Union Of India vs Ahmedabad Electricity Co. Ltd. & Ors on 29 October, 2003

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Bench: Ruma Pal, Arun Kumar

CASE NO.:
Appeal (civil) 2168-2169 of 2001

PETITIONER:
Union of India

RESPONDENT:
Ahmedabad Electricity Co. Ltd. & Ors.

DATE OF JUDGMENT: 29/10/2003

BENCH:
Ruma Pal & Arun Kumar

JUDGMENT:

J U D G M E N T WITH CIVIL APPEALS NOS. 7792-7795/2001, 626-627/2002, 2013/2002, 3194/2002, 4183-4188/2002, 4724/2002, 8642- 8644/2002, 8649/2002, 87-89/2003, 4051/2003, 4490-4493/2003 ARUN KUMAR, J.

The question which arises for consideration in this bunch of appeals is regarding exigibility of 'cinder' to excise duty. The respondents in all the appeals use coal as fuel for producing steam to run the machines used in their factories to manufacture the end product. Coal is burnt in the boilers or furnaces for producing steam. Normally coal when it is burnt in boilers is reduced to ash. Some part of coal does not get fully burnt because of its low combustible quality. This unburnt or half burnt portion of coal is left out in the boilers. It is called 'cinder'. Though the respondents are engaged in manufacturing different end products, one thing is common between them and that is that they all use coal as a fuel.

The First Schedule to the Central Excise Tariff Act contains various entries which is a list of excisable goods. The list also gives rates of duty leviable on the respective items. 'Cinder' is not

mentioned in any of the entries to the First Schedule. Chapter 26 of the Schedule contains an entry at Serial No. 26.21 which is as under:

> "Other slag and ash, including seaweed ash (kelp)---8%"

The Revenue seeks to cover 'cinder' under the said entry to make it subject to levy of excise duty. The respondents have resisted this claim of the Revenue. This has led to the present litigation. The learned Additional Solicitor General appearing for the Union of India, i.e. the Central Excise Department, raised following points in support of the stand of the Department that "cinder" is liable to be subjected to levy of excise duty:

> (1) In view of the Entry No. 26.21 in the Central Excise Tariff Act, 'cinder' is per se exigible to excise duty as it is covered under an entry in the First Schedule to the Tariff Act. According to him, the fact that an item finds mention in the Schedule to the Tariff Act per se becomes excisable. The said Schedule contains a list of excisable goods and all items in the Schedule are liable to payment of excise duty.
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> (2) Section 3 of the Central Excise and Salt Act is the charging Section from which the twin test of excisable goods being manufactured in India and capable of being marketable emerge. According to the learned ASG both the tests are satisfied in the present case. It is argued that 'cinder' is a by-product of coal which emerges in the course of manufacture of the end product. 'Cinder' is sold by the various assessees from their factories. Therefore, it is marketable. Thus both the tests are satisfied.
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> (3) The question involved in the present appeals is more a question of fact which the High Court should not have entertained in a petition under Article 226 of the Constitution of India.

Apart from the above points urged on behalf of the Revenue, some points emerge from the contentions raised by the learned counsel appearing for the assessees. They are :

> In the statutory appeals filed by the Revenue against the judgment of the Customs Excise & Gold (Control) Appellate Tribunal in the case of Tata Iron and Steel Company (C.A.No.4051/2003), it has been argued that the show cause notice issued by the departmental authorities was beyond time. Section 11A of the Central Excise Act which allows an extended period of limitation for issue of Show Cause Notice could not be invoked in the facts of the case because all necessary facts were being disclosed regularly by the Company to the Revenue authorities and there was no concealment or suppression or misrepresentation. Therefore, the show cause notice being highly belated was liable to be quashed.
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> Another point raised in the Tata Iron Company's case is that 'cinder' is a waste emerging from coal and the Company was spending much more on its removal from the site as compared to what it was getting from its sale. This point has been raised in

some other cases also. This is a point which would arise on the facts of particular cases. Proper pleadings have to be there. The Tribunal being the fact finding body ought to have adverted to it. Unfortunately, this aspect has not received any attention before the Tribunal.

WHAT IS CINDER :

Cinder is obtained as a result of burning coal in the boilers and furnaces in factories. When coal is fully burnt it is reduced to ash. When it is not fully burnt, it leaves pieces behind. Such pieces of unburnt or partly burnt coal are called cinder. Cinder loses its capacity to produce flame. That is why it is of no use in the boiler and is left out. Since it is left with some combustible value, it is described as inferior quality coal.

Mc Graw – Hill Dictionary of Scientific and Technical terms describes cinders as :

"Incombustible residue from a burning process; in particular, small pieces of clinker from the burning of soft coal."

According to the New Webster's Dictionary of the English Language one of the meanings of cinder is "a burned-out- or partially burned piece of coal, wood or other substance."

An important distinguishing factor is that coal is used in factories as fuel and not as raw material for purposes of manufacturing the end product. The learned ASG appearing for the Union of India submitted that cinder is a by-product of coal. Even if cinder is a by-product of coal, it is not a by-product of the raw material used in a factory for manufacturing the end product. It is a by-product of an item of fuel.

Point I Whether inclusion of an item in the entries to the First Schedule to the Tariff Act per se makes the item exigible to excise duty? This point needs a reference to relevant statutory provisions. Material portion of Section 3 of the Central Excise Act, 1944 is reproduced as under :

" Section 3 : Duties specified in the First Schedule to be levied (1) 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 and a duty on salt manufactured in, or imported by land into, any part of India as, and at the rates, set forth in the First Schedule."

The following key words occurring in this provision have been defined in the Act as under :

" Section 2

(a).....

(b).....

©.....

(d) "excisable goods" means goods specified in the First Schedule as being subject to a duty of excise and includes salt;

(e).....

(f) "manufacture" includes any process incidental or ancillary to the completion of a manufactured product;.....

The learned Additional Solicitor General appearing for the Union argued that Section 3 of the Act is the charging Section. It provides that excise duty is to be levied on all excisable goods. Excisable goods are listed in the First Schedule to the Tariff Act. According to him, Section 3 read with Section 2(d) makes it clear that an item which is listed in the First Schedule to the Tariff Act is exigible to excise duty. It is further submitted that in view of entry No. 26.21 in the First Schedule 'cinder' is liable to levy of excise duty. According to him, cinder is nothing but ash. From this argument, it follows that cinder is being equated to ash in order to bring it within Entry No. 26.21 to the First Schedule. As seen earlier, cinder is not ash - it is something between coal and coal ash.

For the sake of deciding this issue, we will assume that cinder is ash and, therefore, is liable to be covered under entry 26.21. The real question to be considered is whether all items listed in the First Schedule to the Tariff Act, per se become subject to levy of excise duty. According to the learned counsel for the Revenue, all excisable goods listed in the first Schedule are subject to the liability to pay excise duty in view of Section 3 of the Act. Excisable goods as per Section 2(d) are those which are specified in the First Schedule to the Tariff Act. 'Ash' being found mentioned in Entry 26.21 in the First Schedule, it per se becomes liable to payment of excise duty. In support of his argument, the learned counsel relied on M/s. Khandelwal Metal and Engineering Works and Another vs. Union of India and others [(1985) 3 SCC 620]. This was a case of levy of additional customs duty under Section 3(1) of the Customs Tariff Act, 1975. This duty is leviable in addition to the customs duty under Section 12 of the Customs Act. The additional customs duty is leviable on items imported into India if like articles if produced or manufactured in India are liable to payment of excise duty. The argument on behalf of the assessee was that brass scrap imported by it was not subject to levy of the additional customs duty which is in the nature of counter veiling duty. It cannot be levied on brass scrap because such scrap is not manufactured in India. This contention of the assessee was rejected on the ground that brass scrap was being produced in India. The argument on behalf of Revenue was that waste and scrap is mentioned in Entry 26A of the First Schedule to the Tariff Act and is therefore exigible to excise duty. Since reliance was placed on the argument that waste and scrap being found in relevant entry in the First Schedule to the Tariff Act and therefore were exigible to customs duty, this authority was pressed into service in support of the argument that presence of an item in an Entry to the First Schedule to the Act makes it per se subject to levy of excise duty. In our

view, this authority is of no help to the appellants. This was basically a case of levy of additional customs duty, for which different considerations apply.

He also relied on the following observations contained in Associated Cement Company Ltd. vs. Commissioner of Customs [(2001) 4 SCC 593] :

> " 81. Under the Central Excise Act, 1944 in the definition of the words 'excisable goods' under Section 2 (d), the very specification or inclusion of goods in the First and Second Schedules of the Central Excise Tariff Act would make them excisable goods subject to duty."

These observations were made in the context of provisions of the Customs Act, 1962. The charging Section in that Act is Section 12 which refers to 'dutiable goods'. The expression 'dutiable goods' has been defined in Section 2 (14) of the Act as goods which are chargeable to duty and on which duty has not been paid. In the present case however, we are considering the expression 'excisable goods' in the light of provisions contained in Section 3 of the Central Excise Act, 1944. Section 3 qualifies to expression 'excisable goods' by laying down the further requirement that such goods should be produced or manufactured in India. Such a requirement is not there in the Customs Act. Therefore, the above observations have no bearing on the issue involved in the present case.

We are unable to accept the proposition advanced by the learned Additional Solicitor General. A close look at Section 3 of the Central Excise Act shows that the words 'excisable goods' have been qualified by the words "which are produced or manufactured in India". Therefore, simply because goods find mention in one of the entries of the First Schedule does not mean that they become liable for payment of excise duty. Goods have to satisfy the test of being produced or manufactured in India. It is settled law that excise duty is a duty levied on manufacture of goods. Unless goods are manufactured in India, they cannot be subjected to payment of excise duty. There is no merit in the argument that simply because a particular item is mentioned in the First Schedule, it becomes exigible to excise duty. [See Hyderabad Industries Ltd. and another vs. Union of India and others (1995) 5 SCC 338 and Moti Laminates Pvt. Ltd. and others vs. Collector of Central Excise, Ahmedabad (1995) 3 SCC 23]. Therefore both on authority and on principle, for being exigible to excise duty, excisable goods must satisfy the test of being produced or manufactured in India. The argument to the contrary is rejected.

Point 2 Does the item in question satisfy the tests of being "manufactured in India" and "marketability" ?

While discussing the earlier issue, we have already emphasised the requirement of goods being manufactured in India being satisfied before excise duty can be levied on goods. This requirement is a sine qua non for levy of excise duty. Excise duty in fact is an incidence of manufacture.

What is the meaning of 'manufacture' in the context of excise law ? We have already quoted the definition of the word "manufacture" as contained in Section 2(f) of the Act. According to this definition, manufacture includes any process incidental or ancillary to the completion of a

manufactured product. The word 'manufacture' used as a verb is generally understood to mean as bringing into existence a new substance. It does not mean merely to produce some change in a substance. To quote from a passage in the Permanent Edition of Words and Phrases Vol.XXVI "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". 'Manufacture' may involve various processes. The aim of any manufacturing activity is to achieve an end product. Depending on the nature of manufacturing activity involved, processes may be several or one. The natural meaning of the word 'process' is a mode of treatment of some material in order to produce a good result. Every process which is incidental or ancillary to the completion of manufactured product is included within the meaning of manufacture. The word 'process' has not been defined in the Act. In its ordinary meaning 'process' is a mode of treatment of certain material in order to give a desired shape to the material. It is an activity performed on a given material in order to transform it into something.

The word "manufacture" has been defined in various judgments of this court. In South Bihar Sugar Mills vs. Union of India [AIR 1968 SC 922], this court observed:

> "The Act charges duty on manufacture of goods. The word "manufacture implies a change every 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."

In M/s. Hindustan, Polymers vs. Collector of Central Excise [(1989) 4 SCC 323] this court observed :

> "Excise Duty is a duty on the act of manufacture. Manufacture under the excise law, is the process or activity which brings into being articles which are known in the market as goods and to be goods these must be different, identifiable and distinct articles known to the market as such. It is then and then only that manufacture takes place attracting duty. In order to be goods, it was essential that as a result of the activity, goods must come into existence. For articles to be goods, these must be known in the market as such and these must be capable of being sold or are being sold in the market as such. In order, therefore, to be manufacture, there must be activity which brings transformation to the article in such a manner that different and distinct article comes into being which is known as such in the market."

According to M/s. Ujagar Prints and others (II) vs. UOI and others [(1989) 3 SCC 488] the test to ascertain that there is manufacture is whether the change or the series of changes brought about by the application of processes take the commodity to the point where, commercially it can no longer be regarded as the original commodity but is, instead, recognised as a distinct and new article that has emerged as a result of the processes."

In Collector of Central Excise, Bombay-II vs. M/s. Kiran Spinning Mills [(1988) 2 SCC 348], the assessee used to cut running length fibre into short length fibre. In this process it brought a change in the substance but did not bring into existence a new substance. The character and use of the substance remained the same. It was held that no manufacturing activity was involved and therefore there was no further liability to excise duty. It was emphasized that the taxable event under the Excise Law is "manufacture". Since there was no manufacture in this case there was no liability to pay excise duty.

On the same lines there is a recent decision of this court in Collector of Central Excise vs. TechnoWeld Industries [2003 (155) ELT 209]. The process in this case was drawing wires from wire rods that is from bigger guage wire rods smaller guage wire rods were drawn. The goods continued to be described as wire rods. It was held that no manufacture as such was involved and therefore there was no liability to pay excise duty. It was reiterated that a product becomes excisable only if there is manufacture. In Collector of Central Excise, Jaipur vs. Rajasthan State Chemical Works, Deedwana, Rajasthan and others [(1991) 4 SCC 473], this court adverted to the meaning of process as well as manufacture. The following passages occurring in the judgment are useful for present purpose:

> "12. Manufacture implies a change but every change is not manufacture, yet every change of an article is the result of treatment, labour and manipulation. Naturally, manufacture is the end result of one or more processes through which the original commodities are made to pass. The nature and extent of processing may vary from one class to another. There may be several stages of processing, a different kind of processing at each stage. With each process suffered the original commodity experiences a change. Whenever a commodity undergoes a change as a result of some operation performed on it or in regard to it, such operation would amount of processing of the commodity. But it is only when the change or a series of changes takes the commodity to the point where commercially it can no longer be regarded as the original commodity but instead is recognised as a new and distinct article that a manufacture can be said to take place.
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> 13. Manufacture thus involves series of processes. Process in manufacture or in relation to manufacture implies not only the production but the various stages through which the raw material is subjected to change by different operations. It is the cumulative effect of the various processes to which the raw material is subjected (sic that the) manufactured product emerges. Therefore, each steps towards such production would be a process in relation to the manufacture. Where any particular process is so integrally connected with the ultimate production of goods that but for that process manufacture of processing of goods would be impossible or commercially inexpedient, that process is one in relation to the manufacture.
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> 14. That natural meaning of the word 'process' is a mode of treatment of certain materials in order to produce a good result, a species of activity performed on the subject matter in order to transform or reduce it to a certain stage. According to

> Oxford Dictionary one of the meanings of the word 'process' is a "continuous and regular action or succession of actions taking place or carried on in a definite manner and leading to the accomplishment of some result". The activity contemplated by the definition is perfectly general requiring only the continuous or quick succession. It is not one of the requisites that the activity should involve some operation on some material in order to (sic effect) its conversion to some particular stage. There is nothing in the natural meaning of the word 'process' to exclude its application to handling. There may be a process which consists only in handling and there may be a process which consists only in handling and there may be a process which involves no handling or not merely handling but use or also use. It may be a process involving the handling of the material and it need not be a process involving the use of material. The activity may be subordinate but one in relation to the further process of manufacture."

Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam vs. M/s. Thomas Stephen & Co. Ltd., Quilon [(1988) 2 SCC 264] is a case under the Kerala General Sales Tax Act, 1963. The assessee used to purchase cashew shells for use as fuel in the kiln in the factory. Under the Act levy of tax was on consumption of goods in the manufacture of other goods for sale or otherwise. The difference between use of goods in manufacture as raw material and use for other ancillary purposes was brought out. Goods used for ancillary purposes like fuel in the process of manufacture were held not to be exigible to tax. Since cashew shells were used only as fuel and they did not get transformed into the end product they were held to be not exigible to tax. Cashew shells were used in aid of manufacture of goods and as such they did not attract levy of tax.

In the case in hand also coal which leads to production of cinder is not used as a raw material for the end product. It is being used only for ancillary purpose that is as a fuel. Therefore, irrespective of the fact whether any manufacture is involved in production of cinder it should be held to be out of the tax net for the reason that it is not a raw material for the end product. In producing 'cinder', there is no manufacturing process involved. Coal is simply burnt as fuel to produce steam. Coal is not tampered with, manipulated or transformed into the end product. For purposes of manufacture the raw material should ultimately get a new identity by virtue of the manufacturing process either on its own or in conjunction or combination with other raw materials. Since coal is not a raw material for the end product in all the cases before us, the question of getting a new identity as an end product due to manufacturing process does not arise.

In Collector of Central Excise, New Delhi vs. M/s. Ballarpur Industries Ltd. [(1989) 4 SCC 566], the raw material in the course of chemical reactions got burnt up and lost its apparent identity. To be more precise, the input of sodium sulphate in the manufacture of paper would not cease to be of raw material by reason alone of the fact that in the course of the chemical reactions, this ingredient is consumed and burnt up. All the same it remained a raw material. It was held that the relevant test is not the absence of the raw material in the end product, but the dependence of the end product for its essential presence at the delivery end of process. What follows from this is that the raw material which we are concerned about is the raw material which is linked with emergence of the end product. It has to be present in the end product whether visibly or invisibly. Use of an item as fuel

cannot be called part of the manufacturing activity in relation to production of the end product. Therefore, cinder cannot be said to be a by-product of the final product. At best it is a by- product of coal which is used as fuel.

Can burning of coal be called manufacturing? The locomotive steam engines used to run on coal. Coal was being constantly burnt in the boiler of the engine. The constant burning of coal produced cinder. Could it be said that the engine driver was manufacturing cinder ? Is any manufacturing activity involved ? Burning of coal for purposes of producing steam cannot be said to be a manufacturing activity. Therefore, neither ash nor cinder can be said to be products of a manufacturing process. From burning coal when you get either cinder or ash, it cannot be said that a new product had emerged. Cinder remains coal. In fact, the Department has itself described it as unburnt part of coal in the grounds of appeal in C.A.No.2168-2169 of 2001 in the Ahmedabad Electricity Supply Company Case. 'Cinder' is not a new product. After correctly describing cinder as unburnt part of coal, the Revenue cannot equate it to ash simply to somehow bring it within Entry 26.21 of the Tariff Act.

In the First Schedule to the tariff, cinder does not find any place anywhere. It appears that it is because of this that the Revenue had to fall back upon entry 26.21 in the First Schedule in order to cover cinder within the excise net. The new tariff that is Tariff Act, 1985 does not have a residuary entry like entry 68 in the old tariff. Instead the new tariff has interpretative notes. Whenever some by-product of a product is sought to be included for taxability it has been so said in the interpretative notes. However, regarding coal there is no interpretative note nor there is anything about cinder. When cinder is derived from coal it could have at best been treated as coal for purposes of entries in the First Schedule to the Tariff Act. But that would not suit the department because coal is exempt from excise duty. The department now describes cinder as "coal ash". But coal ash also fails the test of being manufactured in India. It cannot be subjected to levy of excise duty.

The learned counsel appearing for the assessee brought to our notice several judgments of the CEGAT holding that cinder was not exigible to payment of excise duty. Against some of the judgments statutory appeals filed before this Court were dismissed. In Commissioner of Central Excise, Calcutta Vs. Papyrus Papers [33 ELT 97] it was held by CEGAT that cinder obtained by burning coal in boiler does not constitute manufacture of excisable commodity even if sold for a price. In Collector of Central Excise Vs. Kesoram Rayons the CEGAT held that cinder obtained on burning coal in the boiler as a fuel is not exigible to excise duty. Civil appeal filed by the Collector of Central Excise, Calcutta against the said judgment was dismissed by this Court. H.M.M. Ltd. Vs. Collector of Central Excise [(1989) Vol.40 ELT 422] is another judgment of the CEGAT holding cinder to be coal waste. Merely because it could fetch some price on sale it is not exigible to excise duty. Appeal against this judgment was also dismissed by this Court. Same is the situation about decisions of the CEGAT in CCE Vs. Mafatlal Fine Spinning [92 ELT A-145] and CCE Vs. Swadeshi Cotton Mills [82 ELT A-160]. Both these cases are regarding cinder being held to be not exigible to excise duty and appeals against orders of the CEGAT in these cases were dismissed by this Court. The Bombay High Court noting this consistent view of the CEGAT regarding non-exigibility of cinder to tax held in Century Rayon Vs. Union of India [2002(142) ELT 319] that cinder produced

from use of coal as fuel could not be treated as excisable commodity. Against this decision of the High Court, Special Leave Petition was dismissed by this Court.

Recently this Court had occasion to deal with a case of excise duty sought to be levied on 'spent earth'. This was in Commissioner of Central Excise, Chandigarh Vs. Markfed Vanaspati and Allied Industries [2003 (153) ELT 491]. Excise duty was being paid on "earth". 'Spent earth' is a residue resulting from treatment of fatty substances. The 'spent earth' remained 'earth' even after processing though its capacity to absorb was reduced. It was held that no excise duty was leviable on 'spent earth'. The facts in this case are quite similar to the facts of the case in hand. In Markfed Case 'earth' was reduced to 'spent earth' with a reduced potency to absorb. In the case in hand coal was reduced to inferior quality coal which was no longer of use in the furnaces in the factories, therefore, it could reasonably be said that 'cinder' i.e. coal of reduced quality still was coal and not exigible to excise duty.

In Modi Rubber Ltd., Modi Nagar, U.P. and anr. Vs. Union of India and others [(1987) 29 ELT 502 Delhi] it was held that waste/scrap obtained not by any process of manufacture but in the course of manufacturing the end product was not exigible to excise duty. This was a case of manufacture of tyres, tubes etc. In the course of manufacturing process to produce the end product i.e. tyres, tubes, flaps etc. waste was obtained in the shape of cuttings. It was held that this was not exigible to tax even though the waste may have some saleable value. The essential reason for this was that there was no transformation in the case of waste/scrap to a new and different article. No new substance having a distinct name, character and use was brought about. Manufacturing process involved treatment, labour or manipulation by the manufacturer resulting in a new and different article. It requires a deliberate skillful manipulation of the inputs or the raw materials. This was not so in case of scrap.

It is worth mentioning that in UOI and ors. Vs. Indian Aluminium Co. Ltd. and Anr. [1995 Suppl. (2) SCC 465], it was held that waste or rubbish which is thrown up in the course of manufacture could not be said to be a produce of manufacture exigible to excise duty. In this case the assessees manufactured aluminium products out of the aluminium ingots. In the process of manufacture dross and skimmings arise and accumulate in the furnace in the shape of ashes as a result of oxidization of metal. Aluminium dross contain an amount of metal from which they come but they lack not only metal body but also metal strength, formability and character. Such dross and skimmings are distinct from scrap which is a metal of good quality. Dross and skimmings though obtained during process of manufacture were held to be not exigible to excise duty at the relevant time. Since the dross and skimmings were sold in the market it was argued that they were a marketable commodity and should be subject to levy of excise duty. The court observed that these were nothing but waste or rubbish which is thrown up in the course of manufacture. This judgment also answers the argument of the learned counsel for the appellant based on Khandelwal Metal's case (Supra) wherein brass scrap produced during manufacturing of brass goods were considered to be liable to excise. In the present case cinder though sold for small price cannot be said to be a marketable commodity in the sense the word "marketable" is understood. Due to sheer necessity cinder has to be removed from the place where it occurs because unless removed it will keep on accumulating which in turn lead to loss pf precious space. Facts noted in TISCO's case by the lower

authorities show that TISCO had been paying substantial amounts for removing cinder to a dumping ground. From the dumping ground it was picked up by parties to whom it was sold. As per the averment, TISCO is spending many times more on removing cinder than what it realizes from its sale. These are matters of fact which have not been gone into by the authorities concerned and therefore it is too late for us to go into all this.

Applying the tests laid down in these judgments, it is not possible to say that cinder satisfies the requirement of being manufactured in India.

From the above discussion it is clear that to be subjected to levy of excise duty 'excisable goods' must be produced or manufactured in India. For being produced and manufactured in India the raw material should have gone through the process of transformation into a new product by skilful manipulation. Excise duty is an incidence of manufacture and, therefore, it is essential that the product sought to be subjected to excise duty should have gone through the process of manufacture. Cinder cannot be said to have gone through any process of manufacture, therefore, it cannot be subjected to levy of excise duty.

The onus to show that particular goods on which excise duty is sought to be levied have gone through the process of manufacture in India is on the revenue. They have done nothing to discharge this onus. For this reason alone they must fail.

The Department has been consistently taking a stand that cinder is not excisable as it does not involve any manufacturing activity. The Department issued a clarification vide Circular No. B.352/75-TRU(pt) dated 6th June, 1975. According to it coal ash left out in burning of coal would not attract duty under item 68 for the reason that in the burning of coal as fuel, resulting in coal ash as a waste product no manufacturing process is involved. With the introduction of the new tariff in 1986 and specific entry for ash being included in the Tariff Chapter 26, the issue again revived. Notification No.76/86 dated 10th February, 1986 exempted cinder from levy of excise duty. The whole thing was sought to be overturned after the annual budget for the year 1996-97. The Tariff Act, 1975 was amended by virtue of the Tariff Act, 1985. The exemption was withdrawn by virtue of notification No. 11/96 dated 23rd July, 1996 in view of the annual budget for the year 1996-97. The Commissioner of Central Excise vide Trade Notice No. 35 of 1998 dated 21st August, 1998 clarified that coal ash (cinder) is specified in the Schedule to the Tariff Act and read with Section 2(d) of the Central Excise Act was subject to levy of excise duty. This sudden turn is not only unjustified but also is contrary to law.

Why we say it is contrary to law is because the department clarified in June, 1975 that cinder is not exigible to excise duty as in its emergence no manufacturing process is involved. How can suddenly cinder become exigible to excise duty ? The procedures which lead to emergence of cinder have remained the same as they were in 1975. If it was not the result of manufacturing process in 1975, it is not so even now. This aspect was not taken into consideration at all. Interestingly in the Circular No.386/19/98-CX dated 7th April, 1998 the Central Board of Excise and Customs while declaring coal ash (cinder) as subject to levy of excise duty, states that "the commodity also satisfied the tests of marketability and has a distinct commercial identity known to trade." There is no reference to the

essential test of being manufactured in India. It is for failing this test that the item was excluded from levy of excise duty earlier in 1975 How can you ignore it now ?

In view of our finding that cinder cannot be subjected to levy of excise duty because it is not an item of goods which has been subjected to process of manufacture, it is not necessary for us to go into any other point. We may only note that courts have evolved another test of marketability i.e., to be exigible to excise duty goods must be marketable. It is not disputed that cinder is being sold by the assessees. But can it be said to be marketable goods in the sense word marketable is used ? We doubt it. However, this need not detain us since cinder does not satisfy the test of being manufactured in India. Even if it is saleable, it does not make any difference. The result is that the contention of the Revenue that cinder is liable to payment of excise duty is hereby rejected.

Point 3 The objection is that the High Court should not have entertained a petition under Article 226 of the Constitution of India in the facts and circumstances of the case. At the outset we may note that we have only one Civil Appeal in the case of Ahmedabad Electricity Company (C.A.No. 2168-69/2001) which is arising from proceedings before the High Court under Article 226. The remaining matters in the bunch are statutory appeals under Section 35L of Central Excise Act. Therefore, this court has to go into the matter on merits. Moreover, in the Ahmedabad Electricity Company's case challenge by way of Writ Petition under Article 226 was to a Circular dated 7th April, 1998 issued by the Central Board of Excise and Customs and the consequential Trade Notice No.36/98 dated 22nd May, 1998 issued by the office of the Commissioner of Central Excise and Customs, Ahmedabad by which it was clarified that "coal- ash (cinder)" is an excisable commodity classifiable under sub- heading No. 26.21 of the Central Excise Tariff Act, 1985. In the first place no objection regarding maintainability of the Writ Petition seems to have been taken before the High Court. Even if such an objection was raised, the same would have been a futile attempt. In the facts of the case the High Court would have been justified in rejecting such an objection. The impugned circular could not have been challenged before the departmental authorities as they would have felt bound by it. We find no merit in the objection. The same is rejected.

All the appeals filed by the Revenue stand dismissed with no order as to costs.