

**C.C.E. and ors. Vs. Shell Paper Pvt. Ltd. and ors.**

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

**Decided On :** Nov-16-1990

**Reported in :** (1991)(34)LC337Tri(Delhi)

**Judge :** M T D.C., D Vasavada

**Appellant :** C.C.E. and ors.

**Respondent :** Shell Paper Pvt. Ltd. and ors.

**Judgement :**

1. In all these appeals, though facts may be slightly different, the issues to be decided are same. So, we have heard them together and dispose them of by this common order.

2. Appellants are paper mills manufacturing different types of papers wherein they have to prepare some types of aqueous solution for the purpose of sizing the paper. Sizing is for the purpose of making the paper water repellent and rosin is a material which is used for giving this effect. But, as stated by the appellants and not disputed by the Department, rosin comes in the form of lump and cannot be used as such, so emulsion has to be prepared by adding some other material and dissolving them in the water. Process, adopted for this purpose by all the appellants, is more or less the same. The process, as stated in the impugned order in para 8 in Appeal No. E/4015/89-C (M/s. Steadfast Paper Mills, Appellant), is that the product, in question is manufactured reacting caustic soda lye in water and then heating the same with rosin for 4 to 6 hours. In appeal memo of Appeal

No.E/401/89-C (Orient Paper Mills)(in para 3), the process is stated as under: The appellants mix soda ash and rosin and heat them with steam. The result out produce is cooked rosin. It is passed through strainer and the material so obtained is passed through emulsifier where it is mixed with the steam and water. The product at this stage is a clear rosin emulsion. It is not a solution because rosin does not dissolve in soda ash or water. This product is pumped through a meter to a tank and mixed with pulp and sent to paper machine for being used for sizing of paper. It is this rosin which serves as a sizing agent for paper along with other chemicals like alum.

3. In Appeal No. E/3307/89-C (Shree Datta Shetkari Sahakari Sakhar Karkhana Ltd.), in appeal memo at page 1, it has been stated as under: Paper mills prepare their own rosin sizing by mixing rosin in caustic lye as rosin is not soluble in water. A solution of water and caustic lye is boiled in tanks and pieces of rosin are added slowly and cooked for 3-4 hours and the said solution is further diluted and passed through storage tanks and after mixing with alum passed in the pulp slurry. This is a continuous process and the boiling solution so formed when mixed with pulp acts as a binding or sizing agent giving strength to the paper and leaving precipitates of rosin on the paper to acquire water repellent and ink resistant properties.

4. This would show that process adopted by all the appellants is the same (subject to some minor variations).

5. Central Excise Tariff was amended w.e.f. 1.3.1986 and relevant portion of which reads \_\_\_\_\_ as under: \_\_\_\_\_

No.	Sub-Heading	No.	Description	of	goods	Rate	of
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1.

2.

3.

4. MISCELLANEOUS PRO-DUCTS OF THE CHEMICAL OR ALLIED 3801.11 -  
Easter gums 15% 3801.12 -Run gums 40% 3801.19 -Other  
15%

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6. As a result of introduction of this Tariff Entry, notices were issued to almost all the paper mills in the country that the material that they were manufacturing, as described above, was 'sodium rosinate'-a compound of rosin and soda ash/caustic soda/lye and that intermediate product is an excisable product by the above Entry and that is why dutiable. In some show cause notices, it was described only as 'sodium rosinate'. So, the appellants were called upon to show as to why C.E. duty should not be demanded from them on this material alleged to have been manufactured by them at the intermediate stage. In most of the cases, notices were issued after six months, the period for which duty demanded being 1.3.1986 to 28.2.1987 in most of the cases. So, longer period of limitation was invoked alleging that the appellants had not declared that they were manufacturing this product; that they had not filed the classification list or price list and that they had intentionally evaded payment of duty. Most of the appellants were availing of benefit of notification No. 225/86 dated 3.4.1986 by taking credit of central excise duty paid on rosin purchased and setting off towards the payment of excise duty on the paper cleared by them. So, it was alleged in some of the show cause notices that as the rosin was utilised as raw material in manufacture of the product, in question, which was excisable, the appellants were not entitled to avail of benefit of such notification and they were also asked to show as to why they should not be asked to pay the duty for which they have claimed set off during the said period.

(i) whether the material, in question, which is being manufactured, at the intermediate stage, is 'sodium rosinate'; (iv) whether there was justification for invoking longer period of limitation.

8. As facts involved in above appeals are more or less the same and the issues that arise are also the same, it is not necessary to recite facts of each appeal individually. In all the above appeals, the adjudicating authority concerned, confirmed the demand raised in show cause notices (barring some variation in

some cases) holding that what was being manufactured was 'sodium rosinate' and that the same was covered under the above T.I. that they have suppressed the facts of this manufacture and a longer period of limitation was invoked and that they were not entitled to claim benefit of notification No. 225/86. In Appeals Nos. at s1. Nos. 1, 2, 14, 15, and 16, the adjudication orders were passed by the Jurisdictional Assistant Collectors. So, the assessee went in appeal before the Collector (Appeals) and the appeals were allowed and the adjudication orders were set aside. So, the Revenue has preferred these appeals seeking restoration of the finding of the Assistant Collector concerned.

9. We have heard the Ld. Advocates and the Ld. J.D.R., Shri S. Sunder Rajan and hereunder we summarise their arguments: 10. L.A., Shri Bhangoo arguing for Zenith Papers Ltd., made following submissions: Appellants were not engaged in manufacture of 'sodium rosinate'.

There is no specific reference to sodium rosinate in the T.I. and the Department has not produced any evidence to show that the appellants had been manufacturing 'sodium rosinate'. The material that is produced, is not a standard product and the chemical test report does not pertain to the period in dispute, so cannot be applied to it. It is not marketable and the Department has not produced any evidence to show marketability. Non-marketability cannot be proved. Cross-examination of chemical analyst was not provided. The Department was aware of the process and only there was change in the T.I., so it cannot be said that the appellants had suppressed these facts. The Collector did not give any finding that the excisable goods are being manufactured. The aqueous solution, that is being prepared, is not included in T.I. under Chapter 39 and cannot be so included by reference to any Chapter Note. Arguing for Kanwar Papers (Pvt.) Ltd., he referred to a letter dated 23.12.1986 addressed by the Inspector (C.E.) to the appellant (page 14 of the paper book) whereby a questionnaire was sent to the appellant. This is the same questionnaire which was addressed to most of the appellants. This would suggest that on that date, the Department knew about the manufacture and its process. For (i) Pratap Paper Mills; (ii) Charan Kamal Card Board Paper Mills; and (iii) A.B.C. Papers Ltd., the Ld. Advocate adopted the above arguments.

In Vinod Paper Mills Ltd., chemical test report has not stated the composition, but has only stated 'aqueous solution'. The appellants mixed soda ash with rosin and what emerges is salt and water. Some part of it may be 'sodium rosinate', but most of the part will remain only 'rosin'. In fact, what is being prepared is sizing material. There are three types of material from which sizing material is prepared available in the market as stated in the technical literature. They are (i) powder form; (ii) paste form; and (iii) protein fortified. From this solution, which is in question, can be prepared, but solution is not marketable and is not marketed.

He referred to technical literature and dictionary meaning of sodium rosinate. Entry 3806 (B) (6) in HSN does not cover the material in question and at the relevant time, the Indian Tariff Nomenclature was not 'Pari Materia' with HSN. All the paper mills are manufacturing this material since more than 50 years and formerly, all these manufacturers were availing of benefit of notification No. 201/79 and from 1.4.1987, Modvat Scheme is extended to paper mills so it cannot be said that the applicants suppressed the fact and the Department all along knew the use of rosin in manufacture of the material. As the material was captively consumed, there was no legal necessity to declare. Notification No. 225/86 was issued to grant set off on duty-paid on rosin and now if it is denied, the Notification would be rendered nugatory and would stand invalidated.

Use of rosin was known to the Department because at the time of claiming set off under notification No. 201/79 and subsequently 225/86, process and use had to be explained to the Department.

12. L.A., Shri N.C. Jain arguing for Indian Cardboard Industries Ltd., made following submissions: He adopted the above arguments and further submitted that the contentions of the appellant about non-marketability and very short shelf life of the material have not been controverted and excisability of the product also has not been considered by the Collector. There is no allegation of suppression in the show cause notice.

13. Ld. Consultant, Shri Kumtakar for (i) Shree Datta SSK Karkhana Ltd. and M/s. Warana SSK Ltd., made following submissions: Rosin is not fully soluble in water. So, some percentage (5 to 10%) caustic lye (or any alkali) is to be added and

sodium solution is to be prepared and this solution while boiling with steam pressure has to be mixed with pulp. So, the material is not storable and hence not marketable. It has to be kept boiling and under steam pressure and so has no shelf life. So, it can be only in captive position.

The solution, in question, contains 90% water, 3% sodium rosinate and 5 to 7% caustic lye. The appellants have produced evidence about non-marketability (at pages 99-104 in Appeal No. 3307/89 and at pages 41-82 in Appeal No. 3004/89-C).

14. L.A., Shri Sridharan, for Steadfast Paper Mills, made following submissions: In Steadfast (Appeal No. 4015/89-C), solid content of the solution is 2-3 per cent and rest is water. So, it is not marketable. He adopted the earlier arguments and further submitted that for obtaining the stage at which sizing material can be marketed in either of the three forms described in text books and referred to by the adjudicating authorities, the solution i.e. the material, in question, has to undergo some further process. But the appellants do not undertake this process and so it is not marketable. T.I. 38.01 covers derivatives, but this product is not derivative. He referred to technical literature. He also referred to Trade Notice issued by the Hyderabad Collectorate number 188/89 dated 27.9.1989 (1989 Vol.

43 T 13), to show that similar product has been declared to be non-excisable.

15. L.A., Shri Sharma for Shreyans Paper Mills Ltd. adopted the arguments advanced by Shri Sridharan, Ld. Advocate.

16. Shri Prabhakar, Financial Controller for United Pulp adopted the arguments and referred to Trade Notice issued by the Baroda Collectorate No. 178/89 dated 18.9.1989 [1989 (24) ECR 21C]. He, further, submitted that discussion about manufacture of sodium rosinate is not correct. Moreover, reference in the impugned order to Trade Notice is not proper because, the Trade Notice is dated 14.7.1987 while the period, in question, is 1.3.1986 to 28.2.1987. The Collector is not clear whether the appellants are allegedly manufacturing sodium rosinate or derivative of rosin.

17. L.A., Shri Lahoty for Madhya Bharat Papers Ltd. adopted the above arguments on the points of marketability, limitation and valuation. He, further, submitted that in the show cause notice (at page 17), it is not stated how the weight of alleged sodium rosinate manufactured and valuation have been arrived at and in the impugned order, it is not discussed. So, the order is arbitrary. Moreover, in the impugned order (para 4.6) it has been stated as under: Being an exempted product prior to the coming into force into new tariff, not much attention was paid on its excisability both by the department as well as by the manufacturers. But that does not mean that the notice can take advantage of the legal obligation under which he is required to intimate the department of each and every excisable goods which he manufactures. It was his duty, a duty cast upon by him by the provision of the Central Excise Laws, to suo moto tell the department what he was manufacturing or what he had or what he intended to manufacture. Failure to do so does not absolve him of his responsibility for which not only can the duty be demanded for the extended period..., but also he is liable for penal action.

18. According to the Ld. Advocate, this is self contradictory, is not correct and is contrary to the settled position of law.

19. Shri Sogani, Ld. Consultant for Mandya National Paper, made following submissions: In show cause notice, the Department has taken value of caustic soda and added 10% to arrive at valuation. This method of working is not correct and factually also incorrect because the appellants are using caustic soda for manufacture of pulp and not for preparing sizing material in question. The appellants are using soda ash for manufacture of the material, in question, which is not taken into consideration at all. This material is a composite article and is not a derivative of rosin.

20. L. A., Shri Bajoria for Orient Paper Mills made following submissions: In Appeal No. E/401/89-C, the show cause notice was time barred. The questions put to the appellants were loaded questions. What the appellants are manufacturing is emulsion by adding water as rosin which is in a lump form cannot be used as such. But this does not result into manufacture of sodium rosinate. What is manufactured is emulsion for purpose of rosin sizing of paper. There is

free rosin in the emulsion which applies to paper to make paper water repellent. So, it is not a solution. Solution is homogenous while emulsion is not homogenous and it has been clarified in question No. 5 in questions/answers produced in the impugned order. The appellants have clarified how the material differs from sodium rosinate which has been stated in the impugned order itself. The material, in question, will have to undergo process of evaporation and saponification before converting it into sodium rosinate.

Moreover, sodium rosinate is manufactured from rosin and caustic soda (sodium hydroxide) while the appellants are preparing sizing material by adding soda ash to rosin. Moreover, the material, in question, is not derivative of rosin and it is a mixture of two things. The test report was not given to the appellants, even though sample was drawn after hearing. So, no reliance can be placed upon it and so composition of the product is not proved. In HSN under Chapter Heading 38.09, preparations are included, but no derivatives and in T.I. of CET, paper sizing agents are not included. By amending T.I. from 10.2.1987, by Amendment Act, 1985, [1986 (27) ELT B35], finishing agents of a kind used in the paper industry have been included in 38.09 which would, by implication, suggest that that was not included earlier. Moreover, it has been described as preparation which would also suggest that it is neither sodium rosinate nor rosin derivative. There is no chemical test determining physical and chemical properties of the preparation on record. There is no evidence produced by the Department about marketability.

Notification No. 201/79 was in force till 28.2.1986 and issue had gone up to Hon'ble Supreme Court. So, the use of rosin was known to the department. He referred to show cause notice dated 14.12.1984 issued by the Department (page 1 of the Paper Book). Only because the Department has changed the view, it cannot be said that there was suppression.

21. In Appeal No. E/1116/88-C, which is the another unit of the same company, longer period of limitation is not invoked and no penalty is imposed and so for the same reasons in the earlier appeal also, there was no reason to impose penalty or to invoke longer period of limitation. Moreover, in this appeal, reliance is placed upon test reports of samples drawn in 1984-85, but they were not tested for

sodium rosinate.

22. L.A., Shri Beri for Mukeria Paper Mills adopted the arguments advanced by others and further submitted that the material, in question, is produced and used in a continuous process and cannot be stored. Marketability has been decided on the basis of technical literature, but there is no evidence on the point.

23. Remco Paper & Board Industries and Bhagwati Paper Mills submitted written submissions which are almost on the lines of the arguments summarised above.

24. For Delux Board and Paper Mills, Mahinder Pulp & Paper Mills (P) Ltd., Rama Pulp & Papers Ltd. and Ruby Paper Mills (P) Ltd., L.A., Shri Sridharan adopted his arguments advanced earlier in Rohit Paper Mills.

The period before 1.3.1986 was covered. Before 1.3.1986, the appellants were entitled to avail of benefit of notification No. 201/79 and so question arose as a result of Tariff Item excerpted above. T.I. 38.01 covers rosin, etc. and according to Note 1 of General Explanatory Notes to Rules of Interpretation any goods covered under heading 3801.19 would be classifiable under the same Chapter. Sodium rosinate can be used only after dilution in water.

So, first the appellants have to produce sodium rosinate and then they diluted in the water. He referred to technical note prepared by one Dr. R.S. Tripathi, General Manager (W) of the Mandya National Paper Mills Ltd. which is produced as additional submissions by the appellant in Appeal No. E/3319/89 wherein it has been stated as under: Rosin is weighed and cooked in the kettle having steam check up arrangement for 3-6 hours along with soda as solution....A concentrated rosin emulsion is prepared which is diluted to 2.0 per cent concentration in the dilution tank with hot water.

26. He also referred to the written submissions wherein it is stated as under: Then, he referred to a letter dated 12.6.1937 (page 21 of the Paper Book of the said appeal) addressed to the Chairman, C.B.E.C. by the Secretary of Indian Paper Mills Association wherein it is stated as under: But this rosin cannot be used as such and it has to be mixed with soda ash and the resultant compound Sodium

Abietate/rosinate is used in the manufacturing process.

27. He also referred to a letter dated 29.7.1987 (page 23) by the said Association addressed to all the members of the Association wherein also, it is stated as under: Sodium Abietate/Rosinate are resultant compound of rosin in admixture with soda ash is used by paper mills in their manufacturing process.

28. Then, he referred to additional paper book produced by the Orient Paper Mills (Appeal No. E/401/89-C wherein at page 1, in a letter dated 2.1.1988 from the said association, it is contended that what is produced is not sodium abietate/rosinate (at page 2 of the letter). So, according to him, this was an after thought. He referred to Trade Notice No. 114/87 (page 19) issued by the Hyderabad Collectorate whereby it was clarified that sodium rosinate would be classifiable under sub-heading 3801.19 during the period prior to 10.2.1987 and under sub-heading 3806.90 w.e.f. from 10.2.1987. It was issued under the instructions of the Board. He submitted that the contention that shelf life is less than one week is not correct and even if it be so, it would be excisable, for example, ice cream has got very short shelf life. He referred to Chapter heading 38.09 and Explanatory Notes thereunder in HSN and submitted that the same were not applicable to the paper industry. Even sizing material would be covered under 3801.19 T.I. About marketability, he contended that the affidavit of Shri Jangalgi in Orient Paper Mills (page 22), would not help because it is an opinion for which he was not competent. So, concentrate so prepared, as stated in the technical note (Mandya Paper Mills and Orient Paper Mills), can be marketed. He referred to reliance placed on different text books by adjudicating authorities and defended it saying that the same was permissible and support can be derived from this literature.

He referred to question/answers reproduced at internal page 4 of the Order-in-Original in Orient Paper Mills (running page 35) wherein the technical experts had admitted that manufacture of sodium rosinate was a must for sizing of paper and that saponification reaction results into manufacture of sodium rosinate which is a derivative of rosin. He also disputed the contention that this was a continuous process. He referred to technical literature referred to by the adjudicating authorities in their orders. "Goods" is not defined in CES A, but is defined in Article

366(12) of the Indian Constitution and it is an inclusive definition and more products can be covered under that. On the point of double taxation, he submitted that when physical properties on rosin change as a result of chemical reaction, it could be taxed again. On marketability, he further contended that in Chhotabhai Jethabhai Co. and Ors. v. UOI ECR C 147 SC 1932-1982 Compilation of S.C. Judgments wherein in para 35, it has been laid down that excise duty is levied because of the mere fact that the goods have been produced or manufactured and are unrelated to and not dependent on any commercial transaction in them. He submitted that this has not been overruled up-till now and so whether the product is marketable and is marketed has no relevance. Regarding limitation, he submitted that all the appellants knew that the product that they were manufacturing had become excisable and it was their legal duty to file classification list and declare the production of the same to the Department. It was a statutory duty which they had dis-regarded intentionally and that was a suppression. Shri Sunder Rajan reiterated the arguments stated in the appeal memos of the four appeals preferred by the Departments.

29. In reply, the Ld. Advocates contended that the arguments advanced by the Ld. D.R. that the Department intends to levy duty on paste which is first manufactured before converting it into solution is a new argument and none of the adjudicating authorities has said so. Even show cause notices have also not said so and it is not open to the Department to raise such a plea. Assuming that the product is derivative, then also it is not satisfactory derivative and incomplete product cannot be taxed. They distinguished case of Chhotabhai Jethabhai and submitted that the interpretation sought to be put by Shri Sunder Rajan is not correct and warranted. In departmental appeals, the Ld. Advocates reiterated the same arguments as advanced by them in the appeals preferred by the assesseees.

30. We have perused the records and considered the arguments. The issues which arise are as set out above and we discuss them hereunder in the same order and as the result of all these appeals depends upon decision on the above issues, it is not necessary to discuss and decide each appeal individually.

31. The first issue is whether the material, in question, which is being manufactured at the intermediate stage, is sodium rosinate. It has been alleged by all the adjudicating authorities concerned that the appellants are manufacturing sodium rosinate, but ultimately, duty has been demanded on solution which is prepared for process of sizing. None of the authorities has referred to any technical literature to state what is sodium rosinate? But in Appeal No. E/4015/89-C (Steadfast)(at page 16 of the paper book), the appellant produced an abstract from page 931 of the Condensed Chemical Dictionary by Gessner G. Hawley (10th Edition) wherein sodium rosinate is defined and described as under: 32. In Appeal Nos. 1894/89 (Zenith), 2404/89 (A.B.C. Papers), 3004/89 (Warna), 3996/89 (Quality Pulp), 3743/89 (Rohit Pulp), 3781/89 (Vapi Paper, 260/90 (Nathani), 261/90 (Delux Board), 262/90 (Ruby Paper) and 167/90 (Mukerian), test reports are on record. In appeal No. 1894/89 (Zenith)(at pages 20 & 21 of the paper book), there are two test reports. As stated therein, they were the samples of rosin paste produced on different dates and reports of the Chemical Analyser are as under: i) the sample is a thick viscous liquid of sodium rosinate. The solid content of the sample is 32.5% (by ml.).

ii) the sample is sodium rosinate in the form of thick and light yellow coloured paste. The percentage content of solid matter is 36.3.

33. In the impugned order, the Additional Collector has (at page 3 of the copy) held asunder: Rosin and soda ash or caustic soda which are the principal raw materials for Sodium Rosinate, are cooked together in a vessel with water by steam to convert the same into soluble form i.e. sodium rosinate. The same solution is added to stock (Pulp) alongwith other chemical in a chest for manufacture of paper. Rosin in turn reacts with other chemical in the manufacturing process of paper. It is used by paper industry for sizing of paper. It is a derivative of rosin and finds mention in the explanatory notes to HSN below heading No. 38.86.

34. In the show cause notice (page 14), it was alleged that the appellant was manufacturing sodium rosinate. The samples are in liquid form and the Additional Collector has come to the conclusion that what is manufactured is derivative. So,

there is no definite finding that what is being manufactured is sodium rosinate and it appears from the impugned order that what is being sought to be made excisable is a liquid which is prepared as sizing material. It may be noted that in this case, the appellant was not allowed to cross-examine the Chemical Analyst.

35. In Appeal No. E/2404/89 (A.B.C.), test report is not on record, but in show cause notice, it is stated "the sample is sodium rosinate in the form of light yellow coloured thick viscous liquid. The percentage of the solid content is 33.3". The same Additional Collector has given the same finding.

36. In Appeal No. E/237/90 (Mukerian), the test report is "the sample is sodium rosinate in the form of light yellow coloured aqueous solution" (page 11).

37. In Appeal No. E/262/90-C (Ruby Paper), as stated in the show cause notice (at page 19), "the sample is in the form of yellowish white viscous liquid. It is an aqueous solution of sodium rosinate (Rosin soap)". Test reports in other appeals are more or less on the same lines. So, it can be seen that what was found was not sodium rosinate as such, but as described by the adjudicating authorities, was derivative thereof.

38. In Appeal No. E/3743/89-C (Rohit Paper Mills), in the impugned order, it has been discussed as under: The officers also noticed that the assessee was manufacturing sodium rosinate compound by the following process: Cold water is put in rosin dissolving tank up to 1/4 level of the tank, then IV grade rosin in chunks/granules form is put up in rosin dissolving tank, then caustic lye is added in rosin dissolving tank and again cold water is added in the tank so as to fill up the tank completely; the solution thus prepared is kept for one hour so as to dissolve the rosin completely. The solution thus prepared is put into pulp stock so that it is uniformly mixed and in the solution of rosin in water, caustic lye is added to ensure proper dissolution of rosin and make the solution fit for adding to pulp stock. This solution is further diluted by adding water for adding it to pulp in a homogenous solution and this solution is known as "Sodium rosinate (rosin soap).

39. So, here also what is sought to be made dutiable is aqueous compound which is used as sizing material and not sodium rosinate as such. No attempt is made to

find out whether sodium rosinate, as such, is manufactured and if so, whether it is in continuous process. It has been consistently contended by all the appellants and submitted by all the advocates that the appellants do not manufacture sodium rosinate as such nor do they manufacture sizing material which is marketed in different forms, but they are manufacturing the liquid compound which is used in the process of sizing of the paper. So, if the dictionary meaning of the sodium rosinate is kept in mind, there is no evidence that any of the appellants is manufacturing sodium rosinate.

40. Shri Sunder Rajan, mainly relied upon and referred to the record in Appeal No. E/3319/89 (Mandya National Paper). This is a Government enterprise and it can be presumed that the facts stated by them can be relied upon. In this appeal a technical note, prepared by Dr. R.Tripathi, General Manager(W), is produced wherein it is stated as under: In our Mill, we are using rosin size which is a part of paper manufacturing process. In short, rosin is weighed and cooked in the kettle having steam jacket arrangement for three to six hours along with soda ash solution. The consumption of soda ash varies from 12 to 14% of weight of rosin. A concentrated rosin emulsion is prepared which is diluted to 2.0% concentration in the dilution tank with hot water. Alum solution is also prepared simultaneously in separate tank (4 to 5 TW). Both these solutions are added separately to the 'pulp' in the stock preparation section and obtain required sizing of paper. The process involves continuous addition to pulp stock and it is controlled by routine tests.

41. Shri Sunder Rajan referred to this and contended that the appellant first manufactures concentrated rosin emulsion and that is taxable.

According to him, this is the process which is more or less adopted by all the appellants and this material which is in the form of paste is sought to be made dutiable. He also submitted that further on this material is diluted for use as sizing material, but that is a subsequent process. But, then, this is not clear from any of the impugned orders and moreover, it has not been alleged in any show cause notice also. On the contrary, what has been stated in the impugned orders concerned, is that the final solution which is used as sizing material, is the dutiable product and duty is sought to be levied upon that liquid.

42. Another issue is whether the material, in question, can be described as derivative of rosin. There again no technical literature is produced by the Revenue or any of the adjudicating authorities. From the side of the appellants (assesseees), L.A., Shri Bajoria in A. No.E/401/89-C (Orient Paper Mills), has produced an abstract of page 1081 from a text book of Practical Organic Chemistry by Vogel (III Edition), wherein under heading 'The Preparation of Derivatives', the requirements of a satisfactory derivative have been described which include (i) should be easily and quickly prepared in good yield by an unambiguous reaction, and be easily purified...must be a solid; (ii) should be prepared preferably by a general reaction which under the same experimental conditions would yield a definite derivative with the other individual possibilities; and (iii) the properties (physical and chemical) of the derivatives should be markedly different from those of the original compound.

43. As submitted by Shri Bajoria, there is no attempt made on the part of the department to find out whether any of these requirements are fulfilled. According to Shri Bajoria, this is not a derivative and if at all it can be described as derivative, it is not a satisfactory derivative and if it is incomplete product, it cannot be marketed and cannot be made dutiable. He also contended that the material, in question, contains rosin and rosin makes paper water repellent and so it is used for sizing purpose and that is why material is referred to as rosin size and there is substantial quantity of free rosin therein and there is no complete saponification. So, the material is emulsion and not solution. Solution is homogenous in nature while emulsion is not. So, as pointed out by him, it is not proved that the material, in question, conforms to the definition of rosin derivative.

44. In Appeal No. E/401/89-C (at page 4), five questions which were put to the appellant and answers by the appellant (By Shri B.M. Lal), have been reproduced, which are as under: 1. Is it correct that Rosin and caustic soda and/or soda ash is purchased and used in the preparation of rosin the manufacture of Sodium Rosinate size (Sodium rosinate) in stock (Sodium Abeitate) preparation plant. 2. Is it a fact that Rosin cannot be used in the original form for sizing of paper unless reacted with Soda Ash/Caustic Soda. 3. Is it a fact that manufacture of

Yes. Sodium Rosinate is a must for sizing of 4. The Resin and Caustic Soda is mixed 4. Yes in a cooking Vessel and cooked for 6-85. Is it a fact that PH of die size 5. The emulsion contains 5 to 30% free solution is around 8-9, that sodium Rosin depending on other conditions rosin is true solution and it varies from mill to mill. The PH Relying upon this, Shri Sunder Rajan argued that it has been admitted by the appellant that what is being manufactured by the appellant is sodium rosin at the intermediate stage. It appears that sodium size is described as sodium rosin, but considering the dictionary meaning, it cannot be so.

45. In Appeal No. E/4015/89-C (Steadfast Paper Mills), the abstract of page 37 of Modern Science Dictionary by Webster, is produced, which describes derivative as under: (i) Derivative. (a) a substance derived or prepared from some other substance, usually retaining the general structure of the parent substance; (ii) a substance that was not actually prepared from another substance, but it is structurally so related to it that it may be thought of as its derivative.

No attempt is made in any of the impugned orders to examine this aspect and decide whether the material, in question, is derivative.

46. Coming to the third issue, assuming that what is being prepared can be described as derivative the question arise whether it is manufactured in such a manner that it can be marketed or whether it is produced in continuous process. All the appellants have contended that it is manufactured in continuous process and so it is not possible to take out the product, in question, at intermediate stage and market it.

We do not find in any of the impugned orders against which the assesseees have come in appeal, that the authority made any attempt to look into this aspect. But in Appeals Nos. E/1743/89-C and E/1744/89-C, wherein the Revenue has come in appeal, in the impugned order, the Collector (Appeals) has noted as under: Observe that it is not denied by the Assistant Collector that the solution of rosin and caustic soda i.e. so-called derivative of rosin comes into existence in the continuous manufacturing process of paper and that it is not possible to take the solution out of the manufacturing machine for the purpose of marketing. Thus, the solution so produced in the course of manufacture of paper, has no identifiable

existence of its own except in the mixture of paper pulp, during the process of sizing of paper.

47. All the appellants have stated the process of the manufacture of the material and have stated that it is a continuous process.

48. Shri Sunder Rajan referred to a technical note of Shri Tripathi produced in Appeal No. E/3319/89-C, but then in that very note, it is stated that the process involves continuous addition to pulp stock. It has been contended by the appellants that this is continuous process and it is not that concentrated rosin emulsion is produced and taken for sizing purpose. Layout of the machinery is produced on record in A.No. 401/89-C (Orient Paper) wherein rosin stock godowns are also shown and Shri Sunder Rajan submitted that here in the material, in question, is possibly stocked by Shri Bajoria explained that it is not so and these are the godowns where rosin, purchased, is stocked, but otherwise it is a continuous process. In Mandya National Paper, alongwith note of Shri Tripathi, layout of machinery for preparation of the material is produced and according to Shri Sogani, this is a continuous process as can be seen from this layout. *Bhor Industries Ltd. v. CCE, Bombay 1989 (21) ECR 273 (SC)* and (ii) *CCE, Baroda v. A.S. Enterprises 1989 (24) ECR 433 (S.C.)* that if the product is to be made excisable, it should be marketable. If it is so, then unless it can be shown that the product is capable of being marketed, it cannot be held to be excisable.

50. Shri Sunder Rajan referred to *Chhotabhai Jethabhai Patel and Co. v. UOI ECR C 147 (SC)*, from *Compilation of Supreme Court Judgments (1932-1982)*, wherein in para 35, it has been stated as under: In our view, a duty of excise is a tax-levy on home produced goods of a specified class or description, the duty being calculated according to the quantity or value of the goods and which is levied because of the mere fact of the goods having been produced or manufactured and unrelated and not dependent on any commercial transaction in them.

51. According to Shri Sunder Rajan, this is not overruled till now and so whether the goods are marketable or not, is not a criteria. We have carefully perused the above citation and we are not able to accept this contention. The above observation is in context of the contentions of the appellants that they had already

sold the goods much earlier and now if the duty was to be levied retrospectively, it would not be possible for them to collect the same from the customer. So, in our view, the above observation does not lay down a rule that marketability is not a criterion. Moreover, even if the interpretation sought to be put by Shri. Sunder Rajan is accepted, then also the position of law, as laid down by the Hon'ble Supreme Court, in *Bhor Industries, etc.* has to prevail as it should be presumed that the earlier interpretations are overruled or reversed, if not explicitly, then by implication. In the present appeals, the Department has not produced any evidence about the marketability, but in most of the impugned orders, technical literature has been referred to show that three types of sizing materials are being marketed in India. Even if it is so, then also the appellants have contended that they do not manufacture any of these types of material, but they are preparing a solution which has to be prepared for use from one of these materials also if one of these materials is purchased and used by the appellant. As contended by the L. Advocates, that if any of these types of material is to be produced, the appellant has to carry out some further process which they are not carrying out.

It is also contended by L.A., Shri Kumtakar that if sodium rosinate is a product which can be prepared out of this solution, the solution is an intermediate product and no sodium rosinate is produced by the appellants. In the same manner, only because some types of sizing material is available in the market, it cannot be said that what is being manufactured by appellants or any of them is an equivalent to or similar to either of these materials and that it can be marketed. In fact, no such attempt has been made in any of the impugned orders. So, unless it is proved by the Department that the material, in question, is marketable, then even if it may be a derivative of rosin, it cannot be made excisable.

52. On the point of limitation, most of the show cause notices are issued beyond period of six months and longer period of limitation has been sought to be invoked on the ground that the appellants (assesseees) have suppressed the fact of manufacture of excisable material by not declaring the manufacture of same. All the Ld. Advocates have contended that almost all the paper mills in the country have been issued the show cause notices, consequent upon change in the Central Excise Tariff. Now all the paper mills cannot be alleged to have suppressed the

fact of manufacture. In fact, because of the change in Excise Tariff, the Department took the view that the material which is so manufactured at the intermediate stage, is either sodium rosinat or derivate of rosin and as such is excisable and that is how the notices came to be issued. Moreover, it has been contended by all the Ld.

Advocates that all these assessee appellants were availing of benefit of notification No. 201/79 and as rightly pointed out by them and specifically by L.A., Shri Bajoria, that this issue of availability had gone up to Hon'ble Supreme Court. Before deciding about availability of notification No. 201/79 to the appellants, the Department has necessarily to understand the process in which rosin is used. The paper mills are functioning in the country since last about 50 years. So, now at this stage, it is difficult to believe that the department did not know about the process of manufacturing and that the appellants did suppress this fact from the department and so the longer period of limitation could be invoked under provisions of Section 11A of the Act.

It may be noted that in Appeal No. E/3227/89-C (Madhya Bharat)(in para 4.6), the Additional Collector has staled as under: Prior to 1.3.1986 when goods were classifiable under erstwhile T.I. 68, sodium rosinat which also fell under that tariff item, was exempted by virtue of notification No.118/75 dated 3.4.1975. Being an exempted product prior to the coming into force into new tariff, not much attention was paid on its excisability both by the department as well as by the manufactures.

53. In Appeal No. E/1116/88-C (Orient Paper)(at page 25 of the impugned order), it has been observed as under: Even otherwise, the demand has arisen solely as a result of introduction of new tariff w.e.f. 28.2.1986 and hence there is no fraud, collusion, wilful misstatement, suppression of facts, etc.

for invoking extended period under the provisions of Section 11A.54. So, even some of the adjudicating authorities have admitted that it is the position. In this view, there was no justification for invoking longer period of limitation and wherever it has been invoked and orders have been passed, as a result thereof, such orders will require to be set aside. In the cases where the question of limitation is not there, in light of the discussion above, as it is not proved that any

excisable product is manufactured by the appellants at the intermediate stage, in marketable form, the appeals will have to be allowed on merits and the impugned orders whereby demands have been raised will have to be set aside.

55. The adjudicating authorities have denied benefit of notification No. 225/86 whereunder the appellants have claimed credit of duty paid on purchase of rosin on the ground that same had been used for the manufacture of intermediate product which was excisable and so the appellants were not entitled to avail of that benefit. Now, firstly, as discussed above, it is not proved that the rosin is used for manufacture of intermediate excisable product. Secondly, rosin is not used only for the purpose as contended by the appellants. So, finding to this effect will also have to be reversed.

56. In light of the discussion above, we do not propose to enter into the aspect of law whether the tariff item 3801.09, as it stood till 10.2.1987 or T.I. 3801.90, as it stood after 10.2.1987 would cover sodium rosinate and/or rosin derivative.

57. Various other contentions have been raised regarding dutiability of the product covered under the same heading as the raw material used.

58. Both sides have cited various orders of various Courts and Tribunal, but we do not find it necessary to discuss them in detail.

60. I have perused the order written by learned brother Shri Vasavada.

I have also carefully considered the appeal papers and the arguments advanced before us during the hearing. I fully agree with the findings of Shri Vasavada on limitation as recorded in paragraphs 52 and 53 of his order and hold that longer period of limitation under proviso to Section 11A(1) of the Central Excises and Salt Act, 1944 is not applicable in any of these cases. In this view of the matter, the entire demands for duty in 25 appeals mentioned at Serial Nos. 3 to 13, 17, 19 to 29, 32 and 33 are time barred. In the other appeals, the demands are either in time or partly in time and partly time barred.

61. I also agree with the discussions & findings given in paragraphs-46 to 49 of the order written by Shri Vasavada. All the assessee-appellants have contended that

the impugned product is manufactured in a continuous process and it is not possible to take out the product at intermediate stage and market it. In the impugned orders in the appeals No. E/1743/89-C and E/1744/89-C, the Collector (Appeals) has also given findings to that effect. The findings of Collector (Appeals) have been extracted in paragraph-46 (ante). The Department has not rebutted this contention. The Department has also not produced any evidence to prove that the impugned product, on which it wanted to charge duty in the cases before us, was marketable. Although the learned Departmental Representative argued before us that the Department wanted to charge duty on the sodium rosinate in cake form, but, as the learned brother Shri Vasavada has rightly observed, none, of the show cause notices and the adjudication orders has said so.

Further, the Department has not produced any evidence to show that impugned product was taken out from the pipeline of the continuous process of manufacture of paper, starting from the cooking of rosin with caustic soda/soda ash. On the facts of these cases, agreeing with Shri Vasavada, I also hold that the Department has not proved the marketability of the impugned product. Therefore, in view of the Supreme Court judgments, mentioned in paragraph 49 (supra), no Central Excise duty can be charged on the product in terms of the adjudication orders involved in these cases. Chhotabhai Jethabhai Patel and Co. v. Union of India ECR C 147 SC, as referred to in paragraph-50 (supra), I agree with the view expressed by Shri Vasavada in paragraph 51 of his order.

63. In the light of our findings about non-excisability of the impugned product in the absence of any evidence of marketability, I agree with Shri Vasavada that the benefit of notification No. 225/86-CE of 3.4.1986 was admissible in these cases.

64. Therefore, agreeing with the conclusions of Shri Vasavada on the points of marketability of the impugned product, limitation under Section 11A(1) of the Central Excises and Salt Act and the admissibility of the benefit of notification No. 225/86-CE dated 3.4.1986, I allow the 28 appeals filed by the assesseees and dismiss the five appeals filed by the Collector of Central Excise, Chandigarh.