Karnataka High Court Thungabhadra Steel Products Ltd. vs Uoi And Ors. on 21 March, 1997 Equivalent citations: 1997 (58) ECC 26, 1998 (98) ELT 334 Kar, ILR 1997 KAR 1301, 1997 (3) KarLJ 601 Author: T Vallinayagam Bench: P K Moorthy, T Vallinayagam ORDER T.N. Vallinayagam, J. 1. The petitioner is a Public Sector undertaking jointly owned by the Government of India, Government of Karnataka and Andhra Pradesh. The petitioner is engaged in the fabrication of hydraulic gates of different types and dimensions, hoists and Gantry Cranes for such gates, penstock pipes, Rubber seals etc., for river valley projects, Transmission Line Towers and sub-station structurals for power projects, EOT Cranes, building structurals and bridge structurals. The petitioner undertakes contracts from Government Departments and various Electricity Boards throughout India. Most of the contracts are in the nature of turn-key projects/jobs. All its products are fabricated, according to the petitioner, out of duty paid raw materials and components either purchased from the market or supplied by its customers. As primarily a contracting Company, the petitioner undertakes turn-key projects on contract basis all over the country. The petitioner's customers are mostly the Public Works Department of the State Government, State Electricity Boards and occasionally some Public Sector Undertakings. 2. The petitioner claims that it has been fabricating its products mentioned above not in their full forms, but only in parts which are then taken to the different sites for being assembled into whole by process of welding and fixing with bolts and nuts. The parts so fabricated would all be to the specifications stipulated by the customers to suit their projects or jobs. In other words, according to the petitioner, the parts fabricated for a particular project/job will not be useful for any other project or job. These parts will all thus be utilised in the project or job, for which they have been specifically fabricated and at no point of time, they are offered for sale in the market. 3. Before 1.3.1980, the parts, which were fabricated, were all classified and also assessed to duty provisionally under the erstwhile Tariff Item 68. In 1980, the petitioner filed a writ petition before this Court in Writ Petition No. 23434/1980 contending that the parts fabricated in and cleared from, its Factory are not "goods" within the meaning of Section 2(d) of the Central Excises and Salt Act, 1944, and would not, therefore, attract the central excise duty and even the main products, such as, gates, hoists, cranes, Penstock pipes etc., coming into existence after erection, cannot be treated as goods attracting central excise duty by virtue of their being embedded in earth and consequently becoming immovable. In that writ petition, the Department contended that the provisional assessments in the petitioner's case are resorted to on account of the peculiar nature of clearance made by them in parts for assembling at the site which is away from the place of manufacture and for the correct assessable value at the time of assembling the parts cleared from the factory was not ascertainable. The Department further contended that the petitioner has cleared the goods in parts for the sake of convenience and transportation as contracted goods as a whole, is too heavy and voluminous. Considering the questions as to whether the business activity of the petitioner constitutes manufacture of goods as contemplated under Section 2(f) of the Act to attract the levy of duty under the

Act? and whether the place where the alleged fabrication of structures takes place is a Factory, a Division Bench of this Court, before which the writ petition filed by the present petitioner and another was referred to for decision by the learned single Judge, agreed with the contention raised by the petitioner and held that the products made by the petitioner are not liable for excise duty. This judgment, we are now informed, was taken up to the Supreme Court in Civil Appeal Nos. 4961 to 4964/1989 and the Supreme Court has confirmed the Division Bench judgment of this Court. In view of such confirmation by the Supreme Court of the view taken by this Court, this petition also has to be necessarily allowed following the view of the Supreme Court. 4. However, the learned Counsel for the Department wanted to raise the contention that certain facts were not placed before the Supreme Court and, therefore, they should be considered by this Court afresh. It is, therefore, necessary to discuss in detail the submissions made by the respective learned Counsel and find out whether the contention raised before us by the learned Counsel for the respondents has already been considered by the Division Bench or not. 5. Factually, another important factor to be noted is that during the pendency of the writ petition before the Bench, there was an amendment to the definition of goods by Act 5/1986 where the words "Schedule to the Central Excise Tariff Act, 1985" have been introduced. We are giving below the old Section 2 as well as new Section : - Old Section 2(d) New Section 2(d) "Excisable goods" means goods specified in the First Schedule as being subject to a duty of excise and includes salt" "Excisable goods" means goods specifed in the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as being subject to a duty of excise and includes salt." While old Section 2(d) reads that 'goods' means those which are specified in the First Schedule to the Central Excises and Salt Act, 1944, the new definition would say that 'goods' are those which are specified in the Schedule to the Central Excise Tariff Act, 1985. Earlier the goods were assessed to central excise duty under Item No. 68 of Schedule-I to the Central Excises and Salt Act, 1944. Now, after amendment, the provision that has been made applicable is Chapter 7308.90. Tariff Item No. 69 of Schedule-I reads as "all other goods, not elsewhere specified", while under Chapter 7308.90, the mere word "others" is included. 6. Before proceeding further, it is necessary to state a few more facts- The earlier Division Bench was concerned with Writ Petition Nos. 23434/1980, 14148/1982 and 4623/1982 along with another writ petition filed by another Company. In all these three writ petitions, the present writ petitioner was a petitioner. Writ Petition No. 23434/1980 was for quashing the provisional assessment order for the month of October 1980 that was shown in Annexure-K61 filed in that writ petition; Writ Petition No. 14148/1982 was for quashing the provisional assessment order and the demand of duty as per Annexures-B and C attached to that writ petition; and Writ Petition No. 4623/1982 was also for quashing the order passed by the Collector of Central Excise as confirmed by the Appellate Authority, which were shown as Annexures-D and E in that writ petition. In the first writ petition, there was a prayer for prohibition from levying excise duty and for a direction for refund of the excise duty collected; in the second writ petition, the prayer was also for prohibition from collecting excise

duty and for refund of the excise duty collected; and in the third writ petition, the additional prayer was for a mandamus to the respondents to refund duty paid on five over head cranes and prohibiting the respondents from levying and collecting duty under Tariff Item No. 68 of Schedule I to the Central Excises and Salt Act. In all the three writ petitions, the assessment made to central excise duty under Tariff Item No. 68 of Schedule I to the Central Excises and Salt Act, 1944, was challenged on the same set of facts. While admitting the writ petitions, the learned single Judge, who later referred the matters to the Bench, granted a conditional stay. It is necessary to reproduce the order of stay : - "The enforcing upon the levy of excise duty on the petitioner under Tariff Item No. 68 of Schedule I to the Central Excises and Salt Act, 1944 on their contracts relating to the design manufacture and erecting of Hydraulic gates, hoists, cranes, Penstock pipes which are required for the construction of Dams and Multi-purposes River Valley projects and on Fabrication of Transmission line to wears for the State Electricity Boards etc., is hereby stayed subject to petitioners furnishing Bank guarantee for the duty demanded in a lumpsum of Rs. 30/- lakhs." The stay was in operation till the disposal of the writ petitions by the Bench on 30.11.1988. 7. However, as already discussed supra, Section 2(d) is to the effect that 'excisable goods' means goods specified in the First Schedule as being subject to a duty of excise and includes salt, as found in the Central Excises and Salt Act, 1944 (Act No. 1 of 1944). But, the Central Excise Tariff Act, 1985 (Act No. 5 of 1986), which came into force on 28.2.1986, has made the Section in the following lines : - "2. Duties specified in the Schedule to be levied.-The rates at which duties of excise shall be levied under the Central Excises and Salt Act, 1944 (1 of 1944) are specified in the Schedule." This amendment was introduced during the pendency of the writ petitions before the Division Bench. Therefore, notwithstanding the order of stay granted in the manner mentioned above, the Superintendent of Central Excise has chosen to issue a fresh notice, which is Annexure-C to the writ petition. The said notice runs as follows : - "Rule 2(a) of the New Central Excise Tariff Act, 1985 clearly states that if the incomplete or unfinished goods have the essential character of the complete or finished goods they shall be taken to include in heading of complete or finished excisable goods. Though they are removed in unassembled condition, disassembled condition or knock down condition you are supplying the hydraulic gates, Hoists Cranes, gantry cranes, E.O.T. Cranes, transmission line towers etc., in knock down condition but they got all the characteristics of the complete assembled conditions of hydraulic gates, Hoists, Cranes, gantry cranes, E.O.T. Cranes, transmission line towers, etc. Though they will be embedded to the earth at the site after fabrication they got all the characteristics of the complete assembled conditions of Hydraulic gates, Hoist, Cranes, gantry cranes, E.O.T. Cranes, transmission line towers etc., at the time of clearance from the Factory. Therefore, the goods are correctly classifiable under different headings as per the New Central Excise Tariff Act, 1985. Hence, you have to pay the central excise duty on all the goods manufactured by you and cleared under the unassembled condition." The stay order was sought to be distinguished in the letter filed as Annexure D, by the very same Superintendent, in the fol-

lowing fashion : - ".....Accordingly stay order was granted to you as per Writ Petition No. 23434/80 in respect of hydraulic gates, and Hoists supplied to the river valley projects and transmission line towers supplied to the State Electricity Boards. This goes to prove undoubtedly that you are manufacturing the parts of the above mentioned items. Hence, the parts that are manufactured and cleared in incomplete or unfinished condition have got all the essential characteristics of the complete or finished goods. Hence, Rule 2(a) of Central Excise Tariff Act, 1985 is applicable in this connection. Though they will be embedded to the earth after fabrication at the sites they are part and parcel of the finished goods. The parts that are manufactured and cleared are for definite purpose and they cannot be used for other purposes as far as your goods are concerned. Therefore, please pay the central excise duty at the appropriate rate of duty on the parts of the excisable goods manufactured and cleared by you." An explanation was given by the writ petitioner with reference to the revised Tariff Schedule brought into effect from 28.2.1996, as under : - "The main products that we fabricate are hydraulic gates of different types gantry cranes, hoists, penstocks and Airvent pipes, rubber seals, Transmission Line towers, building structures, electric overhead cranes etc., out of duty paid steel materials either purchased by us or supplied by our customers. Prior to the introduction of the revised tariff, our products mentioned above were classified under the old Tariff Item 68. In this connection we wish to state that we are fabricating and clearing only parts of components of our main products in piece meal and not the main products as such. The Local Central Excise Officers are aware of this. We have been repeatedly maintaining that the parts of components fabricated and cleared by us are not standard products, but they are fabricated according to the individual requirement of each project work and consequently has no commercial identity of their own. They are also incapable of being brought to the market for sale or purchase. Even if offered for sale they will fetch only scrap value. Even our customers are also not interested in them but only in the completed final products whether a gate, penstock pipe or a transmission tower. All our main products such as gates, hoists, gantry cranes, E.O.T. cranes, Transmission line towers etc., assume their full form and come to be known as such only after erection at site and by then they become 'immovable' by virtue of their being embedded or finally fixed to earth. We have therefore disputed our products being subjected to the levy of Central Excise duty, on the ground that they are not 'goods' for excise purposes. Our writ petition in this regard is pending disposal by the High Court of Karnataka, and the Court has also ordered stay of collection of duty on our products. From a perusal of the revised Tariff Schedule we find that a Majority of our products do not find place in the Chapters. It has been claimed by the Government of India that the revised Tariff schedule is based broadly on the system of classification derived from the International Convention on the Harmonised commodity description and coding system." Finally, the Department interpreted the stay order granted by this Court, by letter dated 31.12.1986 under Annexure-G, in the following fashion : - "You are quite aware that the stay order granted in respect of Hoist Cranes, Hydraulic Gates, Pen stock Pipes and Transmission Lines is not ap-

plicable after 1.3.1986 as stated above and the Central Excise Duty is leviable under the New Tariff on parts of machinery manufactured and cleared from your factory at Hospet." Besides such stand taken by the Department, Show Cause Notices were issued as per Annexures-H and M followed by an order passed in Annexure-O, wherein the learned Collector for Central Excise held that "the petitioners manufacture so many articles of iron and steel having a specific name and use and cleared the same for assembly and manufacture of other goods at site during the period 1.3.1986 to 13.1.1987. The party's arguments that these articles are not 'goods' for Central Excise purpose are rejected." Therefore, he held that "since they have a specific name and use and are manufactured of iron and steel, they can be very clearly classified under Chapter sub-heading 73.08 (other articles of iron and steel) due to not showing specific place in any sub-heading from 73.01 to 73.07. On going through the description of such articles as manufactured and cleared by M/s. Thungabhadra Steel Products Limited from 1.3.1986 to 13.1.1987, it is seen that none of them can be classified under sub-heading 73.01 to 73.07. As such, they are correctly classifiable under sub-heading 73.08 only. However, Sub-Heading 73.08 also classifies certain articles by name from 7308.10 to 7308.80 where also, the goods manufactured by M/s. Thungabhadra Steel Products during the said period do not find place and hence they are covered under 7308.90, which is for other articles of iron and steel not covered from 7308.10 to 7308.80." It is necessary to place on record the fact that the amendment to Section 2 does not in any way affect the stand taken by the petitioner. The Department is again not able to show to us what exactly is the difference. In fact, we are able to see that both before and after the amendment, the products of the petitioner have been brought only under residuary category. While the word "residuary" is actually found in Item No. 68 in the old Act, the words "others alone" are found in the new Schedule. We also see that the Department itself is finding it difficult to bring it within the "residuary" category, as a reading of the above order would lead us to such conclusion. The order was passed on 10.3.1988 when the earlier Bench had not disposed of the matter and it was confirmed in the appeal by the Collector on 30.9.1988, which has been filed under Annexure-P. The present writ petition is filed for quashing the above order passed in Annexure-O and confirmed in Annexure-P. 8. Now, it is necessary to refer to the view of this Court as expressed in the judgment rendered by the earlier Division Bench regarding the contentions of the respective parties. The following passage from the judgment of the earlier Division Bench is worth to be quoted : - "12. It is admitted by the Department that the items manufactured by the petitioners are highly technical in nature which are not required for personal use of a common man. These items are not brought to the market for sale. The Department, however, does not admit that the work undertaken by the petitioners is a works contract, since it is not undertaking merely the contract of fabrication or erection but also manufacturing items required for such contract according to the specifications, and supplies the said items for completion of the projects. However, on the admitted facts in the instant case it is clear that what is removed from the factory of the petitioners are parts in unfinished form, which can neither be brought or sold in that form

by any one, including the contracting party. Such items, which are only parts cannot therefore be construed to be goods. The said parts are removed to the site where they are welded and embedded in the concrete and civil works in accordance with the design under the contact and ultimately they become fixtures forming part of the project. Considering the nature of transaction it cannot but be a works contract for fabrication and erection of the particular fixtures and it cannot be construed as a contract for sale or transfer or assembling of manufactured goods, attracting levy of excise duty. That it is indeed a turnkey project cannot be disputed. It is further clear that the hydraulic gates, hoists, crances etc., are fixed in a position and erected and that it is delivered to the customer after they are permanently embedded in the land belonging to the customer, and hence, it cannot constitute transfer of property to the customer as 'goods' attracting the provisions of Section 3 of the Act. The work is undertaken on individual contract basis which, as stated earlier, involves fabrication of some items and installation of power work, including electrical equipment, motors, wires etc., brought from open market or other manufacturers, on which excise duty will have already been paid on removal from the respective factories, including their own. The ultimate project also includes the components supplied by the customer in the form of cement and other material required for masonry jobs, which ultimately emerges and takes the shape of the project. 13. It is well settled that to be called goods an article-tangible or intangible-should be movable. Several parts manufactured elsewhere are brought on site where hydraulic gates, cranes, penstock pipes, transmission line towers etc., are to be erected and installed. Since at the moment they came into existence they are part of the immovable property in which they are erected and installed, hydraulic gates, cranes, hoists etc., are not 'goods' and do not attract levy of duty under the Act. Viewed from any angle, such structures involving the above elements cannot be treated as goods since it will have been fixed to the ground to become an immovable property, which cannot in its nature be said to have been brought to the market for purchase or sale. The process of welding the structure with the use of duty components from the petitioners own factory and other commodities procured from the open market cannot be treated as the process of 'manufacture' which alone can attract duty under the Act. It is also not possible to hold that the project site is a factory or can be deemed to be a factory. In the circumstances the contention of the Department that the duty in the instant case is not levied on the project itself but levied on items manufactured and supplied by the petitioners and used in the project, treating such items as exigible goods appears to be vague and contradictory in terms. The fact that provisional duty is charged on each item on part cleared from the petitioners factory for the purpose of fitting them to form the whole structure according to the specifications cannot convert the ultimate structure embedded on the customers land before it is delivered to the customer or render it 'goods'. Even the circumstances of the petitioners opting for exemption under the Notification No. 120/75-CE 30.4.1975 and payment of provisional duty therefore cannot by itself convert the turnkey project and cranes into goods. The pendency of the final assessment which is held up for want of final invoice on completion of the

job is also not a circumstance which would militate against the view which we have taken regarding the character of the project, which cannot be construed as 'goods' from the nature of the installation work it is inescapable that the fabricated structure becomes immovable property and hence it ceases to be 'goods'. Even the fact that any such cranes and hoists can be dismantled and moved elsewhere would not make such installation a movable goods which can come to the market for being bought and sold, like any other goods. Hence, the view of the department that the cranes become manufactured goods after they had been erected at site and such erection and installation are chargeable to duty is not tenable." As indicated earlier, the view of the Division Bench has been upheld by the Supreme Court. 9. The petitioner brought to our notice not only the order of the Supreme Court upholding the judgment of this Court in Civil Appeal Nos. 4961 to 4964/89 decided on 12.2.1997, but also the judgment relied upon by the Supreme Court which led to the confirmation of the order of the Division Bench of this Court, in Mittal Engineering Works Pvt. Ltd. v. Collector of Central Excise, Meerut . The learned Counsel for the petitioner, apart from bringing to our notice the judgment relied upon by the Supreme Court in the above Civil Appeals, relied upon three more decisions as well. 10. The first decision relied upon by the learned Counsel for the petitioner is in Bhor Industries Ltd. v. Collector of Central Excise , wherein the Supreme Court has held thus : - "6. In support of this appeal, on behalf of the appellant, it was contended by Shri Harish Salve that it was only the 'goods as specified in the Schedule' to the Central Excise that could be subject to the duty. It appears to us that under the Central Excise Act, as it stood at the relevant time, in order to be goods as specified in the entry the first condition was that as a result of manufacture goods must come into existence. For articles to be goods these must be known in the market as such or these must be capable of being sold in the market as goods. Actual sale in the market is not necessary, user in the captive consumption is not determinative but the articles must be capable of being sold in the market or known in the market as goods. That was necessary. This has been clearly spelt out by this Court in Union of India v. Delhi Cloth and General Mills . There this Court held that excise duty being leviable on the manufacture of goods and not on their sale, the manufacturer could not be taxed unless manufacturing process resulted in production of goods as known in the market (emphasis supplied)..... After considering the definition of the word 'manufacture' and several authorities and Words and Phrases, Permanent Edition, Volume 18 from a judgment of the New York Court and also other relevant authorities, this Court held that the definitions made it clear that to become"goods an article must be something which can ordinarily come to the market to be bought and sold (Emphasis supplied). In that view of the matter this Court agreed with the High Court and dismissed the appeal. Therefore, the first principle that emerges is that excise was a duty on goods as specified in the Schedule. In order to be goods an article must be something which can ordinarily come to the market and is brought for sale and must be known to the market as such. Therefore, the marketability in the sense that the goods are known in the market or are capable of being sold and purchased

in the market is essential. This principle was again reiterated by this Court in South Bihar Sugar Mills Ltd. v. Union of India (. "The Act charges duty on manufacture of goods. The word"manufacture" implies a change in the raw material is not manufacture. There must be such a transformation that a new and different article must emerge having a distinctive name, character or use. The duty is levied on goods. As the Act does not define goods, the Legislature must be taken to have used that word in its ordinary, dictionary meaning. The dictionary meaning 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. (Emphasis supplied). That it would be such an article which would attract the Act was brought out in Union of India v. Delhi Cloth and General Mills Ltd. . 8. It is necessary in this connection to reiterate the basic fundamental principles of excise. The Judicial Committee of the Privy Council in Governor General in Council v. Province of Madras, 1945 FCR 179 = (AIR 1945 PC 98), observed at page 192 (of FCR) : (at P. 101 of AIR) = ECR C 94 PC that excise duty was primarily a duty on the production or manufacture of goods produced or manufactured within the country. This Court again in In Re. the Bill to Amend S. 20 of the Sea Customs Act, 1878, and Section 3 of the Central Excises and Salt Act, 1944 (1964) 3 SCR 787 at page 822 = (AIR 1963 SC 1760 at P. 1776) = 1984 ECR 180 (SC) = ECR C Cus 310 SC referring to the aforesaid observations of the Judicial Committee reiterated that taxable event in the case of duties of excise in the manufacture of goods and the duty is not directly on the goods but on the manufacture thereof. Therefore, the essential ingredient is that there should be manufacture of goods. The goods being articles which are known to those who are dealing in the market having their identity as such. Section 3 of the Act enjoins that there shall be levied and collected in such manner as may be prescribed duties of excise on all excisable goods other than salt which are produced or "manufactured" in India. "Excisable goods" under Section 2(d) of the Act means goods specified in the Schedule to the Central Tariff Act, 1985, as being subject to a duty of excise and includes salt. Therefore, it is necessary, in a case like this, to find out whether there are goods, that is to say, article as known in the market as separate distinct identifiable commodities and whether the tariff duty levied would be as specified in the Schedule. Simply because a certain article falls within the Schedule it would not be dutiable under excise law if the said article is not "goods" known to the market. Marketability, therefore, is an essential ingredient in order to be dutiable under the Schedule to Central Tariff Act, 1985." It is significant to note that this decision takes into consideration the new amended Act of 1985. 11. The next decision relied upon is in the case of Moti Laminates Pvt. Ltd. v. Collector of Central Excise, Ahmedabad [1995 (57) ECR 1 (SC)]. The question that came up for consideration in the above case was whether various goods mentioned in the Schedule of Excise Tariff are dutiable as such or they would be 'excisable goods' as defined in the Act, only when they are marketable or capable of being marketed? In that case, the Collector of Appeals held that an intermediate product in order to be excisable must be a product known to the market or commercial community. In other words, the intermediate product,

which came into existence, should have been a complete product known as such to the market. But, if something more was to be done on the product to bring it into a form known to the commercial community, then it could not be treated as excisable goods. However, when the Tribunal over-ruled the decision of the Collector, the matter was ultimately taken to the Supreme Court. The Supreme Court, while allowing the appeal, observed thus : "The duty of excise is leviable under Entry 84 of List of the VIIth Schedule on goods manufactured, or produced. That is why the charge under section 3 of the Act is on all,"excisable goods' produced or manufactured". The expression 'excisable goods' has been defined by clause (d) of Section 2 to mean, 'goods' specified in the Schedule. The Scheme in the Schedule is to divide the goods in two broad categories-one, for which rates are mentioned under different entry and other the residuary. By this method all goods are excisable either under the specific or the residuary entry. The word 'goods' has not been defined in the Act. But, it has to be understood in the sense it has been used in Entry 84 of the Schedule. That is why Section 3 levies duty on all excisable goods mentioned in the Schedule provided they are produced and manufactured. Therefore, where the goods are specified in the Schedule they are excisable goods but whether such goods can be subjected to duty would depend on whether they were produced or manufactured by the person on whom duty is proposed to be levied. The expression 'produced on manufactured' has further been explained by this Court to mean that the goods so produced must satisfy the test of marketability. Consequently it is always open to an assessee to prove that even though the goods in which he was carrying on business were excisable goods being mentioned in the Schedule but they could not be subjected to duty as they were not goods either because they were not produced or manufactured by it or if they had been produced or manufactured they were not marketed or capable of being marketed. 7. 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. The duty is on manufacture or production but the production or manufacture is carried on for taking such goods to the market for sale. The obvious rationale for levying excise duty linking it with production or manufacture is that the goods so produced must be a distinct commodity known as such in common parlance or to the commercial community for purposes of buying and selling . . . . 9. Although the duty of excise is on manufacture or production of the goods, but the entire concept of bringing out new commodity etc. is linked with marketability. An articles does not become goods in the common parlance unless by production or manufacture something new and different is brought out which can be bought and sold . . . ." Ultimately, the Supreme Court held that the marketability is the only criterion and upheld the view of the Collector holding that the Department is not entitled to levy duty. 12. Finally, the case of Mittal Engineering Works (P) Ltd. v. Collector of Central Excise, Meerut , was brought to our notice. The article that was the subject matter of consideration before the Supreme Court was Mono Vertical Crystallisers. It may be worth-while to note the description

of the product mentioned in Paragraph-2 of the decision, which reads as follows : “2. Mono vertical crystallisers are used in sugar factories. Their function is to exhaust molasses of sugar. A general not placed on the record of the Tribunal by the appellants, who have patented the mono vertical crystalliser, described the function and manufacturing process. The mono vertical crystalliser is fixed on a solid RCC slab having a load bearing capacity of about 30 tonnes per sq. mt. It is assembled at site in different sections shown by the packing list given to customers with the invoices. This consists of bottom plates, tanks, coil, drive frames, supports, plates, distance places, cutters, cutter supports, tank ribs, distance plate angles, water tanks, coil extension pipes, loose bend angles, coils supports, railing stands, intermediate platforms, drive frame railings and flats, oil through, worm wheels, shafts, housing, stirrer arms and support channels, pipes, floats, heaters, ladders, platforms, etc. The parts aforesaid are cleared from the premises of the appellants and the mono vertical crystalliser is assembled and erected at site. The process involves welding and gas cutting. Where the assembly and erection is done by the appellants welding rods, gases and the like are procured from the stores of the customer and the customer sends to the appellants debit notes for their value. A sketch and photograph produced by the appellants before the authorities shows that the mono vertical crystalliser is a tall structure, rather like a tower with a platform at its summit.” In the above case, it is seen that various intermediate parts are finally manufactured into a tall structure or a tower with a platform at its summit. Reiterating the earlier view that marketability was a decisive test for dutiability, the Supreme Court further held that “it meant that the goods were saleable or suitable for sale. They need not in fact be marketed. They should be capable of being sold to consumers in the market, as it is without anything more”. The Supreme Court finally held that the record showed that mono vertical crystallisers had, apart from assembly, to be erected and attached by foundations to the earth and, therefore, were not, in any event, marketable as they were. 13. As against these submissions made by the learned Counsel for the petitioner, the learned Counsel representing the Department submitted that there is a distinction between the intermediate parts and the final products consisting of all raw materials and he also submitted that all intermediate parts go into the products and the final structure is emanating; each part is easily identifiable as they are made up of all raw materials and though the final product consisting of all raw materials, which becomes an immovable property, is not liable for duty; the other identifiable part that goes to make the final product is liable to duty and this aspect has not been considered by either the Division Bench of this Court or the Supreme Court. We are unable to agree with this submission. In our opinion, both this Court and the Supreme Court have considered the position of the intermediate parts and also the final product and they have laid down a clear dictum that they would be excisable goods as defined in the Act only when they are marketable or capable of being marketable. They also made it clear that law on this issue is fairly settled. With respect and with no hesitation, we follow the dictum of the Supreme Court and hold that the goods manufactured by the petitioner, as has been analysed by the Department, are not liable to excise duty. 14. In

the result, we allow the writ petition, quash the order dated 10.3.1988 passed by the second respondent as per Annexure-O as also the order dated 30.9.1988 passed by the third respondent as per Annexure-P and consequently, direct that if any duty is collected, the Department must refund the same to the petitioner.