SUPREME COURT OF INDIA

Khandelwal Metal and Engineering Works

Vs.

Union of India

C.A.Nos.338-349 of 1983

(Y. V. Chandrachud, C.J.I., R. S. Pathak and Sabyasachi Mukharji, JJ.)

11.06.1985

JUDGEMENT

CHANDRACHUD, C J.:-

1. This is a group of Civil Appeals and Special Leave Petitions arising out of a judgment dated October 19, 1982 delivered by a Division Bench of the High Court of Delhi in a batch of Writ Petitions filed under Article 226 of the Constitution. Those Writ Petitions having been dismissed by the High Court, the Writ-petitioners have filed these Appeals and Special Leave Petitions.

2. The facts of the various writ petitions naturally vary from case to case but, such variation has no bearing on the points which arise for our decision. We will mention the, facts of Civil Appeals Nos. 27-33 of 1983 as a representative batch of cases. The. two appellants therein are respectively Messers Eastern Engineers, a partnership firm carrying on business at Goregaon, Bombay, and a partner of that firm. For the sake of convenience, we will proceed on the basis that the real appellant is the firm. The appellant carries on the business, inter alia, of importing brass scrap from other countries. Its contention is that the 'additional duty' of customs, which is in the nature of

countervailing duty, cannot be levied on brass scrap because, such scrap which consists of damaged brass articles like taps and pipes, is not "manufactured" in India (or elsewhere), as indeed it cannot be. The second contention of the appellant is that it is liable to pay duty of customs on the brass scrap at the rate of 40% only and not at the rate of 80% because, brass scrap is a 'master alloy'. The rate of customs duty payable depends upon which of the two Notifications, granting exemption from payment of customs duty, is applicable. These contentions are based on the following provisions of law.

3. Section 2(15) of the Customs Act, 1962 defines "duty" to mean a duty of customs leviable under the Act. Chapter V of the Act contains provisions for the levy of, and exemption from, customs duties. By Section 12(1) of the Act, "Except as otherwise provided in the Act or in any other law for the time being in force", duties of customs shall be levied. at such rates as may be specified under the Customs Tariff Act, 1975 or under any other law for the time being in force, on goods imported into or exported from India. Section 25 of the Customs Act, which deals with the power of the Central Government to grant exemption from the payment of Customs duty, provides by sub-section (1) that, if the Central Government is satisfied that it is necessary in the public interest so to do, it may, by a notification in the Official Gazette, exempt generally, either absolutely or subject to such conditions as may be specified, goods of any specified description from the whole or any part of the duty of customs leviable thereon.

4. Section 2 of the Customs Tariff Act, 1975 says that the rates at which duties of customs shall be levied under the Customs Act, 1962 are specified in the First and Second Schedules of the Tariff Act. S. 3 of the Tariff Act deals with the levy of "additional duty equal to excise duty". Sub-sec. (1) of S. 3 and the Explanation to that section which are relevant for our purpose, read thus

"Levy of additional. duty equal to excise duty. (1) Any article which is imported into India shall, in addition be liable to a duty (hereafter in this section referred to as the additional duty) equal to the excise duty for the time being leviable on a like article if produced or manufactured in India and if such excise duty on a like article is leviable at any percentage of its value, the additional duty to which. the imported article shall be so liable shall be calculated at that percentage of the value of the imported article.

Explanation - In this section the expression "the excise duty for the time being leviable on a like article if produced or manufactured in India" means the excise duty for the time being in force which would be leviable on a like article if produced or manufactured in India or, if a like article is not so produced or manufactured which would be leviable on the class or description of article to which the imported article belongs, and where such duty is leviable at different rates, the highest duty."

5. The question which we .Must first examine is as to what is the true nature of the duty mentioned

in S. 3(1) of the Tariff Act. It has to be appreciated at the threshold that the charging section is S. 12 of the Customs Act and not S. 3(1) of the Tariff Act. S. 12, Customs Act, incorporates the different ingredients embodied in the concept of a fiscal imposition. It levies a charge, it indicates the taxable event (the import or export of goods) and it indicates the rate of the levy. The rates are such "as may be specified under the Customs Tariff Act, 1975". The last ingredient takes us to S. 2, Tariff Act, which lays down that "the rates at which the duties of customs shall be levied under the Customs Act are specified in the First or Second Schedule". Nothing more would be ordinarily required to complete the scope of S. 12, Customs Act. The scheme incorporated in that section read with S. 2 of the Tariff Act is analogous to the scheme embodied in S. 4, Income Tax Act read with the relevant provisions of the Finance Act. The levy specified in S. 3(1) of the Tariff Act is a supplementary levy, in enhancement of the levy charged by S. 12 of the Customs Act and with a different base constituting the measure of the impost. In other words, the scheme embodied in S. 12 is amplified by what is provided in S. 3(1). The customs duty charged under S. 12 is extended by an additional duty confined to imported articles in the measure set forth in S. 3(1). Thus, the additional duty which is mentioned in. S. 3(1) of the Tariff Act is not in the nature of countervailing duty, In Ashok Service Centre v. State of Orissa, (1983) 2 SCR 363 : (AIR 1983 SC 394) which considered the nature. of levy of additional sales tax under an Orissa Act, this Court observed :

"This construction receives support from the use of the word 'additional' in S. 3(1) which involves the idea of joining or uniting one thing to another so as thereby to form one aggregate. (See Black's Law Dictionary). The gross turnover referred to therein should therefore be understood as that part of the gross turnover which is taxable under the principal Act." (page 380) (at pp. 401-02 of AIR).

6. Counsel for the appellants rely strongly on the 'Objects and Reasons' of S. 3 of the Tariff Act in support of their contention that the said section is a charging section and imposes a countervailing duty. The Statement of Objects and Reasons says :

"Clause 3 provides for the levy of additional duty on an imported article to counterbalance the excise duty leviable on the like article made indigenously, or on the indigenous raw materials, components or ingredients which go into the making of the like indigenous article. This provision corresponds to S. 2-A of the existing Act, and is necessary to safeguard the interest of the manufacturers in India."

This Statement lends prima facie support to the. contention of the appellants but; in the absence of any ambiguity in the wording of S. 3(1), we cannot treat the additional duty referred to therein as countervailing duty. Nor, indeed, can we regard that provision as a charging section merely because the Statement says that S. 3 "provides for the. levy". The Statement of Objects and Reasons errs in being common to sub-sections (1) and (3) of S. 3. It is more apposite to sub-sec. (3) though, even there, it may not be correct to say that it is a charging provision. Sub-sec. (3) confers power on the Central Government, in public interest, to levy on any imported article "Such additional duty as would counterbalance the excise duty leviable, on any raw materials, components and ingredients of

the same nature as, or similar to those, used in the production or manufacture. of such article", whether on such article, duty is leviable under, sub-sec. (1) or not. Since we are not concerned directly with sub-sec. (3), we will not pronounce upon its meaning and implications.

7. In this view of the matter, it is unnecessary to consider the various decisions cited at the Bar on the nature and connotation of countervailing duty. We are unable to accept the argument of the appellants that S.3(1) of the Tariff Act is an independent charging section or that, the 'additional duty' which it speaks of is not a duty of customs but is a countervailing duty.

8. That leads to the inquiry as to the reason or purpose behind the argument that S. 3(1) of the Tariff Act is an independent charging section. It shall have been noticed that S. 3(1) provides that any article which is imported into India shall, in addition, (that is, in addition to the duty of customs for which rates are specified in S. 2) be liable to an additional duty "equal to the excise duty for the time being leviable on a like article produced or manufactured in India". The contention of Mr. Sorabjee, who appears on behalf of the appellants, is that the brass scrap imported by them is not produced or manufactured in India because the damaged articles of brass which constitute brass scrap, are not only incapable of being manufactured but are in fact not manufactured. Learned counsel contends that if the change In the condition of an article is the result of an accidental event, that is to say, an event not intended, or if the change is the result of ordinary wear and tear, the change thus produced cannot be termed as manufacture. It is urged that the articles imported by the appellants are what they are because, they had suffered damage or had been subjected to ordinary wear and tear in the natural course. If such goods cannot be produced or manufactured in India for the reason that they cannot be and are, in fact, not produced or manufactured in India, or for the matter of that anywhere, no additional duty can be levied upon them under S. 3(1). According to the learned counsel, the basic postulate underlying the levy of duty under S. 3(1) of the Tariff Act is that indigenous goods belonging to the class of goods which are imported are chargeable to excise duty. The illustrations given are the import of live animals, live trees, burnt-up cables, broken glass or fused bulbs. The argument is that there is and can be no levy of additional duty on these goods if imported because they cannot be and are not manufactured for the simple reason that they are not the result of treatment, labour and manipulation, nor are they the result of one or more processes through which the original commodity is made to pass. Putting it in one sentence, the argument is that if indigenous goods, similar to those which are imported, do not suffer excise duty for the reason that they are not manufactured, the charge leviable under S. 3(1) of the Tariff Act is not attracted.

9. There is no substance in this argument. In the first place, as we have indicated earlier, Ss. 2 and 3(1) of the Tariff Act are not charging sections. The charging section is S. 12 of the Customs Act under which, duty is leviable on the taxable event of export of goods from India or the import of goods into India, which is relatable to Entry No. 83 in List I of the Seventh Schedule to the Constitution : "Duties of Customs including export duties". The taxable event is not the manufacture of the goods. Under S. 3(1) of the Tariff Act, "the excise duty for the time being leviable on, a like article if produced or manufactured in India" is only the measure of the duty leviable on the imported article. S. 3(1) does not require that the imported article should be such as to be capable of

being produced or manufactured in India. The assumption has to be that an article imported into India can be produced or manufactured in India and upon that basis, the duty has to be determined under S. 3(1).

10. Any doubt on this point is resolved by the Explanation to S. 3(1) of the Tariff Act. The Explanation furnishes, a dictionary for the interpretation of S. 3(1) and provides a clue to its understanding. The Explanation provides in so many words that the expression "excise duty for the time being leviable on a like article if produced or manufactured in India" means "the excise duty for the time being in force which would be leviable on a like article if produced or, manufactured in India" (emphasis supplied). The Explanation even goes further and provides that if a like article is not so produced or manufactured, then, the duty leviable means the duty which would be leviable on the class or description of articles to which the imported article belongs. These provisions leave no doubt that the duty referred to in S. 3(1) of the Tariff Act does not bear any nexus with the nature and quality of the goods imported into India.

11. Section 3(5) of the Tariff Act which provides, inter alia, that the duty "chargeable under this section" shall be in addition to any other duty imposed under the Act, cannot be pressed into service in support of the contention that S. 3(1) is in the nature of a charging provision. The word 'chargeable' which occurs in sub-sec. (5) has to be read along with the expression "imposed under this Act". S. 2 of the Tariff Act does not charge a duty but only prescribes the rates of duty leviable under S. 12 of the Customs Act. Besides, S. 3(5) of the Tariff Act refers not merely to any other duty imposed. under the Tariff ' Act but also "under any other law for the time being in force", which could include S. 12 of the Customs Act. For these reasons, we must reject the, argument of Mr. Sorabjee and of the other learned counsel for the appellants that S. 3(1) of the Tariff Act is not attracted because, the damaged articles, which are in the nature of brass scrap, are outside the scope of that Act since, such articles are not and cannot be produced or manufactured.

12. Looking at the matter from a different point of view, the brass scrap of the kind imported by the appellants is a by product of the manufacturing process. Such goods can and do come into existence as waste articles or rejected articles during the process of manufacturing that class of articles. Indeed, brass scrap is known in commercial parlance by that name and is excisable as such. Assuming for the sake of argument that the appellants' contention is correct that the duty "chargeable" under S. 3(1) of the Tariff Act is a countervailing or a counterbalancing duty, the brass scrap imported by the appellants will attract the charge on that basis also. As stated above, damaged goods of brass, which are compendiously called 'brass scrap', can come into existence during the process of manufacturing brass articles and such brass scrap has an established market in India. The scrap is re-cycled for extracting metal. Since excise duty is payable on such scrap, the imported brass scrap is subjected to the additional duty in order that indigenous brass scrap may not suffer in competition with the imported brass scrap. The argument that the articles imported by the appellants have been reduced to scrap by reason of damage, wear and tear, is quite irrelevant. The true test is as to what is the description of the articles imported. If the articles are brass scrap, the limited inquiry which has to be made is whether brass scrap can come into being during the process of manufacture. If the answer is in the affirmative, the imported brass scrap will be chargeable to additional duty in

accordance with S. 3(1) of the Tariff Act.

13. Having disposed of the contention as to whether the duty mentioned in S. 3(1) of the Tariff Act, whether one calls it additional duty or countervailing duty, is leviable on the brass scrap imported by the appellants, the next question for consideration is as to whether the appellants are liable to pay excise duty on the brass scrap at the rate of 40 per cent or at the rate of 60 (sic) per cent. The answer to this question depends upon which of the two notifications, notification No. 97 dated June 25, 1977 and notification No. 156 dated July 16, 1977, is applicable. It is undisputed that excise duty is payable on the brass scrap imported by the appellants, the only controversy being as to the rate of duty payable.

14. Section 25, Customs Act, as stated earlier, empowers the Central Government, in public interest, to exempt goods of any specified description from the whole or any part of the customs duty leviable thereon. The First Schedule called "Import Tariff" to the Tariff Act, which is referable to S. 2 of that Act consists of one hundred chapters divided into XXII sections. Each chapter bears a broad heading of the articles comprised therein. Chapter 74, which bears the heading "Copper and articles thereof", contains six headings, the first of which reads thus :

Heading No.	Sub-heading	Standard Rate of Duty	Central Excise Tariff Item
74.01/02	Copper matte; Unwrought copper (refined or not); copper waste and scrap; master alloys.	(a) 100%	26A

15. On June 25, 1977; the Central Government issued Notification No. 97 to the following effect :

"In exercise of powers conferred by sub-sec. (1) of S. 25 of the Customs Act, 1962 (52 of. 1962) the Central Government being satisfied that it is necessary in public interest to do so, hereby exempts articles. other than copper waste and scrap and unwrought copper (refined or not) falling under heading No. 74.01/02 of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) when imported into India, from so much of duty of customs leviable thereon which is specified in the First Schedule as is in excess of 40% ad valorem."

Another Notification No. 156, was issued by the Central Government on July. 16, 1977 by which copper waste and scrap falling under the same heading were exempted from so much of the duty of customs leviable thereon which is specified in the First Schedule, "as is in excess of 80% ad valorem". The upshot of the two notifications is that under the first notification of June 25, 1977, customs duty at the rate of 40% is payable while, under the second notification of July 16, 1977, customs duty at the rate of 80% is payable. In other words, 60 per cent duty is exempted under the first notification while 20 per cent duty is exempted under the second notification. The case of the appellants is that they are liable to pay customs duty at the rate of 40 per cent only by reason of the exemption granted by the first Notification while, the case of the Union Government is that they are liable to pay duty at the rate of 80 per cent since the second Notification is attracted.

16. The fact that the goods imported by the appellants are brass scrap should be beyond the pale of argument though an attempt was made in the High Court by some of the counsel to contend that the goods imported by the appellants are not brass scrap at all. There is a specific averment in the pleadings of the appellants that they carry on the business of importing brass scrap and have in fact imported brass scrap. In the Bill of Entry, the Customs Tariff Heading indicated by the appellants themselves is 74.01/02. That entry has to be made in order to show entitlement for importing goods of the particular description. The import policies for the years 1980-81 and 1981-82 contain lists, in Appendix 10, of items which can be imported under the Open General Licence. It is in pursuance of an Entry in Appendix 10 that the appellants import brass scrap. Indeed, the appellants had to accept that goods were imported by them under the Open General Licence, the goods being described by themselves as 'brass scrap'. Otherwise, they would have countered other serious impediments. Further, the claim made by the appellants for exemption, whether it is 60 per cent or 20 per cent, is dependent upon the goods imported by them failing under the heading 74.01/02.

17. The fact that brass scrap is covered by the heading 74.01/02 is undisputed and is indisputable. The controversy between the parties is this: Whereas the appellants claim that brass scrap is a 'master alloy' and, therefore, falls under the notification dated June 25, 1977, the contention of the Union Government is that brass scrap is comprehended within the expression 'copper waste and scrap' and therefore falls under the notification dated July 16, 1977. In the first place, the appellants' claim that the goods imported by them fall in the class of 'master alloy' is against the tenor of their own documents to which we have referred a little while ago. The learned Attorney General is not unjustified in his submission that if the appellants were to ask for permission to import 'master alloy' under the Open General Licence, they could not have been granted that permission since, under the OGL, the import of brass scrap was permissible at the relevant time but, not of any master alloy. One of the three items in Entry 44 of Appendix 10 of the 'Import Policy' was 'Brass Scrap.' But, apart from this consideration, it seems to us difficult to accept the appellants' contention that brass scrap is a 'master alloy'.

18. The best part of the argument before us was occupied by this particular question since, the difference between the duty payable by the appellants is quite considerable depending upon whether the first or the second notification applies. The contention of the various counsel on this point may be summed up thus. Firstly, 'Brass Scrap' cannot be classified as 'copper scrap' because, the context

in which Notification No. 97 was issued has to be examined in order to find out whether Note 4 of S. XV of the 'Import Tariff is at all applicable. Secondly, two Notifications, Nos. 96 and 97, were issued simultaneously, one for 'copper scrap' and the other for 'other than copper waste and scrap'. Notification No. 97 on which the appellants rely should, therefore, be so interpreted as to avoid any conflict between the two Notifications. The intrinsic evidence furnished by the two Notifications points to the conclusion that they relate to two separate types of scrap. Thirdly, the contemporaneous understanding of those who framed and issued the exemption Notifications has always been that the expression 'brass scrap' is distinct from the expression 'copper scrap' for determining the application of those Notifications. For example, each of the two Notifications, No. 403 dated August 2, 1976 and No.138 dated July 1, 1977, uses the expressions 'copper scrap' and 'brass scrap', which unequivocally indicate that the framers of the Notifications understood these two expressions to mean two different things. Reliance is placed by the counsel on the decisions of this Court in Desh Bandhu Gupta v. Delhi Stock Exchange Association, (1979) 3 SCR 373 : (AIR 1979 SC 1049) and K. P. Verghese v. I. T. O. (1982) 1 SCR 629 : (AIR 1981 SC 1922), in support of their submission that the contemporaneous exposition is a legitimate aid to interpretation. Therefore, so the contention goes, even assuming for the purpose of argument that copper scrap includes brass scrap, that conclusion must be resisted in view of the history of the exemption. Notifications issued from time to time.

19. Mr. Sorabjee urged, in addition, that the classification of an item under a particular commercial category must not be mixed up with its liability to taxation. Rule I of the Rules for the interpretation of the First Schedule ('Import Tariff') of the Tariff Act, 1975 takes precedence over other rules by providing that "for legal purposes, classification shall be determined according to the terms of the Headings and any relative Section ox Chapter Notes and, provided such Headings or Notes do not otherwise require, according to the provisions hereinafter contained". The question of the application of Interpretative Rules 2 to 4, therefore arises, only where the text of the Heading and of the Notes cannot by itself determine the appropriate Heading for classification of an article. The other Interpretative Rules cannot be invoked in the instant case because, brass scrap being an alloy of copper, its classification can be determined under Rule 1. In any case, Note No. 4 of the Import Tariff which says :

"Goods not falling within any Heading of the Schedule shall be classified under the Heading appropriate to the goods to which they are most akin"

cannot apply since, Rule I of the Interpretative Rules must take precedence over it. These considerations, according to the learned counsel, lead to the conclusion that brass scrap, as a 'copper alloy scrap' must be classified with copper as an 'alloy scrap of copper' or copper alloy scrap'. It cannot be classified as copper scrap'.

20. Arguments advanced by the various learned counsel including Mr. Asoke Sen, Mr. Sorabjee, Mr. Bajoria, Mr. R. K. Jain, Mr. Gobind Das, Mr. L. R. Gupta and Mr. K. Parshurampuria were an

interesting interplay of different facets of forensic presentation. Broadly, the central theme of their argument was the same but, a few of them, who are evidently well versed in the "Import Tariff', dissected with ability many a minute point concerning the composition of metals like brass and copper.

21. The reasons why we are unable to accept the submission of the appellants that brass scrap is a 'master alloy', are these. An 'Alloy' is described in "A Dictionary of Metallurgy by A. D. Merriman" thus :

"Alloy

It is a substance possessing metallic properties and composed of two or more elements of which at least one must be a metal. The term is usually reserved for those cases where there is an intentional addition to a metal for the purpose of improving certain properties. Though pure metals may possess certain useful properties, they seldom possess the strength required for industrial application. Copper is practically the only matter used in bulk in the commercially pure state. In the case of most metals, alloying elements are added to increase the hardness, strength and toughness of the basic metals and to obtain properties which are not found in any of those metals." (page 5).

22. At page 182 of Merriman's book it is stated that :

"Master alloy is the name given to an alloy of mixture of elements that is used for introducing desired elements into molten metals in the foundry . .....and are often used in the ladle to obtain good control over the final product. Also called Foundry Alloy."

The book does not mention brass as a master alloy. Indeed, zinc which is a constituent of brass is not mentioned even as one of the constituents of a master alloy.

23. At pages 25 and 26 of "Materials Handbook" by George S. Brady, it is stated :

"The commercial utility of alloys arises from the fact that the pure metals are often too soft, weak or rare to be used alone. Thus, copper, a soft metal, when alloyed with the brittle metal zinc, forms a strong, hard alloy, brass, that has wide usage."

"A master alloy or a foundry alloy is an alloy used for adding elements in the foundry."

24. Moves to unify tariff classification stem at least from the early days of the League of Nations. In Brussels in 1950, the Customs Co-operation Council was formed by a convention signed by 13 governments of the European Customs Union Study Group. The CCC studies customs matters with a view towards simplifying and unifying them and has prepared the "Brussels Tariff Nomenclature" complete with principles of interpretation and an advisory process for settling disputes over the nomenclature. (See pp. 238-239, S. 10.7 of 'World Trade and the law of Gatt' by John H. Jackson Ed 1969).

According to Brussels Tariff Nomen-clature,

"Master alloys are generally in the form of small blocks or cakes divided for easy breaking, brittle sticks, or pellets, and have the appearance of crude foundry products."

25. In Henderson's 'Metallurgical Dictionary' (page 206) 'Master alloy'is treated synonymously with 'Foundry alloy' and 'Hardener'. At page 163 of the book the following statement occurs :

"Hardener (preliminary alloy; foundry alloy; master alloy; rich alloy)

An alloy, rich in one or more alloying elements, that is added to the melt, this procedure permitting closer composition control than is possible with the addition of pure metals; an alloy designed to facilitate adding to a base metal, to make a complete composition, those additive elements that due to refractoriness or susceptibility to oxidation, do not, as pure metals, readily alloy with the base metal."

At page 142 of the book, Foundry alloy which is equated with Master alloy is described as "an alloy of specific composition as, for example, a ferro-alloy, used for making cupola, ladle, or furnace additions."

26. In Osborne's 'Encyclopaedia of the Iron and Steel Industry' (page 195) 'Hardeners' are described as "Master alloys prepared for the purpose of adding small quantities of the desired alloying elements to molten metals."

27. According to Encyclopaedia Britannica (Volume 1, pages 649-50).

"The most common way of preparing alloys is by the melting together of the constituent metals. If the melting points of the metals differ widely, or if one is relatively very reactive, it may be convenient to prepare first a master alloy, portions of which are then melted with the remaining metals."

28. It is clear from these statements, which occur in books which are universally regarded as authoritative, that brass scrap cannot possibly be a 'master alloy'. It is not, in the wildest imagination, an alloy of mixture of elements used for introducing desired elements into molten metals in the foundry. A master alloy is generally called a foundry alloy for the simple reason that it is an alloy used for adding elements in the foundry. Brass scrap does not square with that description and use. The appellants' contention, if accepted, will lead to the anomalous position that all brass articles shall have to be regarded as Master alloys. That will be doing grave violence to the science, of Metallurgy: Almost putting the science rather than the metals into a melting pot.

29. As stated at page 22 of Merriman's 'A Dictionary of Metallurgy', "Brass is essentially an alloy of copper and zinc, but for special purposes small proportions of other metals are sometimes added to obtain increased strength and hardness of resistance to corrosion". The book states further at page 23 that "the commonest form of brass (known as 60/40), contains 40% zinc". According to Encyclopaedia Britannica, (Vol. I, page 649), "Brass is an alloy of copper and zinc, the copper content usually varying between 57% and 70%.

30. This shows that brass is but an alloy of copper and zinc and is a complete and finished product by itself. Brass or brass scrap is not used as a raw material in the manufacture of other alloys. Therefore, it is not a Master alloy. Accordingly, the appellants cannot claim the benefit of Notification No. 97 dated June 25, 1977 on the basis that brass scrap' is a Master alloy.

31. That leads to the question as to whether brass scrap is comprehended within the expression 'copper waste and scrap' under Heading No. 74.01/02. Brass, as we have seen, is an alloy of copper and zinc, generally in the proportion of 60 : 40. Rule I of the Rules for the interpretation of the First Schedule (Import Tariff) to the Tariff Act, 1975 provides that for legal purposes, classification shall be determined according to the terms of the Headings and any relative Section or Chapter Notes and, provided such Headings or Notes do not otherwise require, according to the provisions contained in the following Rules. By Rule 2(b), the classification of goods consisting of more than one material or substance shall be according to the principles contained in Rule 3. Rule 3, on its own terms, is applicable only when goods are prima facie classifiable under two or more Headings. But by reason of Rule 2(b), the principles contained in Rule 3 will apply to the classification of scrap since it consists of more than one material or substance, namely, copper and zinc. That is, of course, if the Rules, apart from Rule 1, are at all attracted. Under clause (a) of Rule 3, the Heading which provides the most specific description shall be preferred to Headings providing a more general description. Under clause (b) of Rule 3, Mixtures and composite goods which consist of

different materials or are made up of different components and which cannot be classified by reference to clause (a) shall be classified as if they consisted of the material or component which gives the goods their essential character, insofar as this criterion is applicable. Rule 4 provides that goods not falling within any Heading of the Schedule shall be classified under the Heading appropriate to the goods to which they are most akin.

32. We will immediately proceed to consider the impact of these rules on the case on hand but, before doing so, it must be mentioned and appreciated that the sole ground on which the appellants claim exemption from payment of duty to the extent of 60% under Notification No. 97 dated June 25, 1977 is that brass scrap, being a master alloy, is an article other than 'copper waste and scrap' or 'unwrought copper'. Once that contention is rejected, the appellants cannot claim the benefit of the said Notification. However, in order not to leave scope for needless litigation in future, we must examine the question whether the item 'copper waste and scrap' under Heading No. 74.01/02 includes brass scrap. Besides, by the second Notification, No. 156 dated July 16, 1977 'copper waste and scrap' falling under the same Heading were exempted from so much duty of customs as exceeded 80% ad valorem. The contention of the Attorney General is that copper waste and scrap include brass scrap, which at once leads to two consequences : The first Notification is not attracted and the second Notification would apply.

33. Turning to Rule 1 of the Import Tariff, insofar as relevant, classification has to be determined according to the terms of the Headings; and, provided such Headings do not otherwise require, classification has to be determined according to the provisions of the rules following Rule 1. Heading No. 74.01/02 consists of four items: (i) Copper matte, (ii) unwrought copper (refined or not), (iii) copper waste and scrap, and (iv) master alloys. Insofar as the terms of Heading No. 74.01/02 are concerned, the primary conclusion to which we have come is that brass scrap is not a master alloy. It is nobody's case that brass scrap belongs to either of the first two categories, namely, copper matte or unwrought copper. The only question then is whether the, third item 'copper waste and scrap' includes brass scrap. Putting Rule 1 in simple language, classification has to be determined according to the description of the article in the Heading and, if the Heading or a Note does not otherwise require, according to the provisions of the other Rules and Notes. In the instant case, the terms of the relevant Heading do not, by themselves, yield an answer to the question whether copper waste and scrap includes brass scrap. But, the particular Heading does not require or provide that the other rules should be excluded while determining the classification of articles under that Heading. That is how, Rules 2 to 4 become relevant for deciding the question whether 'copper waste and scrap' include brass scrap. What is meant by the clause in Rule 1 : "and, provided such Headings or Notes do not otherwise require" is not that a Heading must require that the provisions contained in the rules following Rule 1 should be applied. What it means is exactly the opposite, namely, that if a Heading does not require the exclusion of the other rules, those other rules must also be applied for determining the classification of an article. Therefore, all the relevant rules of interpretation in the Import Tariff come into play in the classificatory process. Rules 2 to 4 of the Import Tariff are not a mere adornment. Nothing ever is an adornment in an Import Tariff. Therefore, classification has to be determined both according to the terms of the Headings and according to the provisions of the rules unless a particular Heading or Note excludes the application of rules other than Rule 1.

34. Accordingly, we must turn to Rules 2 to 4 for determining the classification of Brass Scrap. By reason of the concluding part of Rule 2(b), classification of goods consisting of more than one material or substance shall be according to the principles contained in Rule 3. Clause (a) of Rule 3 has no application. Applying the principle contained in Rule 3(b), which is relevant for our purpose, brass is a mixture of copper and zinc, usually in the proportion of 60 : 40 (See pages 22 and 23 of Merriman's 'A Dictionary of Metallurgy') but, in which the component of copper may be, anywhere between 67%, and 70% (See Encyclopaedia Britannica, Volume I, page 649). Since copper gives its 'essential character' to brass, brass scrap has to he classified as 'copper waste and scrap' within the meaning of Heading No. 74.01/02. Alternatively, Rule 4 would yield the same result if it is assumed, for which there is no justification, that brass scrap does not fall within any Heading of the First Schedule. If it does not, it has to, be classified, by reason of Rule 4, under the Heading appropriate to the goods to which it is most akin, Brass. unquestionably, is most akin to copper and therefore, brass scrap has to be classified as 'Copper Waste and Scrap'.

35. We may usefully turn to the Notes to Section XV of the First Schedule (Import Tariff), which is called 'Base Metals and Articles of Base Metal'. Clause (a) of Note 3 provides that an alloy of base metals is to be classified as an alloy 'of the metal which predominates by weight over each of the other metals. Since brass is an alloy of copper and zinc in which copper predominates by weight, brass has to be classified as an alloy of copper. Therefore, 'Copper Waste and Scrap' include brass scrap. According to Note 4, unless the context otherwise requires, any reference in the First Schedule to a base metal is to be taken to include a reference to alloys which, by virtue of. Note 3, are to be classified as alloys of that metal. Heading No. 74.01/02 of the First Schedule refers to copper waste and scrap. Copper is a base metal. Reference to copper in that Heading would include reference to Brass since, by virtue of Note 3. brass has to be classified as an alloy of copper, Therefore, 'copper waste and scrap' include 'Brass Scrap'.

36. The appellant relied upon certain documents issued by the Merchants 'Association and upon extracts from'. Indian Standard Coding and Classification for non- ferrous scrap metals' to show that brass scrap and copper scrap are regarded as distinct and separate items for commercial purposes. Such considerations cannot furnish, a true answer to the question before us because, the distinguishing feature is that, here, brass and copper are not mentioned as separate items in the Import Tariff. It is because of the absence of such specific, separate specification of these two items that the question arises whether, under Heading No. 74.01/02 'Copper Waste and Scrap, include 'brass scrap'.

37. Reliance was also placed by the appellants on certain exemption Notifications, referred to earlier, as affording intrinsic evidence, to show the contemporaneous understanding of the framers of such Notifications. True, that such understanding is a legitimate aid to interpretation but we cannot decide the question of classification of goods under the 'Import Tariff' by implications, when there are Rules of interpretation which are. specially framed to aid and assist the classification of goods under appropriate Headings. Those rules must have precedence over other aids of

interpretation.

38. Notification No. 156 of July 16, 1977 exempts 'copper waste and scrap' from so much of the duty of customs as is in excess of 80% ad valorem. Since brass scrap is includible in the expression 'copper waste and scrap' and since, brass scrap is not a 'Master alloy', the appellants' case would fall under 'this Notification. Accordingly, they would be entitled to exemption from custom duty to the extent of 20% only.

39. The next question which is raised by some of the appellants is as to whether the imposition of excise duty on 'waste and scrap', which is referred to in clause (1b) of Entry 26A of the First Schedule to the Central Excises and Salt Act, 1944 is either ultra vires S. 3 of that Act or beyond the legislative competence of the Parliament. S. 3 of the Act of 1944 provides that there shall be levied and collected duties of excise on all excisable goods, other than salt, which are produced or manufactured in India. The question as to whether 'waste and scrap can be regarded as capable of being produced or manufactured, the appellants' Argument being that it cannot be so regarded, has already been answered by us in the affirmative. The production of waste and scrap is a necessary incident of the manufacturing process. It may be true to say that no prudent businessman will intentionally manufacture waste and scrap. But, it is equally true to. say that waste and scrap are the by-products of the manufacturing process. Sub.-standard goods which are produced during the process of, manufacture may have to be disposed of as 'rejects' or as scrap. But they are still the products of the manufacturing process. 'Intention' is not the gist of the manufacturing process. We have already dealt with this aspect of the matter and do not consider it necessary to elaborate upon it any further.

40. The argument of legislative competence of the Parliament is a facet of the same contention. S. 3 of the Act of 1944 brings to duty excisable goods produced or manufactured in India. S. 2(d) of the Act defines 'excisable goods' to mean goods which are specified in the First Schedule as being subject to_a duty of excise. Therefore, the goods mentioned in the First Schedule will attract excise duty under S. 3 only if they are manufactured in India and not otherwise. Entry 26A(1b) of the First Schedule of the Act of 1974 cannot be held to be beyond the legislative competence of the Parliament because, the pre-condition of the excisability of the articles mentioned therein, namely, waste and scrap, is in the manufacturability of those articles, Since the production of waste and scrap is an integral part and an inevitable incident of the manufacturing process, Parliament has the legislative competence to make 'waste and scrap' excisable tinder Entry 84 of List I of the Seventh Schedule to the Constitution. which relates to "Duties of excise on Tobacco and other goods manufactured or produced in India". except intoxicants and narcotics.

41. On the question of the legislative competence of the Parliament to incorporate Entry 26A(1b) in the First Schedule to the Act of 1944, it must be added that the proper approach is to determine whether the subject-matter of a legislation falls in List II, the State List. which is the only field which the Parliament cannot enter. If it does not fall in List II, Parliament would have the legislative

competence to pass the law by virtue of Art. 248 read with the residuary Entry 97 of List I. This is clear from the decisions of this Court in Second Gift Tax Officer, Mangalore v. D. H. Hazareth, (1971) 1 SCR 195 : (AIR 1970 SC 999) and Union of India v.. H. S. Dhillon, (1972) 2 SCR 33 : (AIR 1972 SC 1061). The cases relied upon by the appellants, namely, Hingir-Rampur Coal Co. Ltd., v. State of Orissa, (1961) 2 SCR 537 : (AIR 1961 SC 459), Kalyani Stores v. State of Orissa, (1966) 1 SCR 865 : (AIR 1966 SC 1686), A. B. Abdul Kadir v. State of Kerala and M. C. Dowell and Co. Ltd., v. Commercial Tax Officer, VII Circle, Hyderabad, (1977) 1 SCR 914 : (AIR 1977 SC 1459), relate to State legislations, namely, The Orissa Mining Fund Act, The Bihar and Orissa Excise Act, The Kerala Luxury Tax on Tobacco (Validation) Act and the Andhra Pradesh General Sales Tax Act respectively, Those cases are, therefore, not relevant for deciding upon the competence of the Parliament to enact the impugned law.

42. We may sum up our conclusions thus :

(1) The charging section under which duties of customs are leviable is S. 12 of the Customs Act, 1962 read with section 3(1) of the Customs Tariff Act, 1975. (2) 'Additional duty' which is mentioned in S. 3(1) of the Customs Tariff Act, 1975 partakes of the same character as the Customs duty since, it is in addition to the duty which is leviable tinder S. 12 of the Customs Act, 1962, the rates for which are, prescribed by S. 2 of the Tariff Act, 1975. The duty mentioned in S. 3(1) of the Tariff Act, 1975 is not countervailing duty. (3) S. 3(1) of the Tariff Act, 1975 provides a measure of the additional duty, which has to be "equal to the excise duty" leviable on a like article if produced or manufactured in India, as defined in the Explanation to that section. The measure of a tax or duty cannot determine its nature or character. (4) The brass scrap which is imported into India by the appellants is liable to the levy of additional duty mentioned in S. 3(1) of the Tariff Act, 1975 because. the taxable event is the import of the goods into India and not their manufacture. (5) The duty referred to in S. 3(1) of the Tariff Act, 1975 is, therefore, leviable even if the goods imported into India are not capable of being manufactured in India or are not in fact manufactured in India. (6) The expression "excise duty for the time being leviable on a like article if produced or manufactured in India", which occurs in S. 3(1) of the Tariff Act, 1975 means excise duty for the time being in force which would be leviable on a like article if produced or manufactured in India or, if a like article is not so produced or manufactured, which would be leviable on the class or description of articles to which the imported article belongs. (7) Even if the duty referred to in S. 3(1) of the Tariff Act, 1975 is regarded as in the nature of a countervailing duty, the brass scrap imported by the appellants would still be liable to the levy of that duty. The reason is that scrap or waste is a by-product of manufacture and, is an integral part and an inevitable incident of the manufacturing process. Brass scrap is manufactured or happens to be manufactured in India. It is well known as a marketable commodity, both of Indian and foreign origin. The brass scrap produced in India must receive protection by the imposition of a countervailing duty on imported brass scrap. (8) The brass scrap imported by the appellants falls under Exemption Notification No. 97 dated June 25, 1977 and not under Exemption Notification No. 156, dated July 16, 1977. The reason is twofold : one, that within, the meaning of Heading No. 74.01/02 of the First Schedule to the Tariff Act, 1975, brass scrap is not a 'Master alloy'; and two, that it is comprehended within the expression 'copper waste and scrap' in that Heading. The appellants are, therefore, entitled to exemption from duty of customs to the extent of 20% only and not to the extent of 60%. (9) Clause (1b) of Entry 26A of the First Schedule to the Central Excises and Salt Act, 1944 is not ultra vires

S. 3(1) of that Act. The reason is that 'waste and scrap' referred to in that Entry is excisable to duty if it is produced or manufactured in India. Waste and scrap are by-products of the process of manufacture and are inevitably incidental to the manufacturing process. (10) The said Entry, namely, Entry 26A(1b) of the First Schedule to the Act of 1944 is within the legislative competence of the Parliament because the duty of excise is attracted under the Central Excises and Salt Act, 1944, only if the goods are produced or manufactured in India. The impugned. provision falls within Entry 84, List I, of the Seventh Schedule to the Constitution. Even otherwise, Parliament would have the. legislative competence to pass the law because of the combined operation of Art. 248 and Entry 97, List I of the Seventh Schedule.

43. In the result, the judgment of the High Court, which is marked with care, is confirmed and these Appeals and the Special Leave Petitions are dismissed with costs.

44. Writ Petition No. 3761 of 1982, in which Mr. Abdul Khadar appears, relates to 'copper fungicide'. That Writ Petition was delinked from the other cases since the pleading therein are not complete. That Writ Petition and all other cases involving import of, copper scrap may be listed for hearing at an early date.

Order accordingly.