(1995) 12 BOM CK 0042

Bombay High Court

Case No: Writ Petition No. 1800 of 1988

Tata Engineering and Locomotive Co. Ltd.		APPELLANT
	Vs	
Union of India		RESPONDENT

Date of Decision: Dec. 13, 1995

Acts Referred:

- Central Excise Rules, 1944 - Rule 173B, 173C
- Central Excises and Salt Act, 1944 - Section 2, 3

Citation: (1997) 89 ELT 463

Hon'ble Judges: N.D. Vyas, J; K.G. Shah, J

Bench: Division Bench

Advocate: Shri D.B. Shroff, S.A. Diwan and H.N. Vakil, instructed by M/s. Mulla and Mulla and Craigie Blunt and Caroe, for the Appellant; Shri R.A. Dada, R.V. Desai and H.V. Mehta, for the Respondent

Judgement

N.D. Vyas J.

1. By the present writ petition under Article 226 of the Constitution of India, the Petitioners have inter alia challenged the legality of Trade Notice No. 15 of 1988 dated 8th February 1988 and the Order dated 22nd March 1988 passed by the Assistant Collector of Central Excise, Pune II Division, Pune and have asked for the same to be quashed and set aside. Although in the petition, the Petitioners have also asked for a declaration that the provisions of Heading No. 73.08 of the Schedule to the Tariff Act are unconstitutional, invalid and void, at the time of arguments this prayer has not been pressed.

2. The short question that requires determination in the present Petition is whether ''Columns'', ''Girders'', ''Trusses'' and ''Purlins'' of a structure are exigible to excise duty.

3. Briefly stated the facts giving rise to the present Petition are as follows :-

(a) The Petitioner No. 1 Company is engaged in the manufacture of commercial motor vehicles and the Petitioner No. 2 is a shareholder and a citizen of India. The Respondent Nos. 2 and 3 are officers of the Respondents No. 1, carrying out duties and performing functions under the provisions of the Central Excises and Salt Act, 1944 (hereinafter referred to as the said Act) read with Central Excise Tariff Act, 1985 (hereinafter referred to as the ''Tariff Act'') and the Central Excise Rules, 1944 (hereinafter referred to as the said Rules).

(b) The Petitioner No. 1 Company has a factory at Pimpri where they manufacture commercial motor vehicles. As a part of the programme of expansion, the Petitioner No. 1 decided to construct a new shed known as ''J'' Block in their premises at Pimpri and they awarded the work of construction of new shed to an independent construction contractor viz. M/s. Shapoorji Pallonji and Co. Pvt. Ltd. The Petitioner No. 1 Company decided to use the said ''J'' Block, when completed, to manufacture their new vehicle ''Tatamobile''. The said construction commenced in or about October 1985 and at the time of filing of the Petition, the same was still in progress.

(c) It is the Petitioners'' contention in the Petition that in the course of executing the works contract in respect of ''J'' Block, varied iron and steel materials such as angles, channels, etc., were purchased by the Petitioners in open market after paying excise duty thereon and were brought into the petitioner No. 1''s premises. The said duty paid materials were modified by cutting, welding, drilling, fastening, etc., for the erection of the new shed and were used in the construction as Girders, Columns, Trusses and Purlins. It is the Petitioners'' case, which is not disputed, that the said materials viz. angles, Channels, etc., brought into the factory of the Petitioner No. 1 Company were duty paid and purchased in open market and that by modifying and using the said materials in the construction of the new shed, neither the Petitioner No. 1 Company nor their contractors manufactured any new or different articles/items nor did they bring into existence any ''goods'' capable of being bought and sold in the market. It is the Petitioners'' further contention that the modifications to the said materials were made specifically to suit the plans and designs of the ''J'' Block and the materials as modified were meant wholly and exclusively for the said construction. The Petitioners have in no uncertain terms stated in the petition that neither the Petitioner No. 1 Company nor its contractors manufactured or produced any ''structures'' or parts of structures and the only reason why the materials are cut, welded, drilled, fastened, etc., was to build the new shed of which such materials became integral and immovable parts. The Petitioners have also averred that the said materials, after being so modified, were useless for any purpose other than construction of the said ''J'' Block and were incapable of sale to any consumer in the market, either as goods or as articles of iron or steel and the said materials were nothing but construction materials for building immovable property comprising of the said ''J'' Block.

(d) The Respondent No. 3 by his letter dated 1st December 1987 called upon the Petitioner No. 1 Company to pay duty involved in the goods manufactured or used in the construction of the said "J" Block and amongst the items referred to by him in the said letter were super-structures for crane girders and structures for baking ovens. Other items like air duct ,trollies were also included in the said letter. By their letter dated 31st January 1988 addressed to the Respondent No. 3, the Petitioner No. 1 inter alia pointed out that the items manufactured and cleared to "J" Block so far, already stood covered in their classification lists and the items had been cleared on the gate passes at the appropriate rate of duty as applicable to the subject items referred. Though inspection of the items enlisted in the letter dated 1st December 1987 of the Respondent No. 3 was offered and classification list of all the items was given, in reply to item Nos. 7 and 9 of the said letter dated 1st December 1987, the Petitioners categorically stated that the said items were part of factory building and did not attract excise duty. The Respondent No. 3 again by his letter dated 1st February 1988 addressed to the petitioner No. 1, in continuation of his letter dated 1st December 1987, called upon the Petitioner No. 1 to file classification list for the items manufactured by them and indicated that the classification list should reflect the items already mentioned in the earlier letter and also iron and steel structures like Trusses, Purlins, Girders, Columns, Angles, Channels, Beams, Plates, Racks, Tables, Work Tables, etc. The Petitioner No. 1 Company was further called upon to classify those items which were not manufactured on job basis and were asked to prepare a comprehensive list of items manufactured, fabricated, etc. and to file the same in the office of the Respondent No. 3 and were informed that the question of excisability or otherwise of the product would be considered by the Respondent No. 2 in due course. A further letter dated 16th February 1988 was addressed by the Respondent No. 3 inter alia referring to a visit to "J" Block and pointing out that it was observed that the articles of iron and steel i.e., Trusses, Purlins, Rafters, Beams, Girders, Structures, Angles, Brackets and Iron Scaffolding were being manufactured by the Petitioner No. 1 company on job work basis and that the said excisable goods were being installed in "J" Block and classification lists as required under Rule 173B and 173C of the said Rules in respect of manufacture of articles of iron and steel falling under Chapter Heading No. 7308.90 were not filed by the Petitioner No. 1 Company. Dealing with the contention contained in the Petitioner No. 1 Company"s letter dated 31st January 1988, it was pointed out by the Respondent No. 3 in the said letter that the classification list which had been filed in respect of all items made/installed at "J" Block did not appear to be correct and hence the C.L./P.L. in respect of the above subject goods was required to be filed by the Petitioner No. 1 Company. A detailed letter was addressed by the Petitioner No. 1 Company dated 19th February 1988 to the Respondent No. 3 and after referring to the earlier letters of the Respondent No. 3, it was reiterated by the Petitioner No. 1 Company that as far as the articles used in the construction of their factory shed viz. "J" Block at Pimpri were concerned, the letters dated 1st February 1988 and 16th February 1988 covered those items and in respect thereof, they stated that amongst these items,

certain items like Angles, Channels, etc., were purchased by them from outside parties and therefore that question of their paying excise duty thereon did not arise and that when these purchased items were joined together either by welding or by otherwise fastening by their contractors, they became Girders, Columns, Beams, Trusses, etc., which were part of the factory, and the factory as such being an immovable property, could not be the subject matter of excise duty. The said letter in detail dealt with other items in respect of which classification lists were called upon and with which items we are not concerned in the present writ petition as the present Petition revolves around only four items as indicated above. On 19th February 1988, the Respondent No. 3 addressed a letter to the Petitioner No. 1 Company enclosing therewith a copy of the Trade Notice No. 15 of 1988 dated 8th February 1988 and in view of the Trade Notice, the Respondent No. 3 directed the Petitioner No. 1 Company to take necessary action to pay duty on the items mentioned in the Trade Notice and manufactured by the Petitioner No. 1 Company at their ''J'' Block.

The copy of the Trade Notice which is annexed to the Petition as Exh. ''G'' inter alia mentioned that a doubt had been raised whether duty paid Sheets, Angles, Channels, Beams, Plates, etc., being subjected to various processes for preparing ''columns'' and trusses'' which went into the erection of shed or erected structures would be leviable to duty and that it had been considered that these items after being subjected to various processes would fall under chapter sub-heading No. 7308.90 and since these were not immovable goods, they would be leviable to duty. It was further requested all Trade Associations and Chambers of Commerce and Industries to bring the contents of the said Trade Notice to the notice of their member constituents. On 19th February, 1988, by another letter addressed by the Respondent No. 3 to the Petitioner No. 1 Company, the Respondent No. 3, after referring to his earlier letter of even date i.e., 19th February 1988, called upon the Petitioner No. 1 Company to furnish information detailed therein viz. list of contractors who were doing jobs in ''J'' Block with the material supplied by the Petitioner No. 1 Company, nature of work carried out with full description of articles manufactured by each contractor, activities carried by the Petitioner No. 1 Company in addition to the above with their own material, date of commencement of expansion activities, value of total transaction and goods manufactured by contractors with their own materials and supplied to the Petitioner No. 1 Company. It further asked to give the aforesaid information with cost of materials and labour classes used. On 22nd March 1988, a detailed letter was again written by the Petitioner No. 1 Company to the Respondent No. 2 inter alia stating that by the Finance Bill, the Schedule to the said Act had been revised and articles of iron and steel such as structures and parts of structures, props and similar equipments for scaffolding, shuttering or pit-propping, etc., had been added and on advice the Petitioner No. 1 Company stated that in respect of articles of iron and steel such as structures, parts of structures, pillars, doors, roofing frameworks, plates, rods,

angles, shapes, sections, tubes, etc., no excise duty could be levied when they were fabricated in the integral process of constructing a building because as a result of such fabrications, no ''goods'' or ''chattels'' got manufactured as in that process, they became part of an immovable structure. The Respondent No. 2 by his letter dated 22nd March 1988, after referring to the earlier letter whereby the details were called upon to be supplied, pointed out that the Petitioner No. 1 Company had failed to supply the necessary information after he had visited the premises of the Petitioner No. 1 Company along with other officer of the Excise Department and had impressed upon the Petitioner No. 1 Company''s officers to expedite the matter of compiling details as required by the Department. The Respondent No. 2 again by his letter of the same date, after again referring to the failure on the part of the Petitioner No. 1 Company to supply the information, inter alia stated that the contention of the Petitioner No. 1 Company that the activity of manufacturing of structures, parts of structures, pillars, doors, etc., could not be subjected to excise duty when they were fabricated in the integral process of constructing a building and building of an immovable structure like a factory was ''incorrect'' and therefore the Petitioners were called upon to furnish the information so as to ascertain the ''quantum of duty payable'' by the Petitioner No. 1 Company on such ''manufacturing activity'' and for recovery of the same. In the last para of the said letter, it was in categorical terms mentioned that if the Petitioner No. 1 failed to furnish the information within a week''s time, the Respondent No. 2 would have to take recourse to legal action as contemplated under the said Rules. Although necessary information was supplied by the Petitioners as per their letter dated 23rd March 1988, the present Petition was filed challenging the Trade Notice dated 6th February 1988 and the Notice dated 22nd March 1988. In the present Petition, the Petitioners have concentrated mainly on four items, viz. Columns, Girders, Trusses and Purlins.

4. On behalf of the Petitioners, it was contended by Shri Diwan and Shri Shroff, the learned counsel appearing for the Petitioners, that the said items, viz. ''Columns'', ''Girders'', ''Trusses'' and ''Purlins'' were not exigible items inasmuch as neither there was any ''manufacture'' involved nor any ''goods'' much less intermediary or transient goods came into existence. It was further submitted that the said items did not fulfil the test of being ''goods'' inasmuch as that they were not marketable. Therefore, the question of excise duty being charged thereon did not arise. In any view of the matter, it was submitted that the burden was on the Department to prove that these items were subject to excise and that burden had not been discharged. It was the further contention of the Petitioners that the excise duty could be levied and collected only on ''goods'' which were produced or manufactured, however, the said items, on being fabricated became part of the structure in question and thus, became immovable property and therefore, the same could not be considered ''goods''. On the other hand, it was submitted on behalf of the Respondents by Shri Dada, the learned Additional Solicitor General,

that these items were distinct items which came into existence as a result of manufacturing process and thus being goods, were exigible to excise duty. It was submitted on behalf of the Respondents that it is a settled law that even items manufactured for captive consumption and were thus not marketed although marketable, could be the subject matter of excise duty. It was further submitted that under Chapter 73 of the Central Excise Tariff for the year 1987-88, the items in question were chargeable to excise duty under Item 73.08 which covered "other articles of iron and steel" and in any case under Item 7308.90 which dealt with ''other'' i.e. residual and that under Central Excise Tariff for the year 1988-89, which was the period during which the Petition was filed under Item 73.08 which dealt with structures and parts of structures, etc., and in any case under Item 7308.90 which dealt with ''other''. It was lastly submitted on behalf of the Respondents that the Petitioners have rushed to Court after the said Notice dated 22nd March 1988 and that although the Petition has been admitted, the same could be and should be still rejected on the ground of Petitioners not availing of the alternate remedy. It was further submitted that when the present Petition was admitted, other Respondents were permitted to proceed further in the matter of issuance of Notices of Demand and hence several Notices of Demand have been issued and in fact, in respect of the amount demanded as per the interim order passed by this Court, bank guarantees have been given. It was thus the submission on behalf of the Respondent that the present matter involved determination of the question as to whether these four items are goods or not and the same could be done only by the fact finding body viz. the adjudicating authority.

5. In order to appreciate the above submissions, it would be advantageous to refer to certain provisions of the Act. Section 3 of the said Act is the charging section and the same provides inter alia that there shall be a levy and collection of duty of excise on all excisable goods other than salt which are produced or manufactured in India. Section 2(d) of the Act defines ''excisable goods'' as goods specified in the Schedule to the Central Excise Tariff Act, 1985 as being subject to a duty of excise and includes salt. Prior to the enactment of the said Tariff Act, the Schedule to the Act itself specified the goods on which excise was payable but, however, after the enactment of the said Tariff Act, only those items which are in the Schedule to the Tariff Act are liable to excise duty. Section 2(f) defines ''manufacture'' and it says that ''manufacture'' includes any process - (i) incidental or ancillary to the completion of a manufactured product and which is specified in relation to any goods in the Section or Chapter notes of the Schedule to the said Tariff Act as amounting to manufacture. Significantly, the said Act is silent as to the definition of the word ''goods'' although the said word forms part of ''excisable goods'' which are defined in section 2(d) as mentioned above. Although the ''goods'' are not defined here, the definition of ''goods'' in the Sale of Goods Act, 1930 is ordinarily followed which definition says that ''goods'' means every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass

and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale. Thus, ''good'' would mean movables only. The Supreme Court, in the case of Union of India (UOI) Vs. Delhi Cloth and General Mills, inter alia laid down that ''Manufacture'' implies a change, but every change is not manufacture and yet every change of an article is the result of treatment, labour and manipulation. But something more is necessary and there must be transformation; a new and different article must emerge having a distinctive name, character or use. The Supreme Court, again in the case of South Bihar Sugar Mills Ltd., etc. Vs. Union of India (UOI) and Others, reiterated the above view and further laid down that as the Act does not define ''goods'' the legislature must be taken to have used that word in its ordinary dictionary meaning which is that to become goods, it must be something which can ordinarily come to the market to be bought and sold and is known to the market. It can be taken as settled law that a manufactured product in order to attract excise duty must be marketable and the fact that it is in fact not marketed would not made any difference. Thus, the Supreme Court in the case of Ujagar Prints Vs. Union of India (UOI), inter alia laid down :- "There is in law no ''manufacture'' unless as a result of the process a new and commercially distinct product with distinct use emerges." The Supreme Court, again in the case of Moti Laminates Pvt. Ltd. and Others Vs. Collector of Central Excise, Ahmedabad, inter alia laid down that the duty of excise being on production and manufacture which means bringing out a new commodity, it is implicit that such goods must be usable, movable, saleable and marketable. From the several authorities cited by both the sides, the further three facets also emerge as settled law. They are that :- (1) items manufactured for ''captive consumption'' and not meant to be marketed although marketable would attract excise duty; (2) items coming into existence as ''intermediary'' or ''transient'' articles if marketable although not marketed would also attract excise and (3) the burden is on the Department to show that the article in question is marketable and is thus ''goods''. To summarise, in order to attract excise duty, a new and different article/item must emerge having a distinct name, character and use as a result of a manufacturing activity, that such article/item must be ''goods'' i.e., something which can be ordinarily brought to the market, known as the market and bought and sold and that burden to on the Department to show that the article in question attracts excise duty.

6. In the light of the above position in law, let us now test whether in the case before us, the items in question could be called ''excisable goods'' which are manufactured or produced. We do not wish to go into various authorities which were cited before us. Suffice it to say at the cost of repetition that in order to attract excise duty, first of all the items in question must be ''goods''. As far as the first ingredient viz. manufacture or production is concerned, as mentioned earlier, the Supreme Court in the case of Delhi Cloth and General Mills Co. Ltd. (supra) laid down that the ''manufacture'' implies a change and that every change is not manufacture and yet

every change of an article is the result of treatment, labour and manipulation. However, something more is necessary and that there must be transformation. In the present case, whether the items in question satisfy this test or not would be the first question. Secondly, in order to determine the exigibility of these four items, we have to see whether they are goods or not.

7. On behalf of the Petitioners, it was submitted that as far as these items were concerned, they were not ''manufactured'' by the Petitioners. It was their contention that out of duty paid items purchased from the market, at the site itself, after carrying out several operations of cutting, drilling and fastening, these items came into existence; that these items were not parts of a structure as contended by the Respondents, however, they were only sections of the ''J'' Block and on their coming into existence, they immediately became part of the structure and thus, became immovable in character. It was their further submission that these items ex facie were not any objects or goods which came into existence. Therefore, there was no question of the test of captive consumption or marketability being made applicable. In support of their above submissions, the Petitioners relied on the definitions of these words from the Webster''s Third New International Dictionary. As far as the item ''Column'' is concerned, it is inter alia defined at page 451 as "a supporting pillar ..... one of a building''s vertical supporting members made of steel, cast iron, reinforced concrete, timber or stone and often extending from the foundation through several floors, which it supports to the roof." Coming to the definition of ''Girder'' it is inter alia defined therein at page 949 as "a horizontal main member supporting vertical concentrated loads (as from beams) b : Beam; esp. an iron or steel beam either made in a single piece or built up typically of plates, flitches, lattice-work or bars and often of very large proportions; ..... 2. a rolled metal unit of ''I'' section or other section or a built up unit of rolled members and plate that may be transverse or longitudinal depending on the structure to be supported." The word ''Truss'' is inter alia defined therein at page 2456 as "a bracket - an assemblage of members (as beams, bars, rods) typically arranged in a triangle or combination of triangles to form a rigid framework (as for supporting a load over a wide area) that cannot be deformed by the application of exterior force without deformation of one or more of its members." The word ''Purlin'' is also defined in the said Dictionary at page 1846 as "horizontal member in a roof supported on the principals and supporting the common rafters." The Petitioners also referred to certain passages from Volume I of Structural Engineering by Richard N. White, Peter Gergely and Robert G. Sexsmi. Therein, ''Column'' is defined as "a straight member loaded along its centurial axis with a compressive load." ''Truss'' is defined as "a triangular form with both tensile and compressive elements." Lastly, ''Beam'' is defined as "transmission of load perpendicular to the axis of a long member." The Petitioners also relied upon the decision of the Central Government in the matter of Otis Elevator Company (India) Ltd. reported in 1981 E.L.T. 720 (G.O.I.) wherein it was inter alia held that if an article did not come into existence until it is fully erected or

installed, adjusted, tested and commissioned in a building and that on complete erection and installation such article became a part of immovable property then it cannot be described as "goods" attracting levy of any Central Excise Duty. The Government therein was dealing with lifts. The Petitioners further relied upon the decision of the Supreme Court in the matter of Quality Steel Tubes (P) Ltd. Vs. Collector of Central Excise, U.P., wherein the Supreme Court while dealing with the items like Tube Mill and Welding Head erected and installed in the premises and embedded in the earth for manufacture of steel tubes and pipes out of duty paid raw material, inter alia held that the basic test of levying duty under the said Act is two-fold, firstly, that any article must be "goods" and secondly, that it should be "marketable" or "capable" of being brought to market and all goods which are attached to the earth and thus become immovable do not satisfy the test of being goods within the meaning of the Act nor can be said to be capable of being brought to the market for being bought and sold. Applying these tests, the Supreme Court came to the conclusion that the said items viz. "Tube Mill" and "Welding Head" did not satisfy the required tests. The Supreme Court inter alia referred to its earlier decision in the matter of Delhi Cloth and General Mills Co. Ltd. (supra) wherein it was laid down that the twin test of exigibility of an article to duty under Excise Act are that it must be goods mentioned either in the Schedule or under Item 68 and must be marketable. The Supreme Court in the case of Delhi Cloth and General Mills Co. Ltd. (supra) had further held that the word "goods" applies to those goods which can be brought to market for being bought and sold, and therefore, it implied that it applies to such goods which were movable. The Supreme Court in the case of Quality Steel Tubes (supra) also relied on its earlier decision in the case of Union Carbide India Limited Vs. Union of India (UOI) and Others, wherein it was held that even if the goods were capable of being brought to the market it still had to satisfy the test of marketability and therefore the basic test for levying duty under the Act was that an article must be goods and secondly, that it should be marketable and capable of being brought to the market and goods which were attached to the earth and thus, became immovable did not satisfy the test of being goods within the meaning of the said Act. Again, dealing with the arguments advanced on behalf of the Department, the Supreme Court in the case of Quality Steel Tubes (P) Ltd. (supra) held that erection and installation of a plant cannot be held to be excisable goods, that if such wide meaning is assigned, it would result in bringing in its ambit structures, erections and installations and that, that would surely not be in consonance with accepted meaning of excisable goods and its exigibility to duty.

8. The Petitioners submitted that in respect of identical items in several decisions it has been held that these items are not exigible. The Petitioners relied on the decision of the Madhya Pradesh High Court in the matter of Union of India (UOI) Vs. Bajaj Tempo Ltd., wherein the High Court was dealing with identical items viz. Trusses, Columns, Girders and Purlins and after applying the tests laid down by the Supreme Court, it came to the conclusion, after following the decision of the

Supreme Court in the case of Quality Steel Tubes (P.) Ltd. (supra), that these items did not attract excise duty. The Petitioners further relied on the decision of the Customs, Excise and Gold (Control) Appellate Tribunal (CEGAT for short) in the matter of Aruna Industries, Vishakhapatnam and others v. Collector of Central Excise, Guntur and others, reported in 1986 (25) E.L.T 580 (Tri). The Tribunal therein was dealing with identical items and after referring to various decisions of the Supreme Court and after referring to the definitions of these words and to the process which was to be carried out in order to bring these items into existence, held that these items did not satisfy the test laid down by the Supreme Court and that therefore they were not susceptible to excise duty. Similar view was taken by CEGAT in the matter of Standard Industrial Engineering Co. v. Collector of Central Excise, reported in 1988 (38) E.L.T. 196 (Tri) as well as in the matter of I.A.E.C. Bokers Pvt. Ltd. v. Collector of Central Excise, reported in 1990 (48) E.L.T. 388 (Tribunal) and lastly in the matter of Partap Steel Rolling Mills v. Collector of Central Excise, reported in 1990 (48) E.L.T. 539 (Tri).

9. On the other hand, Shri Dada, the learned Additional Solicitor General did not, as expected, dispute the principles on which excise duty can be levied as laid down by the various decisions of the Supreme Court referred to above. However, he submitted that the four items in question were goods inasmuch as that after the process of fabrication, the same came into existence. The fact that they were not marketed was irrelevant and that these items were, in any view of the matter, intermediary/transient products and they were marketable and they satisfied the twin tests laid down by the Supreme Court in the matter of Delhi Cloth and General Mills Co. Ltd. (supra). Shri Dada referred to several decisions of the Supreme Court on this aspect to the effect that transient products also could be subjected to payment of excise duty. We do not think it necessary to refer to the said decisions as the submission per se cannot be disputed. However, the questions still remain whether the process of drilling, welding and fastening after cutting the duty paid material purchased from the market amount to manufacturing and whether any new ''goods'' came into existence. Shri Dada referred to the General Excise Tariff of India for the years 1987-88 and 1988-89. It is apparent from the same that prior to April 1988, Entry No. 73.08 of Chapter 73 dealt with ''other articles of iron and steel'' and Entry 7308.90 thereof was the residual entry. For the year 1988-89, the amended items 73.08 and 7308.90 are relevant. They are reproduced below :-

It was his submission that these items in question fell under this entry as "parts of structures". In any view of the matter, the same fell under Entry No. 7308.90 - ''Other''. Shri Dada in fact referred to a decision of the Tribunal in the matter of Richardson and Cruddas (1972) Ltd. v. Collector of Central Excise, reported in 1988 (38) E.L.T. 176 (Tri) wherein after distinguishing the decision in Aruna Industries, Vishakhapatnam and others (supra), the Tribunal came to the conclusion that the process of conversion of iron and steel products into columns, purlins, etc., amounted to a process of manufacture since the resultant goods had a distinct

name, character and use, different from the raw materials like angles, channels, etc. The Tribunal in the said case, after referring to other decisions and also to the decision of the Supreme Court in Empire Industries Ltd. v. Union of India, reported in 1985 (2) E.L.T. 179, wherein it was held that to constitute ''manufacture'' it was not necessary that one should absolutely make out a new thing and it was the transformation of a matter into something else and that something else was a question of degree, whether that something else was a different commercial commodity having a distinct character, use and name and was commercially known as such. Shri Dada thus differed with the Petitioners and submitted that the items in question became excisable items before becoming parts of the structure.

10. In our opinion, the position is well settled as a result of several judicial pronouncements of the Apex Court and the High Courts. ''Manufacture'' implies change but every change is not a manufacture. There must be a transformation. A product, with a distinct use, character and name necessarily must come into existence. Every products, in order to become exigible to excise duty, must be known as such in the commercial community. In the instant case, it is admitted that on the materials like angles, plates, etc. which are used, excise duty is already paid. They are subjected to cutting to size, drilling holes for fastening the materials with nuts and bolts. There is no manufacture in the strict sense. In our view, the cutting of the steel plates, drilling of holes, riveting or fastening them are merely operations from which one could not hold that the identity of the original product was lost and a transformation had taken place. The Columns, Beams, Trusses and Purlins are sections or portions of a structure, come into existence when affixed or fabricated into the structure, thus, simultaneously on coming into existence, become part of the structure and thus becoming immovable in character. This is, like preparing/constructing a ''flooring'' or a ''wall'' of a building which is done by subjecting to further processing articles like cement, sand and tiles in the case of ''flooring and cement, sand bricks in the case of ''wall''. Can it be said that ''floorings'' and ''walls'' being ''parts'' of a building are excisable ? Undoubtedly, the definitions of these ''items'' referred to above and the photographs which were produced by the Petitioners would show that these ''items'' are only portions or ''sections'' of a structure. The other test is : whether they could be separately known as commodities separately bought and sold ? The answer could be only in the negative. Thus, none of these items, in our view, satisfy the twin tests and are, therefore, not exigible to excise duty.

11. The other aspect of the matter before us is the challenge to the legality and validity of the Trade Notice, dated 8th February 1988. Both sides advanced arguments in support of their submissions. However, in view of the fact that we have come to the conclusion that these four items viz. Columns, Girders/Beams, Trusses and Purlins are not exigible to excise duty, it is not necessary to consider these arguments in detail. As a necessary corollary to our above view, the said Trade Notice to the extent of any of these items will stand quashed.

12. Lastly, Shri Dada submitted that the Petitioners have rushed to Court after the notice, dated 22nd March 1988 was received. Relying on the decision of the Supreme Court in the matter of Collector of Central Excise, Chandigrah Vs. M/s. Steel Strips Ltd., Sangrur, and also the decision of the Division Bench of this Court in the matter of Bajaj Auto Ltd. Vs. Union of India, , it was submitted that although the Petition has been admitted, it is not necessary that this Court should go into the questions of facts as to whether these items are goods or not. All these questions should be left to be adjudicated upon more so when the Petitioners were now not challenging vires of any provisions of law as they had not pressed prayer (a) of the Petition. In support of this contention, Shri Dada relied on the decision of the Supreme Court in the matter of Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others, . On the other hand, on behalf of the Petitioners, reliance was placed on the decision of the Supreme Court in the matter of L. Hirday Narain Vs. Income Tax Officer, Bareilly, wherein it was inter alia held that the High Court, after entertaining the petition and giving the hearing to the Petitioners on merits, cannot reject the petition on the ground that the statutory remedy was not availed of. Further, reliance was placed by the Petitioners on the decision of this Court in the matter of Tata Engg. and Locomotive Company Ltd. Vs. Union of India, wherein this Court entertained the Writ Petition at the show-cause notice stage itself and rejected the contention raised by the Department to the effect that the Department should be permitted to continue with the proceedings and the High Court should not examine the validity of the show-cause notice and held that if the show-cause notice was issued without any jurisdiction or the show-cause notice cannot be sustained by reference to any of the provisions of law, then the High Court was entitled to strike down the show-cause notice and it was not necessary to compel the assessee to undergo a cycle of litigation before the Excise Authorities. We see considerable force in the Petitioners'' submission. In the case before us, the four items in question, without any further evidence/fact finding being necessary, do not appear ex facie to be exigible to excise duty. We have arrived at this conclusion after following not only the settled law, but also examining the character, meaning, use and function of the items in question. The Department, on whom the burden lies to satisfy the Court that these items are exigible to excise, have not produced any material to show that these items are either the result of ''manufacture'' or ''goods'' as understood on the basis of settled law. In our opinion, ex facie the items which are sought to be charged with excise are not exigible to excise duty at all. Therefore, there is no question of throwing out the Petitioners at this stage, i.e. after admitting the petition, on the ground of alternative remedy and to make them to undergo unnecessary litigation. In these circumstances, we cannot accede to Shri Dada''s submission.

13. At the outset, on behalf of the Petitioners, it was submitted that the Petitioners were not pressing prayer (a) of the Petition which seeks declaration that the provisions of Heading No. 73.08 of the Schedule are unconstitutional. Thus, there is

no question of considering or granting prayer (a). The Petition is made absolute in terms of prayers (b), (c) and (d). However, we wish to make it clear that the Notice, dated 22nd March 1988 is held invalid and quashed as far as it relates to the said items viz. Columns, Girders, Trusses and Purlins. In the facts and circumstances of the case, there shall be no order as to costs.