

**IN THE HIGH COURT OF MADHYA PRADESH
AT J A B A L P U R**

BEFORE

**HON'BLE SHRI JUSTICE RAVI MALIMATH,
CHIEF JUSTICE**

&

HON'BLE SHRI JUSTICE VISHAL MISHRA

ON THE 19th OF SEPTEMBER, 2022

WRIT PETITION NO.1200 OF 2006

BETWEEN:-

- 1. M/S HEAVY ENGINEERING WORKSHOP, REWA
(UNIT OF JAI PRAKASH ASSOCIATES LIMITED),
REWA (MP) THROUGH GENERAL MANAGER
PANKAJ VERMA S/O DR. J.K.VERMA AGED 45
YEARS R/O REWA (MP)**
- 2. SHRI SANJAY CHOPRA, S/O SHRI D.N. CHOPRA
SHAREHOLDER OF M/S JAI PRAKASH
ASSOCIATES LIMITED, LUCKNOW (UP) AGED
41 YEARS, R/O JAYPEE NAGAR, REWA (MP)**

..... PETITIONERS

***(BY SHRI NAMAN NAGRATH - SENIOR ADVOCATE WITH SHRI AVINASH
ZARGAR - ADVOCATE)***

AND

- 1. THE COMMISSIONER, CUSTOMS & CENTRAL
EXCISE 48, ADMINISTRATIVE AREA, BHOPAL (MP)**
- 2. THE ASSISTANT COMMISSIONER, CENTRAL
EXCISE, SATNA (MP)**

3. UNION OF INDIA, THROUGH THE SECRETARY,
MINISTRY OF FINANCE, NORTH BLOCK, NEW
DELHI.

.... RESPONDENTS

*(SHRI SIDDHARTH SETH – ADVOCATE FOR RESPONDENTS NO.1
AND 2)*

WRIT PETITION NO.10832 OF 2008

BETWEEN:-

1. M/S HEAVY ENGINEERING WORKSHOP, REWA
(A UNIT OF JAI PRAKASH ASSOCIATES
LIMITED), PLOT NO.641, REWA CHIJJWAR
ROAD, JAYPEE NAGAR, REWA (MP) – 486450
THROUGH ITS SENIOR MANAGER (TAXATION)
SHRI GEORGE ABRAHAM S/O LATE SHRI
ABRAHAM A.M. AGED 48 YEARS R/O D/2,
JAYPEE NAGAR, REWA (MP)

..... PETITIONER

*(BY SHRI NAMAN NAGRATH - SENIOR ADVOCATE WITH SHRI AVINASH
ZARGAR - ADVOCATE)*

AND

1. THE COMMISSIONER, CUSTOMS & CENTRAL
EXCISE 48, ADMINISTRATIVE AREA, BHOPAL (MP)
2. THE ASSISTANT COMMISSIONER, CENTRAL
EXCISE, SATNA (MP)
3. UNION OF INDIA, THROUGH THE SECRETARY,
MINISTRY OF FINANCE, NORTH BLOCK, NEW
DELHI.

.... RESPONDENTS

*(SHRI SIDDHARTH SETH – ADVOCATE FOR RESPONDENTS NO.1
AND 2)*

These petitions coming on for hearing this day, Hon'ble Shri Justice Ravi Malimath, Chief Justice passed the following:

ORDER

The petitioner in both the cases are one and the same. The facts as stated in Writ Petition No.1200 of 2006 are being narrated for the sake of convenience.

2.(a) The first petitioner is a company registered under the Indian Companies Act. The second petitioner is one of the shareholders. The first petitioner - Company is engaged in the business of hydro power generation and allied activities. It was awarded a turnkey contract relating to Vishnuprayag Hydroelectric Power Project and thereafter the Omkareshwar Hydroelectric Power Project in Writ Petition No.10832 of 2008. It is the run-of-the-river scheme for generation of hydroelectric power on the river Alaknanda in Chamauli District in the State of Uttarakhand. The project envisages the construction of a 15 meter high and 60 meter long barrage across the river Alaknanda. The construction and erection of various gates of the diversion barrage had to take place. Various duty paid iron and steel items were brought to the petitioner's workshop situated at Rewa. That, the said iron and steel items would be sent to the workshop and at the workshop, the various gates and other items were being prepared. That all these are required for the purpose of erection of the said project. That all these materials were purchased by the petitioner from the respective manufacturers and also from the open market. After purchase they are sent to the site at Rewa. The appropriate Central Excise duty on the said items purchased were already paid. The said fact is not disputed. The dispute was with regard to the different iron and steel items such as plates, angles, channels, beams etc., which

were first brought to the petitioner's workshop and are then subjected in the said workshop for activities of cutting, bending, welding, drilling etc., as per the requirement of the project. Thereafter, they are embedded into the said structure at the dam.

2.(b) Another turnkey project of a similar nature was awarded to the petitioner by the Narmada Hydroelectric Development Corporation in relation to the Omkareshwar project in the District of Khandwa in the State of Madhya Pradesh. The same is covered by Writ Petition No.10832 of 2022.

2.(c) That, all these activities are being undertaken at the workshop of the first petitioner/Company. They are nothing but intermediate activities on which duty paid iron and steel items are subjected to during the course of their use. That, all the articles so prepared at the workshop are used only for the purposes of the said project. None of the articles are sold in the open market or diverted for any other purpose. However, some of the items are also diverted so far as the second project in Omkareshwar is concerned. Therefore, each and every item that is so prepared in the workshop is sent either to the project at Vishnuprayag Hydroelectric Power Project or the Omkareshwar Hydroelectric Power Project. That, the said items that are fabricated in the workshop are not useful for any other purpose or any other project. The same are prepared for the exclusive use and for the exclusive design of the project concerned.

2.(d) All the items bought by the petitioner from the market have suffered Central Excise duty. About 300 metric tons of the said iron and steel items were prepared for being dispatched at the petitioner's

workshop. Therefore, a letter dated 1st December, 2004 was addressed to the respondent No.1/Commissioner, Customs and Central Excise requesting for confirmation that no Central Excise duty was payable by the petitioner on the said items. Yet another letter was addressed on 20th December, 2004. There was no response from the respondents. Therefore, the writ petitioner filed Writ Petition No.417 of 2005 before this Court seeking for order to restrain the respondents from levying or demanding any Central Excise duty on the iron and steel items cleared from the petitioner's workshop and other consequential reliefs. By the order dated 11.04.2005, the writ petition was disposed off as follows :-

“This Court on 28.02.2005 had passed the following order:

“Shri S.K. Bagaria, Sr. Advocate with Shri Sumit Nema, Adv. and Shri Mukesh Agrawal, Adv. for the petitioner.

Shri S. Aole, Adv. for the respondents.

Petitioner has sought following reliefs:-

“1. A writ and/or Order and/or direction in the nature of mandamus commanding the respondents not to levy/demand any Central Excise duty on the iron and steel items cleared from the petitioner's said workshop for being used at Vishnuprayag Hydroelectric Project and Omkareshwar Project and to act according to law.

2. A writ of and/or Order and/or direction in the nature of prohibition commanding the

respondents to forebear from levying /demanding any Central Excise duty on the said iron and steel items cleared from the petitioner's said workshop for use at the said Vishnuprayag Hydroelectric Project and Omkareshwar Project.

3. Such other or further order or orders be made and/or directions be given as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."

Learned counsel for the petitioner submitted that the petitioner has been awarded a Turnkey contract relating to Vishnuprayag Hydroelectric and Omkareshwar Power Project, wherein petitioner has to supply fabricated iron gates etc. The raw material for fabrication of the iron gates etc. are Excise duty paid material and further no Excise duty is payable on fabrication and assembling of the gates etc. It is submitted that the matter has been considered by a Division Bench judgment of Karnataka High Court in Thungabhadra Steel Product Ltd. vs. Union of India (1998 (98) ELT 334) and submitted that no Excise duty is payable on the aforesaid material. It is also submitted that till the decision of this petition by way of ad interim writ respondents be

restrained to levy Excise duty on the said items.

Shri S. Aole, learned counsel for the respondent No.2 prays for a short time to file reply. He also opposed the prayer and contended that the Excise duty is payable on the aforesaid items and if the Excise duty is paid and in future it is held that the petitioner is not liable for the payment of the Excise duty, the said amount shall be refunded to the petitioner.

Contention of the petitioner is that he is not liable for the payment of Excise duty and has to supply the aforesaid material to a national project.

The payment of Excise duty is to be considered by this Court after hearing the other side. Till the next date of hearing, by way of interim measures, following directions are issued:

- 1. Petitioner shall pay 50% of the Excise duty in accordance with the rules to the respondents.*
- 2. For remaining 50% of the Excise duty, petitioner shall furnish surety to the respondent no.2 that in case of any order passed by this court or dismissal of the petition, petitioner shall pay Excise duty*

payable by them within a period of 15 days from the date of passing of the order.

3. Petitioner shall also furnish an undertaking that respondents shall be entitled to recover the aforesaid Excise duty from the petitioners or from the bills raised from the petitioners to the Project for the payment of the material.

Be listed for hearing on 16.03.2005.

Reply if any be filed before the next date of hearing.

Certified copy today.”

A counter affidavit has been filed stating, inter alia, that no adjudication has taken place. In view of the aforesaid, I am only inclined to direct that if the adjudication proceeding is going on the same shall be finalised. It would be open to the petitioner to raise all contentions before the adjudicating authority. Be it noted, the adjudicating authority shall keep in view the law laid down in the case of Tungabhadra Steel Products Ltd. vs. Union of India (1998) 98 ELT 334. At this juncture, the learned counsel for the petitioner submitted that the representation is pending before the Deputy Commissioner, Central Excise Division, Satna. It is also contended by him that he would also submit further representation to the Commissioner, Customs and Central Excise, Bhopal, who can really take a decision in the matter with regard to

imposition of Excise duty on the material in issue. If a representation is submitted within a period of two months from today, the same shall be dealt with by the respondent No.1 within a period of two months therefrom. It would be open to the petitioner to file necessary documents as well as notice to the respondent No.1 so that he can take sound decision which shall be informed by reasons. Till the matter is finally decided by the said authority order dated 28.02.2005 passed by this Court shall remain in force. Thereafter if any order is passed which would give rise to any grievance of the petitioner, the said order shall be kept in abeyance for a period of four weeks so that he can approach the appropriate legal forum.

The writ petition stands disposed of in the above terms.”

3.(a) In pursuance to the said order, a representation was filed by the petitioner before respondent No.1. Thereafter, by the impugned order dated 15.12.2005 his representation was answered. The respondent No.1 came to the conclusion that goods are liable to Central Excise duty and appropriately classifiable under Chapter Sub-heading 7308. 9090 to the schedule of Central Excise Tariff Act, 1985 (Act No.5 of 1986) wherein it was held as follows :-

“In view of the above, I am of the view that the “Goods” so manufactured by the party are excisable, marketable and liable to Central Excise Duty. Accordingly, I pass the following order :-

ORDER

I pass an order that :-

(i) *the activities such as cutting, bending, joining, drilling and welding for the fabrication/manufacture of Radial Gates, Gate Hoists, Hydraulic Hoists, Spillway units, Stop Logs, Intake Gates, Bulk Head Gates, Intake Trash Racks, Draft Tube Gates, Grany Crane etc. from various iron and steel items such as plates, angles, channels beams, nuts and bolts etc. amount to manufacture as per section 2 (f) of the Central Excise Act, 1994; the goods are liable to Central Excise duty and appropriately classifiable under Chapter Sub Heading 7308. 9090 to the schedule of Central Excise Tarrif Act, 1985 (Act No.5 of 1986) as structures/parts of Hydroelectric Power Project;*

(ii) *the goods fabricated/manufactured by the party viz. Radial Gates, Gate Hoists, Hydraulic Hoists, Spillway units, Stop Logs, Intake Gates, Bulk Head Gates, Intake Trash Racks, Draft Tube Gates, Grany Crane etc. are excisable, marketable and liable to Central Excise duty under section 3 of the Central Excise Act, 1994.*

(iii) *the jurisdictional Asstt. Commissioner shall workout the duty liability & interest to intimate to the party,*

(iv) *the party should henceforth, pay the outstanding duty & interest against the “Goods” cleared failing which penal proceedings shall be initiated”.*

3.(b) Questioning the same, the instant writ petition was filed.

4.(a) Shri Naman Nagrath, learned senior counsel appearing for the petitioners’ counsel submits that the order passed by the respondents is unsustainable on facts as well as on law. That the finding recorded by the respondent No.1 that the goods are excisable is erroneous. That in similar circumstances, the Hon’ble High Court of Karnataka in its judgment in the case of Thungabhadra Steel Products Ltd. Vs. Union of India reported in 1998 (98) ELT 334 was concerned with the very question of fact and law. By the said judgment, it was held that assembling of fabricated parts into a whole structure at customers’ site are not goods attracting levy of excise duty. The said order was

challenged by the Commissioner, Customs before the Hon'ble Supreme Court by filing Special Leave Petition (Civil) No.4743 of 1998 (Union of India v. Thungabhadra Steel Products Ltd.) wherein the SLP was dismissed by the Hon'ble Supreme Court. The said fact is not disputed by the respondents.

4.(b) Reliance is also placed on the judgment of the CESTAT in the case of KPC Limited Vs. Commissioner of Central Excise, Guntur reported in 2004 (168) ELT 325, wherein a similar view was taken by the Tribunal by relying on the judgment of Thungabhadra Steel Products Ltd (supra). He has also relied upon the judgment of the Hon'ble Supreme Court in the case of Collector of Central Excise, Jaipur v. Man Structural Ltd. reported in (2009)17 SCC 550, Orissa Bridge and Construction..v. Commissioner of Central Excise, Kolkata reported in 2002(146) ELT 84 [Tri Kolkata], Birla Vxl Ltd. v. Commissioner of Central Excise, Delhi reported in 2003 (152) ELT 349 [Tri Delhi], Godrej Hi Care Ltd. v. Commissioner of Central Excise, Trichy reported in 2005 (184) ELT 394, Union of India and Anr. v. Delhi Cloth and General Mills Co. Ltd. and Ors. reported in 1977 (1) ELT 199, M/s Afcons Infrastructure Ltd. V. Commissioner of Service Tax, Mumbai – II reported in Appeal No.ST/85811 to 85813 and 85777 of 2013, Union of India and Ors. v. J.G. Glass Industries Ltd. and others reported in AIR 1998 SC 839, A.P. State Electricity Board v. Collector of Central Excise, Hyderabad reported in 1994 (2) SCC 428 and Sanjay Industrial Corporation V. Commissioner of Central Excise, Mumbai reported in Appeal No. E/1806/97.

5. On notice, the respondents have filed their reply on 25.04.2006. They have disputed the claim of the petitioner. They have stated that the

orders passed by the Authorities are just and proper and do not call for any interference. That the goods being prepared by the petitioner attract excise duty and hence, the petitioners are liable to pay their relevant excise duty. The question of marketability and the question of fact has to be decided in the facts of each case, therefore, in the given facts of this case the goods are liable for excise duty. It is also further stated in their reply that as a consequence whereof, the petitioner may be directed to pay the Central Excise duty at appropriate rate with applicable interest etc. They do not accept the judgment in the case of Thungabhadra Steel Products Ltd (supra). It is their plea that it is not at all applicable in the petitioners' case and is distinguishable. That in the case of Thungabhadra Steel Products Ltd (supra) components and parts of semi-finished condition of gates are manufactured and cleared from the factory. These semi-finished parts were again subjected for welding and fabricating according to required specification. However, on the contrary in the instant case, the gates in fully finished conditions were cleared from the factory, therefore, the same is distinguishable on facts and hence not applicable. It is further pleaded that since the impugned order is an order in original, the petitioner is entitled to file an appeal under Section 35-B of the Central Excise Act, 1944. Therefore, entertaining of a writ petition is improper. Hence, it is pleaded that the petition be dismissed.

6. The learned counsel for the petitioner on the other hand has filed a rejoinder. Learned counsel submits that the impugned order cannot be treated as an order in original. That, it is an order passed as a result of the direction issued by this Court in Writ Petition No.417 of 2005. It is a mere consideration of the representation of the petitioner. Therefore,

since it is not an order in original it cannot form a subject matter of the appeal. He further contends that in terms of direction No.3, the Authority was directed to work out the excise liability on the goods. The same has not been done. Therefore, until and unless the adjudication takes place, there is no order which the petitioner can challenge. Hence, the contention of the respondents that the order is original cannot be accepted.

7. Heard learned counsels and perused the records.

8.(a) The reliance placed by the petitioner is on the Division Bench judgment of the High Court of Karnataka in the case Thungabhadra Steel Products Ltd. vs. Union of India & others reported in 1998 (98) ELT 334 KAR, wherein, the Court placed reliance on various judgments of the Hon'ble Supreme Court with regard to the test of marketability. The relevant paras are as under :-

“10. The first decision relied upon by the learned Counsel for the petitioner is in Bhore Industries Ltd. v. Collector of Central Excise 1989(40) E.L.T. 280 (S.C.) = AIR 1989 SC 1153, 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 Tariff 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 - (1963) (Supp.) 1 SCR 586 : AIR 1963 SC 791. 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. 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 - (1968) 3 SCR 21 : AIR 1968 SC 922.

(Emphasis supplied)

"The Act charges duty on manufacture of goods. The word "manufacture" implies a change in the raw material but any change 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. That it would be such an article which would attract the Act was brought out in Delhi Cloth and General Mills Ltd's case (supra).

(Emphasis supplied)

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 at 192: AIR 1945 PC 98 at 101 observed that excise duty was primarily a duty on the production or manufacture of goods produced or manufactured within the country. This Court again 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 822: AIR 1963 SC 1760 at 1776 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 Excise 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 Excise 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 (76) ELT 241 (SC)] = 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 or 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 article 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 note 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, coils, 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 trough, 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."

8.(b) Therefore, it was clearly held that in the absence of showing marketability of the goods in question, the same do not get attracted. The said judgment was confirmed by the Hon'ble Supreme Court as reported in 1998 (101) ELT A139 (SC) (Union of India v. Thungabhadra Steel Products Ltd.). Moreover, the CESTAT, South Zone Bangalore have also relied on the very judgment in the case of Thungabhadra Steel Products Ltd. (supra) and applied the same thereon in the case of KCP Limited vs Commissioner Of Central Excise, Guntur reported in 2004 (168) ELT 325 (Tri. Bang.).

9.(a) The learned counsel for the respondents places reliance on the judgment of the Hon'ble Supreme Court in the case of A.P. State Electricity Board vs. Collector of Central Excise, Hyderabad reported in 1994 (70) E.L.T. 3 (S.C.) with reference to para 10, which reads as follows:-

"10. It would be evident from the facts and ratio of the above decisions that the goods in each case were found to be not marketable. Whether it is refined oil (non-deodorised) concerned in Delhi Cloth and General Mills (1963) Supp. 1 SCR 586

or kiln gas in South Bihar Sugar Mills (1968) 3 SCR 21, or aluminium cans with rough uneven surface in Union Carbide (1986) 2 SCC 547, or PVC films in Bhor Industries (1989) 1 SCC 602 or hydrolysis in Ambalal Sarabhai (1989) 4 SCC 112, the finding in each case on the basis of the material before the court was that the articles in question were not marketable and were not known to the market as such. The "marketability" is thus essentially a question of fact to be decided in the facts of each case. There can be no generalisation. The fact that the goods are not in fact marketed is of no relevance. So long as the goods are marketable, they are goods for the purposes of Section 3. It is also not necessary that the goods in question should be generally available in the market. Even if the goods are available from only one source or from a specified market, it makes no difference so long as they are available for purchasers. Now, in the appeals before us, the fact that in Kerala these poles are manufactured by independent contractors who sell them to Kerala State Electricity Board itself shows that such poles do have a market. Even if there is only one purchaser of these articles, it must still be said that there is a market for these articles. The marketability of articles does not depend upon the number of purchasers nor is the market confined to the territorial limits of this country. The appellant's own case before the excise authorities and the C.E.G.A.T. was that these poles are manufactured by independent contractors from whom it purchased them. This plea itself- though not pressed before us - is adequate to demolish the case of the appellant. In our opinion, therefore, the conclusion arrived at by the Tribunal is unobjectionable."

9.(b) Having considered the same, there is no dispute with the proposition of law therein.

10. The question whether the goods are being manufactured by a single manufacturer or not is not the question herein. The question herein is one of marketability. In the instant case, what was being marketed therein are cement concrete poles, which have been manufactured, therefore, it was held thereon that the marketability of the article does not depend on the number of purchasers nor is a market confined to the territorial limits of the country. As said hereinabove, we have no quarrel with the aforesaid proposition of law, which have already been reiterated by the Hon'ble Supreme Court in the aforesaid judgments as referred to in Thungabhadra Steel Products (supra).

11. What the department would have to show is that the goods that are being manufactured by the petitioner are goods that are capable of being sold in the open market or to any purchaser. Only going by the theoretical reference that goods are marketable is not sufficient. The nature and extent of the goods requires to be defined in order to show that any one in the open market can purchase the same. In the instant case, there is no dispute that what the petitioner is fabricating or manufacturing are articles such as Spillway Raisal Gates, Spillway Stoplog Units, Intake Gates of Trash Racks, Sedimentation Chamber Gates, Flushing Conduit Gates. The same has also been extracted in the impugned order. They would clearly indicate that these are articles that have been fabricated or manufactured for the particular requirements of the particular Hydroelectric Project. That the Gates, RCC construction etc. have been made by the petitioner. The same are invariably made out of the embedded parts as supplied from the petitioner's workshop,

which are subjected and brought out by the iron and steel items used in such activities. Therefore, the design of each one of these articles is specific to the particular hydro electric project. No two Hydroelectric Projects are one and the same. They differ in size and vary in every single component. Therefore, every component that has to go into a hydroelectric unit is definitely one of those which are designed only for that purpose. Therefore, it cannot be said, nor to be found from any material on record to indicate that all the goods that are being manufactured by the petitioners are goods which are said to be marketable. Therefore, we are of the view that the plea of the petitioner is clearly covered by the judgments in Thungabhadra Steel Products Ltd (supra)

12. Hence, for all these reasons the petition is allowed. The order dated 15.12.2005 passed by respondent no.1 is quashed. The amount in deposit made by the petitioner with the respondents is directed to be adjusted towards any dues of the petitioner and if there are no dues, then to be refunded to him within a period of six months from today.

(RAVI MALIMATH)
CHIEF JUSTICE

(VISHAL MISHRA)
JUDGE