2026 INSC 582

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISIDICTION

CIVIL APPEAL NO. 8030 OF 2010

M/S ALUPRO BUILDING SYSTEMS PVT. LTD ...APPELLANT

VERSUS

COMMISSIONER OF CENTRAL EXCISE BANGALORE-II ...RESPONDENT

J U D G M E N T

J.B. PARDIWALA, J.

For the convenience of exposition, this judgment is divided into the following parts:-

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1. This appeal is at the instance of an assessee and is directed against the judgment and order dated 01.04.2010 passed by the High Court of Karnataka in Central Excise Appeal No. 17/2007 (hereinafter, "**the impugned judgment**"), by which the appeal filed by the respondent-Revenue under Section 35G of the Central Excise Act, 1944 (for short, "**the Act, 1944**") came to be allowed thereby setting aside the order dated 27.06.2006 passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench at Bangalore (for short, "**CESTAT**") in Final Order No. 1112/2006 arising in Appeal No. E/1199/2005, and the order dated 28.10.2005 passed by the Commissioner (Appeals) in Appeal No. 196/22005 came be restored by answering the substantial question of law in favour of the Revenue and against the assessee.

I. FACTUAL MATRIX

2. The appellant is a construction contractor and amongst the various activities it undertakes in the course of its business, the appellant also affixes Aluminum Composite Panels (for short, "**ACPs**") on the exterior façade of buildings or structures as per the design requirements of the customer. In short, the appellant undertakes the job of fixing ACPs on buildings.

3. The ACPs, as the very name suggests, is a composite product made up of aluminum and polyethylene sheets. The core material is the rigid polyethylene sheet. An aluminum sheet is bonded to both sides of this sheet. The ACPs can be pre-coated with a heat-resistant fluorocarbon coating to withstand solar radiation and

industrial pollution, making them durable on exposed facades. The ACPs are primarily used in buildings as a covering or cladding.

4. The appellant imported such pre-coated ACPs manufactured by the foreign manufacturer in various standard sizes (1270x5500x4mm, 1575x2150x4mm, etc.), by classifying them under Customs Tariff Heads 7606/7610 and paying the applicable customs duties. After importing the pre-coated ACPs, the following activity is undertaken:

   i. The imported ACPs are cut into rectangular or square panels of required size according to the design requirement of the building/structure. Thereafter, grooves are made on the back side of the ACPs to enable them to be affixed to buildings/structures. This process is known as routing/grooving. The process of cutting, routing or grooving process is undertaken at the premise of the appellant.

   ii. The appellant then erects a frame at the building/structure. The cut and grooved ACPs are taken to the site and are fixed on the frames using angles, clamps, and fasteners leaving a gap of not more than 16 mm between adjacent panels and matching adjacent panels, suitable for a weather-sealed junction using appropriate sealant.

5. It appears from the materials on record that before April 2002, the appellant was paying excise duty on the cutting and grooving of ACPs. Thereafter, the appellant discontinued the payment excise duty under the *bona fide* belief that the aforementioned process of cutting and grooving does not amount to “manufacture” under

Section 2(f) of the Act, 1944, and consequently, it was under no obligation to pay excise duty for the same.

6. On 14.09.2004, the appellant was issued a Show Cause Notice (SCN) on the ground that the process of cutting, grooving, and assembling of the ACPs for use in structures would amount to "manufacture". Thus, the assessee was required to show cause as to why under the provisions of the Act, 1944: (i) duty of Rs. 21,46,437/- on the ACPs cleared from April 2002 to December 2003 should not be demanded and recovered; (ii) interest should not be charged on the aforementioned amount of payable excise duty; and (iii) penalties should not be imposed.

7. The appellant responded to the SCN stating that the aforestated process was being undertaken solely to provide functional utility to the ACPs and no new product with a distinct name, character, or use was emerging, and therefore, the process carried out does not amount to manufacture thus, it was not liable to pay excise duty. It appears that the appellant had already paid the duty amount demanded in the SCN alongwith the interest payable.

8. Thereafter, the Additional Commissioner of Central Excise *vide* Order-in-Original No. 3/2005 dated 21.06.2005 confirmed the demand of duty of the amount stated in the SCN, interest payable thereon and penalty. The amount of demand and interest was appropriated out of the amount already paid by the appellant.

9. Aggrieved by the order of the Additional Commissioner, the appellant preferred an appeal before the Commissioner of Central Excise (Appeals). The Commissioner (Appeals) *vide* Order-in-Appeal No. 196/2005 CE dated 28.10.2005, partly allowed the appeal by setting aside the imposition of penalty and interest. The order of the Additional Commissioner was upheld to the extent that activities undertaken by the appellant were held to be manufacture.

10. Aggrieved by the aforesaid part of the Commissioner (Appeals) order, the appellant filed an appeal before the CESTAT. The CESTAT *vide* Final Order No. 1112/2006 dated 27.06.2006, allowed the appeal of the appellant holding that, *first*, the Revenue failed in discharging its burden of marketability of the item as separate goods. *Secondly*, the process undertaken by the appellant does not amount to "manufacture" as it does not bring into existence a new product.

11. Aggrieved by the aforesaid order of the CESTAT, the respondent preferred an appeal CEA No. 17/2007 under Section 35G of the Act, 1944, before the High Court.

II. IMPUGNED JUDGMENT

12. The question of law framed by the High Court in its impugned judgment reads thus:-

> "*Whether the Appellate Tribunal is right in holding that mere cutting of aluminium angles, plates to size, drilling holes, etc., would not bring into existence new product and the Revenue has not discharged its burden that those goods are marketable items*

subject to payment of excise duty under the provisions of the Central Excise Act, 1944?"

13. The High Court answered the aforesaid question in favour of revenue holding as under:-

> "*5. Having heard the learned counsel for both the parties and after perusal of the material on record, it is not in dispute that the respondent-assessee has been purchasing aluminium composite panels and on the said panels it has been cutting the same into required size and also grooving the said panels which is called routing. The scope of the work that is done on the said goods is that of fixing the aluminium composite panel comprising polyethylene core sandwiched between two skins of 0.50 mm. thick special alloyed sheet and pre-fabricated panels and these are used for various purposes by cutting them into requisite sizes and also by grooving the said sheets. The said aluminium composite panels are then fixed to the main frame, therefore the question that has to be considered is as to whether the respondent is carrying on manufacturing activity on the aluminium composite panel. The panels thus pre-fabricated are to be fixed to suit the conditions. The aluminium panel has to be pre-coated with weather resistant coating of fluoro carbon (PVDF) which can withstand solar radiation and industrial pollution. The main frame work has to be fixed to masonary to form a suitable grid and aligned to perfect level and form. The aluminium composite panels have then to be fixed to the main frame leaving uniform gap of not more than 16 mm. between adjacent panels and to match adjacent glazing gaps. This gap is to be made suitable as a weather- sealed junction using sealant 789 or equivalent. Considering the fact that the respondent is not selling the said panel as it is, on the other hand, after purchasing the said aluminium composite panels is carrying on operation of cutting and grooving and routing the same, the product that emerges is a new product which is commercially*

identifiable and different from the product which the assessee had purchased. Therefore, the product which is termed after the said operations are carried out is different from what had been purchased as such by the assessee.

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8. In the instant case, since the process of cutting, grooving and routing of aluminium sheets to make composite panels amounts to manufacture as a new product emerges, the product is dutiable. The Tribunal has not taken into consideration the actual process involved and the nature of the operations that have been carried out by the respondent-assessee in changing the nature of the product which it has been using to suit the particular requirements. That mere cutting of sheets to size, drilling, grooving, welding, fastening, etc., is not manufacture when the original identity of the product is not lost. In several other cases it was held that cutting to size, welding of steel plate to make "steel band" which is a product with distinct name and character is "manufacture". The goods in the instant case cannot be equated with the aluminium sheets in running length used for manufacturing the aluminium composite panels. In view of the foregoing, we are of the view that cutting, grooving of the aluminium sheet to make aluminium composite panels amounts to manufacture of a distinct product commercially known as different. Therefore, we find that the view expressed by the Tribunal that no manufacturing activity is carried out by the respondent-assessee is contrary to the material on record and also the judgments of the apex court. Hence the order of the Tribunal is set aside and the orders of the Additional Commissioner of Central Excise (Appeals) is restored by answering the substantial question of law in favour of the Revenue and against the assessee."

14. In such circumstances referred to above, the appellant are here before this Court with the present appeal.

III. SUBMISSIONS ON BEHALF OF APPELLANT

15. Ms. Charanya Lakshmikumaran, the learned counsel appearing for the appellant would submit the following:-

    i. The jurisdiction to decide whether the activity undertaken by the appellant amounts to manufacture lies solely with this Court in view of Section 35L(1)(b) of the Act, 1944. In the same breath, it was submitted that Section 35G precludes the High Court from deciding any issue relating to "*determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment*". In this regard, reliance was placed on decision of this Court in ***Navin Chemicals Manufacturing & Trading Co. Ltd.* v. *Collector of Customs***, reported in **(1993) 4 SCC 320**.

    ii. The process of cutting and grooving or routing of the ACPs undertaken by the appellant does not amount to manufacture as there is no emergence of a product of a distinct name, character and use. To fortify the submission, the two-fold test developed in the decisions of this Court in ***Union of India* v. *J.G. Glass Industries Ltd.***, reported in **(1998) 2 SCC 32**, and ***Servo-Med Industries (P) Ltd.* v. *CCE***, reported in **(2015) 14 SCC 47**, respectively were highlighted.

    iii. In such circumstances referred to above, the learned counsel appearing for the appellant-assessee would submit that there being merit in his appeals, the same may be allowed and the impugned judgment passed by the High Court may be set aside.

IV. SUBMISSIONS ON BEHALF OF THE RESPONDENT

16. Mr. N. Venkataraman, the learned Additional Solicitor General alongwith Mr. G.S. Makker, the learned counsel appearing for the respondent-Revenue assisted by V. Chandrashekara Bharathi would argue the following:-

    i. When a product complete by itself is cut into various shapes and sizes it amounts to manufacture. By cutting the ACPs into various sizes, more particularly, by routing them, an irreversible change is brought out by the appellant. It was further submitted that by the process being undertaken, the end use of the aluminium panel changes and are made compliant for the specific consumer. Thus, the process causing an integral change in the product satisfies the test of manufacture. In this regard, reliance was placed on decision of this Court in ***Servo Med*** (*supra*) and ***Quippo Energy Ltd. v. CCE***, reported in **2025 SCC OnLine SC 2021**.

    ii. In such circumstances referred to above, the learned counsel prayed that there being no merit in the appeal, the same may be dismissed.

V. ISSUES FOR CONSIDERATION

17. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the following questions fall for our consideration:-

    a. Whether the High Court had the jurisdiction to decide the issue on excisability of the aluminum composite panels?

b. Whether the process of cutting and grooving or routing of the aluminum panels as per desired measurements would amount to "*manufacture*" under Section 2(f) of the Act, 1944?

VI. ANALYSIS

A. Scope and ambit of expression "*the determination of any question having a relation to the rate of duty of excise or to the value of goods*" in sub-section (1) of Section 35G of the Act, 1944

18. Before adverting to rival submissions canvassed on either side, we must look into the issue of maintainability of the appeal. Sections 35G and 35L of the Act, 1944, respectively, reads thus:-

> "*35G.—Appeal to High Court.—(1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal on or after the 1st day of July, 2003 (not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment), if the High Court is satisfied that the case involves a substantial question of law. […]*"
>
> *xxx*
>
> "*35L. Appeal to the Supreme Court—(1) An appeal shall lie to the Supreme Court from—*
> *(a) any judgment of the High Court delivered—*
> *(i) in an appeal made under section 35G; or*
> *(ii) on a reference made under section 35G by the Appellate Tribunal before the 1st day of July, 2003;*
> *(iii) on a reference made under section 35H,*
> *in any case which, on its own motion or on an oral application made by or on behalf of the party aggrieved, immediately after the passing of the judgment, the High Court certifies to be a fit one for appeal to the Supreme Court; or*

(b) any order passed before the establishment of the National Tax Tribunal by the Appellate Tribunal relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment.

(2) For the purposes of this Chapter, the determination of any question having a relation to the rate of duty shall include the determination of taxability or excisability of goods for the purpose of assessment."

(Emphasis is ours)

19. A plain reading of sub-section (1) of Section 35G of the Act, 1944, would reveal that an appeal lies to the High Court from an order passed by the Appellate Tribunal where it does not relate to the determination of any question having a relation to the rate of excise duty or to the value of goods. In other words, the provision envisages a clear bar on appeals from an order not being an order relating to the determination of any question having a relation to the rate of excise duty or the value of goods.

20. At the same time, sub-section (1)(b) of Section 35L of the Act, 1944, provides that an appeal from an order passed by the Appellate Tribunal relating to the determination of any question having a relation to the rate of excise duty or to the value of goods for the purpose of assessment lie to this Court. Further, sub-section (2) of the provision states that questions having relation to the "*rate of duty*" includes the questions on determination of taxability or excisability of goods for the purpose of assessment. We shall discuss the application of sub-section (2) along with the object and

purpose behind its introduction in more detail in the latter part of this judgment.

21. The essentials of Section 35G can be better understood in the following manner:-

    i. The order in appeal came to be passed by the Appellate Tribunal on or after the 1st day of July, 2003;

    ii. The order is not an order relating, among other things, to -

        a. The determination of "any" question;

        b. Having a relation to –

            i) the rate of duty of excise, or

            ii) the value of goods

        c. For the purpose of assessment

    iii. The High Court is satisfied that the case involves a substantial question of law.

22. The conditions (i) and (iii) respectively are positive conditions. In other words, they must be satisfied for the appeal to be maintainable before the High Court. Whereas, condition (ii) is a negative condition. If the order passed by the Appellate Tribunal falls within this condition, the appeal does not lie, regardless of whether (i) and (iii) are met.

23. The expression that we are concerned in the case at hand is the bracketed portion in Section 35G, which reads, "*(not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment)*".

24. A plain yet careful reading of Section 35G leaves very little to imagine. The word "*any*" in the aforesaid expression gives the exclusion as regards the jurisdiction a wide sweep, indicating that the question referred to therein is not limited to a specific question of rate of excise duty or value of goods. In other words, even peripheral questions touching a question pertaining to rate or valuation can attract such exclusion. Further, the conscious use of the prefatory phrase "*among other things*" also serves to communicate that these are not the only exclusions and are merely illustrative of a broader category of rate of duty and valuation. These words or phrases in the provision cannot be assumed to be surplusage.

25. The expression "*for purposes of assessment*" also deserves some attention. It qualifies and governs both the preceding limbs of the exclusion i.e., the rate of excise duty and the value of goods. In other words, the exclusion is not triggered by every question touching rate of duty or value of goods in the abstract. The question must have a relation to rate or value specifically in the context of assessment. It is not the mere mention of rate or value in an order that triggers the exclusion but the fact that the question goes to the root of the assessment itself.

26. The argument that the question of excisability is distinct from the question of "*rate of duty*" deserves to be rejected at the threshold. The two questions are not merely related, they are sequentially and logically interdependent. An issue on excisability of goods would

be intrinsically connected with the "*rate of the duty*" for the "*purpose of assessment*". The decision on excisability of goods is a precursor to the determination of any question having a relation to the rate of excise duty or to the value of goods for the purpose of assessment. Afterall, the levy of excise duty presupposes that the goods upon which such assessment is to be made, are downstream consequences of determination of excisability. To hold otherwise would be to sever what is inherently a continuous chain of fiscal adjudication into fragments, which the legislature could never have intended.

27. One another good reason to hold the aforesaid is that decision on such an issue would not only have ramifications *in personam* but also *in rem*. The consequences thereof would be applicable on all the assessees dealing in the particular goods. The provision intends uniformity in the determination of fiscal questions having wide ramifications.

28. It is pertinent to note that the jurisdiction of the High Court under Section 35G is not a matter of absolute right but is a creature of statute, and therefore, the conditions precedent to the exercise of such jurisdiction must be strictly construed. The legislature has expressed its intention by employing clear and deliberate language in the bracketed portion of sub-section (1) of Section 35G to exclude a category of orders from appellate jurisdiction of the High Court.

29. Although the respondent has not addressed the submission canvassed by the appellant on maintainability of the appeal as regards the issue of jurisdiction, yet it could be argued that the question of excisability is a pure question of law and therefore falls within the High Court's jurisdiction to decide a "*substantial question of law*" under Section 35G. This argument although, at first glance, appears persuasive, yet does not withstand scrutiny.

30. Jurisdiction cannot be assumed merely because the question is framed as question of law, if the underlying subject matter of the order is that the legislature has explicitly placed beyond the reach of the High Court. In other words, the nature of the question, whether it is one of fact, law, or mixed question of fact and law, is a separate inquiry from whether the subject matter of the order falls within the exclusionary bracket. The satisfaction of the High Court as to the existence of a substantial question of law is a condition precedent to the exercise of jurisdiction but it has to be within the four corners of bar imposed by the exclusion.

31. In this regard, we would like to refer to the decision in ***CST* v. *Ernst and Young (P) Ltd.***, reported in **(2014) 27 GSTR 22**, wherein the issue before the Delhi High Court was whether the assesses therein could be said to be commission agents and were liable to pay service tax on the act of brokerage. The Court held that the dispute would fall in the category of "*rate of duty of excise*" under Section 35G of the Act, 1944. It was held that determination of any question relating to rate of tax would directly and

proximately involve the question as to whether service tax is leviable. The relevant observations read thus:-

> "*3. Section 83 of the Finance Act, 1994 stipulates that sections 35G and 35L of the Central Excise Act, 1944 shall mutatis mutandis apply and accordingly, appeals would be made to the High Court and the Supreme Court against the decisions of the Appellate Tribunal. An appeal in clause (a) to section 35L of the Central Excise Act, 1944 would also lie to the Supreme Court against the decision of the High Court rendered under section 35G, reference made by the Appellate Tribunal before the first day of July, 2003 or on a reference under section 35H of the Central Excise Act, 1944. <u>Clause (b) stipulates that an appeal before the Supreme Court would lie against the order passed by the Appellate Tribunal which includes amongst others, question or issue in "relation" to rate of duty of service tax or value of services for the purpose of assessment.</u> <u>Section 35G stipulates that any order passed by the Appellate Tribunal made on or after the first day of July, 2003, is appealable before the High Court on a substantial question of law, except an order which among other things, determines any question relating to duty of service tax or value of a service for the purpose of assessment.</u>*
>
> *xxx*
>
> *9. Before we examine other judgments, it is important to examine the language of section 35G in the bracketed portion which relates to matters in which appeal is to be filed before the Supreme Court. Section 35L of the Finance Act, 1994 is specific. <u>The words/expression used is "determination of any question in relation to rate of duty or value for the purpose of assessment".</u> <u>The word "any" and expression "in relation to" gives appropriately wide and broad expanse to the appellate jurisdiction of the Supreme Court in respect of question relating to rate of tax or value for the purpose of assessment. Further, if the order relates to several issues or</u>*

questions but when one of the questions raised relates to "rate of tax" or valuation in the order in the original, the appeal is maintainable before the Supreme Court and no appeal lies before the High Court under section 35G of the Central Excise Act, 1944. […]

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32. The question raised is whether the assessee was liable to pay service tax under section 65(105)(zzb) of the Finance Act, 1994. Case of the assessee is that they were not liable as the activities undertaken were non-taxable.

33. In view of the interpretation given above, the dispute would fall in the category of "rate of tax". Hence, the present appeals would not be maintainable before the High Court under section 83 of the Finance Act, 1994 read with section 35G of the Central Excise Act, 1944."

(Emphasis supplied)

32. We may also refer to the decision of the Full Bench of the Bombay High Court in ***CCE* v. *Reliance Media Works Ltd.***, reported in **2019 SCC OnLine Bom 5162**, where the Court was called upon to decide the issue whether the question of excisability of goods is an issue of rate of duty appealable to this Court in terms of Section 35L(2). The Court held that it is only when goods are held to be excisable that the rate of duty can be decided. It was underscored that the term "*assessment*" is a comprehensive term as it comprehends the whole procedure for ascertaining and imposing duty liability. The relevant observations read thus:-

"*(III)(a) We have considered the rival submissions. The appeals from the orders of the Tribunal under the Finance Act, 1994 and the Act prior to the introduction of sub-section (2) to section 35L of the Act were governed by section 35G(1) and 35L(1) of the*

Act. In terms of section 35G(1) of the Act, every appeal from order of the Tribunal passed after July 1, 2003 giving rise to a substantial question of law would be to the High Court except orders of the Tribunal relating to the rate of duty of excise or value of goods for the purpose of assessment. The above orders were excluded from the jurisdiction of the High Court and were appealable only to the hon'ble Supreme Court in terms of section 35L(1)(b) of the Act. In the context of the above, we have to consider that when the order of the Tribunal decides a dispute that the service is not covered by the Finance Act or goods not being covered by the Act for the purposes of determining the rate of duty for the purpose of assessment, would be appealable to this court or not.

(b)[…] It is only on deciding the taxability of services or excisability of goods that a rate of duty can be decided. The words "determination of any question having a relation to rate of duty of excise for the purpose of assessment" as found in the context of section 35G and 35L of the Act was a subject of consideration by this court in Sterlite Optical Technologies Ltd. v. CCE (2007) 213 ELT 658 (Bom). This court held that the word "assessment" has a very comprehensive meaning, i. e., it can comprehend the whole procedure for ascertaining and imposing duty liability. Thus, the words "for the purpose of assessment" would cover even the issue of the Tribunal deciding excisability and/or taxability as it is a part of the process of assessment. Besides, the answer to the question whether a product/service is excisable/taxable will not only have an impact on a dispute between parties inter se but would have an all India impact and, therefore, the statute contemplates an appeal to the hon'ble Supreme Court for uniformity of decisions. Otherwise, we would have a situation where different High Courts take different views on the issue of excisability/taxability,

leading to a situation where in some States the service/goods are not taxable/excisable and taxable in other States.[...]

(c) The appellant Revenue also relies upon the decision of this court in Greatship (India) Ltd. (supra) and of the Supreme Court in Navin Chemicals (supra) to contend that an appeal arising from an order dealing with taxability/excisability would only be before this High Court and not the hon'ble Supreme Court. We find that the decision in Greatship (India) Ltd. (supra) of this court is not applicable to the present facts as it itself records in paragraphs 24 and 28 thereof that there was no dispute before it that the services are taxable. Thus, the objection of the Revenue (respondent before it) that this court does not have jurisdiction, was negatived. So far as reliance upon the decision of the apex court in Navin Chemicals (supra) is concerned, we note that in paragraph 11 thereof, the Supreme Court has observed as under :

> *"11. It will be seen that sub-section (5) uses the said expression 'determination of any question having a relation to the rate of duty or to the value of goods for the purposes of assessment' and the Explanation thereto provides a definition of it 'for the purpose of this sub- section'. The Explanation says that the expression includes the determination of a question relating to the rate of duty; to the valuation of goods for purposes of assessment; to the classification of goods under the Tariff and whether or not they are covered by an exemption notification; and whether the value of goods for purposes of assessment should be enhanced or reduced having regard to certain matters that the said Act provides for. Although this Explanation expressly confines the definition of the said expression to sub- section (5) of section 129D, it is proper that the said expression used in the other parts of the said Act should be interpreted similarly. The statutory definition*

> *accords with the meaning we have given to the said expression above. Questions relating to the rate of duty and to the value of goods for the purposes of assessment are questions that squarely fall within the meaning of the said expression. A dispute as to the classification of goods and as to whether or not they are covered by an exemption notification relates directly and proximately to the rate of duty applicable thereto for purposes of assessment. Whether the value of goods for purposes of assessment is required to be increased or decreased is a question that relates directly and proximately to the value of goods for purposes of assessment. The statutory definition of the said expression indicates that it has to be read to limit its application to cases where, for the purposes of assessment, questions arise directly and proximately as to the rate of duty or the value of the goods." (emphasis supplied)*

From the above, it is clear that the apex court noted that the classification of goods under the tariff for the purpose of determining the rate of duty would be a question having relation to the rate of duty. Thus, the above observations by the apex court would support the view that taxability/excisability is not appealable before this court, as decision on the above is in the context of it being classifiable under the Finance Act, 1994 or the Act read with the tariff."

(Emphasis supplied)

33. The jurisdictional exclusion of the High Court on the issue of determination of rate of duty may be looked at from one another angle. In ***Commr. of Customs* v. *Motorola (India) Ltd.***, reported in **(2019) 9 SCC 563**, the issue before this Court was whether an appeal from the order of the CESTAT, on violation of conditions

contained in customs exemption, would lie before the High Court under Section 130 of the Customs Act, 1962 ("**the Customs Act**") or this Court under Section 130E of the Customs Act. It is pertinent to note that Sections 130 and 130E of the Customs Act, respectively are *pari materia* to Sections 35G and 35L of the Act, 1944. The Court referred to the decision in ***Navin Chemicals*** (*supra*) wherein the expression "*relation to*" in the bracketed portion of Section 130 of the Customs Act was stated to indicate that the direct and proximate relationship of the question before the court to the "*rate of duty of excise or to the value of goods*" for the purpose of the assessment. The relevant observations read thus:-

> "*11. Upon a conjoint reading of the aforesaid provisions, it could thus be seen that an appeal shall lie to the High Court against every order passed in appeal by the Appellate Tribunal, if the High Court is satisfied that the case involves a substantial question of law. The only exception carved out is that an appeal shall lie before this Court and shall not lie before the High Court against the order relating, amongst other things, to the determination of any question having relation to the rate of duty of customs or to the value of goods for the purposes of assessment.*
>
> *12. It could thus clearly be seen that, only if any question having relation to the rate of duty is involved in an appeal or if it relates to value of goods for the purpose of assessment, the appeal would lie to this Court and in all other cases it would lie before the High Court.*
>
> *xxx*
>
> *14. It could thus clearly be seen that, this Court, while considering the provisions of Section 130 and Section 130-E of the Customs Act, has held that*

where an appeal involves determination of any question that has relation to customs duty for the purpose of assessment or where an appeal involves determination of any question that has relation to the value of goods for the purposes of assessment, such cases will have to be treated separately and have to be given special treatment."

(Emphasis supplied)

34. We would lay emphasis on the fact that Section 35G must be read in the context of the other provisions of the Act, 1944, as well. The exclusion carved out by the bracketed portion of Section 35G is not a self-contained bar that leaves the excluded category of orders in a vacuum. On the contrary, it is a deliberate and precise legislative act of channelling. What Section 35G excludes, Section 35L picks up. The exclusion in Section 35G is, therefore, meaningful only when read alongwith Section 35L. The two provisions are not independent of each other. They are interdependent, and together they constitute a complete, exhaustive, and mutually exclusive appellate scheme under the Act, 1944.

35. At this juncture, it would be apposite to refer to the observations of this Court in ***Munshi Ram* v. *Municipal Committee, Chheharta***, reported in **(1979) 3 SCC 83**, on the understanding of provisions dealing with jurisdiction. It reads thus:-

> *"23.[…] when a revenue statute provides for a person aggrieved by an assessment thereunder, a particular remedy to be sought in a particular forum, in a particular way, it must be sought in that forum and in that manner, and all the other forums and modes of seeking [remedy] are excluded."*

(Emphasis supplied)

36. The issue before the High Court i.e., whether the activity of cutting and routing or grooving of aluminium composite panels would bring into existence new product subjecting it to payment of excise duty would be an issue clearly covered by Section 35(1)(b). This dispute as to whether the aforesaid activity undertaken would be excisable or not relates directly to the rate of duty applicable thereto for the purpose of assessment. The assessee had raised an objection with regards to maintainability of the appeal before the High Court. However, the same was left unaddressed.

37. We have gone through the order passed by the Appellate Tribunal. The only determination made by the Tribunal is with regards to the excisability of the goods in question. Since what was done by the Tribunal is the determination of the levy of duty under the Act, 1944. In our considered opinion, the Revenue ought to have preferred an appeal before this Court under Section 35L of the Act, 1944.

38. For all the aforesaid reasons, we are of the considered view that the issue in the present appeal is in regard to excisability of the goods. In view of Section 35G(1) read with Section 35L(1)(b) the appropriate remedy for the respondent-Revenue would have been to approach this Court.

i. Nature of amendment in sub-section (2) of Section 35L of the Act, 1944

39. We may answer this issue in one another manner i.e., by answering the question, whether sub-section (2) of Section 35L could be said to be clarificatory and hence, retrospective in its application? At the cost of repetition, we deem it necessary to once again quote the provision of Section 35L for a better exposition:- The same reads thus:-

> "*35L. Appeal to the Supreme Court—(1) An appeal shall lie to the Supreme Court from—*
> *(a) any judgment of the High Court delivered—*
> *(i) in an appeal made under section 35G; or*
> *(ii) on a reference made under section 35G by the Appellate Tribunal before the 1st day of July, 2003;*
> *(iii) on a reference made under section 35H,*
> *in any case which, on its own motion or on an oral application made by or on behalf of the party aggrieved, immediately after the passing of the judgment, the High Court certifies to be a fit one for appeal to the Supreme Court; or*
>
> *(b) any order passed before the establishment of the National Tax Tribunal by the Appellate Tribunal relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment.*
>
> *(2) For the purposes of this Chapter, the determination of any question having a relation to the rate of duty shall include the determination of taxability or excisability of goods for the purpose of assessment.*"
>
> (Emphasis is ours)

40. The true test of whether an amendment is clarificatory is not dependent on the label that the legislature attaches to it, but whether the amendment, on a purposive and contextual reading, does no more than make explicit what was already implicit in the original provision. The legislature's declaration that an amendment is clarificatory, although not conclusive, is a significant and weighty indicator of legislative intent that the courts must take into account and not lightly discard.

41. Sub-section (2) of Section 35L was inserted in the Act, 1944, by the Finance (No. 2) Act, 2014. Clause 99 of the Bill which sought to insert the sub-section stated that:-

> "Clause *99 of the Bill seeks to insert a new sub-section (2) in section 35L of the Central Excise Act so* ***as to clarify*** *that determination of disputes relating to taxability or excisability is covered under the expression "determination of any question having a relation to rate of duty.*"
>
> (Emphasis is ours)

42. In the aforesaid context, the Memorandum on the Finance (No. 2) Bill, 2014, by the Central Board of Direct Taxes Memorandum also clarified the position as regards appellate jurisdiction of this Court. It reads thus:-

> "*Section 35L is being amended so* ***as to clarify*** *that determination of disputes relating to taxability or excisability of goods is covered under the term 'determination of any question having a relation to rate of duty' and hence, appeal against Tribunal orders in such matters would lie before the Supreme Court.*"
>
> (Emphasis is ours)

43. The reading of the text of the provision stipulates that it does not create any new legal position. It merely gives statutory expression to what was already the natural and necessary consequence of collective reading of Sections 35G and 35L, respectively. As a result, such a clarificatory amendment would have retrospective effect.

44. It is trite law that an amendment could be characterized as clarificatory of existing law when the provision it seeks to amend was subject to more than one interpretation. In other words, the provision prior to the amendment was not being interpreted in harmony with the statutory intent without the amendment being read into it.

45. The phrase "*shall include*" denotes inclusive and expansive definition that clarifies the scope of an existing expression, rather than one that adds a new category to it. The use of the phrase signifies that the legislature was not introducing excisability as a new category of questions falling within the rate of duty, it was clarifying that excisability always fell within that expression, and any doubt to the contrary was unwarranted.

46. It appears that the amendment was introduced to clarify the position of law, with the aim of removing existing doubts and correcting judicial error, thereby rendering it declaratory in nature. By inserting sub-section (2), the legislature put an end to uncertainty, and reaffirmed the position that was always inherent in the scheme of Sections 35G and 35L, respectively.

47. We may also examine what the amendment does not do. Sub-section (2) does not create a new right of appeal. It does not vest a new jurisdiction in any court. It does not impose any new obligation upon assessees. It also does not alter the mechanism or procedure of assessment. All it does is clarify that when the legislature referred to questions having a relation to the rate of duty, it includes within that expression the question of excisability of goods for the purpose of assessment. The absence of any new right, obligation, or liability created by the amendment is a significance of the fact that the amendment it is clarificatory in nature.

48. In this context, we may refer to the decision of this Court in ***CIT* v. *Podar Cement (P) Ltd.***, reported in **(1997) 5 SCC 482**, wherein it was observed that the circumstances in which the amendment were introduced and the effect of the amendment or rather the consequences would have to be taken into consideration to state whether an amendment was clarificatory or substantive and retrospective or prospective in nature.

49. In ***M. Rajendran* v. *KPK Oils & Protiens India (P) Ltd.***, reported in **(2026) 3 SCC 505**, wherein one of us, J.B. Pardiwala, J., was a part of the Bench, held that procedural amendments are presumed to be retrospective in nature unless the express intention of the legislature to the contrary. It was categorically held that presumptions against retrospectivity is not applicable to

enactments which affect procedure, or forum, or are declaratory in nature. The relevant observations read thus:-

> "*191. It is no more res integra that the presumption against retrospective operation does not apply to the legislation merely concerned with matters of procedure or of evidence; on the contrary, the provisions of that nature are to be construed as retrospective unless there is a clear indication that such was not the intention of Parliament.*
>
> *192. We may summarize the principles on retrospective application of legislations as under:*
> *(i) Presumption against retrospectivity is not applicable to enactments which merely affect procedure or change the forum or are declaratory;*
> *(ii) Retroactive/retrospective operation can be implicit in a provision construed in the context where it occurs;*
> *(iii) Given the context, a provision can be held to apply to cause of action after such provision comes into force, even though the claim on which the action may be based may be of an anterior date;*
> *(iv) A remedial statute applies to pending proceedings and such application may not be taken to be retrospective if application is to be in future with reference to a pending cause of action; and*
> *(v) The Sarfaesi Act is a remedial statute intended to deal with problem of pre-existing loan transactions which need speedy recovery.*
>
> *193. A legislation, be it a statutory Act or a statutory rule or a statutory notification, may physically consist of words printed on papers but conceptually, it would be a great deal more than ordinary prose. Of the various rules guiding how a legislation has to be interpreted, the one established rule is that unless a contrary intention appears, a legislation is presumed not to be intended to have retrospective operation and the idea behind the rule is that a current law should govern current activities.*

> *194. If legislation confers a benefit on some persons without inflicting a corresponding detriment on some other person or on the public generally, and such conferment appears to have been the legislator's object, then the presumption would be that such legislation, giving it a purposive construction, would warrant a retrospective effect.*"
>
> (Emphasis supplied)

50. In the aforesaid context, the observations of a Three-judge Bench in ***University of Kerala* v. *Merlin J.N.,*** reported in **(2022) 9 SCC 389**, are also noteworthy. It was noted that when an amendment intends to clarify something which was implicit in the operation of the provision such an amendment is meant to operate retrospectively. Such an amendment is ordinarily made to clarify the position in order for the courts to avoid taking conflicting decisions. The relevant observations read thus:-

> "*23. When an enactment or an amendment is declaratory, curative or clarificatory, impelled by a felt need to make clear what was always intended, such amendment is usually meant to operate from an antecedent date, or to cover antecedent events. This position was clarified in CIT v. Shelly Products [CIT v. Shelly Products, (2003) 5 SCC 461, para 38] where this Court, while interpreting an amendment, held that : (SCC p. 478, para 38)*
>
> > *"38. … It seeks to clarify the law so as to remove doubts leading to the courts giving conflicting decisions, and in several cases directing the Revenue to refund the entire amount of income tax paid by the assessee where the Revenue was not in a position to frame a fresh assessment. Being clarificatory in nature it must be held to be retrospective, in the facts and circumstances of the case. It is well-settled that the legislature may*

> *pass a declaratory Act to set aside what the legislature deems to have been a judicial error in the interpretation of statute. It only seeks to clear a meaning of a provision of the principal Act and make explicit that which was already implicit.*"

(Emphasis supplied)

51. In ***Reliance Media Works*** (*supra*), the Full Bench of the Bombay High Court also dealt with this issue. It held that the amendment by insertion of sub-section (2) is clarificatory and retrospective in nature as its intention was to make explicit what was implicit in Sections 35G(1) and 35(1)(b) respectively. The Court also highlights the Notes on Clauses to the Finance (No. 2) Bill, 2014, mentioned hereinabove. The relevant observations read thus:-

> "*(e) It was also contended by the appellant-Revenue that insertion of sub-section (2) to section 35L of the Act that taxability/excisability would be a rate of duty issue with effect from August 6, 2014 would itself imply that prior to August 6, 2014, the issue of taxability/excisability was appealable to the High Court. This submission on behalf of the Revenue cannot be accepted in view of the various decisions referred to hereinabove wherein the courts have held that issue of excisability of goods and taxability of services are appealable to the hon'ble Supreme Court even prior to the insertion of sub-section (2) to section 35L of the Act. The introduction/insertion of sub-section (2) to section 35L of the Act was done as a matter of abundant caution so as to clarify and make explicit what was implicit in sections 35G(1) and 35L(1)(b) of the Act. This was done only to ensure that the courts do not waste time examining the issue again and again, when the issue has already been decided by various courts upon which the respondent assessee has placed reliance. This in support of its case that an appeal with respect to taxability/excisability is maintainable only before the*

hon'ble Supreme Court of India even before the insertion of sub-section (2) of section 35L of the Act. In fact, this view is also supported by clause 99 of Notes on Clauses to the Finance (No. 2) Bill, 2014 which introduced sub-section (2) to section 35L of the Act. It specifically states that section 35L is being amended so as to clarify that issue of taxability/excisability is covered by the term rate of duty. Thus, what was implicit has been made explicit. We find support for this view in the decision of the Supreme Court in W. P. I. L. Ltd. v. CCE (2005) 4 RC 405; (2005) 181 ELT 359 (S.C.). We also note that Punjab and Haryana High Court Commissioner, Service Tax v. DLF Golf Resort Ltd. [2018] 56 GSTR 247 (P & H) has held that insertion of sub-section (2) to section 35L of the Act was clarificatory. Therefore, insertion of sub-section (2) to section 35L of the Act with effect from August 6, 2014 would not justify the contention of the Revenue that prior to August 6, 2014, the appeals were maintainable before the High Court.

(III)(a) […] It appears that this insertion of sub-section (2) to section 35L of the Act became necessary as this issue, viz., where such an appeal would lie, was being urged time and again before various High Courts. To settle the issue being urged and set the matter at rest, it appears that the amendment has been introduced. The amendment, therefore, is in the nature of a clarification and not for bringing about any change in the law, i. e., excluding a set of orders of the Tribunal, which were earlier appealable to the High Court, now made appealable to the hon'ble Supreme Court for the first time. This is also supported by the plain reading of sub-section (2) of section 35L of the Act which merely clarifies/states "having relation to the rate of duty shall include the determination of taxability or excisability of goods for the purpose of assessment". In case, it was a new category, then, all that Parliament had to do was to state that the question of excisability and taxability

> *arising in of an order of the Tribunal would be appealable to the Supreme Court. Further, our interpretation that the amendment of section 35L of the Act by insertion of sub-section (2) thereof was clarificatory in nature, is supported by Notes on Clauses to the Finance (No. 2) Bill, 2014. […]*
>
> *(b) Next submission on behalf of the appellant was that even if there has been an intent on the part of the Government while introducing the amendment to section 35L of the Act by insertion of sub-section (2) thereof, yet the same does not find mention in the amended Act as passed by Parliament. This submission in the present facts would not be correct. This for the reason that the Act was passed in the same form as it was introduced along with Notes on Clauses to the Bill in Parliament. Thus, the Parliamentarians were aware while passing the bill and making it into an Act that this provision was intended to be clarificatory in nature. Therefore, insertion of sub-section (2) to section 35L of the Act is retrospective in nature and not prospective*."
>
> (Emphasis supplied)

52. It would be worthwhile to also refer to the observations made by the Punjab & Haryana High Court in ***Commr., S. T.* v. *DLF Golf Resorts Ltd.***, reported in **2017 SCC OnLine P&H 1529**. The Court highlighted that the amendment being clarificatory was acknowledged by the Department of Revenue in a circular. The relevant observations read thus:-

> "*7. Sub-section (2) was inserted with effect from August 6, 2014 by section 107 of the Finance (No. 2) Act, 2014. The amendment is, however, clarificatory and, therefore, operates retrospectively. That it is clarificatory, is accepted by the Department. The Ministry of Finance, Department of Revenue, Tax Research Unit issued a circular dated July 10, 2014,*

> *which refers to the Finance Minister having introduced the Finance (No. 2) Bill, 2014 in the Lok Sabha on July 10, 2014. Paragraph 14 of annexure IV referred to in this circular, reads as under :*
>
> > *"14. Section 35L is being amended so as to clarify that determination of disputes relating to taxability or excisability of goods is covered under the term 'determination of any question having a relation to rate of duty' and hence, appeal against Tribunal orders in such matters would lie before the Supreme Court." (Emphasis supplied)*
>
> *xxx*
>
> *9. It is, therefore, evident that the Department has considered the amendment to be clarificatory and has proceeded on that basis, inter alia, by withdrawing various proceedings before the Supreme Court. The controversy as to whether the issues such as the one raised in the present appeal relates to taxability or not, is now set at rest including by the Department. We are informed that similar questions are, in fact, pending before the Supreme Court."*

(Emphasis supplied)

53. The net effect of the aforesaid is that sub-section (2) being merely clarificatory in nature does not create new liabilities or obligations or to impose new duties in respect of transactions already accomplished. The provisions of Sections 35G and Section 35L, read together, always pointed to one and only one conclusion that the question of excisability fell within the exclusive appellate jurisdiction of the Supreme Court. Even prior to the amendment, a question of excisability of goods was never a question that could be answered in isolation. It is a question that would arise in the context of, and as a precursor to, the assessment of excise duty. The amendment does not alter this relationship, it merely

articulates it. In other words, the amendment states in express terms were always implicit in the structure and language of the provision.

B. Meaning, scope and application of "*manufacture*" under Section 2(f) of the Act, 1944

54. Ms. Charanya Lakshmikumaran, the learned counsel appearing for the appellant herein vociferously contended that the process undertaken by them involves cutting of the ACPs in required smaller sizes, in rectangular and square shape, and these smaller sheets are further grooved on all the four edges, bent, made into frames and sent to sites. Thereafter, "C" angles are fixed to the walls depending on the sizes and shapes and the ACPs are fixed on the substructures by screws and the gaps are filled with sealants.

55. It was submitted that merely because the activity of cutting and grooving makes the ACPs usable as per the requirements, it would not amount to manufacture as there is no change in the characteristics and end use of the product.

56. On the other hand, Mr. G.S. Makker, the learned counsel appearing for the respondents contended that the process undertaken by the appellant causes an irreversible change in the ACPs, and the end use of the ACPs have also changed from what it was prior to cutting and routing the panels. It was submitted that when generic end use is tampered with and made suitable for a specific end use, such process amounts to manufacturing.

57. We shall now look into the relevant provision that defines "manufacture" in the Act, 1944. Section 2(f) of the said Act reads thus:-

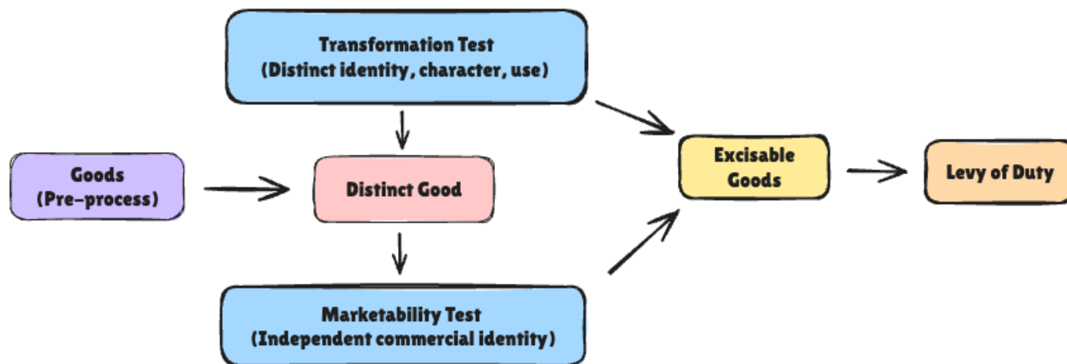
> "2. *Definitions.— In this Act, unless there is anything repugnant in the subject or context,—*
>
> *[(f) "manufacture" includes any process—*
>
> *(i) incidental or ancillary to the completion of a manufactured product;*
>
> *(ii) which is specified in relation to any goods in the Section or Chapter Notes of the Fourth Schedule] as amounting to manufacture; or,*
>
> *(iii) which, in relation to the goods specified in the Third Schedule, involves packing or repacking of such goods in a unit container or labelling or re-labelling of containers including the declaration or alteration of retail sale price on it or adoption of any other treatment on the goods to render the product marketable to the consumer;] and the word "manufacture" shall be construed accordingly and shall include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account;"*

58. At the outset, we must mention that the taxable event for levy of excise duty is manufacture. To ascertain excisability of goods, the two-fold test has to be passed:-

   i. Whether by the said process distinct commercial goods with a new identity, or character, or use emerge indicating transformation;

ii. Whether the transformed goods is marketable or capable of being marketed.

59. By reading the aforementioned test, one could argue that if the taxable event is the manufacture of goods, then assessing marketability of the manufactured goods ought not to be made necessary. When the taxable event is said to be of manufacture, it means that even though the taxable event is "manufacture", the collection of duty on excisable goods is shifted to stage of removal of goods for administrative convenience.



60. Through the first test, the question that requires an answer is whether distinct goods with the new name, identity, character or use have emerged. Whereas, through the second test, the question that requires an answer is whether the resultant goods are marketable after undergoing the particular process.

61. The test laid down in ***J.G. Glass*** (*supra*) was laid down to decipher "manufacture" of goods. In furtherance of the 'fundamental change' test and 'but for the process' test, this Court in ***Servo-Med*** (*supra*) tied the application of the tests to marketability of the manufactured goods. This is done so because it is marketability

which reflects whether the goods are excisable goods as defined under the Act, 1944.

62. This Court's understanding of the two-fold test in ***Servo-Med*** (*supra*) and ***Quippo*** (*supra*) respectively, may be summarized as follows. In ***Servo-Med*** (*supra*), the Court cautioned against reading of the 'but for' test in isolation. The Court envisaged a scenario where, without any transformation, goods could transition from being commercially useless to commercially useful (unsterilized syringes to sterilized syringes) solely by virtue of the process it underwent. The emphasis of the Court in ***Servo-Med*** (*supra*) was therefore to affirm that transformation is a necessary and indispensable component of manufacture. It is a must. On the other hand, in ***Quippo*** (*supra*), the Court clarified that the two-fold test cannot be read as a strict conjunctive test. To say that transformation will constitute manufacture only in those scenarios where the goods transition from being commercially useless to commercially useful (wheat grain to flour). In other words, ***Quippo*** (*supra*) holds that in order to establish manufacture, it is not necessary to invoke the 'but for' test. Both the decisions convey that the 'but for' test is not a sufficient assessment to establish manufacture.

63. The Constitution Bench of this Court in ***Union of India* v. *Delhi Cloth & General Mills Co. Ltd.***, reported in **1962 SCC OnLine SC 148**, held that manufacturing means bringing into existence a new substance and not merely to produce some change in a substance. In other words, the threshold to be met for goods that

have undergone some change is that they must have a distinct name, character or use at the end of the process. Further, the decision in ***Servo-Med*** (*supra*) clarified that that both the essentials i.e., the transformation test and the marketability test must be fulfilled in order for an activity to amount to "manufacture". In other words, they must be read cumulatively.

64. The dispute between the parties before us primarily lies with respect to the transformation test. It is the case of the appellant that no transformation has occurred and there is no change in the name, character, identity or use as, *first*, the function and end use of both the ACPs before and after cutting and grooving remains the same. *Secondly*, cutting and grooving of the ACPs is only for functional purposes.

i. First Limb – No goods with distinct characteristics came into existence

65. We may now put the activity undertaken by the appellant through the first limb of the test. The first question to be asked is, could it be said that the process undertaken by the appellant results in emergence of distinct goods having their own character, identity, or use. The answer is an emphatic 'No'. We say so because what enters the process is an ACP consisting of two aluminium sheets bonded to a polyethylene core, and what emerges from the process is still an ACP cut to a particular size, grooved at the edges, and bent into a frame. Here, the essential character of the goods remain entirely unchanged.

66. The process of cutting, grooving, and bending does not alter the fundamental nature of identity of the ACP, it merely adapts its dimensions and shape for a specific use. In other words, it amounts to no more than preparation, sizing, and installation of the ACPs for use as a cladding or façade material. The process of grooving or routing does not alter the material properties or the commercial character of the ACPs in any manner whatsoever. The form and shape of the ACPs are being changed to facilitate its use.

67. The final steps of the process i.e., erecting a frame at the site, fixing the cut and grooved ACPs onto the frame using angles, clamps, and sealing the gaps between adjacent panels with an appropriate sealant are unambiguously installation activities. It is as clear as a noon day that none of these activities, individually or collectively, result in the creation of new distinct goods. After undergoing the aforesaid process, the ACPs continues to retain its original character but in a modified form.

68. In this regard, we may refer to and rely upon the decision of this Court in ***Bharat Forge and Press Industries (P) Ltd.* v. *CCE***, reported in **(1990) 1 SCC 532**, wherein the appellant purchased steel pipes on payment of excise duty. Later, cut the pipes into different sizes giving them shape and turned them into pipe fittings in the factories by hammering and pressing. The question before this Court was whether the pipe fittings so produced by the appellant were liable to excise duty. The Court held that to make pipes and tubes workable, it is necessary to turn them into required shape and size. When pipes and tubes undergo process

of forging, welding, hammering, their essential character and use remain the same. The relevant observations read thus:-

> "*5. […]The position is somewhat similar in the present case. As explained above, the goods described in the tariff, namely, pipes and tubes are designed to meet various types of requirements. Normally pipes and tubes are produced as long and straight pieces. But by themselves they cannot fulfil all the needs or the end use for which they are intended. To get the maximum use out of the pipes and tubes, it is necessary not only to produce long and straight pipes and tubes but also to turn out pipes and tubes of smaller dimensions and of different shapes and curves such a bends, elbows, 'T' pieces, 'Y' pieces, plugs, caps, flanges, joints, unions, collars and so on. This is done by a process of forging, welding, hammering and so on applied to the longer tubes but basically the items remain the same and the use also remains the same. The tariff entry calls for no distinction between pipes and tubes manufactured out of sheets, rods, bars, plates or billets and those turned out from larger pipes and tubes. In these circumstances it is difficult to say that pipe fittings, though they may have a distinctive name or badge or identification in the market, are not pipes and tubes. It is true that all pipes and tubes cannot be described as pipe fittings. But it would not be correct to say that pipe fittings are not pipes and tubes. They are only a species of pipes and tubes. The use of the words "all sorts" and the reference to the various processes by which the excisable item could be manufactured set out in the tariff entry are comprehensive enough to sweep within their fold the goods presently under consideration.*"
>
> (Emphasis supplied)

69. We may also look into the decision of this Court in ***CCE* v. *S.R. Tissues (P) Ltd.***, reported in **(2005) 6 SCC 310**, wherein the question before this Court was whether the activity of unwinding,

cutting, slitting, and packing it as boxes of tissue paper amounts to manufacture. This Court held that through the predominant test of the characteristics of the tissue in jumbo roll and tissue paper in the form of table napkins, facial tissues and toilet rolls the texture, moisture absorption capacity, feel, etc., they come out to be the same. It was observed that the jumbo rolls were cut into various shapes and sizes for nothing but convenience. Accordingly, the Court held that the aforesaid activity would not amount to manufacture as no distinct product had emerged. The relevant observations read thus:-

> "*12. At the outset, we may point out that the assessee is one of the downstream producers. The assessee buys duty-paid jumbo rolls from M/s Ellora Paper Mills and M/s Padamjee Paper Mills. There are different types of papers namely tissue paper, craft paper, thermal paper, writing paper, newsprints, filter paper, etc. The tissue paper is the base paper which is not subjected to any treatment. The jumbo rolls of such tissue papers are bought by the assessee, which undergo the process of unwinding, cutting/slitting and packing. It is important to note that the characteristics of the tissue paper are its texture, moisture absorption, feel, etc. In other words, the characteristics of table napkins, facial tissues and toilet rolls in terms of texture, moisture absorption capacity, feel, etc. are the same as the tissue paper in the jumbo rolls. The said jumbo rolls cannot be conveniently used for household or for sanitary purposes. Therefore, for the sake of convenience, the said jumbo rolls are required to be cut into various shapes and sizes so that they can be conveniently used as table napkins, facial tissues, toilet rolls, etc. However, the end-use of the tissue paper in the jumbo rolls and the end-use of the toilet rolls, the table napkins and the facial tissues remains the same, namely, for household or sanitary use. The*

predominant test in such a case is whether the characteristics of the tissue paper in the jumbo roll enumerated above is different from the characteristics of the tissue paper in the form of table napkin, toilet roll and facial tissue. In the present case, the Tribunal was right in holding that the characteristics of the tissue paper in the jumbo roll are not different from the characteristics of the tissue paper, after slitting and cutting, in the table napkins, in the toilet rolls and in the facial tissues."

70. In yet another decision of this Court in ***Aman Marble Industries (P) Ltd.* v. *CCE***, reported in **(2005) 1 SCC 279**, the question before the Court was whether the cutting of marble blocks into marble slabs would amount to manufacture for the purpose of levying excise duty. The Court held that the activity undertaken i.e., cutting and polishing of granite block into slabs and tiles by the appellant would not amount to manufacture. The relevant observations read thus:-

> "*2. The contention put forth on behalf of the appellant is that the activity carried on by the appellant does not amount to manufacture at all. The case put forth by the learned counsel appearing on behalf of the appellant is that the cutting of blocks into marble slabs involves only sawing of the marble blocks and thereby does not bring into existence a distinct commodity so as to state that when such activity is completed a new substance has come into existence. The submission is that even after such activity is completed the marble will remain marble and, therefore, this activity does not attract tax.*
>
> *xxx*
>
> *4. In Rajasthan SEB v. Associated Stone Industries [(2000) 6 SCC 141 : JT (2000) 6 SC 522] such a question fell for consideration before this Court although in a different context, and this Court held as follows: (SCC p. 146, para 12)*

> *"This apart, excavation of stones from a mine and thereafter cutting them and polishing them into slabs did not amount to manufacture of goods. The word 'manufacture' generally and in the ordinary parlance in the absence of its definition in the Act should be understood to mean bringing to existence a new and different article having a distinctive name, character or use after undergoing some transformation. When no new product as such comes into existence, there is no process of manufacture. Cutting and polishing stones into slabs is not a process of manufacture for the obvious and simple reason that no new and distinct commercial product came into existence as the end product still remained stone and thus its original identity continued."*
>
> *and this position was further reiterated as follows: (SCC pp. 147-48, para 16)*
>
> *"It is also not possible to accept that excavation of stones and thereafter cutting and polishing them into slabs resulted in any manufacture of goods."*
>
> (Emphasis supplied)

71. In ***Bheraghat Mineral Industries*** **v.** ***Divisional Deputy Commissioner of Sales Tax***, reported in **1987 SCC OnLine MP 270**, the Madhya Pradesh High Court had the occasion to consider whether the assessee who was in the business of selling dolomite chips and powder after crushing the dolomite lumps purchased from registered dealers produced a different commodity. If no different commodity was said to be produced from the process of crushing, then, the assessee was entitled to deduct the sales from taxable turnover under the relevant State Act. As a result, the Revenue would have been in error in levying into chips and powder could be said to be producing a new commodity. In such circumstances, the Court expressed the following observations:-

"*16. Here, the petitioner, after purchasing lumps of dolomite from registered dealers, crushed them and sold chips and powder to glass manufacturers. <u>What was purchased was dolomite and sale was also of dolomite. Chips and powder of dolomite are not different commercial commodities than dolomite lumps.</u> It is not the respondents' case in their return that anything more is required to be done, except crushing the lumps to get chips and powder from the lumps and that the composition of the end-product is different from lumps. <u>The lumps are broken into chips and powder for convenience in use but they retain the same characteristics and qualities of dolomite lumps. Except for change in shape, there is absolutely no transformation into composition to bring about a new commercial commodity.</u> It appears from the vouchers produced by the respondents that the petitioner had supplied dolomite lumps, chips and powder to different glass manufacturers as required by them. Some manufacturers may not be having crushing facilities or of sufficient capacity. So they purchased in powder form also. However, the respondents by their additional return stressed that while dolomite lumps were sold for Rs. 38 per metric ton, dolomite powder was sold at the rates between Rs. 150 per metric ton, thereby suggesting that some lengthy process is required for getting the powder. <u>The learned counsel for the petitioner has given us the break-up of the price of dolomite powder. As extra cost of Rs. 88 per metric ton is incurred in getting powder from the lumps by way of extra lead for taking the lumps to the crushing machine, loading, unloading charges, breaking charges and packing them in bags and stitching them. About 20 gunny bags are required for packing 1 metric ton powder in bags of 50 kg. each. Lumps are transported in bulk and not required to be packed in gunny bags. For breaking 1 ton lumps into powder, the breaking and labour charges are about Rs. 35 and another Rs. 35 are the costs of 20 gunny bags and stitching charges.</u> This explains the difference in price of lumps and*

powder of dolomite by about Rs. 90 or so per ton. As the dolomite lumps, chips and powder are the same commodities, there is no manufacture by crushing lumps into chips and powder. So the respondents erred in holding that there is manufacture by breaking lumps into chips and powder and by levying tax over again in respect of the same tax-paid goods. So the petitioner is justified in deducting from his taxable turnover, the sale price of dolomite lumps purchased from registered dealers on payment of full sales tax under section 2(r)(ii) of the State Act and under the notification dated October 17, 1977, under the Central Act."

(Emphasis supplied)

72. The net effect of the aforesaid is that the test of whether a distinct product has come into existence is not a test of physical transformation alone, it is a collective test - of transformation *into* a new product. The question is also not as to whether the goods look different after the process, but whether they could be regarded as different goods commercially. For instance, a piece of cloth cut into a various shape would still be a cloth.

73. The cutting merely adapts the dimensions of the ACPs to the specific requirements of a particular building or structure. Whereas, routing merely prepares the reverse face of the panel for a specific mode of mechanical fixing, and grooving facilitates the bending and joining of the ACPs at its edges. All that we are trying to convey is that goods are merely being adapted for particular use.

74. It is undisputed that the cutting and grooving are undertaken at the premise of the appellant. However, the location at which a such

a process is carried out is not much of significance to the question of whether it is manufacturing. The fact that these steps are carried at the appellant's premises does not elevate them to the level of manufacture. We would also emphasize that merely because an assessee gave the specifications he could not be considered engaged in manufacturing.

75. In ***Quippo*** (*supra*), wherein one of us, J.B. Pardiwala, J., was a part of the Bench, succinctly explained the distinction between "processing" and "manufacturing" in the dictum of the Constitution Bench in ***Delhi Cloth & General Mills*** (*supra*). The relevant observations read thus:-

> "*26. As per this court's decision in Union of India v. Delhi Cloth and General Mills Co. Ltd. [1962 SCC OnLine SC 148.] for an activity to amount to "manufacture" and not be considered as merely "processing" it has to produce a "transformation" of the subject article, i.e., a new and different article must emerge having a distinctive name, character or use. This test, as laid down by this court in Union of India v. Delhi Cloth and General Mills Co. Ltd. [1962 SCC OnLine SC 148.] , has been extensively applied by this court in its subsequent rulings.*
>
> *xxx*
>
> *28. This court in Union of India v. J.G. Glass Industries Ltd. [(1999) 114 STC 387 (SC); (1998) 2 SCC 32; 1997 SCC OnLine SC 22.] established a two-fold test to ascertain if an activity constitutes "manufacture":*
>
> > *(a) Fundamental change test : The first criterion is to determine if the process results in a new commercial item being created, or if the original item's identity is fundamentally altered or ceases to exist. This means assessing whether a transformation occurs such that a distinct product*

with a new name, identity, character, or use emerges;
(b) But for the process test : The second criterion evaluates whether the product that existed before the process would be commercially useless or serve no purpose without undergoing that specific process. In other words, if the preexisting commodity would lack any commercial utility were it not for the process, this condition is met.

xxx

33. This court in Servo-Med Industries P. Ltd. v. Commissioner of Central Excise [(2015) 32 GSTR 404 (SC); (2015) 14 SCC 47; 2015 SCC OnLine SC 431.] categorised the entire case law into four categories. In paragraph 27, the court lists them out as follows (page 419 in 32 GSTR):

"27. The case law discussed above falls into four neat categories:
(1) Where the goods remain exactly the same even after a particular process, there is obviously no manufacture involved. Processes which remove foreign matter from goods complete in themselves and/or processes which clean goods that are complete in themselves fall within this category.
(2) Where the goods remain essentially the same after the particular process, again there can be no manufacture. This is for the reason that the original article continues as such despite the said process and the changes brought about by the said process.
(3) Where the goods are transformed into something different and/or new after a particular process, but the said goods are not marketable. Examples within this group are Brakes India Ltd. v. Supdt. of Central Excise [(1997) 10 SCC 717.] and cases where the transformation of goods having a shelf life which is of extremely small duration. In these cases also no manufacture of goods takes place.
(4) Where the goods are transformed into goods which are different and/or new after a particular

> *process, such goods being marketable as such. It is in this category that manufacture of goods can be said to take place." (emphasis supplied)*"

(Emphasis supplied)

76. From the reading of the aforesaid exposition, there is no doubt that by cutting the ACPs into various sizes and routing them, the ACPs are undergoing a process which brings a change. However, it is only when a change or series of changes result in new and distinct goods that manufacturing is said to take place. At the same time, even if undergoing processing, if goods retain their substantial identity, they would be processed and not manufactured in terms of Section 2(f) of the Act, 1944.

ii. Second Limb – Transformed goods are marketable as distinct goods

77. Although it may not be necessary to delve into the second limb of the test, yet we may discuss, in brief, the importance of the test of marketability of manufactured goods and the burden of proof required to be discharged by the Revenue. The CESTAT in this regard observed thus:-

> "*On a careful consideration, it is seen that the Revenue has not produced any evidence of trade parlance and understanding in the market that this activity of cutting and routing i.e., cutting the aluminium of ACP would bring into existence the new product as known in the market. The Apex Court in the case of UOI Vs. Delhi Cloth and General Mills Co Ltd as reported in 1977 (1) ELT J199 (SC) has clearly laid down that manufacture means bringing into existence known the market and not merely producing some change in a substance. The same*

ratio was reiterated by, the Apex Court in Hindustan Zinc Ltd. (supra). In the light of both these rulings and the ruling relied on by the Counsel rendered in the case of M/s. Hubli Electricity Supply Company Ltd. and KEB (supra), it is clear that mere process of cutting and routing (i.e. cutting the grooves) does not bring into existence new products. The Tribunal in the case of AGV Alfab Limited (supra) have also held that mere cutting of aluminium angles, plates to size, drilling holes, etc., would not bring into existence new product. The above cited ratios clearly apply to the facts of the present case. As the Revenue has not discharged their burden of marketability of the item as a separate goods, therefore, in the light of the cited judgment, it has to held that the impugned cider is not legal and proper. The same is set aside by allowing the appeal with consequential relief, if any."

78. The second test requires an examination as to whether the ACPs after undergoing the manufacturing process are marketable as distinct goods having its separate identity. In other words, where once it is determined that the product emerging from the process are distinct goods, the inquiry then turns as to whether the goods having undergone the process are marketable, more particularly, with its transformed features. Even when the courts directly assess marketability with the presumption that transformation has occurred, it is testing the distinctiveness of the goods. Thus, the second limb of the test completes the assessment on manufacturing as that is what fastens excise duty.

79. It is pertinent to state that the first and second limbs of the two-fold test operate independently of each other, and neither limb, standing alone, is sufficient to establish manufacture. The mere fact that goods have undergone transformation does not, by itself,

lead to the conclusion that manufacture has occurred. Equally, the mere fact that goods are marketable after having undergone a process does not, without more, warrant the conclusion that manufacture has taken place. Each limb must be independently examined and satisfied on the basis of the facts and circumstances of the case, and it is only upon the conjunctive satisfaction of both limbs that an activity can be properly characterized as manufacture within the meaning of the Act, 1944. We envisage following situations for a better exposition:-

Scenario One: The goods entering the process were commercially useful and the resultant goods are marketable but *no transformation has taken place*. It cannot be said to be manufacturing.

Scenario Two: The goods entering the process were commercially useless and the resultant goods are *not marketable* but transformation has taken place. It also cannot be said to manufacturing.

Scenario Three: The goods entering the process were commercially useless but the resultant goods are marketable because *transformation has taken place*. At the same time, where the goods entering the process was commercially useful and the resultant goods are also marketable *because of transformation*. In both these cases, manufacturing takes place.

Scenario Four: Where the goods entering the process were commercially useful but the *resultant goods are not marketable* even when transformation has taken place. It could not be said that manufacturing has taken place.

a. Meaning and understanding of the term "*marketable*"

80. It is apposite to understand that marketability, as contemplated in the second limb of the two-fold test, is an absolute and standalone inquiry. The second limb asks whether the goods that have emerged possessing a distinct character, identity, or use, are marketable as such. In other words, the emerging goods must be capable of standing alone in the market, recognized or traded on the basis of what it is, not on the basis of what it was.

81. To illustrate, consider a steel ingot that is melted and cast into a steel pipe. The steel ingot is sold and bought in the market. The steel pipe is also sold and bought. However, once it is produced, it is bought and sold as a pipe in with its own characteristics. In other words, it has completely shed that identity and stands on its own as new and distinct goods with its own name, its own uses, and its own place in the market. This is the kind of marketability that the second limb contemplates. It is needless to state that the name with which the goods are commonly identified ought not to be the sole consideration to arrive at a conclusion of marketability.

82. It is not necessary for us to multiply the rulings on this point as this question now stands concluded by several decisions of this Court. We need not discuss all the decisions but rather intend to refer and rely upon a few of them. A Three-judge Bench of this Court in ***Moti Laminates (P) Ltd.* v. *CCE***, reported in **(1995) 3 SCC 23**, had the occasion to consider whether goods mentioned in the Schedule of Excise Tariff are dutiable as such or they would be "excisable goods" only when they are marketable. The Court

rejected the submission on behalf of the Revenue that once it is found that a new substance has been brought and it was known as such, the burden to prove marketability would stand discharged. The Court held that the test of marketability is *sine qua non* for levying duty even for those goods which are mentioned in the tariff item. The relevant observations read thus:-

> "*9. 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, moveable, 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. Since the solution that was produced could not be used as such without any further processing or application of heat or pressure, it could not be considered as goods on which any excise duty could be levied.*
>
> *xxx*
>
> *14. It cannot thus be disputed that even if the resin produced by the appellants are resols as mentioned in Item 15-A it could not be subjected to duty. The purpose of specifying the goods in the Schedule is twofold, one, the rate on which the duty would be charged and other that if the goods satisfy the description and are covered in the entry then they are liable to pay excise duty. But even in respect of specified goods it could be established that it was not marketable or capable of being marketed, therefore, no duty was leviable on it.[…] Since the test of marketability or capable of being marketable applies even to those goods which are mentioned in the tariff item the intermediate resin produced by the appellants which are mentioned as resols under*

> *Tariff Item 15-A were not exigible to duty. The finding of the Tribunal that once the product manufactured by the appellants answered the chemical description of the product under Tariff Item 15-A it was assessable to duty whether it was marketable or not was thus not well founded.*"
>
> (Emphasis supplied)

83. We may look into the decision of this Court in ***Union of India* v. *Sonic Electrochem (P) Ltd.***, reported in **(2002) 7 SCC 435**, wherein this Court dealt with an issue as to whether plastic body of electro mosquito repellent (EMR) are liable to excise duty. The Court observed that the plastic body was being manufactured to suit the requirements of EMR of the respondents particularly and were not available in the market generally. It was observed that they were not standardized items or goods known or generally dealt with in the market with any commercial name. The relevant observations read thus:-

> "*9. It may be noticed that in the cases referred to in the passage, quoted above, the reasons for holding the articles "not marketable" are different, however, they are not exhaustive. It is difficult to lay down a precise test to determine marketability of articles. Marketability of goods has certain attributes. The essence of marketability is neither in the form nor in the shape or condition in which the manufactured articles are to be found, it is the commercial identity of the articles known to the market for being bought and sold. The fact that the product in question is generally not being bought and sold or has no demand in the market would be irrelevant. The plastic body of EMR does not satisfy the aforementioned criteria. There are some competing manufacturers of EMR. Each is having a different plastic body to suit its design and requirement. If one goes to the market to purchase the plastic body of*

> *EMR of the respondents either for replacement or otherwise one cannot get it in the market because at present it is not a commercially known product. For these reasons, the plastic body, which is a part of EMR of the respondents, is not "goods" so as to be liable to duty as parts of EMR under para 5(f) of the said exemption notification."*
>
> (Emphasis supplied)

84. What emerges from the foregoing exposition of law is that marketability is a decisive test for dutiability. It means that goods are capable of being bought or sold in the market or are understood to be available in the market. In other words, it means "saleable" or "suitable for sale" and it need not be marketed. The manufactured goods be capable of being sold to consumers in the market as it is. For this, the distinct goods must be known as such in commercial parlance or to the commercial community for the purposes of buying and selling. To establish marketability, it could be shown that the goods were known in the market as commercial products. It is this capacity to be identified, bought and sold as a distinct article that constitutes marketability.

b. Standard of proof to be met while discharging burden of proof

85. Where the Revenue seeks to levy excise duty, it is not sufficient for the Revenue to merely point to the process that has been undertaken. It must establish the commercial consequence i.e., the marketability of the goods. In other words, the Revenue must demonstrate not only that something has been done to the goods, but that what has been done has resulted in the emergence of

goods that the market recognizes, treats, and deals with as something new and different.

86. It is well settled that the burden of establishing marketability lies on the Revenue. Marketability, being a question of fact, must be determined on the basis of the specific facts and circumstances of each case, and cannot be presumed or inferred in the absence of sufficient material. It is for the Revenue to affirmatively demonstrate by placing adequate material on record. The question of marketability must be answered on the basis of objective evidence. A mere assertion cannot discharge this burden.

87. We may now look into some instances of how this Court has weighed the evidence produced by the Revenue to prove marketability of manufactured goods. The conduct of the assessee paying excise duty in the past could not be served as evidence of marketability. This was held by a Three-judge Bench in ***Union Carbide India Ltd.* v. *Union of India***, reported in **(1986) 2 SCC 547**, wherein it had the occasion to consider whether manufacture of aluminium cans or torch bodies were exigible to excise duty. The Court answered the issue in negative by assessing the nature of the goods at the stage of manufacture, and absence of any evidence on behalf of the respondents to indicate a market for the goods. The relevant observations read thus:-

> "*7. The question here is whether the aluminium cans manufactured by the appellant are capable of sale to a consumer. It appears on the facts before us that there are only two manufacturers of flashlights in India, the appellant being one of them. It appears also*

that the aluminium cans prepared by the appellant are employed entirely by it in the manufacture of flashlights, and are not sold as aluminium cans in the market. The record discloses that the aluminium cans, at the point at which excise duty has been levied, exist in a crude and elementary form incapable of being employed at that stage as a component in a fleshlight. The cans have sharp uneven edges and in order to use them as a component in making flashlight cases the cans have to undergo various processes such as trimming, threading and redrawing. After the cans are trimmed, threaded and redrawn they are reeded, beaded and anodised or painted. It is at that point only that they become a distinct and complete component, capable of being used as a flashlight case for housing battery cells and having a bulb fitted to the case. We find it difficult to believe that the elementary and unfinished form in which they exist immediately after extrusion suffices to attract a market. The appellant has averred on affidavit that aluminium cans in that form are unknown in the market. No satisfactory material to the contrary has been placed by the respondents before us. Reference has been made by the respondents to the instance when aluminium cans were ordered by the appellant from Messrs Krupp Group of Industries. This took place, however, in 1966 as a solitary instance, and what happened was that aluminium slugs were provided by the appellant to Messrs Krupp Group of industries for extrusion into aluminium cans. The facts show that the transaction was a works contract and nothing more. Apparently, the appellant made use of the requisite machinery owned by that firm for extruding aluminium cans. Not a single instance has been provided by the respondents demonstrating that such aluminium cans have a market, the record discloses that whatever aluminium cans are produced by the appellant are subsequently developed by it into a completed and prefected component for being employed as flashlight cases.

> *8. <u>Much emphasis has been laid by the respondents on the circumstance that the appellant had in the past treated the aluminium cans produced by it as excisable goods and had submitted price lists to the excise authorise which included a margin of profit in the specified price.</u> It is clear that the appellant did so under the mistaken belief that the aluminium cans attracted excise duty. The margin of profit included in the price was arrived at notionally, in order merely to comply with the demand of the excise authorities for the submission of price lists. The conduct of the appellant in the past, having regard to the circumstances of the case, cannot serve as evidence of the marketability of the aluminium cans. Indeed, subsequent price lists were submitted under "protest" by the appellant, who maintained that the article did not attract excise duty.*"
>
> (Emphasis supplied)

88. The question before this Court in ***CCE* v. *Ambalal Sarabhai Enterprises (P) Ltd.***, reported in **(1989) 4 SCC 112**, was whether starch hydrolsate is "goods" which could attract excise duty. The Court referred to an affidavit by one Food Technologist indicating propensity of it being non-marketable. Further, the evidence noted by the Tribunal also indicated that hydrolysed starch is not being marketed by anyone. Nonetheless, no enquiry was conducted or evidence was adduced by the Revenue to this effect. The Court held that the Revenue failed to discharge its onus to prove that the product was dutiable. Similarly, in ***CCE* v. *United Phosphorus Ltd.***, reported in **(2000) 4 SCC 18**, the Court held that mere mention of an article in dictionary as "goods" would also not satisfy the test of marketability.

89. We may also look into the decision of this Court in ***Hindustan Zinc Ltd.* v. *CCE***, reported in **(2005) 2 SCC 662**, wherein the question before the Court was whether an intermediate product produced in the manufacture of zinc is marketable. Notably, both the product of the assessee and the product in the market was silver chloride. Although, the show cause notice to the assessee recorded that as per market enquiry, silver chloride having 50% silver was a marketable commodity, yet, the Revenue failed to show the contents of the market enquiry. Further, no efforts were made to ascertain whether silver chloride consisting 50% silver had a market. As a result, the Court held that the Revenue failed to prove the test of marketability. In ***Gujarat Narmada Valley Fertilizer Co. Ltd.* v. *Collector of Excise & Customs***, reported in **(2005) 7 SCC 94**, the dictum of the Court was that marketability cannot be established by hypothetical possibility of sale and purchase of the goods but when there is sufficient proof that the goods are commercially known.

90. In yet another decision of this Court in ***Cipla Ltd.* v. *CCE***, reported in **(2010) 5 SCC 534**, the Court dealt with an issue as to whether benzyl methyl salicylate (BMS) is marketable and exigible to excise duty. The Revenue did not adduce any evidence to show that the product was marketable or capable of being marketed. It merely relied on *Chemical Weekly Drug Directory* to show BMS as an intermediate product. While rejecting such reliance, the Court observed that since there was no evidence of buying or selling in the market, it could not be said that the product was marketable.

91. In circumstances referred to above, there is no doubt that the standard of proof to be met is that of preponderance of probabilities. In this regard, it would be apposite to refer to observations of Lord Denning in ***Bater* v. *Bater*, [1951] P. 35**, wherein he succinctly expressed the degrees of probabilities within preponderance of probabilities. The relevant observations read thus:-

> "*I do not think that the matter can be better put than it was by Lord Stowell in Loveden v. Loveden (1810) 2 Hagg. Con. 1, 3. "The only general rule that can be laid down upon the subject is, that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion". The degree of probability which a reasonable and just man would require to come to a conclusion — and likewise the degree of doubt which would prevent him coming to it — depends on the conclusion to which he is required to come. It would depend on whether it was a criminal case or a civil case, what the charge was, and what the consequences might be; and if he were left in real and substantial doubt on the particular matter, he would hold the charge not to be established: he would not be satisfied about it.*
>
> *But what is a real and substantial doubt? It is only another way of saying a reasonable doubt; and a reasonable doubt is simply that degree of doubt which would prevent a reasonable and just man from coming to the conclusion. So the phrase "reasonable doubt" takes the matter no further. It does not say that the degree of probability must be as high as 99 per cent. or as low as 51 per cent. The degree required must depend on the mind of the reasonable and just man who is considering the particular subject-matter. In some cases 51 per cent. would be enough, but not in others. When this is realized, the*

phrase "reasonable doubt" can he used just as aptly in a civil case or a divorce case ns in a criminal case; and indeed it was so used by my Lord in Davis v. Davis [1950] P. 125 and Gower v. Gower 66 T. L. R. (Pt. I) 717 to which we have been referred. The only difference is that, because of our high regard for the liberty of the individual, a doubt may be regarded as reasonable in the criminal courts, which would not be so in the civil courts. I agree therefore with my brothers that the use of the phrase "reasonable doubt" by the commissioner in this case was not a misdirection any more than it was in Briginshaw v. Briginshaw (1938) 60 C. L. R. 336."

(Emphasis supplied)

92. In terms of varying degree of probability that would be required to establish marketability of respective goods, to lay down a general rule or rather attempt to define what circumstances would be sufficient or insufficient to infer the fact of marketability would be impossible.

93. In the aforesaid context, when we say "degree of probability", we mean it vis-à-vis the goods in consideration. That a commodity may be so rare that even one instance of it being marketable would be sufficient. On the other hand, where the commodities are common goods, the degree of probability would be correspondingly higher. Thus, the degree of probability is a flexible and calibrated to the nature, rarity, or character of the goods in question.

94. All that we are trying to convey is that the degree of probability should be proportionate to the subject matter. In other words, on an objective perusal of the evidence so produced, the courts must

either believe it to exist or consider its existence so probable that a reasonable man ought, under the given circumstances, acts upon the supposition that it exists.

95. The standard of proof to be met by the Revenue ought to be one where on a careful analysis of the evidence before the courts, it aids in eliminating subjectivity and reaching a justifiable conclusion. In other words, the courts must come at a considered conclusion as to whether the Revenue has discharged its burden of establishing that the goods in question were marketable as a distinct and independent product. The conclusion must flow from the evidence and not from assertion, assumption, or the mere fact of a process having been undertaken.

96. In the present case, as mentioned above, since the ACPs have not undergone any transformation being goods having distinct characteristics, or identity, or use, the question of marketability pales into insignificance.

VII. CONCLUSION

97. A conspectus of the aforesaid detailed discussion on the position of law as regards Sections 35G and 35L, respectively, and the meaning and application of "*manufacture*", is as follows:-

i. An appeal from an order passed by the Appellate Tribunal relating to the determination of any question having a relation to the rate of excise duty or to the value of goods for the purpose of assessment lies before this Court and not before the High Court. However, such exclusion is not attracted by every question touching the rate of duty or the value of goods. The

question must have a direct and proximate relationship with assessment.

ii. The question of excisability of goods is connected with the rate of duty for the purpose of assessment. A decision on excisability of goods would be a precursor to the determination of any question having a relation to the rate of duty or to the value of goods.

iii. Sub-section (2) of Section 35L of the Act, 1944, merely gives statutory expression to the collective reading of Sections 35G and 35L, respectively. It clarified that excisability always fell within the expression "rate of duty". Thus, when an amendment intends to clarify something which is implicit in the operation of a provision, such an amendment operates retrospectively.

iv. The process of making superficial changes in order to facilitate the use of goods, which do not alter the fundamental properties of the goods, does not create a distinct product so as to pass the transformation test. To levy excise duty, marketability of the manufactured goods has to be proved. Manufactured goods are said to be marketable when they are capable of being bought or sold, or known as a commercial product in the market.

v. The burden of establishing marketability of the manufactured goods lies on the Revenue, and it must be discharged by demonstrating "marketability" as defined in the foregoing paragraphs of this judgment. In this regard, the standard of

proof while discharging the burden must be met keeping in mind the goods in question.

98. Thus, from an exhaustive analysis of the position of law on the issue, we are of the view that the process undertaken by the appellant does not result in a distinct product.

99. In the result, the appeal succeeds and is hereby allowed. The impugned judgment is set aside. Pending applications, if any, shall stand disposed of.

..................................J.
(J.B. PARDIWALA)

..................................J.
(R. MAHADEVAN)

27th May, 2026;
New Delhi