against the proposed order.

This proviso to sub-section (3) of Section 35A of the said Act clearly indicates that it is independent of the provisions of Section 11A of the said Act and on plain reading of Sections 11A and proviso to Section 35E(3) of the said Act, it is clear that the submission of Mr. Nariman that Section 11A is a mere machinery section and cannot be exercised independently but can only be exercised in connection with an appeal or revision as provided in Section 35A or Section 35EE of the said Act is without any substance. Section 35A and 35EE of the said Act merely adopted the period of limitation prescribed under Section 11A of the said Act for the purpose of initiating a proceeding for realisation of duties not levied or short paid in connection with an appeal or revision.

Accordingly, in my view, on plain reading of Section 11A of the said Act, no other interpretation could be given. In this connection reference may be made to the observation of Lord Esher M.R. in the case of *R.v. City of London Court Judge* reported in 1842 (9M&W) 378 at 398 may be quoted, wherein it was observed that "if the words of an act are clear, you must follow them, even though they lead to manifest absurdity. The Court has nothing to do with the question whether the legislature has committed an absurdity. In my opinion, the rule has always been this if the words of an act admit of two interpretations, then they are not clear; and if one interpretation leads to an absurdity and the other does not, the Court will conclude that the legislature did not intend to lead to an absurdity, and will adopt to other interpretation." In my view, the interpretation sought to be given by Mr. Nariman in Section 11A is given that would produce a wholly unreasonable result and it is duty of the Court to construe a statute according to literal and grammatical meaning which it had expressed and that the words of enactment must prevail. Under the scheme of the said Act, Section 11A of the said Act was provided as a substantive provision and a complete code for realisation of excise duty in case of short levy or short payment and Section 11B of the said Act also provided the substantive and the machinery provision for refund of any excess excise duty paid which is also a complete code for the same.

Parliament introduced a simplified procedure for recovery of the excise duties not paid or short paid etc. and at the same time provided some procedure for the benefit of the assessee for getting refund of duty. The twin sections - Sections 11A and 11B were introduced in the interest of the revenue as well as the assessee and that, that is the reason why the legislature had not laid down any condition precedent and/or restriction in the matter of exercise of its powers under 11A or 11B of the said Act. In my view also the decision referred to by Mr. Nariman decided by the Tribunal reported in 1987 (29) E.L.T. page 933, had not correctly decided the law on the subject and I hold that the said Tribunal had not correctly interpreted the provision of Section 11B of the said Act, inasmuch as, such interpretation is on the face of it contrary to the plain meaning of the language used in the statute and that would be contrary for the purpose of which Section 11B was introduced and accordingly I am unable to persuade myself to accept the proposition laid down by the said Tribunal that unless the price list is set aside on appeal, the question of refund will not arise. Such an interpretation given by the Tribunal on the face of it is erroneous, in view of the fact that sub-section (3) of Section 11B provides cases where refund should be made as consequence of an order passed in appeal or revision. If the interpretation given by the Tribunal is accepted that would result a disastrous effect and that would made the provision of Section 11B(1) completely nugatory and unworkable. If such an interpretation given by the Tribunal is accepted, in that event also the provision of Section 11A should also be made completely nugatory and unworkable. In my view, the Tribunal's decision is wholly erroneous and contrary to the scope and object of the Act and cannot be sustained on any rules of interpretation. The said Tribunal sought to narrow down and abridge the scope and ambit of Section 11B of the said Act to defeat a claim for refund on a proposition which if accepted would produce a wholly unreasonable results. The Court's and Tribunal's duty is to apply rules of interpretation by which it should make sense of the enactment than by opening it to destructive analysis. The Tribunal's view, in my opinion would lead to destructive analysis. The provisions of Section 35A and Section 35EE neither override the provisions of Section 11A nor it could be said that Section 11A is a mere machinery provision which could not be invoked independently and/or the same could only be invoked in aid of the powers conferred in Section 35A and/or

Section 35EE of the said Act. The later Sections adopted by reference, only the period of limitation and nothing else. When the language of Section 11A is clear and the powers conferred in other provisions could be invoked only within the period of limitation mentioned in Section 11A of the said Act, makes it clear that the provision of Section 11A is an independent code and/or provision for the purpose of recovery of the excise duty short paid and short levied. In my view, if the interpretation as sought to be given by Mr. Nariman is to be given in Section 11A of the said Act, it would produce a wholly unreasonable result and would also defeat obvious intention of the legislature and further the Court has to do some violence to the words which, in my view, is not permissible. In this connection I may quote the observation of Lord Scarman of the House of Lords, in the case of *Duport Steels Ltd. v. Sirs and Others* reported in (1980) 1 All ER page 529 at 551, "But in the field of Statute law the judge must be obedient to the will of Parliament as expressed in its enactments. In this field Parliament makes and un-makes, the law, the judge's duty is to interpret and to apply the law, not to change it to meet the Judge's idea of what justice requires. Interpretation does, of course, imply in the interpreter a power of choice where differing constructions are possible. But our law requires the Judge to choose the construction which in his judgment best meets the legislative purpose of the enactment. If the result be unjust but inevitable, the Judge must say so and invite Parliament to reconsider its provision. But he must not deny the statute. Unpalatable statute law may not be dis-regarded or rejected, merely because it is unpalatable. Only if a just result can be achieved without violating the legislative purpose of the statute may the Judge select the construction which best suits his idea of what justice requires". In my view, when the language of Sections 11A, 35A and 35EE of the said Act are clear and when they are independent provisions, the scope and ambit of Section 11A cannot be curtailed. In my view, Section 11A provides a complete code and is an independent provision and any other interpretation would, in my view, narrow down, limit and/or abridge the scope and ambit of the provision of Section 11A of the said Act. If the provision of Section 11A has to be narrowed down defeating the obvious intention of the legislation, this would produce a wholly unreasonable result. In my view, the Court will not interpret a statute which would give rise to a destructive analysis. This is not a case where the provision of Section 11A is

capable of two alternative interpretation. Even interpreting a revenue statute, the Court should examine the substance and not merely the form of the language and should mould the taxing statute so far as possible to achieve the legislative intent and also to meet with the change of social needs. It is no longer the duty of the Court to interpret a statute strictly to help the evasion. Its duty is to construe in a manner which will suppress the evasion of tax or duty. In this particular case, the petitioner was admittedly enjoying a concession and/or exemption and the provision of notification giving concession and/or exemption should not be construed liberally in favour of the taxpayer defeating the purpose of the legislation. While interpreting the provision of law, the Court will try to ascertain the mischief which the statute intended to remedy from the whole of the enactment and the existing statute of law. The object of Section 11A was for recovery of duty short paid or short levied and in my view, the provision of Section 11A could not be interpreted in a manner which would defeat the very purpose and/or object for which the same is enacted. Accordingly, in my view, this contention of Mr. Nariman must be overruled. In my view, that within the scope and ambit of Section 11A of the said Act, the impugned show cause notice was issued rightly." Calcutta High Court did not accept this Tribunal's earlier view that unless the price list was set aside on appeal, the question of refund would not arise and accordingly held that the Tribunal did not decide the law on the subject correctly in its decision reported in 1987 (29) E.L.T. 933. The Hon'ble High Court also held that it could not be said that Section 11A is a mere machinery provision which could not be invoked independently and/or the same could only be invoked in aid of the powers conferred in Section 35A and/or Section 35EE of the Central Excises and Salt Act.

18. The law on this issue has been settled by the Supreme Court in its latest judgment dated 15-11-1988 reported in 1988 (38) E.L.T. 751 (S.C.) quoted in paragraph 16 (supra). In the present case, the show cause notice dated 4-5-1984 was issued under Section 11A of the Central Excises and Salt Act demanding duty and this notice was based on the legal effect of the correct interpretation of the Central Excise Tariff and the Notification No. 66/82-C.E. issued under Rule 8(1) of the Central Excise Rules. In view of this judgment of the Supreme Court, the Department cannot be estopped from correcting the mistake committed in the classification made earlier and from recovering the duty short levied, according to

the provisions of law. The Assistant Collector was competent to raise demand for duty under Section 11A. In the circumstances, we hold that the duty demanded by the Assistant Collector in his order-in-original dated 28-1-1985 is legally sustainable.

19. In our foregoing discussions we have held that under the erstwhile Central Excise Tariff as in force prior to 1-3-1986, the respondents' final products were classifiable under Item 68 of C.E.T. and not under Item 17(4) or 17(3), as the case may be, of the Tariff. Hence, the exemption under Notification No. 66/82-C.E., dated 28-2-1982 was not admissible for these goods. Duty demanded by the Assistant Collector in his order in-original dated 28-1-1985 for six months prior to the issue of show cause notice dated 4-5-1984, i.e. from 4-11-1983, is legally sustainable. In the show cause notice dated 4-5-1984 duty was proposed to be recovered with effect from 1-3-1982, invoking the proviso to Section 11A(1) of the Central Excises and Salt Act. The respondents contested the demand beyond six months on ground of limitation.

Collector (Appeals) has not given any findings regarding applicability of longer time limit under the said proviso as he decided the case in favour of the respondents. As we have decided the classification in favour of the Revenue, the case is remanded to Collector (Appeals) on the limited question of limitation which he should decide after giving necessary opportunity of personal hearing to the respondents. The Revenue's Appeals No. E/1883/85-C and E/2031/85-C are allowed subject to remand on this limited issue and the impugned orders are set aside.

20. We have held in paragraph 12 (supra) that under the new Tariff effective from 1-3-1986, the products are classifiable under Heading "4818.90 - Other". We, therefore, set aside the impugned orders-in-appeal and allow Appeals No. E/1468/88-C and E/1986/88-C in favour of Revenue.