2001 (136) E.L.T. 1195 (Tri. - Del.)

IN THE CEGAT, SPECIAL BENCH 'C', NEW DELHI
Shri S.K. Bhatnagar, Vice President and Shri S.L. Peeran, Member (J)

Third Member on Reference : Shri Shiben K. Dhar, Member (T)

UNIVERSAL CABLES LTD.
Versus
COLLECTOR OF CUSTOMS, BOMBAY

Misc. Order No. 100/95-C and Final Order Nos. 517 to 534/96-C, dated 12-8-1996 in Appeal Nos. C/305-320/94-C, 432/94-C and 433/94-C

Synthetic Rubber Grade TS 430 - Customs - Chloro Sulphonated Polyethylene is similar to Hypanol - Chemical report of Deputy Chief Chemist not to be relied upon as a decisive factor, being not conclusive - Product generally known as synthetic rubber in trade and commercial parlance - Classifiable under Chapter 40 of Customs Tariff Act, 1975 as per Note 4(a) [Per Majority : S/Shri S.L. Peeran, Member (J) and Shiben K. Dhar, Member (T)]. - *Hypanol, the trade mark of DUPONT, is a Chloro Sulphonated Polyethylene; TS-430 and TS-530, trade marks of Toyo Soda Manufacturing Co. Ltd. of Japan, is also admittedly Chloro Sulphonated Polyethylene. The understanding of the licensing authorities is that Hypalon 40 is a synthetic rubber. The understanding of the Government is also to treat the goods as synthetic rubber under Notification No. 345/86-Cus., dated 16-6-1986. The importer has produced enormous evidence which shows that the goods are synthetic rubber and synthetic rubber can be classified under Chapter 40 as per Note 4(a). Furthermore the experts in this case has found the items to be unsaturated synthetic substance and not a synthetic rubber. In that event of the matter, it is not proper for the adjudicating authority to replace such experts' opinion with his own opinion, in the absence of any rebuttal evidence placed by the department. There is no evidence except the test report of Deputy Chief Chemist dated 2-7-1992. This report is not conclusive, in view of the earlier reports of the department, in favour of the importers and also in the absence of any explanation from the Deputy Chief Chemist in the light of fresh evidence of the importers. The plea of the importer for retest for the remnant samples has been unjustly rejected without any reasons at all. There is no doubt in this case that the goods are considered as synthetic rubber in trade and commercial parlance. Therefore, even going by the Interpretative Rules 3(c) the goods are to be classified under chapter which occurs last in the numerical order i.e. under Chapter Heading 40.02. [1994 (69) E.L.T. 465 (Cal.) relied on]. [paras 13, 18, 19, 20]*

[Contra per : S.K. Bhatnagar, Vice President]. - *The products in question are thermoplastic elastomers which do not require vulcanisation with Sulphur; And on curing or vulcanisaton with other chemicals they become even more thermoplastic. Hence they are hit by the provisions of Chapter 40 and get excluded. The very fact that they are admittedly made of Chlorosulphonated polyethylene shows that they are chemically modified polymers. Thus, they fully satisfy the conditions of Chapter Note 5 of Chapter 39. Thus, they could only be considered as a modified polymer of a saturated type (elastomer) covered by Heading 39.01. [paras 35, 38, 68]*

Demand - Limitation - Department itself by their own test report accepted goods as synthetic rubber from 1984 onwards - Earlier test reports of importers also indicating the goods to be synthetic rubber - Charge of suppression or misdeclaration invoking larger period of limitation not sustainable - Section 28(1) of Customs Act, 1962 [Per Majority : S/Shri S.L. Peeran, Member (J) and Shiben K. Dhar, Member (T)]. - *The Department has not proved that importers have misdeclared or suppressed the correct description of the goods for the reason that the Department by itself by their own test report had accepted the goods as synthetic rubber from 1984 onwards. In the case of M/s. Skytone Electrical (India), the appellants were*

describing the goods as synthetic rubber TS 430. They were not declaring it as synthetic rubber (Polychlorobutadiene Type). Therefore, the allegation made against them that they knew the contents and yet they had misdeclared the correct contents is also not sustainable. Earlier test reports of the importers also indicated that the goods are synthetic rubber and the department had accepted the same. Therefore, in this case the charges of suppression or misdeclaration to invoke larger period is not sustainable. [para 19]

[Contra per : S.K. Bhatnagar, Vice President]. - *The fact that the appellants had deliberately withheld the information relevant for the purpose of determining the correct classification is evident from the statement of Shri H.S. Sethi, Partner of M/s. Skytone Electricals. Furthermore, recovery of catalogues or bulletins pertaining to TS 430 and 530 indicating the chemical description chlorosulphonated polyethylene show that they were aware of the correct chemical nature and yet withheld this crucial description from the Customs. Since the importing firms had from the very beginning suppressed or withheld information known to them which was material for the purpose of determining the correct classification with mala fide intention, therefore, the demands were not time-barred and could be validly incurred under Section 28(1). [paras 70, 72]*

Strictures against Collector - Bias of adjudicating authority - Findings of Collector arrived at with utter disregard to technical opinion of expert/institution - Literature not put to appellant to seek clarification in case of doubt - Department not taken keen interest to assist Tribunal - Fresh test result of Deputy Chief Chemist when found to be different from previous one, retest from remnant samples ought to be obtained - Enquiry as to whether test result of Deputy Chief Chemist carried out as required under Note 4(a) of Chapter 40 - Collector having a predetermined mind to pass adverse order against importer [Per : S.L. Peeran, Member (J)]. - *The type of approach adopted by the Collector with utter disregard to the technical opinion of the expert/institutions is totally erroneous and unfortunately is without any sound basis. The Collector ought to have put his doubts to the technical experts to seek clarification from them or he could have sent the evidence produced by the importers to the departmental experts for clarification and opinion. The adjudicating authority cannot substitute the experts' opinion with their own opinion. The technical experts' opinion is the last word in technical matters unless it is shown to the contrary with better evidence. The Chief Departmental Representative had personally contacted the Collector to send some one to explain the technical aspect of the matter. However, the Collector had expressed his helplessness in the matter as no expert was available. Therefore, it is very clear that the department has not taken keen interest to assist the Tribunal in this matter to render justice to the parties. The department had cleared the goods from 1984 as Synthetic Rubber, time and again by testing the samples of the goods and satisfying themselves about the contents of the goods. Thereafter after a lapse of time i.e. in 1992, when the Department had obtained a fresh test results which is different from the previous one, then re-test of remnant samples ought to have been obtained and also further enquiries should have been carried out from the expert authorities to find out whether the various tests were carried out as required under Note 4(a) of Chapter 40 or not especially when appellants specifically raised this plea before the Collector. The manner in which the Collector has proceeded in this matter by replacing the expert evidence with his personal opinion, by rejecting technical experts' opinion, and also having not said a word on the affidavits of experts and professors, therefore clearly shows that the Collector had a pre-determined mind, to somehow pass an adverse order against the importer. [paras 12(i), 12(ii)]*

CASES CITED

Andhara Sugar Ltd. v. Collector — 1991 (55) E.L.T. 262 (Tribunal) — *Referred*..... [Para 8]
Cable Corpn. of India v. Collector — 1993 (67) E.L.T. 611 (Tribunal) — *Referred*..... [Para 17]
Collector v. Chemphar Drugs and Liniments — 1989 (40) E.L.T. 276 (S.C.) — *Referred*.... [Para 8]
Collector v. H.M.M. Ltd. — 1995 (76) E.L.T. 497 (S.C.) — *Followed*..... [Para 103]
Collector v. National Insulated Cable Co. Ltd. — 1994 (74) E.L.T. 568 (Cal.) — *Relied on* [Paras 10(iii), 12(iii), 82.3, 92, 92.3]
Collector v. Parle Exports Ltd. — 1988 (38) E.L.T. 741 (S.C.) — *Referred*..... [Para 18]
Dimensional Plastiglass Industries (P) Ltd. v. Collector — 1991 (54) E.L.T. 443 (Tribunal) — *Referred* [Para 8]
Dr. Beck & Co. v. Collector — 1991 (54) E.L.T. 271 (S.C.) — *Referred*..... [Para 8]
Frozen Foods Pvt. Ltd. v. Collector — 1992 (59) E.L.T. 279 (Tribunal) — *Referred*..... [Para 99]
Honsur Plywood Works Ltd. v. Collector — 1988 (34) E.L.T. 393 (Tribunal) —*Referred* [Paras 86.5, 97.3]
INARCO Ltd. v. Collector — 1990 (50) E.L.T. 161 (Tribunal) —*Referred*..... [Para 16]

Indian Cable Company v. Collector — 1987 (30) E.L.T. 680 (Cal.) — *Referred*..... [Para 5]
Jaishri Engineering Co. (P) Ltd. v. Collector — 1989 (40) E.L.T. 214 (S.C.) — *Referred* [Para 40(vi)]
Limenaph Chemicals v. UOI — 1993 (68) E.L.T. 77 (Mad.) — *Referred* ..... [Para 10(vi)]
Lucas TVS Ltd. v. Collector — 1989 (41) E.L.T. 267 (Tribunal) — *Referred*..... [Para 10(vi)]
National Insulated Cable Co. Ltd. v. UOI — 1994 (69) E.L.T. 465 (Cal.) — *Relied on*..... [Para 14]
National Insulated Cables Co. Ltd. v. Collector — 1987 (28) E.L.T. 248 (Cal.) — *Relied on* [Paras 4.1, 5, 6, 15, 92.3, 111]
Padmini Products v. Collector — 1989 (43) E.L.T. 195 (S.C.) — *Referred*..... [Para 8]
Pushpam Pharmaceuticals Co. v. Collector — 1995 (78) E.L.T. 401 (S.C.) — *Referred* [Paras 85.2, 87, 102]
Rainbow Ink and Varnishes v. Collector — 1992 (59) E.L.T. 593 (Tribunal) —*Referred*..... [Para 8]
Silverchem Industries v. Collector — 1990 (49) E.L.T. 634 (Tribunal) — *Referred* [Paras 8, 85, 102]
Steel Authority of India v. Collector — 1985 (22) E.L.T. 487 (Tribunal) — *Referred*..... [Para 8]

REPRESENTED BY : Shri N. Khaitan, Smt. Malini Sud and Shri V. Lakshmikumaran, Advocates, for the Appellant.
Shri Sharad Bhansali, SDR, for the Respondent.

[Order per : S.L. Peeran, Member (J)]. - In all these appeals, common questions of law and facts are involved and hence they are all taken up together for disposal as per law.

Appeal Nos. C/305-320/94-C :

2. These appeals arise from order-in-original dt. 25-11-1993 passed by the Collector of Customs-II, Bombay. He has in this order classified the goods TOSO CSM 430 imported by the appellants under chapter sub-heading 3901.90 of the Customs Tariff Act and has confirmed a total duty in respect of various imports to an extent of Rs. 1,22,27,918/-. He has also held that the goods imported by the importers are liable for confiscation under Section 111(m) of the Act, 1962 for misdeclaration of the description. However, he has not imposed any redemption fine but has imposed a penalty of Rs. 2,00,00,000/- (Rupees Two Crores only) under Section 112(a) of the Act and while imposing this penalty the learned Collector has taken into account the fact that the goods which are liable for confiscation are not physically available. He has imposed personal penalty under Section 112(a) of the Act on the following persons:

	Names	Amount of Penalty
(i)	Shri J.S. Chowdhari (Import Executive)	Rs. 5,00,000/- (Rupees Five Lakhs only)
(ii)	Shri S.M. Jayawant (Import Assistant)	Rs. 4,00,000/- (Rupees Four Lakhs only)
(iii)	Shri P.S. Ramachandran (Manager R & D)	Rs. 2,00,000/- (Rupees Two Lakhs only)
(iv)	Dr. R.K. Sharma (Lab. Incharge)	Rs. 1,00,000/- (Rupees One Lakh only)

He has not imposed any penalty on the indentor M/s. Chemrub and S/Shri S.L. Tibrewala, D.R. Bansal, R.K. Mirani and S.K. Sureka.

3. (i) These orders have arisen out of adjudication of four show cause notices issued to the importers under the proviso to Section 28(1) read with Section 124 of the Customs Act, 1962. The show cause notices are very exhaustive and running into several pages, *inter alia*, basic facts have been summarised by the Ld. Collector which are noted herein; It is alleged that the appellants have been importing goods under the description *"Synthetic Rubber Grade TS-430"* when they have first filed their Bill of Entry for such goods in November, 1984 in the Bombay Customs House. Since, 1986, or so, all imports of such goods by the said importers had been cleared by them under declared description of *"Synthetic Rubber Grade TS-430 (Polych-lorobutadiene Type)"*.

(ii) It is alleged that the Customs Department came to know later that the product being imported by the importer was Chlorosulphonated Polyethylene classifiable as other than a Synthetic Rubber especially since it is a saturated polymer which falls outside the scope of Chapter 40 governing Synthetic Rubber. All such imports of TS-430 material were apparently assessed by the Customs Authorities on the basis of declaration and certain previous test reports of the Customs Chemical Laboratory carried out from time to time at the time of clearance of the product. All these test reports of Customs Lab. invariably gave test results to the effect that TS-430 material was 'Synthetic Rubber (Polychlorobutadiene Type)'. The effect of such test reports was that the classification of TS-430 was done by the Customs Authorities under Customs Tariff Heading 40.02, there being a specific entry for Chlorobutadiene rubbers as well as owing to the fact that the said description qualifies the scope of expression "Synthetic Rubber" as laid down in Note 4(a) to Chapter 40 of the Customs Tariff. The net effect of the classification under Tariff Heading 40.02 was that the rate of Customs duty was about 40% Basic and 15% Additional Duty, by virtue of certain duty concession notifications issued under Section 25 of the Customs Act, 1962.

(iii) It is alleged by the Department that in or about April/May. 1991, information was received in the Custom House, *inter alia,* to the effect that TS-430 grade material was being imported by misdeclaring the description as 'Polychlorobutadiene Rubber', whereas the said goods were actually exactly similar to material, "Hypalon" [Chemical name Chlorosulphonated Polyethylene (CSP)] which was not Synthetic Rubber as defined in the Customs Tariff, Chapter 40 and which was being regularly assessed to customs duty under CTH 39.01 at the rate of 100% Basic and 40% Additional Duty. On the basis of the information, the Customs authorities sent a representative sample of TS-430 material out of a consignment of the importer which was sought to be cleared by them under IGM/Item No. 812/31 (B/E Thoka No. 10151 dt. 26-4-1994). In the mean time, the importer through their Customs House Agents, submitted a single page copy of purported technical brochure that TS-430 grade was Polychlorobutadiene Rubber. To further substantiate their case the importer also submitted a test report prepared by their own Research & Control Lab. at Satna claiming that TS-430 material satisfied the expression Synthetic Rubber as per Note 4 (a) of Chapter 40 and they reiterated that TS-430 material was unsaturated Synthetic Rubber. On the basis of such claims by the importers, 60% of the goods were released pending further enquiry and report of Dy. Chief Chemist on the sample forwarded to them. On being tested vide its order No. 216/2-7-1992, the Dy. Chief Chemist gave an opinion on the nature of TS-430 material as under: -

> "The sample forwarded along with the file has been tested. It is not Poly- chlorobutadiene Synthetic rubber. It is not found to be Chlorosulphonated Polyethylene Polymer, a modified Polyethylene Polymer. It is a saturated polymer, not a Synthetic Rubber."

(iv) The above report does not pertain to the consignment cleared by the importer but in view of the acknowledge fact of the appellants that these goods are the same, the Department alleged that the importer had misdeclared/suppressed the material facts. Therefore, the office premises of the importer at Bombay and Satna and the office of the indentors for the said material, M/s. Chemrab and its associates were searched under Section 105 of the Customs Act, 1962. Several incriminating documents were seized from the above premises. These *inter alia* included a forwarding letter bearing No. 8427/1063, dt. 4-7-1984 along with the purchase order No. 8477, dt. 3-7-1984 placed by the importer on M/s. Chemrab. The above referred letter indicated acknowledgement of the fact that the importer was aware that TS-430 was equivalent to "Hypalon" material and the deal was subject to the condition that if TS-430 material was to be found of sub-standard quality the indentors would refund all the costs incurred by the importer on such goods. Besides this, certain telex, wireless, correspondence, records were also seized which appeared to indicate complicity of Shri J.S. Choudhary, Import Executive of the Importer in suppressing certain material facts. A few raw material monitoring registers were also taken over from Satna works of the importer which indicated common account for material "Hypalon" and TS-430 under the category CSP. It is also alleged that the original catalogue of M/s. Tosoh Corporation, Japan, of TOSO-CSM materials described it as *'Chloro- sulphonated Polyethylene'* as against the declaration filed by the importers describing the goods as '*Polychlorobutadiene'*, seized by the department. On the basis of alleged *prima facie* case of misdeclaration, further investigations were carried out and the statements of several persons working under the importer were recorded under the provisions of Section 108 of the Customs Act, 1962. It has been alleged on the basis of documents seized by the officers that the importer and their officers were well aware that both *'Hypalon and TS-430 were chemically composed of CSP, having the same properties'* but were misdeclaring/suppressing the relevant documents in respect of TS-430 before the Customs authorities with a motive to evade the Customs duty over the last eight years inasmuch as "Hypalon" had been charged to an aggregate duty of 200% *Adv.* as against about 100% *Adv.* levied on TS-430. These *inter alia* included:

(a) A common folio under the nomenclature CSP maintained in the raw material.

(b) The trend of import of Hypalon showed decreasing quantities from 27 MTs in 1984-85 to nil in 1990-91 and 1991-92 whereas import of TS-430 showed a rising trend from one MT in 1984-85 to 65 MTs. in 1990-91. Again in 1992-93 (till November, 1992) Hypalon imported was 30 MTs. as against TS-430 nil quantity which was attributed in the Show Cause Notice to high profitability in TS-430 import owing to duty evasion.

(v) The Department also relied on two reference books in Annexure H to the show cause notice to bring out the difference between *Polychlorobutadiene and CSP* and to prove that CSP was fully saturated polymer not covered under Chapter 40 of the Customs Tariff.

4. (i) The appellants have taken their stand against the Department's allegation as follows: that they are carrying on the business of manufacturing and dealing in electric wires and cables and that they have their plant at Satna in the State of Madhya Pradesh. They were duly complying with all the formalities pertaining to the Customs and other laws and had been paying duty. They had stated that they required *Synthetic Rubber* as a raw material. Prior to July, 1984, the main type of Synthetic Rubber purchased by the appellant was Hypalon-40. The said Hypalon-40 is appropriately classifiable under heading 40.02 of the Customs Tariff Act, 1975 and this had been confirmed by the Calcutta High Court in the case of *National Insulated Cables Co. Ltd.* v. *Collector of Customs,* as reported in 1987 (28) E.L.T. 248. They had also stated that the Notification No. 345/86, dt. 16-6-1986 also contemplates that Hypalon (Chlorosulphonated Polyethylene) can fall under Chapter 40 of the Tariff. It is stated by them in the middle of 1984, Chemrub (an indenting Agent of foreign supplier) represented to them that Synthetic Rubber of grade TS-430 (manufactured by Tosoh Corporation) was an equivalent of Hypalon-40 and was capable of meeting

the relevant specifications of the appellant. Chemrub further represented to the appellant that the said Synthetic Rubber TS-430 was being assessed by the Department under heading 40.02, in pursuance of which duty leviable was only 40% basic and 15% additional duty as against the rate of 100% basic and 40% additional duty leviable under Chapter 39 of the Tariff. They submitted that being induced by the said representation of Chemrub and the financial benefits implicit therein, the appellant, by their letters dt. 3-7-1984 and 4-7-1984 placed a trial order for the supply of 1 MT Synthetic Rubber TS-430. Tosoh Corporation (formerly known as Toyo Soda Manufacturing Company Limited) who were the manufacturers of Synthetic Rubber TS-430 and M/s. Sohwa Trading Limited were dealers in the products of the Tosoh Corporation in Japan. They further stated that M/s. Sohwa Trading Limited were the principals of Chemrub through whom goods were being supplied by Chemrub to the importers. However, they stated that their dealings relating to the goods supplied to them was only with Chemrub and that they had no dealing whatsoever with either M/s. Sohwa Trading Limited or Tosoh Corporation. They stated that they imported the goods and filed the Bill of Lading, Bill of Entry dt. 23-11-1984 before the Customs department, Bombay.

(ii) In the Bill of Entry dt. 23-11-1984, the Department had made the following endorsement on the Bill of Entry :

"TR No. 1655A Lab No. 10070

M/s. Sohwa Trading Co. Ltd., Japan

Des. Synthetic Rubber

TS 430 Sample is Synthetic Rubber

(Polychlorobutadiene Type)

In the form of coloured soft lumps. It is free from added ingredient."

Although the importer had described the said goods as "Synthetic Rubber TS 430", the Department by way of the said endorsement in the said Bill of Entry described the said goods as "Synthetic Rubber (Polychlorobutadiene Type)". The importer has taken a stand that they never described the said goods as "Synthetic Rubber (Polychlorobutadiene Type)". The Department in all the imports made by the importer from time to time from 1984 classified the said goods as "Synthetic Rubber (Polychlorobutadiene Type)" under heading 40.02 of the Tariff. The appellant had taken the stand up to January, 1986, that they described the goods as Synthetic Rubber TS 430 only, imported by them in their Bill of Entries. On the other hand in all the said Bill of Entries, the Department described the said goods as "Synthetic Rubber (Polychlorobutadiene Type)" and classified the same under heading 40.02 of the Tariff and finally assessed the same as such. The importer has stated that they had reasonable and *bona fide* belief that the description of the said goods was "Synthetic Rubber (Polychlorobutadiene Type)" and it was brought to the notice of M/s. Tosoh Corporation by Chemrub. It is also stated that right up to 1991, there is no communication whatsoever between the importer on the one hand and Tosoh Corporation or Sohwa Trading Ltd., on the other. It is also stated by them that they were informed by Chemrub, the Tosoh Corporation made its own investigations and arrived at the conclusion that the said goods should appropriately be described as "Synthetic Rubber Grade TS 430 (Polychlorobutadiene Type)". The importer has also taken the stand that they described the said goods as "Synthetic Rubber TS 430" only in the orders placed by the importer upon Chemrub. The Chemrub also referred to the said goods as "Synthetic Rubber TS 430" only. They have stated that in respect of order No. 8627 dt. 20-6-1986 placed by the importer upon Chemrub, Sohwa Trading Ltd., they issued an Invoice dt. 5-8-1986 in which the said goods were described as "Synthetic Rubber Grade TS 430 (Polychlorobutadiene Type)". The said invoice accompanied by a Test and Analytical Certificate dt. 28-8-1986 issued by the Manager, Rubber Division of the Toyo Soda Manufacturing Co. Ltd., in which the said goods were described as "Synthetic Rubber Grade TS 430 (Polychlorobutadiene Type)". In the relevant Bill of Lading under which the said goods were shipped, the same were also described as "Synthetic Rubber Grade TS 430 (Polychlorobutadiene Type)". Therefore, the importer has submitted that in the circumstances, the appellant had no option but to describe the said goods as "Synthetic Rubber Grade TS 430 (Polychlorobutadiene Type)" in the Bill of Entry dt. 3-9-1986 filed by them in respect of the import of the said goods. They further submitted that the said description of the goods as described by them was not a description of the said goods given by them. The said description was initially given to the said goods by the Department as stated by them. Therefore, they stated that the said description of the said goods was given by the foreign manufacturers and suppliers in their respective invoices, Test and Analytical Certificates and Bills of Lading. They also submitted that in view of the relevant rules and practices followed by the Customs Department, they had no choice in the matter but to adopt the description appearing in the relevant invoices, bills of lading and Test and Analytical Certificates. In the circumstances, they stated that in respect of all imports made from and after September, 1986 right up to 1991, the said goods were described as "Synthetic Rubber Grade TS 430 (Polychlorobutadiene Type)" in the bills of entry filed by them. They also submitted that the Bill of Entry filed by them on 1-12-1989 the Department made the following endorsement :-

"T.No. 1444 dated 8-1-1988 Synthetic Rubber Grade TS 430

As seen from the literature submitted by the party, this is claimed to be Synthetic Rubber of Polychlorobutadiene Type. This is confirmed by the Test obtained here. Party' s claim may therefore be accepted. It is free from added ingredient."

(iii) On the basis of the said endorsement, the said goods were classified by the Department under heading 40.02 of the Tariff and assessed on 5-12-1989 and the same were cleared by them upon payment of duty. They have submitted that this

was classified by the Department despite an objection raised by them that the goods were synthetic Polyethylene in the form of lumps. They have also relied on another endorsement appearing in the same Bill of Entry dt. 1-12-1989. Therefore, they have stated that the Department had made investigations and had specifically applied its mind to the issue as to whether the said goods should be classified as "Synthetic Rubber Grade TS 430 (Polychlorobutadiene Type)" under heading 40.02 of the Tariff or as Synthetic Polyethylene under a different heading of the Tariff. They have submitted that on due application of mind as aforesaid and on the basis of expert opinion obtained by the Department itself, the Department treated the said goods as "Synthetic Rubber Grade TS 430 (Polychlorobutadiene Type)" and classified the same under heading 40.02 of the Tariff. They also submitted that prior to 1991 assessment made by the Department was not regarded by any person to be erroneous or incorrect. They also referred to Bill of Entry filed on 30-6-1989 wherein the following endorsement has been made by the Department :-

> *"T.R.No. 1382, dt. 17-5-1989*
>
> Lab No. 488/29.5
>
> Sub : Sohwa Trading Co. Ltd.,
>
> Des - In the form of elastomeric lump composed of Synthetic Rubber. For later part of the querry party's literature may be forwarded.
>
> T.R. No. 284, dt. 7-7-1989.
>
> It is seen from the Test and Analytical certificate put up that the product unsaturated rubber is "Synthetic Rubber (Polychlorobutadiene Type)".
>
> "The remnant samples of the product has been re-examined. It is found to be the "Synthetic Rubber (Polychlorobutadiene Type)". It is free from added ingredient."

Referring to this endorsement they submitted that it is patent that the Department had on its own repeatedly tested the goods imported by them. In all the said tests the Department came to the conclusion that the goods were Synthetic Rubber of the Polychlorobutadiene Type.

5. Before the ld. Collector, the appellants made out a very strong case in their favour by producing Test reports issued by the various authorities, like Indian Institute of Technology, Kharagpur vide its Test report dt. 3-3-1992 and that of test report dt. 24-2-1992 issued by the Indian Rubber Manufacturers Association, which stated that "the goods can be irreversibly transferred by vulcanisation with sulphur into non-thermoplastic substance, which at a temperature between 18°C and 29°C will not break on being extended to three times their original length and will return, after being extended to twice their original length within a period of five minutes to a length not greater than one and half times their original length. In the premises, the said goods must be regarded as "Unsaturated Synthetic Substance" within the meaning of the said Note 4(a) of Chapter 40". They also submitted the report dt. 23-4-1993 of the Indian Institute of Technology, Powai, Bombay; Report dt. 21-1-1992 of the University of Calcutta, and Test Report dt. 14-2-1992 of Professor Abhijit Banerjee of the Calcutta University, all of which stated that the goods are of unsaturated substance, and as such, clearly fall within the said Note 4(a) of Chapter 40. They also submitted the affidavit of several experts namely :

(i) Dr. A.S. Bhattacharya

(ii) Dr. Varinder Kumar Tikku

(iii) Shri Damodar Hari Pal

(iv) Shri P.K. Sen Gupta

All the said affidavits of these experts have stated that the goods are Synthetic Rubber and it was also known in the market. They also relied on the Test and Analytical Certificates issued by the Tosoh Corporation which stated that the items were "Synthetic Rubber Grade TS 430 (Polychlorobutadiene Type)". They had contested the Department's Test Report dt. 8-7-1991 which stated that the item Chlorosulphonated Polyethylene Polymer is a modified Polyethylene Polymer and that it is a saturated polymer not Synthetic Rubber. They had also submitted before the Collector that the Department obtained the test reports from 1984 establishing the goods as Synthetic Rubber and the experts evidence also supplied proof that the item is a Synthetic Rubber and, therefore, the test report dt. 2-7-1992 is not conclusive test report, as the chemical lab of Department did not have any facility to carry out various tests which are required to establish the criterion as laid down in Note 4(a) of the Chapter 40. They also submitted before the Collector that the correct thing was to have got the test redone to establish in a reputed lab. with regard to the criterion laid down in Note 4(a) of Chapter 40. They also submitted that the Calcutta High Court had held that the "Hypalon" is classifiable under Chapter 40 and therefore, there is no reason to differ from the said judgment and the goods were rightly classifiable under Chapter 40 only. They had also submitted that there was no *mala fides* in importing the goods in view of the judgment of the Calcutta High Court, which established that the matter is capable of dual interpretation i.e. in the case of *Indian Cable Company* v. *Collector of Customs* as reported in 1987 (30) E.L.T. 680 and in the case of *National Insulated Cable Company* as reported in 1987 (28) E.L.T. 248. Both these judgments of the Hon'ble Calcutta High Court had considered three previous judgments of the Tribunal and held that the product Hypalon-40 is classifiable under Chapter 40. They submitted that since the impugned goods namely TOSO CSM Grade TS 430 are equivalent to Hypalon-40

the classification of the impugned goods has to be under Chapter 40 in terms of the said Calcutta High Court's judgment in the case of *National Insulated Cable Company*.

6. The ld. Collector after going through all these arguments and the evidence produced by the importer has come to a different conclusion and has totally rejected the entire evidence placed by the appellants as well as the results of the Test Reports, which had been obtained by the Department from 1984 onwards, in respect of consignment imported by the importer from time to time. The ld. Collector has held that the goods are classifiable only under Chapter 39 and not under Chapter 40, as the latest test results dt. 8-7-1991 obtained by the Department had indicated that the item is Chloro- sulphonated Polyethylene Polymer, a modified Polyethylene Polymer and that it is saturated polymer and not Synthetic Rubber. The ld. Collector has drawn his own conclusion and has challenged the experts evidence and test results of the appellants by reading page 484 of Encyclopaedia of Chemical Technology by Kark-Othmer, wherein it is stated that the Polyethylene is essentially Synthetic Polymer. He has come to the conclusion that the item is made from base material Polyethylene chemical synthetic Rubber and the product of this polymerisation reaction is chemically modified form of original Polyethylene. In this regard the ld. Collector has also noted the definition of Polyethylene from Hawley's Concise Chemical Dictionary and also noted some paragraphs from the book titled "Fibres, Films, Plastics and Rubbers" by W.J. Roff and R.J. Scott. Referring to these materials, the ld. Collector has held that the Polyethylene itself is a synthetic polymer with an average of much more than 5 monomer units and qualifies as a synthetic polymer as defined under Chapter Note 3(c) of Chapter 39. Therefore, he has rejected the plea of the importer that in the absence of specific test carried out, the goods cannot be classified under CTH 39 in view of Notes 3 and 5 of Chapter 39. He has held that in the light of references and data available in all books relating to organic Chemistry/Plastics/Polymers, to the effect that Polyethylene is a Synthetic Polymer which is classifiable under Chapter 39, non-testing of the sample for determining the classification under Chapter 39, is not of much consequences. *He has held that "at best it is a forgiveable failure".* (emphasis supplied). The ld. Collector has rejected two books made by the appellants namely, Plastics Insulating Materials by I.M. Mayofis and Plastic Analysis Guide by Krause, Lang, Ezrin which gives details of instructions and methodology to be adopted for determining whether the goods are saturated or unsaturated polymers. He has also rejected the references in the said books to infrared (I.R.) Spectroscopy and Nuclear Magnetic Resonance Spectroscopy (NMR) which by analysis of the samples of the polymer identify the nature of chemical bond in molecular chain by way of comparison of data/spectrum with reference spectra. He has rejected the arguments of the appellants that the ld. Professors at University College of Science, Calcutta and I.I.T., Bombay had opined that product TS-430 has characteristics of Rubber and can be considered as Terminal Vinyl Type Unsaturated products and that it satisfies Note 4(a) of Chapter 40. He also rejected the certain literature/book references on the latest developments in research for determining saturation, unsaturation in a given organic compound/mixture as noted in the books referred by them before him. The experts evidence and the affidavits have also been rejected. The ld. Collector noting the test results of the expert has held that no comparison of the spectrum enclosed with the report was shown with regard to a standard reference spectrum of Chlorosulphonated Polyethylene. He has also held that the exact nature of the sample and quantum of the unsaturation cannot be determined by such spectroscopy method alone nor have such authorities attempted to do so. He has held that the Scientific test and analysis is supposed to be carried out by taking appropriate precautions, ruling out confusing/ambiguous/false data/signals and applying appropriate controls to rule out false signals. He has held that the none of the learned professors chose to determine, spectroscopically or otherwise the chemical nature, its composition and purity before subjecting the same to spectroscopy or bromination test. He has held that the previous objective was always restricted to determine saturation/unsaturation, if any, in the sample and never to determine the actual chemical composition of the sample. He has held that the procedure applied and the inferences given therein, therefore, cast serious doubts about their acceptability as the last word in the present circumstances. He has also held that on comparison of the three reports, it can be seen that NMR report indicates two signals indicating a double bond, whereas FTIR report indicates 1 signal indicating a double bond terminal vinyl type and IR report indicates 4 signals indicating a double bond terminal. He has held that as three different contents/structures. He has in his opinion, in view of his observations, the three methods description would not be sufficient in themselves to determine the unsaturation reliably. He has held that alternatively, the doubt arises about the genuineness of the sample forwarded to the three different authorities. The three test reports put up by the importers, he has held, cannot be relied upon to determine the nature of the samples and also whether the imported TOSO-CSM TS-430 has unsaturation in its molecule. He has held that the samples were not drawn under Customs supervision as given in an intimation regarding their testing and that their entire activity was done without knowledge of Customs department. Hence the authenticity of the material placed is not free from doubt and therefore, there is no cognizance of such reports can be taken for the purpose of evidence in this case. He has also held that the texts in the books, by no means prove that there is no polyethylene without a double bond even by way of deviation. He has held that even if it is presumed that there is no polyethylene without unsaturation, the importers have not submitted any published work to prove unsaturation in the Chlorosulphonated Polyethylene. He has held that the importers in this case have tried to exploit the mention of certain traces of unsaturation in the molecules of certain polyethylene but have failed to prove that TOSO-CSM TS-430 also has such unsaturation. He has held that without conceding, even if it is assumed that certain traces of unsaturation are available in the goods, this is only by way of deviation/defects which are unintentional. Such defects/deviations do not take away the primary saturated nature of Polyethylene or Chlorosulphonated Polyethylene. Therefore, he has held that the Polyethylene or CSP containing such

negligible defect/deviation to the extent of 0.5 to 1.5 double bonds per 1000 carbon atoms has to be considered as a saturated polymer for all practical purposes. He has held that the catalogue submitted by Shri J.S. Choudhary, Import Executive on or about 17-11-1992 before the investigating officer and also recovered by the Department by way of search in the identing agent's office, indicated in the introductory paragraph that TOSO-CSM contains no double bonds in the molecule. He has held that in the absence of reliability of the test report submitted by the importers, the only alternative is to rely upon authentic literature of the manufacturer which leads to believe that TOSO-CSM is fully saturated Chlorosulphonated Polyethylene. He has rejected the various arguments raised by the importer with regard to two or more Chapters being applicable then most appropriate chapter is only Chapter 40. The ld. Collector has also rejected the appellant's plea that the case is fully covered by the Calcutta High Court's judgment in the case of *National Insulated Cable Company* as reported in 1987 (28) E.L.T. 248, which has considered the three previous judgments of the Tribunal and held that the product Hypalon-40 is classifiable under Chapter 40, on the ground that the goods before him for adjudication are TOSO-CSM TS-430 & with an allegation of wilful mis-statement and suppression of facts. He has held that he can take a different view from the view expressed by the Calcutta High Court. He has also rejected the arguments that there are no *mala fides* and there was no mis-declaration. The ld. Collector has held that the importers had knowledge of the correct material and had not disclosed the details and had taken advantage of the wrong technical reports of the Department and, therefore, larger period was invokable to confirm duty under the proviso to Section 28 of the Act. He has drawn these references after noting the statements of employees of the importer. He has held that the employees are also involved in this matter and hence, they are liable to be penalised.

Appeal Nos. C/432 & 433/94-C :

7. (i) In these appeals the appellants have challenged the Order-in-Original No. 81/94, dt. 22-2-1994. The brief facts of the case are that they were importing Synthetic Rubber Grades TS-430 and TS-530. In the impugned order the Collector has confirmed short levied duty amounting to Rs. 22,21,811/- under proviso to Section 28(1) of the Customs Act, 1962. He has also held that TS-grade material weighing 35 MTs valued at Rs. 16,72,286/- imported under various Bills of Entry as per Annexure 'A' to the show cause notice since 1988 onwards is liable to confiscation. As the same goods were not physically available and that the evaded duty was allegedly to be more than Rs. 22,00,000/-. The ld. Collector has found it fit to impose a high penalty of Rs. 25,00,000/- (Rupees Twenty Five Lakhs only) under Section 112 of the Customs Act, 1962. He has also imposed a penalty of Rs. 2,00,000 (Rupees Two Lakhs only) on Shri H.S. Sethi, partner of the appellant. It is stated by the appellants that they were manufacturing Rubber insulated cables since, 1987, by using various kinds of Synthetic Rubber. The Synthetic Rubber was being imported by them through the Bombay Customs. In the Bill of Entry filed by them, for payment of duty and clearance of the said goods, they submit that they had declared its classification under Heading 40.02, which was accepted by the Bombay Customs and the same was allowed to be cleared under the sub-heading 40.02. Samples of the goods had been drawn by the customs before allowing its clearance under the above Tariff Item and sent to the Chemical Examiner, who on analysis of the same confirmed them to be synthetic rubber as per his analysis reports dt. 16-6-1989 and 10-7-1989. The Department carried out investigations throughout the year 1993 on the suspicion that the importer has mis-declared the goods as Synthetic Rubber, while the goods imported from M/s. Sohwa Trading Ltd., Japan, were 'Chlorosulphonated Polyethylene Plastomer', which were to be classified under Chapter 39, as they were plastics and not Synthetic Rubber. On the basis of some investigations carried out and the test results obtained in the other imports of the other case, (namely, the importers of M/s. Universal Cable Ltd.), the department issued a show cause notice dt. 12-4-1993 to appellants. It is alleged in the show cause notice that none of the Bill of Entries filed by the department, they had declared the chemical composition of the Synthetic Rubber and they had described the goods as "Synthetic Rubber TS-430 and TS-530" only. It is stated that such Bills of entries were apparently cleared/assessed by the customs Department on the basis of a Test Report pertaining to a certain previous consignments imported by a certain other party. These test reports appear to be erroneous in as much as these reports indicated that the TS-430 and TS-530 materials were Polychlorobutadiene Type Synthetic Rubber. It is alleged that the Assistant Collector of Customs vide a communication F.No. S/26-497/91 2B, sought an advice from the Dy. Chief Chemist of the New Customs House as to whether the sample of TS-430 was a Polychlorobutadiene Synthetic Rubber or Chlorosulphonated Polyethylene Elastomer. The Dy. Chief Chemist vide T.O. No. 216/2-7-1991 gave the following opinion :-

> "The sample forwarded along with the file has been tested. It is not Polychlorobutadiene Synthetic Rubber. It is found to be Chlorosulphonated Polyethylene Polymer, a modified Polyethylene Polymer. It is saturated polymer, not a synthetic rubber."

(ii) It is alleged that this opinion of Dy. Chief Chemist appeared to match with the description indicated in the catalogue of TOSO-CSM materials manufactured by M/s. Tosoh Corporation, Japan and marketed under different grades viz. TS-430, TS-320, TS-530, TS-940 etc. procured by the Customs House from independent sources. A copy of such product catalogue was also recovered by the department.

(iii) It is alleged that on scrutiny of the Bills of Entry filed by the importers and its authorised representatives, it revealed that they had invariably declared in the declaration since 1984 that they had not received and did not know of any other documents or information showing a different price, value, quantity or description of the said goods and that if at any time thereafter they had discovered any information showing a different state of facts then they would immediately make the same known to the Collector of Customs. The Department has alleged that from the documents and information available with them, it

appeared that the importers were also importing and using a product named "Hypalon" manufactured by M/s. Dupont of USA and had been using the same as raw material for the manufacture of cables. They were paying higher customs duty on such Hypalon under CTH 39.01. The department has alleged that the chemical composition of Hypalon as Chlorosulphonated Polyethylene and that it is a saturated synthetic polymer. Therefore, as per Note 4(a) of Chapter 40 only unsaturated synthetic substance would be covered under the category of synthetic rubber subject to fulfilment of other laid down conditions. It is alleged that the imported goods being Chlorosulphonated Polyethylene (CSP) fully saturated would merit classification as other than a synthetic rubber under CTH 39.01 as is applicable to the brand name 'Hypalon'. The department had taken statements from several persons to rely upon their case. It is alleged that on going through pages 100-91 of a catalogue seized from the premises on 10-1-1992 under a panchnama *it was observed that the importers were well aware that TOSO-CSM material of M/s. Toyo Soda Manufacturing Co. Ltd., was Chlorosulphonated Polyethylene, product chemical name was 'Hypalon'*. (emphasis supplied). It is alleged that in spite of such complete knowledge about the chemical nature of TS-grade material, the said importer had deliberately suppressed by not declaring the actual chemical nomenclature of the TS-grade material and took undue benefit of the lower rate of Customs duty on the basis of an incorrect previous test reports, which the importer had reason to believe that the same was incorrect.

8. The appellant filed their reply denying all the allegations and reiterating that they were importing TS-430, TS-530 from 1988. They denied having been in possession of any literature and having suppressed any facts. They have stated that the products are synthetic rubber as has been found on test by the department and its classification has to be under Chapter 40, they have relied on test report dt. 17-5-1989 which states that the goods are synthetic rubber. They have also submitted that by technical No. 284 dt. 7-7-1989 the Dy. Chief Chemist had opined that the said goods are synthetic rubber and also had confirmed that the sample of the said goods were re-examined and found to be synthetic rubber. They have submitted that the goods are manufactured produced from Polyethylene by Chemical synthesis with Chlorine and Sulphur-di-oxide gas. Therefore, it does not fit into the description of heading 39.01. It is also stated that the Chapter 4 of Chapter 39 provides that headings 39.01 and 39.39 applied only to goods of a kind produced by Chemicals mentioned therein. Therefore, they submitted that the goods does not fall under Chapter 39 as per Note 3 & Note 5 of the said chapter, as in this polymer, the chemical modification relates to the main polymer chain, that is, substitution of some of the Hypalon item in the main polymer chain with chlorine and sulphur chlorosulphonated group. Therefore, they submitted that the show cause notice does not show any reason for classifying under heading 39.01. They have challenged the technical literature dt. 2-7-1991. They have stated that this technical literature dt. 2-7-1991 has been obtained by the Department to make out a false case against them. They asked for the cross-examination of the Dy. Chief Chemist who issued a certificate dt. 2-7-1989. They have submitted that the goods have the characteristic and properties of a synthetic rubber. The said goods are *pre-dominantly amorphous in nature at room temperature and its glass transission temperature (tg.) (minus 28 degree C) is below room temperature whereas plastic materials is crystaline in nature and has glass transission temperature as such they stated that the goods are Synthetic rubber and not plastics.* They have also relied on the technical opinion supplied by the department along with the show cause notice which itself described as synthetic rubber, and therefore, they submitted that even in the market it is recognised and sold as synthetic rubber only. They submitted that even if both the headings 39.01 and 40.02 equally merited consideration then in that case as per Rule 3(d) the said goods are to be classified under the heading which occurs last in numerical order viz. 40.02 of CTA. They submitted that even if the Rule 3 is not applicable then in that event of the matter under Rule 4, the goods are classifiable under heading 40.02 of CTA, since the said goods are akin to synthetic rubber, having all characteristics and uses of synthetic rubber. *They submitted that even for ITC purposes, the goods are treated and classified as Synthetic Rubber.* They pointed out to the Notification No. 345/86-Cus., dt. 16-6-1986 where the goods including Chlorosulphonated Polyethylene (CSP) falling under Chapter 39 or 40 of CTA are eligible for benefit thereof. They submitted that the said notification issued under Section 25 of the said Act reflects Government's understanding. They submitted that even according to the Government, CSP can fall only as Synthetic Rubber and thus the goods are classifiable under Chapter 40. They have submitted that 'Hypalon' has been held to be classifiable under Chapter 40. Therefore, the goods have to be classified under Chapter 40 only. They also submitted that the demands are all time-barred as they have not suppressed any fact. In all Bills of Entry they have only described the goods as 'Synthetic rubber TS 430'. Therefore, the Department having earlier obtained test results and confirmed the goods as synthetic rubber cannot change its opinion by alleging that they had been suppressing facts and that the goods are plastics. In this regard, they relied on the rulings rendered by the Hon'ble Supreme Court in the Cases :

(i) *Collector of Central Excise* v. *Chemphar and Liniments* [1989 (40) E.L.T. 276].

(ii) *Padmini Products* v. *Collector of Central Excise* [1989 (43) E.L.T. 195].

(iii) *Silverchem Industries* v. *Collector of Central Excise* [1990 (49) E.L.T. 634].

(iv) *Dr. Beck & Co.* v. *Collector of Central Excise* [1991 (54) E.L.T. 271].

(v) *Dimensional Plastiglass Industries (P) Ltd.* v. *Collector of Central Excise* [1991 (54) E.L.T. 443].

(vi) *Steel Authority of India* v. *Collector of Central Excise* [1985 (22) E.L.T. 487].

(vii) *Rainbow Ink and Varnishes* v. *Collector of Central Excise* [1992 (59) E.L.T. 593].

They have also submitted that they were taking MODVAT Credit of the CVD on the said goods as the said goods are used as input in the manufacture of final product and in this regard they relied on the ruling of the Hon'ble Tribunal in the case of *Andhra Sugar Ltd.* v. *Collector of Central Excise* as reported in 1991 (55) E.L.T. 262.

9. The ld. Collector was not impressed with their submissions. He has given the same finding as he has given in the case of *M/s. Universal Cables and Others*. As regards the limitation he has held that the appellants had suppressed the chemical composition of TS grade material, as it is Chlorosulphonated polyethylene. He has held that they had admitted about their product being identical to Hypalon. In that event of the matter, he has held that they had suppressed the material facts from the Department and hence, larger period is invokable.

10. (i) We have heard at great length arguments addressed by the ld. Advocates, Shri N.R. Khaitan and Shri V. Lakshmi Kumaran.

(ii) The department was ably argued by the ld. SDR, Shri Sharad Bhansali.

(iii) The ld. advocate, Shri V. Lakshmi Kumaran very ably presented the technical side of the case and relying on the enormous technical literature pointed out that the goods were synthetic rubber and that merely because they were of five polymers, if could not by itself fall under Chapter 39 as plastics. He submitted that five polymers are common feature for both synthetic rubber and plastics. He submitted that the Collector had proceeded on the ground that the goods were saturated polymer and as per Note 4(a) of Chapter 40 the goods would not be covered under synthetic rubber. He submitted that the department had proceeded on these lines in the show cause notice, but had proceeded on the footing that the goods were akin to 'Hypalon' and as Hypalon had been classified under Chapter 39, the impugned goods also were required to be cleared as Plastics under chapter 39. He submitted that the controversy had been settled by the Division Bench ruling of the Calcutta High Court rendered in the case of *Collector of Customs, Calcutta and Others* v. *National Insulated Cable Co. Ltd. and Another* as reported in 1994 (46) ECC 101. The Hon'ble Calcutta High Court had dealt at great length on the technical aspects of the matter and had accepted the test reports from the I.I.T. Kharagpur, which had confirmed Hypalon-40 as a synthetic rubber. He also submitted that merely because the chemical report stated that the goods to be saturated that by itself is not sufficient for classifying it under Chapter 40, as the Calcutta High Court had rejected this plea on the enormous evidence placed by the importer for classifying Hypalon under Chapter 39. He submitted that the department did not obtain clarification with regard to the requirement under Note 4(a) of Chapter 40 and there was dispute regarding it. He submitted that the item in all the text books, chemical dictionary and in all the test report which department had obtained earlier, had clearly indicated that the goods are synthetic rubber. The Department had changed its opinion on the basis of subsequent report. As regards this report the ld. Advocate submitted that it was not obtained from the samples of the consignments imported by the importer and legally such a test report cannot be relied by the Department. He submitted that legally also department ought to have obtained further reports and sought clarification from the Deputy Chief Chemist as to whether he has carried out the test for determining the details as required by Note 4(a) of Chapter 40 and as to whether the Department had all the equipments for carrying out such a test. He submitted that the entire procedure adopted by the ld. Collector was not as per law. The ld. Collector cannot substitute the technical opinion, affidavits of expert's technical knowledge, with his own opinion and such a procedure has been deprecated by the higher courts. He submitted that the correct procedure to be followed by the ld. Collector was to have put his doubt to the experts, who had given their opinion and got it clarified from them. He cannot substitute his personal opinion against the expert's opinion. He submitted that the technical and expert's opinion was found to be in contradiction with the departmental report, then it was for the ld. Collector to have obtained clarification from the Dy. Chief Chemist or the Chief Chemists by sending these reports to them. The ld. Collector could have also called the experts for cross-examination. He submitted that the findings are totally illegal and the ld. Collector's rejection of the Calcutta High Court's ruling and his comments thereon are not as per judicial disciple. He submitted that the party had not suppressed any facts and that they had only mentioned "synthetic rubber TS Grade 430" in their documents. The ld. Collector had relied on the same literature which had also described the goods as "synthetic rubber". He submitted that mere presence of "Chlorosulphonated Polyethylene" by itself will not make the goods plastics. He submitted that there is no misdeclaration or suppression in their case and, therefore, the order is required to be set aside.

(iv) The ld. advocate Khaitan relied on the evidence, literature and on the Division Bench's judgment of the Calcutta High Court which had confirmed the goods 'Hypalon' as synthetic rubber. He submitted that the department had proceeded on the basis that the goods were similar to 'Hypalon' and as Hypalon is classifiable under Chapter 39, the imported goods were also required to be classifiable likewise. He submitted that the party had been importing the goods from 1984 and it is only the department after carrying out the test had confirmed the goods as synthetic rubber and it is the Department who had described the same as "Polychlorobutadiene Type". He submitted that the appellant had accepted the test results of the Department time and again and that they had continued to describe the goods likewise. The manufacturer had also accepted the said description and had continued to describe the same in their documents. Therefore, when the ld. Collector found the earlier test report to be wrong, then it is the department, which is to be blamed. He submitted the main allegation of the department is that the goods were similar to 'Hypalon', however, the ld. Collector had departed from the said allegation and had come to a different conclusion on the basis of his own understanding of the product by rejecting the technical evidence and technical reports as

unscientific. The Ld. advocate submitted that such a finding is totally biased. He submitted that the subsequent report of the Dy. Chief Chemist is totally unsustainable. Both the advocates seriously argued on this aspect of the matter and made much of the ld. Collector's approach to the whole issue. Both the Counsels submitted that the Department ought to have produced evidence from their experts to counter the previous test reports of the Department and the expert's evidence produced by the importer. The Department having miserably failed to do so, cannot find fault in the expert's evidence. He submitted that the alleged pamphlet relied by the ld. Collector was never produced or even shown to the importers. The reliance on the said pamphlet without obtaining any explanation therein and coming to the conclusion that the goods are plastic is not a correct and legal one and therefore, is not sustainable. The ld. Advocate, Shri Khaitan also vehemently argued on time-bar and pointed out that the Department having accepted the classification under Chapter 40 as synthetic rubber from 1984 on the basis of their own test results, later have changed their opinion on the basis of a test results which is incomplete. He submitted that it was for the ld. Collector to have sent for further tests and also to have sought for clarification from the departmental experts. The ld. Collector has also not accepted their request for cross-examining the departmental chemical Examiner and, therefore, the order requires to be set aside. He submitted that there was no justification for imposing a penalty of Rs. 2,00,00,000/- (Rupees Two Crores only).

(v) The ld. SDR very ably argued the case in the face of such strong arguments placed by the ld. advocates. He submitted that the goods were not unsaturated polymers. The importer's literature and pamphlet itself has stated that the goods were saturated polymers. The Note 4(a) of the Chapter 40 of the Tariff applied only to those synthetic rubber, which are defined therein and only to unsaturated synthetic substance. Although there was no serious challenge from the department with regard to the criterion which has to be fulfilled under Note 4(a) of Chapter 40, but the ld. Collector only proceeded on the basis that the goods were saturated synthetic substance. Therefore, saturated synthetic substance cannot come within the expression 'Synthetic Rubber' as defined under Note 4(a) of Chapter 40. He submitted that the basis for the Collector to proceed was also from the reading of the text books. The experts had not obtained their test results properly and not stated categorically as to whether the goods were unsaturated or saturated synthetic substance and, therefore, the experts evidence losses its evidential value. Even if the goods were marketed as synthetic rubber yet as they were 'saturated synthetic substance', their inclusion under Chapter 40 would not be in terms of chapter notes. He agreed that the synthetic rubber is made of polymer and composed of polyethylene as in the case of plastics. The ld. Collector's ground for excluding it from the Chapter 40 was on the basis of the admission that the goods were saturated synthetic rubber substance. He submitted that the collector did not have the benefit of the judgments of the Division Bench of Hon'ble Calcutta High Court. He pointed out that the Calcutta High Court had held that even if it is saturated synthetic substance it would fall under Chapter 40 but he pointed out that in his humble opinion, the judgment would not be in the terms of Tariff Note, which had a legal force. He pointed out that the parties knew the chemical composition of the product and also knew that it was a Chlorosulphonated Polyethylene, but yet, had chosen to accept wrong test results of the department with a sole view to evade duty and therefore, it is to be construed that the party had misled the department by not giving full description, hence larger period is invokable. He submitted that the ld. Collector had not committed any judicial indiscipline but he had merely quoted from the judgments of the single judge of the Calcutta High Court who had not accepted an earlier judgment of the Tribunal. Therefore, the challenge of the ld. Collector's orders before us was unjustified. Further, the ld. Collector did not find any substance in the argument of the ld. Advocate and that the ld. Collector need not sent for comments of the Chief Chemist on the technical evidence placed by the importer. The ld. SDR justified the action of the ld. Collector on the ground that the literature of the supplier itself had clearly described the goods as saturated polymer and having 'double bond'. The said formula and the description was sufficient to depart from the technical and expert's opinion placed by the parties. The ld. Collector did not proceed in any vacuum but had based his findings on the technical literature produced by the appellants themselves. The ld. SDR submitted that the ld. Collector had reasons to disbelief the technical expert's opinion as they had not tested the goods to find out as to whether it was unsaturated or saturated synthetic substance. He also submitted that such test results cannot be accepted as the sample had not been drawn in the presence of the officials of the Department. Therefore, the ld. Collector was justified in not accepting the findings placed by the importers. He submitted that the goods were different from 'Hypalon' and that they were required to be classifiable under Chapter 39 only.

(vi) The ld. SDR also relied on the rulings rendered in the following cases :

(i) *Limenaph Chemicals* v. *Union of India* [1993 (68) E.L.T. 77].

(ii) *Jaishri Engineering Co. (P) Ltd*. v. *Collector of Central Excise* [1989 (40) E.L.T. 214 (S.C.)]

(iii) *Lucas TVS Ltd*. v. *Collector of Central Excise*, 1989 (41) E.L.T. 267.

These judgments were relied in support of the ground for invoking larger period under Section 28 of the Customs Act.

11. Countering the arguments of the ld. SDR, ld. advocates pointed out that the literature relied by the ld. Collector to hold that the goods had no 'double bond' is on the basis of his reading of the literature on TS-530 and not on TS-430. Imports pertains to TS-430 only and hence the reliance on the said literature is totally misconceived. The ld. Advocate also submitted that there is no occasion to protest with regard to the test results obtained by the department, as the test results pertained to separate proceedings, and even in those proceedings protest has been lodged. In these circumstances, there was no test results to be relied and, therefore, the department had proceeded on a totally erroneous consideration. However, the importer

had obtained all the expert's evidence to counter the departments claim and hence the ld. Collector's findings were totally illegal and not sustainable in law. They also pointed out that the subsequent report did not indicate as to whether it satisfied the Note 4(a) of Chapter 40. The importers had specifically alleged that the department did not have equipments to carry out such tests and, therefore, the ld. Collector ought to have sent for further test of the samples. They also pointed out that the words "there is no double bond" also does not find its place in the pamphlet produced and relied by the department in the proceedings. The alleged pamphlet also was not produced before the Tribunal. Therefore, it cannot be the basis for coming to a different conclusion than the one given by the experts in this case. The ld. Collector had also given a finding that no carrying the test is a "forgiveable failure". They pointed out that it is vital lapse and not a forgiveable failure. The department had also not produced any rebuttal evidence. The ld. Advocate Shri V. Lakshmi Kumaran also pointed out that the item being a synthetic rubber should fall under Chapter 40 only and in that event Chapter 39 is clearly ruled out, also, as heading 39.01 refers only to "Polymers of ethylene in primary forms". He pointed out that the chemical modified polymers should satisfy Note 5 of Chapter 39 for inclusion in Chapter 39. There was no evidence to show that the item was a plastic as per the Chapter notes of Chapter 39. He pointed out that alternatively it is Chapter 29 which could be considered but as the item is not a specifically defined compound, therefore Chapter 29 also gets excluded. He pointed out to page 554 of the HSN which had shown Chlorosulphonated Polyethylene to fall under Chapter 39.01, but the goods in question were of synthetic rubber grade and they were not as those, as stated in HSN to come under Chapter 39.01. In that event of the matter, he submitted that there was no need to differ from the judgments of Division Bench of the Hon'ble Calcutta High Court and the Tribunal was bound to follow the same.

11A. We have carefully considered the submissions made by both the sides and have perused enormous evidences, technical literature, affidavits and the judgments cited before us.

12. (i) At the outset, it has to be pointed out that the department had proceeded in the show cause notice on the basis that the imported goods were 'Chlorosulphonated Polyethylene (CSP)" and that they were similar to 'Hypalon' which had been classified under Chapter 39 and, therefore, the goods not being synthetic rubber (Polychlorobutadiene Type) were saturated synthetic substance, hence they cannot be classified under Chapter 40. The ld. Collector has clearly accepted the fact that all the test results during the 1984-89 certified the product to be synthetic rubber classifiable under Chapter 40 of the Customs Tariff Act. However, he has proceeded solely on the basis of subsequent report of Dy. Chief Chemist which has already been extracted above. Thus, the report dt. 2-7-1992 of Dy. Chief Chemist states that the goods were not Polychlorobutadiene Synthetic Rubber, but it was Chlorosulphonated Polyethylene Polymer, a modified Polyethylene Polymer. It also stated that it is a saturated polymer and not a synthetic rubber. The ld. Collector had also relied on one pamphlet of the supplier which had been seized from the premises of the partner of M/s. Skytone Electrical (India), which had stated that 'TOSO-CSP' contains "no double bond in the molecule". The literature had also described the two kinds of vulcanising agents for such compounds i.e. Metal Oxide based and peroxide/epoxy resin combination. Therefore, the ld. Collector had held that in the absence of reliability of the test report submitted by the importers, the only alternative is to rely upon authentic literature of the manufacturer which leads to believe that TOSO-CSM is fully saturated Chlorosulphonated Polyethylene. He has also relied on the literature of the product TS 430 which claims the product to be fully saturated without any double bond and therefore, he has ruled out the classification under Chapter 40. He has also held in para 61 of his order, that no comparison was made by experts with a standard Chlorosulphonated Polyethylene I.R. Spectrum. The ld. Collector relying on the book reference has held that the exact nature of the sample and quantum of the unsaturation cannot be determined by such spectroscopy method alone nor have such authorities attempted to do so. He has held that the specific test and analysis is supposed to be carried out by taking appropriate precautions, ruling out confusing/ambiguous/false data/signals and applying appropriate controls to rule out false signals. Therefore, he has held that none of the ld. professors chose to determine, spectroscopically or otherwise the chemical nature, its composition and purity before subjecting the same to spectroscopy or bromination test, and that the professors objective was always restricted to determine saturation/unsaturation, if any, in the sample and never to determine the actual chemical composition of the sample. Therefore, he has held that the procedures applied and the inferences given therein, therefore, cast serious doubts about their acceptability as the last word in the present circumstances. He has also compared the test results and observed that NMR report indicates two signals indicating a double bond, whereas FTIR report indicates 1 signal indicating a double bond terminal vinyl type and IR report indicates 4 signals indicating a double bond terminal. Therefore, he has held that as three different methodology reveal three different results, it cannot be reasonably determined as to how many double bonds are there in the molecule and as to how a given uniform sample would contain three different contents/structures. Therefore, he has held that in his opinion, three methods described above would not be sufficient in themselves to determine the unsaturation reliably. He has also held that the doubt arises about the genuineness of the samples forwarded to the three different authorities. He has also stated that the test in the books, by no means prove that there is no Polyethylene without a double bond even by way of deviation. He has held that even if it is presumed that there is no polyethylene without unsaturation, the importers have not submitted any published work to prove unsaturation in the Chlorosulphonated Polyethylene. With all due respect to ld. Collector we have to hold that this type of approach adopted by the ld. Collector, with utter disregard to the technical opinion of the expert/institutions is totally erroneous and unfortunately is without any sound basis. The ld. Collector ought to have to put his doubts to the technical experts to seek clarification from

them or he could have sent the evidence produced by the importers to the departmental experts for clarification and opinion. Having failed to do so and also having failed to obtain further test results of the remnant samples, the findings arrived at are, therefore, totally fallacious and unsustainable in law. It is well settled that the adjudicating authority cannot substitute the expert's opinion with their own opinion. It is also well settled that the technical expert's opinion is the last word in technical matters unless it is shown to the contrary with better evidence. The ld. Collector may be having a genuine doubt with regard to the literature seized from the importers. But this literature was not put to the appellants at all, to seek a clarification from them. The said literature was also not produced before us. The ld. SDR pointed out that his Chief Departmental Representative had personally contacted the ld. Collector to send someone to explain the technical aspect of the matter. However, the ld. Collector had expressed his helplessness in the matter as no expert was available. Therefore, it is very clear that the department has not taken keen interest to assist the Tribunal in this matter to render justice to the parties.

(ii) The department had cleared the goods from 1984 as Synthetic Rubber, time and again by testing the samples of the goods and satisfying themselves about the contents of the goods. Thereafter after a lapse of time i.e. in 1992, when the Department has obtained a fresh test results which is different from the previous one, then in such event it was for the Department to have obtained re-test from remnant samples and also should have carried out further enquiry from the expert authorities to find out as to whether the various test were carried out as required under Note 4(a) of Chapter 40 or not? The appellants had specifically raised this plea before the ld. Collector that the Dy. Chief Chemist had not carried out the test as required under Note 4(a) of Chapter 40 and the Department did not have any equipments to carry out such tests. In the light of this submissions, the ld. Collector ought to have inquired from the Dy. Chief Chemist, who gave the contradictory report, from the earlier test results, to clarify the matter in the light of evidence placed by the importers. The manner in which the ld. Collector has proceeded in this matter by replacing the expert evidence with his personal opinion, by rejecting technical expert's opinion; and also having not said a word on the affidavits of experts and professors, therefore, clearly shows that the ld. Collector had a pre-determined mind in this case, to somehow pass an adverse order against the importers. It is a well settled that a quasi-judicial authority should act without bias and with impartiality and fairness and without prejudice and should consider all the evidence on record, also by giving full opportunity to the importer to establish their case and exonerate themselves from the charges brought forth by the prosecuting agencies. In this case the ld. Collector has not performed this function and has not assisted the Tribunal in this matter.

(iii) The department's charges are that the material imported are akin to Hypalon and as Hypalon is classified under Chapter 39, the same is required to be classified under Chapter 39 and not under Chapter 40. The Department has also proceeded on the presumption that the goods are saturated synthetic substance and hence, they are eliminated from Chapter 40. This aspect of the matter has been concluded by the Hon'ble Calcutta High Court in the case of *National Insulated Cable Company* [1994 (74) E.L.T. 568 (Cal.) = 1994 (46) ECC 101]. The Hon'ble Calcutta High Court has held that even if the goods are saturated synthetic organic polymer they continue to fall under Chapter 40 and not under Chapter 39. The findings given by the Hon'ble High Court in paragraphs 8 to 12 are reproduced herein below :

> "8. The appellants have challenged the said decision of the learned Trial Judge. We find that in *Collector of Central Excise, Kanpur* v. *Krishna Carbon Paper Co.* [1989 (19) ECC 32 (SC)], their Lordships of the Supreme Court held and observed that where no definition is provided in the statute itself for ascertaining the correct meaning of a physical nature, the reference to a dictionary is not always safe as it gives all the different shades of meaning. Where the word has a scientific or technical meaning and also an ordinary meaning according to common parlance, it is in the latter sense that in a taxing statute, the word must be held to have been used unless contrary intention is clearly expressed by the Legislature. If special types of goods is subject-matter of a physical entry, then that entry must be understood in the context of that particular trade, bearing in mind that particular word. The trade meaning is one which is prevalent in that particular trade where such goods are known or traded. The Court also held that the trade notices and Tariff Advices are not relevant as such in construing items for Tariff Schedule.
>
> 9. In this case, we find that Hypalon-40 is manufactured by only one concern in the world, namely DU PONT DE NEMOURS INTERNATIONAL S.A. in the United States of America. The U.S. Manufacturers admittedly sell Hypalon-40 throughout the world as "synthetic rubber". It is also an admitted position that Hypalon-40 is known in the market and amongst commercial people the world over as a variety of Synthetic rubber.
>
> Furthermore, according to the test report of Indian Institute of Technology, Kharagpur, it was found that hypalon can be vulcanized by sulphur and thus can be irreversibly transformed into an elastic and non-thermoplastic substance. This is one of the characteristics of synthetic rubber as stated under Note 4 to Chapter 40 of the First Schedule to the Customs Tariff Act, 1975. Furthermore, the I.I.T. Test Report also shows that on sulphur vulcanization of Hypalon-40, the matter could be extended to about four times its original length and that when extended twice the original length and then released the matter returned to its original length. This was admittedly another characteristic of Synthetic rubber as stated under Note 4 to Chapter 40 of the Customs Tariff Act, 1975. The Test Report of I.I.T., therefore, clearly shows that Hypalon-40 specifically corresponded with the qualities of synthetic rubber as specified under Note 4 to Chapter 40 of the Customs Tariff Act, 1975.
>
> The rubber technology centre of I.I.T. also stated that "Hypalon is a polymer (a new synthetic rubber)....."
>
> 10. If we adjudge the relative merits and demerits of the two reports, we find that the departmental testing was negatively and selectively oriented. The test was directed only for the ouster of Hypalon-40 from the classification of synthetic

rubber. There is another loophole in the report. It made a leap for the conclusion that it was synthetic resin, though exclusion from synthetic rubber does not necessarily bring the item under synthetic resin. An item not being synthetic rubber has again to be proved by test whether it is synthetic resin. It is not in dispute that the Customs authorities conducted no test in that direction. To our mind, the report of the Indian Institute of Technology merits more attention and credibility. It conducted the test in a more comprehensive manner. It found Hypalon to be a polymer. It further found that the item possesses the essential properties of synthetic rubber, i.e., capability of vulcanization by system to transform Hypalon irreversibly into an elastic and non-thermoplastic substance and further its capacity of being extended to about four times of its original length and further its power to revert to its original length when extended to twice the original length if released after extension. The only gap in the results of the said test is that unlike synthetic rubber, the imported item, i.e., Hypalon-40 was a fully saturated substance, if we go by the report of testing by the Customs authorities. But that by itself does not preclude the classification of the item as synthetic rubber when it has all the functionalities and properties of synthetic rubber.

11. In this view of the matter, it is clear that both in the commercial world as well as on scientific test being carried out by I.I.T., Kharagpur, Hypalon-40 was known and/or found to contain qualities of synthetic rubber.

12. We, therefore, find no merit in the appeal filed by the appellants herein. The appeal is accordingly dismissed."

13. In this case the importer has produced enormous evidence and that this evidence clinches the issue and does not leave any room for doubt that the goods are synthetic rubber and synthetic rubber can be classified under Chapter 40 as per Note 4(a) the ld. Collector's sole reliance on the pamphlet of supplier, which is said to describe the goods as not having double bond, is not sufficient evidence at all. This pamphlet has not been produced before us. Further more the experts in this case has found the items to be unsaturated synthetic substance and not a synthetic rubber. In that event of the matter, it is not proper for the adjudicating authority to replace such experts opinion, with his own opinion, in the absence of any rebuttal evidence placed by the Department. There is no evidence before us except the test report of Dy. Chief Chemist dt. 2-7-1992. This report is not conclusive, in view of earlier reports of the Department, in favour of the importers and also in the absence of any explanation from the said Dy. Chief Chemist in the light of fresh evidence of the importers. The plea of the importer for retest of the remnant samples has been unjustly rejected without any reasons at all. Therefore, the orders suffer from infirmity, requiring to be set aside.

14. We notice that Hon'ble Calcutta High Court in the case of *National Insulated Cable Co. Ltd.* v. *Union of India* as reported in 1994 (69) E.L.T. 465; on this very point has held that the chemical report of the said chemist cannot be relied as a decisive factor, being not conclusive. The findings given by the single Judge in this matter has been confirmed by the Division Bench and, therefore, the finding given in paras 24 to 26 of the single Judge also requires to be quoted in order to disposal the doubts raised by the ld. Collector on this point. The same is noted herein below :

"24. On the state of records, the case of the customs authorities appears to be based mainly on the chemical report. This chemical report is not conclusive of the stand taken by the customs authorities. The test results do not indicate anything positive in support of the contention of the customs authorities. A note is attached to the test memo. This note is dated 23rd August, 1984 which invites attention to Customs T.O. No. 1 of 82-83 dated 2nd April, 1982 of the Deputy Collector of Customs as regards the assessment of Hypalon-40. According to the Deputy Collector Hypalon-40 is appropriately classifiable under Chapter 39. This T.O. on assessment by the Deputy Collector of Customs is a general instruction not based on any scientific data. It however mentions certain technical features. The conclusion reached by the Dy. Collector is that Hypalon is classifiable under Chapter 39 because Hypalon is fully saturated. It however goes on to say that Hypalon is as such saturated and that unsaturation results during curing process. *Prima facie* it appears that the said T.O. of the Dy. Collector proceeds on a fundamental technical mistake in that the so-called saturated rubber which are considered to be resin by the customs authorities are also unsaturated. The departmental chemist has not found, as contended by the customs authorities, that Hypalon-40, on the basis of chemical examination, does not satisfy the chemical definition of synthetic rubber. The test results have been quoted hereinabove which would go to show that no positive result was indicated but reference was made to the T.O. issued by the Dy. Collector of Customs. The difference between saturated and unsaturated rubber lies mainly in the degree of unsaturation which would be apparent from the chemical formula of Hypalon-40 relied on by the writ petitioners.

25. From the technical literature as relied on by Mr. Pal it is also evident that Hypalon is chemically Chlorosulphonated Polyethylene designated as C.S.P. This is produced by the reaction of polyethylene in solution with sulphur dioxide and chlorine, thereby giving vulcanisable rubber. Hypalon is the trade name given by M/s. E.I. Du Pont De Nemours, U.S.A., the first and only manufacturer of C.S.P. in the world. Hypalon-40 is on type of Hypalon rubbers suitable for general use and easy processing.

26. Before the Appellate Collector, Madras the contention raised was that Hypalon-40 is neither an artificial/synthetic resin nor a plastic material and that it is a premium rubber developed by Du Pont of U.S.A. especially for industrial applications requiring a tensile strength, abrasive and flex-fatigue resistance. It was further contended that the manufacturers had confirmed that the product is synthetic rubber; that Hypalon is the registered trade made for chlorosulphonated polyethylene manufactured by Du Ponts and that the product is known in the trade throughout the world as synthetic rubber. It was also submitted that Hypalon is specifically classified as synthetic rubber in the Import Trade Control Policy".

15. Before the ld. Collector, the appellant had relied the single judgment of Hon'ble Calcutta High Court in the case of *National Insulated Cable Company Ltd.* as reported in 1987 (28) E.L.T. 248. In this case, the Hon'ble High Court had dealt in great details on the chemical composition of the product and had noticed the reports of the experts, more particularly those of

I.I.T., Kharagpur. The Court had also applied the rule 4 of the Rules for the Interpretation. Therefore, the ld. Collector in the light of these findings of the Hon'ble High Court, ought to have decided in favour of the appellants. Somehow he has emboldened himself, to differ from this judgment, which we do not find it to be in keeping with the judicial discipline. Although the ld. Collector has got liberty to distinguish the judgment but in a case like this, where the Department has proceeded on the basis that the item is equivalent to Hypalon, this judgment should have been applied as it had gone in very great detail on all technical aspects including Note 4(a) to Chapter 40 of the Tariff. In that event of the matter, it was not proper for the ld. Collector to have passed any comments on this judgment of Hon'ble Calcutta High Court. There is no justification for the ld. Collector to have made such comments on the ld. Judgment of the Calcutta High Court. The ld. Collector was inclined to accept the single member judgment of the same High Court in the case of *National Insulated Cable Co. Ltd.,* which was in favour of the deptt. However, this judgment had been rendered on 18-2-1986 while the judgments relied by the importers of the same High Court was rendered on 16-1-1987. Therefore, a later judgment prevails. The department had challenged the single Judge judgment of *National Insulated Cable Co. Ltd.* before the Division Bench and as such the ld. Collector ought to have waited for the outcome of the case before the Division Bench. Instead he has proceeded to accept an earlier judgment of the Calcutta High Court by rejecting the later judgment which was in appeal. Therefore, we are not inclined to accept the procedure adopted by the ld. Collector in this matter in chosing the judgment which was earlier in time and not following the later judgment, which had been appealed by the Department before the division bench and judgment was awaited. The ld. Collector has acted hurriedly in this matter to pass the order without due application of mind and without appreciation of the evidence and the controversy in issue.

16. The Tribunal in the case of *Inarco Ltd.* v. *Collector of Customs* as reported in 1990 (50) E.L.T. 161 had classified the products imported viz. Chemigum N-328 and Chemigum N-628B under Chapter 40. The Tribunal on examination of the evidence placed by the importer which had not been controverted by the department, held the items to be classifiable under Chapter 40. The Tribunal had taken into consideration the technical understanding of the product, literature and the certificate issued by the Indian Rubber Manufacturers Research Association (Finance Ministry, Government of India) to consider the product as synthetic rubber for classifying it under Chapter 40. The importer in this case has also relied on the certificate issued by the Indian Rubber Manufacturers Research Association, who have clearly stated that the product is a synthetic rubber satisfying the criterion laid down in Note 4(a) to Chapter 40. Several evidences produced by the importer are from reputed Government Organisations and the affidavits filed are from the professors and experts in the field, therefore, the entire evidence merits consideration and acceptance.

17. Earlier classification for licensing purpose had come up in the case of *Cable Corpn. of India* v. *Collector of Customs* as reported in 1993 (67) E.L.T. 611. In this case the Department had challenged the classification of Hypalon-40 as synthetic rubber under Open General Licence, Appendix 6, List 8, Part I Serial No. 537 of Import Policy 1990-93, as not permissible. The Tribunal had gone into great detail on this matter and after examining the issue had held that Hypalon-40 is a synthetic rubber. The Tribunal examined Appendix 3 Part A at Serial No. 482, which read as follows :

> "482. Synthetic rubber, the following :-
>
> (i) Styrene Butadiene Rubber (SBR); and 34-1193-00-3
>
> (ii) Poly Butadiene Rubber (PBR)-34-1192-00-7".

The Serial No. 537, Appendix 6, List 8, Part I of the Import Policy for 1990-93 had covered "Synthetic rubber other than those appearing in Appendix 3, Part A". Therefore, the Department had alleged that the Hypalon-40 did not fall under S.No. 537. The Tribunal had taken into consideration the interpretation given by the Chief Controller of Imports & Exports, in the matter of interpretation of import Policy and Procedures as per para 28 of the Import Policy 1990-93, and held that such opinion will prevail over any clarification given by any other authority. The said authority had given an opinion that the product Hypalon-40 is a synthetic rubber. The Tribunal had upheld the clearance of the goods under OGL. Referring to this controversy the Tribunal has held in paras 6 to 10 of the order as follows :-

> "6. There is no dispute that what the appellants have imported is Chlorosulphonate of Polyethylene and this does not correspond to the entry in Appendix 3 Part A. This being so, the interpretation placed by the licensing authorities on the Policy has to be accepted. In this connection we would like to refer to a decision of the Trubunal in the case of *Southern Sea Foods Private Ltd.* v. *Collector of Customs, Madras* [1986 (26) E.L.T. 89] in which a single Member of the Tribunal has held that any interpretation of the import and export policy or procedure given by the Chief Controller of Imports & Exports, New Delhi will prevail over any other clarification in the same matter given by any other authority or person. We observe that the learned Additional Collector has not cited any authority for his view that an individual clarification for a specific item by the CCI is not binding on the adjudicating authority unless there is a doubt on the scope of such entry or in the nature in specification of the product. We are unable to accept such a view which could have some force if the appellants had not sought clarification before the shipment of the goods and had approached the licensing authorities for a clarification after the goods had arrived and the Customs authorities had called the importation into question. Therefore, on this ground alone, we consider that the learned Additional Collector has taken an erroneous view of the matter.
>
> 7. As to the second question of co-relation between the entries in the Customs Tariff and those in the Import Policy, for

which the learned Additional Collector has referred to paragraph 65(2) of the Handbook, all we can say is that this provision merely says that with effect from 1st April, 1988, the Schedule to the Imports (Control) Order has been revised in alignment with the first Schedule to the Customs Tariff (Amendment) Act, 1985. Even though the two are aligned, there is little doubt that the purpose of classification in two enactments is distinct and separate. Since the Open General Licence is a document which provides for import of goods without an import licence and categorises innumerable varieties of goods under different categories for the purpose of regulating their imports, the considerations which go into this classification are very different from those which decide classification for purposes of levy of Customs duty. We are, therefore, unable to accept this view of the learned Additional Collector. We would also like to mention that during the hearing the learned Departmental Representative had referred to the decision of the Tribunal in the case of *National Insulated Cables Co. of India Ltd.* v. *Collector of Customs, Calcutta* [1985 (21) E.L.T. 793] in which it was decided that Hypalon-40 & 40E were classifiable as Synthetic Resins under Heading No. 39.01/06 of the Customs Tariff and not as Synthetic Rubber under Heading 40.01/04 ibid. Since the question of classification of the goods for assessment of duty is not the subject matter of the appeal before us, it is not necessary for us to go into this question with reference to the decision cited before us. In fact, the following portion of paragraph 11 of the decision in that case is relevant and is quoted below :-

"The fact that the import control authorities recognise Hypalon as a Synthetic Rubber is not, in our view, decisive of the classification of the goods under the Customs Tariff Schedule since the objects of the two enactments are different."

8. The learned DR had also referred to the judgment of the Supreme Court in the case of *Akbar Badruddin Jiwani* v. *Collector of Customs* [1990 (47) E.L.T. 161] and paragraph 45 of the judgment in particular in which the Supreme Court had referred to a decision of the Tribunal in the case of *Health Ways Dairy* v. *State of Haryana.* While quoting from a certain paragraph of this decision reference was made to the fact that the Import Schedule of the ITC Order was aligned with the Import Schedule of the Customs Tariff and the rules of interpretation etc. of the Customs Tariff became automatically applicable to the interpretation of the policy. While there could not be two views on the general question, what we have to consider is that the Open General Licence itself in the Import Policy is regulated by Appendix 6 which runs into 52 paragraphs covering 17 pages besides there are as many as 11 lists giving hundreds of items in each list.

9. According to the clarification of the ITC authorities the import of Hypalon-40 is permissible under the Open General Licence and since this clarification was available before the goods were shipped there is no need to go into other questions for the purpose of deciding the validity of the import. In fact, Shri Shroff had pointed out during the hearing that the licensing authorities had also furnished a clarification about the matter to the Rubber Association which was subsequently accepted by the Customs House and clearances have been allowed under the Open General Licence. We consider that in view of the clarification obtained prior to the shipment of the goods it is not necessary for us to go into other questions for the purpose of deciding this appeal. The learned JDR had raised a question that the clarification had not been given by the Chief Controller of Imports and Exports but by the Joint Chief Controller of Import and Export, Bombay.

10. It appears from paragraph 27(3) of the Import policy that it is permissible to obtain clarification on any item-wise entry by Actual Users from the Regional Licensing Authority at Delhi (CLA), Bombay, Calcutta & Madras and that such clarification can be given in consultation with the concerned Technical Authority or the Regional Clarification Committee, wherever considered necessary. There is a procedure prescribed for obtaining such clarifications and the appellants have submitted copies of their application as well as the clarification furnished. In view of this, we do not consider that there was any irregularity in the clarification furnished by the Joint Chief Controller of Import & Exports, Bombay. In view of the above, the impugned order is set aside and the appeal is allowed with consequential relief to the appellants."

18. Therefore, it is very clear that the importing authorities has also considered Hypalon-40 as synthetic rubber and that the Tribunal/High Court has accepted both for licensing purpose and for the classification purpose, the goods to be synthetic rubber. The Department had proceeded on the basis that the item is akin to Hypalon, as both the items contains Chlorosulphonated Polyethylene and, therefore, the classification under Chapter 40 cannot be ruled out; as the Govt. of India's understanding both for the purpose of interpretation and for the licensing purpose is that Hypalon-40 is a synthetic rubber. The Hon'ble Supreme Court of India in the case of *Collector of Central Excise* v. *Parle Exports Ltd.,* as reported in 1988 (38) E.L.T. 741 has held :-

"It is a settled principle of interpretation that Courts in construing a statute of Notification will give such weight to the interpretation put up on it at the time of enactment or issue and since by those who have to construe, execute and apply the said enactments."

This view has also been expressed by the Hon'ble Supreme Court in the case of *Desh Bandhu Gupta & Co. & others* v. *Delhi Stock Exchange Association Ltd.* as reported in AIR 1979 SC 1049. The Hon'ble Supreme Court has relied on the principle of '*contemporanea expositio* would apply in a case where documents issued by Government almost simultaneously with issuance of the Notification explaining the manner in which transactions stated in the Notification were intended to be closed, and therefore, it has been held that the documents can be looked into for finding out the true intention of the Government in issuing the Notification. In this regard, the Hon'ble Supreme Court has also relied on page 268 of Maxwell's Interpretation of Statute (12th Edition) and Crawford on Statutory Contruction (1940 Edn. Pp. 393-395 para 219). In this case the understanding of the Licensing authorities is that Hypalon-40 is a synthetic rubber. The understanding of the Government is also to treat the goods as synthetic rubber under Notification No. 345/86-Cus., dt. 16-6-1986. The principle laid in these above cited rulings are also applicable to the facts of the present case, while interpreting the intention of the Government to treat these

goods as synthetic rubber for the purpose of licensing under ITC Policy and for the purpose of notification.

19. There is no doubt in this case that the goods are considered as synthetic rubber in trade and commercial parlance. Therefore, even going by the Interpretation Rules 3(c) the goods are to be classified under Chapter which occurs last in the numerical order i.e. under Chapter heading 40.02 of CTA. In view of the fact that the goods have been classified as synthetic rubber and even going by the arguments that Chapter 39 equally merits consideration. Even by applying Rule 4 of Rules of Interpretation, the goods are to be classified under Chapter heading 40.02 as admittedly they are treated by Experts and in Trade as synthetic rubber, by virtue of its uses and characteristic as that of synthetic rubber. In that view of the matter, the Department having not established that the goods are plastic under Chapter 39, its classification therein is clearly ruled out. We have also to observe that the Department had not proved that importers have misdeclared or suppressed the correct description of the goods for the reason that the Department itself by their own test report had accepted the goods as synthetic rubber from 1984 onwards. In the case of *M/s. Skytone Electrical (India),* the appellants were describing the goods as synthetic rubber TS 430. They were not declaring it as synthetic rubber (Polychlorobutadiene Type). Therefore, the allegations made against them that they knew contents and yet they had misdeclared the correct contents is also not sustainable. Earlier test reports of the importers also indicated that the goods are synthetic rubber and the Department had accepted the same. Therefore, in this case the charges of suppression or misdeclaration to invoke larger period is not sustainable.

In view of our findings, the impugned orders are set aside and the appeals are allowed, with consequential reliefs, if any.

Sd/-

(S.L. Peeran)

Member (J)

Dated : 29-11-1994

20. [Contra per : S.K. Bhatnagar, Vice President]. - With due respects to Hon'ble Member (J) my views and orders in the matter are as follows :-

21. I observe that two basic issues which are required to be addressed in the first instance relate to :

(i) Identification of the product i.e. determination of its correct structure, nature and type; and

(ii) depending upon (i) whether it could be considered as an elastomer of a type classifiable under Chapter 40 or a polymer of a type classifiable under Chapter 39.

22. For this purpose, without going into the history of the case at this stage, I will prefer to proceed on the basis of an agreed area about which there is no doubt or dispute *at this stage.*

23. Here I am referring to the latest departmental test result (vide TO 216/92 of Dy. CC) which, *inter alia,* describes the material as "chlorosulfonated polyethylene polymer". This description is not disputed by both the appellants *at this stage.*

Hence, the main question which survives in this context is as to whether such a product is classifiable under heading 39.01 as a Chemically modified Polyethylene as claimed by the Department or as a Synthetic rubber of a type classifiable under heading 40.02 as claimed by both the appellants.

24. During the hearing before this bench, the debate has centered in this respect mainly on Chapter Note 4(a) of Chapter 40, the test reports and the Chapter notes of Chapter 39 in relation to technical parameters.

25. As the provisions relied upon are highly technical in nature, I would like to make first a few observations based on internationally recognised books of high repute such as Rubber Technology Handbook by Dr. Werner Hofmann and Rubber Technology (Second Edition) by Maurice Morton (Director, Institute of Polymer Science, Ohio). The Encyclopedia of Chemical Technology by Kirk Othmer, Encyclopedia of Polymer Science and Engg. McGraw Hill Encyclopedia of Science and Technology, etc.

26. A study of these books shows that :-

(i) Chlorosulfonated Polyethylene (CSM) is a **saturated** polymer (Hofmann P/106); (Morton P/343)

(ii) It is a variety of **Synthetic** Rubbers (Hofmann; Morton; Kirk Othmer) (the reference here is to commercially known varieties).

(iii) Synthetic rubber is of **various** types (including both (a) Unsaturated varieties; as well as (b) Saturated varieties (Hofmann; Kirk Othmer; Morton)

(iv) **Thermoplastic** 'rubbers' are intermediate between rubber and plastic (Kirk Othmer P/368);

(v) **Elastomers** are intermediate between Plastomers and Duromers (Hofmann P/4).

27. This is evident from what follows :-

— In his 'RUBBER TECHNOLOGY HANDBOOK' Dr. Werner Hofmann classifies CSM under synthetic rubbers and indicates it as commercially important.

— At page 106 (3.3.11) he indicates the structural formula of CSM as follows :

$-CH_2-CH-CH_2-CH_2-CH-CH_2-$

| |

Cl SO_2Cl

Chloro- Ethylene Chlorosulfonyl Units

ethylene ethylene

— At 3.3.11.3 HOFMANN mentions about structure of *commercially* available CSM grades and states *inter alia* that :-

"Due to its *fully saturated polymer* backbone, CSM is, like CM, very resistant to weathering, aging, ozone and chemical degradation."

HOFMANN while indicating compounding of CSM mentions various *vulcanising chemicals* including polyvalent *metal oxides*, polyfunctional alcohols like *penta erythritol*, *peroxides* and *di amines* etc. It also mentions vulcanising accelerators (including sulfur/sulfur donors like TMTD, DPTT and MBTT), fillers, plasticizers sand indicates that antioxidants are generally not needed.

28. The ENCYCLOPEDIA OF POLYMER SCIENCE AND ENGINEERING (Vol. 6-Page 513-21) mentions as follows :-

"Chlorosulfonated polyethylene (CSM) is the basis of a family of *synthetic elastomers* prepared by simultaneous chlorination and sulfonation of polyethylene.

It indicates the reaction and gives the same structural formula as Hofmann and Morton.

It also mentions *inter alia* that *"lower* chlorine content yields a material which is still *partly thermoplastic,* whereas higher concentrations give a product with a higher glass-transition temperature, which therefore is *less* rubbery."

The polymer properties depend upon the chlorine content, sulfur content (concentration of sulfonile chloride groups), and molecular weight.

The moony viscosity is regarded as an important property of these elastomers which gives some indication of processing behaviour.

These polymers are usually compounded, shaped, and cross linked to form useful articles. Acid acceptors fillers, plasticizers, stabilizers, processing acids and curing ingredients are compounded with the polymer.

The cross-linking systems for CSM elastomers include sulfur donors, peroxides and maleimide cures.

29. This Encyclopedia also states/indicates that CSM includes:

(i) *Low Chlorine* Polymers whose "properties are those *between thermoplastics* and *elastomers"* e.g. Hypalon 45 and 623 grades.

(ii) *General Purpose Elastomers* which are amorphous, linear polymers e.g. 4 grades of Hypalon.

(iii) *High Chlorine* Polymers in which "raising the chlorine content above 43% increases glass-transition temperature and stiffness, yielding a nearly *plastic material."* _____"and they are *used in some* applications *without cure."* (e.g. Hypalon 48 and 4SS)

(iv) Branched CSM Polymers which show Low Moony and Solution Viscosities e.g. Hypalon 20 and 30.

It is also noteworthy that the description of *commercial synthetic elastomers* of CSM type given in this Encyclopedia is mainly with reference to Hypalon of Dupont trade mark and the fact that TOYO SODA has also introduced CSM polymers has been taken note of.

30. MAURICE MORTON in his "RUBBER TECHNOLOGY" concentrates on Hypalon and mentions various grades of Hypalon. He indicates that *uncompounded and uncured* Hypalon is a *thermoplastic elastomer.* He also indicates that conventional curing and melting techniques apply to composition of Hypalon.

At the same time, he also mentions various other modern techniques. He specifically refers to Hypalon-40 and describes it as a general purpose type and notes that Hypalon-45 and 48 are more thermoplastic than Hypalon-40. Significantly, it mentions, *inter alia*, that antioxidants are not required as a compounding ingredient for Hypalon since the polymer is *chemically saturated and contains no double bonds.*

While mentioning various curing systems and techniques, it also mentions about an accelerator system composed of various chemicals; And it is noteworthy that sulfur donors/sulphur as such find mention only as a component of acceleration system which are used in combination with the main vulcanising agent and other chemicals used as plasticisers etc.

31. Thus, it is observed that some varieties of CSM *do not require vulcanisation* (as for *e.g.* TS 320) and those *which do require curing are normally vulcanised with chemicals other than sulfur* (although, as already noticed, sulfur donors/sulfur may be used in certain cases as components of accelerator system used during vulcanisation in combination with other chemicals and plasticizers, fillers etc.

Moreover, the manufacturers bulletins describes the products as elastomers and we have already noted that thermoplastic elastomers have properties in between plastics and rubbers. The degree of plasticity or rubber like quality

depends upon the composition, compounding and/or processing etc.

32. THE TECHNICAL BULLETINS (No. 1 & 2) issued by the manufacturers M/s. TOYO SODA MANUFACTURING CO. themselves describe the products as follows :-

Synthetic Rubber

TOSO - CSM

Chlorosulfonated Polyethylene Elastomer

In the 'Introduction' it is stated that "the following points *are different from other general synthetic rubbers"* and emphasises that : -

"(i) *"TOSO-CSM* requires almost no mastication since CSM *is* more *thermoplastic* than other general synthetic rubbers.

(ii) "Since TOSO-CSM contains *no double bond* in *its molecule* it needs no anti-oxidants except a special case".

(iii) "Selection of vulcanising agents is very important for TOSO-CSM due to the *absence of the double bond in the molecule.* There are two kinds of basic combination system of *vulcanising agents* for TOSO-CSM compounds;

(1) One is *metaloxide*/vulcanisation *accelerator* combination for compounds of general use;

(2) Another is *peroxide/maleimide/epoxiresin* combination of the compounds of special use."

33. The above extracts from recognised technical works of international repute as well as from the technical bulletins of the manufacturer of the imported goods in question themselves show that the product(s) *is a saturated synthetic organic substance which does not require vulcanising with sulfur.* Designated vulcanising agents prescribed by the manufacturer are other chemicals (although sulfur donors could be used as components of accelerator system). It is also noteworthy that TOYO SODA Technical Bulletins No. 1 & 2 between themselves refer to various grades of their TOSO-CSM including both TS-530 and TS-430 and indicate their characteristic properties and main applications.

(It may also be mentioned at this stage that technically there is a distinction between vulcanisation agents *(per se)* and vulcanising accelerators or activaters; and *this distinction* is recognised *by HSN and the Customs Tariff as well).*

34. In view of the above technical position, we are now required to see whether the products satisfy Chapter Notes of Chapter 40 relating to *'Rubber and Articles* thereof'; And we find that following Chapter Notes state that :

1. Except where the context otherwise requires, *throughout this Schedule,* the expression *'rubber' means* the following products whether or not vulcanised or hard natural rubber, balata, guttapercha, guayule, chicle and similar natural gums, *synthetic rubber,* factice derived from oils, and such substances reclaimed.

4. In Note 1 above and in heading 40.02, the expression *'synthetic rubber'* applies to :

   (a) *Unsaturated synthetic substances* which can be irreversibly transformed by *vulcanisation with sulfur* into *non-thermoplastic* substances which, at a temperature between $18^{o}C$ and $29^{o}C$, will not break on being extended to three times their original length and will return, after being extended to twice their original length, within a period of five minutes, to a length not greater than one and a half times their original length. For the purposes of this test, substances necessary for the cross-linking, such as vulcanising activators or accelerators, may be added; the presence of substances as provided for by Note 5(b)(ii) and (iii) is also permitted. However, the presence of any substances not necessary for the cross-linking, such as extenders, plasticizers and fillers, is not permitted.

35. Therefore, to be considered as synthetic rubber for the purposes of this chapter, the product must *inter alia* be :

(i) First and foremost an *unsaturated* synthetic substance whereas the products in question are saturated. Therefore, on this count alone they get excluded.

(ii) Secondly, the product must be irreversibly transformable by *vulcanisation with sulfur* into *non-thermoplastic* substance;

Whereas the products in question are thermoplastic elastomers which *do not require vulcanisation with sulfur;* And on curing or *vulcanisation* with other chemicals they *become* even more *thermoplastic.*

Hence, on this count also they are hit by the provision and get excluded.

The flexibility/elongation aspect by itself was not sufficient and fulfilment of the essential criteria which were critical for distinguishing Chapter 40 polymers from Chapter 39 polymers was necessary; since these are not fulfilled the products go out of Chapter 40.

36. This is however, not the end of the story and we have to examine further and find out that since they do not fall in this chapter whether they could be classified under Chapter 39?

37. In this respect, we find that the Department has pleaded for 39.01 on the ground that these are polymers of Ethylene whereas the appellants have opposed this contention and drawn our attention to following Chapter notes :-

CHAPTER 39

NOTES : 1. *Throughout this Schedule* the expression *"plastics"* means those

materials of heading Nos. 39.01 to 39.14 which are or have been capable, either at the moment of polymerisation or at some subsequent stage, of being formed under external influence (usually heat and pressure, if necessary with a solvent or plasticiser) by *moulding, casting,* extruding, rolling *or other process into shapes* which *are retained* on the removal of the external influence.
Throughout this Schedule, any reference to *"plastics"* also includes *vulcanised* fibre. The expression, however, does not apply to materials regarded as textile materials of Section XI.

2.(g) Synthetic rubber, as defined for the purposes of Chapter 40, or articles thereof;

3. Heading Nos. 39.01 to 39.11 apply only to goods of a kind produced by chemical synthesis, falling in the following categories :

(c) Other synthetic polymers with an average of at least 5 monomer units;

5. Chemically modified polymers, that is those in which only appendages to the main polymer chain have been changed by chemical reaction, are to be classified in the heading appropriate to the unmodified polymer. This provision does not apply to graft copolymers.

38. (i) So far as Note 1 is concerned, as already seen, the products are *thermoplastic polymerisation* products capable of acquiring by moulding and *casting* etc. various *shapes which are retained* as evident from the main applications indicated in the Technical Bulletin of TOYO SODA and annexed with this order.

Therefore, the criteria laid down in this chapter note are satisfied.

(ii) In so far as Chapter Note 2 (g) is concerned as the products do not satisfy the definition given in Chapter 40 they are not hit by this note.

(iii) As regards Chapter note 3 - It is obviously satisfied as undisputably it is a synthetic polymer with more than 5 monomer units.

(iv) Chapter note 5 covers chemically modified polymers of the type described therein.

The very fact that the products are admittedly made of chlorosulfonated polyethylene shows that they are chemically modified polymers. The reaction by which chlorosulfonated polyethylene is formed and its structural formula as given in the above books by Hofmann and Morton as also the Encyclopedia of polymer Science and Engineering and Hofmann's Book shows that these are modified polymers in which only appendages of main polymer chain have been changed by chemical reaction. Thus, they fully satisfy the conditions of chapter note 5 and are accordingly classifiable in the heading appropriate to the unmodified polymer as per this note itself; And Heading 39.01 covers polymers of ethylene, in primary forms.

39. The above analysis finds full support from the HARMONIZED SYSTEM OF NOMENCLATURE on which the Indian Customs Tariff is based. *Heading 39.01* of HSN indicates that "this heading covers polyethylene and *chemically modified polyethylene* (for example chlorinated polyethylene and *chlorosulfonated polyethylene*)."

(i) This clinches the issue technically.

(ii) It shows that the ld. Collector was technically right in his conclusion regarding the classification in so far as the main heading was concerned.

40. As regards sub-headings, the position is as follows :-

Sub-headings 3901.10 and 3901.20 depend upon specific gravity. No arguments have been advanced before us relating to specific gravity or the exact sub-heading. However, the technical material before us shows that specific gravity varies from grade to grade and the technical bulletins of TOYO SODA show specific gravity of 1.18 in case of TS-430 as well as TS-530. Therefore, the products were classifiable under 3901.20 (and not 3901.90 indicated by the Collector).

41. A question which still remains to be answered is that if this was the situation technically what about:

(i) the test reports produced by the appellants and

(ii) the case law in particular, the judgment of the Hon. Calcutta High Court cited and heavily relied upon by the ld. Counsels.

42. (i) In so far as the reports of the tests privately got conducted by the appellants on their own are concerned, these certificates procured unilaterally are of no evidentiary value for a variety of reasons.

First and foremost the analysis of those samples alone is acceptable which are drawn by or in the presence of the officers before clearance of the goods as per the prescribed procedure and not otherwise and the Collector could have rejected them on this ground alone;

Secondly, they are either *not of* the material of the type imported by the appellants and now in question because they do not disclose the same characteristics as indicated by the standard technical literature and the technical specifications indicated by the manufacturer himself and therefore, they are irrelevant and inadmissible *ex-facio*.

OR

(ii) If the samples sent to the ld. Experts were really of the material of the type imported and in question then obviously they do not disclose the whole truth. They are therefore, unacceptable.

(iii) The dates of these reports show that they have been procured after the investigations had begun; Therefore, coupled with the above facts they have apparently been so obtained with an eye on the case.

All this goes to show that the Collector was right in discarding them (and we will discuss the implications of such reports a little later as we proceed with the matter).

43. In so far as the judgment of Hon. Calcutta High Court in the case of *National Insulated Cable Co.* [1994 (74) E.L.T. 568 (Cal.) = 1994 (46) ECC 101] is concerned, we would like to mention that we respectfully agree in its entirety that Hypalon-40 was certainly known in the commercial world as 'Synthetic rubber'. However, in so far as the question of classification is concerned, we have to state that *all types of synthetic rubber are not covered by Chapter 40;* And only those which satisfy the parameters laid down in Chapter note 4 are considered as synthetic rubber for the purposes of Central Exicise Schedule.

44. It is a well known and a well settled principle that where a defination is statutorily provided we have to go by that definition and cannot resort to commercial understanding or common parlance.

45. In the instant case, the Parliament in its wisdom has specifically *included only certain types* or varieties of synthetic rubber under Chapter 40 and *deliberately excluded others* by a statutory provision having force of law. Therefore, unless the parameters laid down in Chapter 40 were satisfied a product could not be classified under this chapter.

46. The judgment of Hon. Supreme Court in the case of *CCE, Kanpur* v. *Krishna Carbon Paper* - 1988 (37) E.L.T. 480 (S.C.) = 1989 (19) ECC 32 (S.C.) applies only to those cases "where no definition is provided in the statute itself" as noted by their Lordships of Calcutta High Court; And in the present case the definition (s) have been provided and a clear distinction has been made between Polymers classifiable under Chapter 40 and those of the type includable under Chapter 39.

47. It is also clear that the internationally accepted standard technical literature discussed above was not placed before that Court and therefore did not receive the attention of the Hon. High Court.

48. And it is noteworthy that *realising that full facts had not been brought to light,* the Hon. Judges took the precaution of recording that *"none of the said two test reports could be said to be conclusive regarding actual character and composition of the Hypalon-40"* (and very rightly so as the technical literature including the Hofmann and the Morton's book shows the actual character in a different light than presented to their Lordships). Obviously in the absence of sufficient material their Lordships were constrained to proceed on the basis of the commercial parlance and the criterion of most akin as per the interpretative rules. In view of such grave limiting factors as noted above the Calcutta High Court judgment could hardly advance the cause of the appellants particularly when many more facts and technical aspects have since come to light and we have both standard technical literature and manufacturers own bulletins to overcome the handicaps which their Lordships faced; and we could arrive at a complete picture and definite conclusions both technically and legally.

49. (i) The present case(s) is even otherwise distinguishable as first and foremost the chlorosulfonated polyethylene substances are of various varieties and grades which differ in the details of chemical composition, characteristic properties and main applications.

(ii) Secondly given details of commercial synthetic elastomers significantly take note of, *inter alia*, *commercial CSM Polymers introduced by Toyo Soda Manufacturing Co. Ltd., Japan* the manufacturers of the products in question; And as many as '7' T.S. grades of CSM showing different composition and characteristic properties have been tabulated in the technical literature. Therefore, the Test Report of one cannot be relied upon for another and the generalisations are best avoided.

(iii) Further, the comparison of the technical parameters indicative of description and characteristics of Hypalon as given in Morton's Book of Rubber Technology and those indicated by the manufacturer TOYO SODA in their technical bulletin regarding the products in question shows that the latter are broadly similar to but not identical with the former in all respects. Various T.S. Grades (such as TS 530, TS 430 and TS 320 etc. not only differ amongst themselves but also) differ from Hypalon (of which the grades again differ with each other) in important features such a moony viscosity etc. so much so that TOYO SODA take pride in announcing in their Bulletins that *their products are different* from other general synthetic products and emphasise the differences already reproduced in para 32 above. We have already dwelt upon the significance of this aspect and it does not bear repetition.

50. Last but not the least, the reasons for discarding the Customs Test Reports in the Hypalon case are not available in the present case in so far as the latest test report on the basis of which the present case has arisen and its commonly agreed portions which we have already noted, are concerned. The latest Customs Test Report in our case has been found to be fully correct and therefore, could be relied upon; Whereas it is the I.I.T. (and other Test Reports produced by the Appellants which were not acceptable for reasons recorded above (so the situation was virtually reverse of the Hypalon case in this regard).

Therefore, the Hypalon-40 case does not come to the rescue of the appellants in any way.

51. It is further noticed that Chapter note 4 (a) excludes substances which can be converted by vulcanisation into thermoplastic substances; Whereas Chapter 39 note 1 includes plastic substances including those polymers which are capable

of being formed under external influence by moulding, casting or other processes into shapes which are retained on the removal of external influence and TOYO SODA shows that grade TS 430 has general use for *mouldings, electric cables, machine parts* etc. (In fact TS 320 is described as *a thermoplastic applicable without vulcanisation* and its applications include *floor tiles*).

52. In view of the above discussion two things become clear :

(i) That according to *commercial* understanding for trading purposes (but *excluding* customs purposes) these type of materials are internationally considered as a variety or type of *synthetic rubber*.

(ii) But *for customs purposes, both internationally and nationally, they are not synthetic rubbers but a type of modified polymers of ethylene.* This distinction is important from the legal point of view as both HSN and customs tariff exclude them from Chapter 40 and include them in Chapter 39 by virtue of chapter notes of Chapter 40 read with those of Chapter 39; And HSN specifically mentions modified polymers of polyethylene and cites the example of chlorosulfonated polyethylene in its heading note under 39.01.

(iii) Ours is a customs case; HSN is an internationally accepted classification for customs purposes and one on which our own tariff is based and the former's persuasive value has been long recognised by Tribunals and Courts. The Customs tariff entries and chapter notes of course have a legal binding force. In case of international trade the cargo is required to pass through the customs and the traders (including foreign suppliers and Indian importers) have to know and keep in view the International Customs practices; and the importers are in any case bound by the customs tariff particularly. We on our part have to take into account every word of the chapter note and cannot leave out the important fact that these were saturated synthetic substance (which were, at the top of it, normally vulcanised by chemicals other than sulfur) and on such vulcanisation remain or become *thermoplastic.* They were, therefore, hit by chapter note 4 (a) of Chapter 40 and were includible in Chapter 39 by virtue of Chapter Note 1 read with Chapter notes 2, 3 and 5. Hence, I have no hesitation in holding that in view of above factual technical and legal position the products in question were *not* synthetic rubber *for customs purposes* and were *not* classifiable under Chapter 40 *but were* modified polymers of polyethylene *classifiable under Heading 39.01*. Hence the order of the Collector was right in this respect legally as well.

53. (In view of the above position, it was really not necessary to look at the import/export policy or the exemption notification No. 345/80-Cus. as amended). However, since they have also been referred to I may mention enpasse that even they do not advance the cause of the appellants. The import/export policies of 1985-88, 1988-91 and 1990-93 also distinguish between synthetic rubbers of various types (allowing only some varieties under OGL and restricting others under different Appendices; And the exemption notification 345/80-Cus. (as amended) goes to the extent of showing two different tariff headings (39 and 40) even for Hypalon itself). This itself goes to show that merely describing the product a 'synthetic rubber' or giving a general commercial description was by itself not sufficient for these purposes as well.

54. Now, we come to the responsibility and liability of each of the appellants in the circumstances of these cases.

55. In case of M/s. Universal Cables Ltd. counsel has pleaded that appellants had placed first trial order in 1984 to import TOSO CSM grade TS 430 as the same was equivalent to Hypalon marketed by M/s. Dupont of U.S.A.

56. It is also not disputed that CSP under brand Hypalon imported by various importers was being assessed under CTA 39.01 or its equivalent heading under CTA 75 despite the fact that Hypalon was commercially known and used as synthetic rubber. The judgment of Calcutta High Court changed this position only by its (single judge) order dtd. 16-1-87 in Hypalon case (which was confirmed by High Court Bench order dtd. May 7, 1993). Therefore, in respect of period between 1984 and 15-1-1987 in any case the appellants could not have forecasted as to what would happen in a future case and could not have proceeded on that assumption; And if anything, they could only go by and were indeed expected to go by the existing customs and trade practice and to declare their product accordingly. But they chose not to do so.

57. Since the appellants M/s. Universal Cables have themselves admitted that they were given to understand that the Japanese product (TS 430) was equivalent to Hypalon and Hypalon was a chlorosulfonated polyethylene and the manufacturer/supplier's technical bulletin also described it as chlorosulfonated polyethylene then it was their duty to describe it correctly as chlorosulfonated polyethylene and not to make an attempt to mislead by first withholding the fact and later *describing* the *product wrongly as polychloro butadiene.* It is important to note that Polychloro-butadiene is the description of an entirely different type of synthetic rubber which is polymer of chloroprene (or 2 chloro butadiene) and goes by the generic name of Neoprene). *Neoprene* is an *unsaturated synthetic rubber* and therefore obviously the attempt was to bring it within the framework of chapter note 4(a) which allows unsaturated rubbers to be included in Chapter 40.

58. [Further amongst the varieties of Neoprene a few may require vulcanisation by sulfur but most of the neoprenes are vulcanised by the addition of basic oxides such as magnesium oxide and zinc oxide as per McGraw-Hill Encyclopedia of Science and Technology. Therefore, it was necessary on their part to get okay from custom's chemical examiner and the chemical examiner appears to have obliged by giving absolutely incorrect indeed *false* 'test reports' describing the product as Polychloro butadiene and thereby letting the classification change from 39.01 to 40.02 which covers Polychloro butadiene].

59. Subsequently when it appeared to the Department that the chemical test reports were erroneous or false then they investigated the matter and found out the truth that the imported material was actually Chloro sulfonated polyethylene which was a saturated compound (and not Polychloro butadiene) all through (and now admittedly so). This was not a case of change of opinion as pleaded but the result of inquiry/investigation which led to the discovery of a wrong which was being perpetuated and an attempt by the Department to take corrective action. Since according to their own admission the appellants were aware that it was an equivalent of Hypalon, a chlorosulfonated polyethylene, therefore, it was their duty to describe it fully and correctly in the first instance. By not doing so they became guilty of suppression and mis-declaration and the fact that the Chemical Examiner or Chemist also blundered along does not alter this position and does not reduce or mitigate their culpability or liability. The fact that they had initially described their product merely as synthetic rubber TS 430 does not help them because that amounts to deliberately giving an incomplete description and trying to take shelter behind a commercial brand name knowing full well that for customs purposes chlorosulfonated rubber was distinguishable from other synthetic rubbers classifiable differently.

60. We have already held in a number of cases that in the basic assessment documents (such as bills of entry etc.), the declaration of the product must be sufficient and such as to enable the Department to identify the product and assess it correctly. Merely giving a commercial name or brand name or trade mark or some symbol or code of its own (or merely reproducing customs tariff) was by itself not sufficient and it is the product which was required to be described fully. This was all the more important where such a description would make all the difference in terms of either import/export or customs requirements. Here apparently the full, correct and complete description was intentionally withhold.

61. The argument that subsequently even the manufacturers/ suppliers also commenced describing the goods as synthetic rubber grade TS 430 polychloro butadiene type also does not help the appellants. If anything it shows, the collusion between the manufacturer/supplier and the appellant and deliberately mis-declaring and misleading the Department with a view to get it wrongly classified and hoodwink the customs. This is apparent from the fact that the technical bulletins of the manufacturer TOYO SODA Manufacturing Co. themselves described the product as chlorosulfonated polyethylene elastomer and clearly indicated in the introduction itself that these were without double bonds (i.e. saturated compounds) and different from other general synthetic rubbers and were vulcanised by metal oxides etc. already noted above. This important and material information was evidently deliberately with held initially and subsequently the incomplete description earlier given was expanded by incorporating an absolutely wrong and false information. Their offence gets further compounded by the fact that they procured and produced false information sheet and false/ incorrect test reports and in the process tried to involve even the experts whose certificates they produced. This is evident from what follows.

62. All the test reports are post-importation reports obtained unilaterally after the investigations against the appellants had begun.

(i) The certificate issued by the Research and Control Lab. of Universal Cables Ltd. themselves dated 7th May, 1991 makes an interesting reading; the Chemist has vulcanised it with sulfur; Whereas the manufacturer's technical bulletin itself shows and considers it a point of distinction that it requires vulcanisation by other agents. It is also interesting to note that when the Lab. was asked to give the certificate with reference to Chapter Note 4 of Chapter 40, it merrily certified it to be an *unsaturated synthetic* rubber whereas the manufacturer's technical bulletin itself describes it as a product with no double bond (i.e. a saturated rubber) and the entire technical literature referred to above confirms that it was indeed a saturated rubber. That itself shows that this procured test report is false, wrong and not worth the paper on which it is written.

(ii) The test report of Indian Rubber Manufacturer's Research Association (affiliated to the Ministry of Industry) also does not help the appellants as it shows the test was required to be conducted only for certain specified properties. And the saturation vs. unsaturation point and curing with chemicals specified by manufacturers was not covered, for obvious reasons. However, the Scientific Officer could not be falted *if* the party itself sought verification of a few properties only and left out deliberately crucial properties essential for customs purposes but the appellants cannot escape the blame.

(iii) The test report of I.I.T., Kharagpur does not indicate what they were asked to report upon but contains gaps and loopholes inasmuch as it does not certify whether the item was saturated or unsaturated and strangely it also shows it vulcanisable with sulfur whereas the manufacturers take pride in emphasising that it was vulcanisable with other chemicals mentioned by them in their bulletin and consider it their distinguishing feature.

(iv) In so far as the report of Professor M.V. Pandya of I.I.T. Bombay is concerned, first and foremost it is a report procured subsequent to the issue of the show cause notice dated 30th November, 1992. This is apparent from the fact that this report is dated April 23, 1993 and has been given with reference to the 'TS-430' 'sample' submitted by the appellants and with reference to their letter dated January 27, 1993.

The ld. Professor finds on analysis of the sample that it has terminal carbon-carbon *double bond* (unsaturation) and confirms the presence of vinyl type terminal unsaturation in the polymer.

These observations are significant in as much as they show that the so called sample of TS 430 was not a sample of the goods imported or even that of the type of the goods imported as the characteristics reported are not those of TS 430 manufactured and exported by the Japanese firm M/s. TOYO SODA MANUFACTURING CO. LTD. and indicated in their technical bulletins.

If, however, the sample was of the type of goods imported the situation would become even more intriguing in as much as in that case the observations could only be considered as wrong. It is really not clear as to how the ld. Professor has ignored the internationally known standard technical literature on chlorosulfonated polyethylene and its characteristics, but I am not dwelling further on it as the ld. Professor is not one of the persons impleaded. In any eventuality, the appellants cannot escape the responsibility and the charge of *mala fide* in either situation.

The test and analytical certificate of September, 1986 issued by TOYO SODA itself merrily refrains from mentioning these crucial and important qualities.

The affidavit of Vice President (Technical) also does not disclose the full facts and indeed withholds the relevant information.

The appellants have claimed in their defence that they started showing polychloro butadiene after the department's test but even in the bill of entries in which they had refrained from indicating the composition below the description synthetic rubber TS 430 they had claimed assessment under tariff item 40.01/04 and the chapter note 4(a) which as it stood during the relevant period specified the types of rubbers included under the expression 'synthetic rubber' mentioning (IR), (BR), (CR), (SBR), (NCR), (IIR) and in view of their admission and technical literature discussed above and the technical bulletins of the manufacturers/suppliers the product fell in none of these categories. So *deliberate suppression* of relevant information in the earlier stages (1984-85) and *explicit misdeclaration* from 1986 to 1991 stands recorded in their own hand so to say is involved and the only inference possible is that it was so done with the intention to *mislead and defraud;* And to my mind it appears to be a case of *collusion and conspiracy* and the appellants deserve no quarter.

63. Therefore, I am not in a position to accept the appellant's plea that it is a case of forgivable failure.

64. In view of above analysis it is clear that the Collector was justified in rejecting the 'test reports' and the plea of the appellants and holding them guilty and his observations were part of appreciation of evidence and rightly so. *I am,* therefore, *unable to agree with the observations regarding the Collector* himself made by my learned colleague at pages 39 and 40 of this order. *I hold that no motive or bias could be attributed to the Collector* and, therefore, the personal type of *remarks* against him made at page 40 were *not called* for and *I disassociate with them.* I consider that the learned *Collector has proceeded objectively and fairly* and has come to the correct conclusion.

65. Before proceeding further in the matter, I may mention that it is interesting to note that in the proceedings before the collector, it was stated by the learned counsel (Sh. Nankani) for M/s. Skytone that they were adopting the arguments advanced by the learned counsel Sh. Hidayatullah for M/s. Universal Cables; Whereas in the proceedings before the Tribunal the learned counsel Sh. Khaitan appearing for M/s. Universal Cables had stated that they were adopting the arguments advanced by learned counsel Sh. Laxmikumaran for M/s. Skytone Electricals.

66. Shri Laxmi Kumaran in turn also referred to the test reports filed by M/s. Universal Cables and relied upon them and also drew attention to the Calcutta High Court judgment in the Hypalon-40 case. On the technical side, he had initially argued about the unsaturated character as originally claimed by the appellants but subsequently was good enough to admit that the products were polychlorosulfonated polyethylene which was a saturated compound as per the manufacturers bulletins No. 1 and 2 themselves. This was accepted by Mr. Khaitan also and in response to a specific query from the Bench, the counsels of both M/s. Skytone Electricals as well as M/s. Universal Cables had accepted that all through they had imported the same material in so far as the importation from TOYO SODA was concerned, the only difference being that M/s. Universal Cables had all through imported TS-430 whereas M/s. Skytone had imported TS-430 and TS-530 grades.

67. Shri Laxmikumaran had further drawn attention to the phraseology used in the case of Chapter Notes of Chapter 39 and Chapter Notes of Chapter 40 and in particular that in Note 4 to Chapter 40 the words used were 'applied to' whereas in Chapter 39 the words were 'applied only to' and prayed that in view of this position the Note 4 to Chapter 40 was not restrictive or exhaustive in nature and would include all forms, types and varieties of synthetic rubber; And Shri Khaitan had concurred.

68. We have already examined the legal and technical aspects which bring to the fore, *ipso facto*, so to say, the fallacy of this argument; And it does not bear repetition except re-emphasise that the definition of synthetic rubber given in Chapter 40 was applicable for the purpose of the whole schedule and so also the definition of plastics given in Chapter 39 which was intended for the whole schedule and these two chapters and their chapter notes have to be necessarily read together, in particular in a situation like the present one where the legislatures intention apparently was to distinguish between the type of polymers (including synthetic rubber) to be covered by Chapter 40 and the type of polymers (including elastomers) which were to be governed by Chapter 39. Therefore, this argument of the appellants does not advance their cause in any manner and we have already seen and recorded as to how the chlorosulfonated polyethylene could only be considered as a modified polymer of a saturated type (elastomer) covered by heading 39.01.

69. In so far as the question of responsibility and liability of M/s. Skytone towards duty and penalty are concerned, it is noticed that M/s. Skytone has pleaded that the declarations that they had made were in *bona fide* belief and had been accepted by the Customs at the time of clearance and, therefore, the demands were time barred and they were not liable to penalty. However, a perusal of the records tells a different story.

70. First and foremost like Universal Cables, they have also not filed a complete declaration that is to say a declaration which would be sufficient for determining the correct classification. The fact that they had deliberately withheld the information relevant for the purpose of determining the correct classification is evident from the statement of Sh. H.S. Sethi, partner of M/s. Skytone Electricals who has admitted *inter alia,* that even the very first order was placed on the basis of advice of an employee who was an ex-employee of M/s. Universal Cables and on being informed by Sh. Jhunjhunwala that TS grade material was equivalent to Hypalon and that they had themselves imported Hypalon which was classified by the Customs under 39.01. He has also clearly admitted that his employee who had advised them to import TS material had also informed that it was CSP i.e. chlorosulfonated polyethylene. Furthermore, recovery of catalogues or bulletins pertaining to TS 430 and 530 indicating the chemical description chlorosulfonated polyethylene show that they were aware of the correct chemical nature and yet withheld this crucial description from the Customs.

71. Moreover, the learned Collector is correct in pointing out that the importing firms had apprehended a declaration to the fact that "I/We have not received any document or information showing different price, value, quantity or description of the said goods and that if at any time hereafter I/We receive any document from the importer showing a different state of facts I/We would immediately make the same known to the Collector of Customs." But they did not do so even after coming into possession of the relevant information and it is, therefore, immaterial whether such information was received by them before or after filing of the Bill of Entry.

72. Since the importing firms had from the very beginning suppressed or withheld information known to them which was material for the purpose of determining the correct classification with *mala fide* intention, therefore, the demands were not time-barred and could be validly issued under Section 28(1) of the Customs Act.

73. It is interesting to note that even after the issue of show cause notice, the appellants have continued to harp on the argument that the products was unsaturated, when as we have already seen they knew that it was a saturated one; And as if the attempt to mislead the customs at clearance and adjudication stage not sufficient, this was sought to be made out to be so even in the appeal memorandum filed before this Tribunal and even at the initial stages of arguments and only in response to persistent questioning from the bench and its direction to show the technical literature and the bulletins that ultimately the appellants M/s. Skytone Electricals as well as M/s. Universal Cables conceded and admitted that the product was chlorosulfonated polyethylene and a saturated type of elastomer and chlorosulfonated polyethylene was classifiable under 39.01 even under HSN and Shri Laxmi Kumaran was good enough to produce a photo copy of the relevant extracts of HSN. It is even more tragic that after hearing when the counsels were given liberty to file short written briefs, what has been filed is merely summary of the appeal memorandum and not a brief resume of the proceedings as they were and it is really a matter of regret and concern that it includes reiteration of the wrong assertion that the products were unsaturated.

74. It only confirms us in our belief that the appellants have not only tried to bluff the customs through and through, all through but they have not even stopped at that and tried to 'pull the wool' so to say on the Tribunal's eyes.

75. In view of the above discussion, the order of the Collector, in so far as the importing firms are concerned, is quite justified. They are liable to pay the duty demanded and suffer the penalty imposed. The order of the Collector is, therefore, confirmed (except for a minor modification regarding sub classification).

76. In so far as Executives of M/s. Skytone Electricals are concerned the liability towards penalty is clearly established beyond doubt; Since Mr. Sethi is a partner with whose knowledge all these acts of omission and commission were done, he was rightly liable to penalty; And the Collector was correct in imposing the penalty deserved by the appellants in the circumstances.

77. In so far as the Staff and Executives of M/s. Universal Cables are concerned, the Collector has penalised Shri J.S. Choudhary, Manager (R&D), Shri P.S. Ramachandran, Lab Incharge, Dr. R.K. Sharma and Import Assistant Shri S.M. Jaywant. He has mentioned in details their role and responsibility, and rightly so.

78. The Import Executives and the Import Assistant were responsibilities dealing with the Customs directly or through the clearing agent and were to ensure correct and proper filing of Bill of Entry. They were also expected to produce all the relevant information which was available with the appellant concern before or at the time of filing the Bill of Entry, or which came in their possession even after filing of the Bill of Entry in terms of the declaration given by or in behalf of importer on the Bill of Entry. It is through them that the appellant firm has acted and they have to share responsibility and the liability for these acts of omission and commission for which they were personally responsible or in which they have acquiscised.

These officers were fully aware of the true facts and the true nature of the goods and the true literature available and yet they withheld the information from the Customs Department and furnished wrong information. Shri Choudhary issued instructions to Satna Office, Shri Ramachandran and Dr. R.K. Sharma and these officers got the so-called laboratory test

conducted in the appellant company's lab and prepared and submitted a test report which was patently false. Shri Ramachandran and Dr. R.K. Sharma had admitted that the laboratory test report was made-to-order under instructions. The test report interestingly refers to Chapter 40 of the Customs Tariff (even the chapter note in question) and this shows that the Manager (R&D) and the Lab Incharge were fully aware of the purpose for which it was being prepared, and Import Executive and Import Assistant were fully aware of the dispute and the case which had arisen and yet did not hesitate to produce a false report knowing it to be false. In view of these circumstances, it is apparent that the Collector was fully justified in taking their role into account and fixing the responsibility accordingly. They had colluded with their Masters i.e. the importing concern in pulling a fast one on the customs and were responsible for aiding and abetting in the act of misdeclaration and consequential wrong classification and evasion of duty. They have been, therefore rightly penalised.

79. In view of this position, the Collector's order is confirmed in respect of these gentlemen also.

The appeals are, therefore, rejected.

Sd/-

(S.K. Bhatnagar)

Vice President

Dated : 18-5-1995

POINTS OF DIFFERENCES

80. In view of the difference of opinion between Hon'ble Member Judicial and the Vice-President, the matter is submitted to the President for reference to a third Member on the following points :-

1. Whether the products were classifiable under Heading 39.01 as chemically modified Polyethylene or as a Synthetic rubber of a type classifiable under Heading 40.02?
2. Whether in view of the private test reports and the Calcutta High Court judgment in the case of Hypalon-40, the appeals were required to be accepted on merits or were required to be rejected, as the above do not advance their cause in the light of the observations and the findings of the Vice-President?
3. Whether any misdeclaration and suppression of facts was involved?
4. Whether the appellants were liable to the penalty imposed?
5. Whether the demands were time barred?
6. Consequently, whether the appeals were required to be accepted or rejected on the grounds of either merits or time bar or both?

Sd/-	Sd/-
(S.L. Peeran)	(S.K. Bhatnagar)
Member (J)	Vice President
Dated : 26-5-1995	Dated : 25-5-1995

81. [Order per : Shiben K. Dhar, Member (T)]. - Arguing on the points of difference, ld. Senior Advocate, Sh. Sorabjee, made the following main submissions :-

82. Show Cause Notice alleged that both hypanol, a Chloro Sulphonated Polyethylene, and TS-430 were exactly similar materials. Both were the same chemically and also used for the same product (Cables) under the same process.

82.2 Collector in Para 69 of his Order observed that it is on record that the importer was clearly aware that the impugned goods TS-430 are a substitute for Hypanol by virtue of having identical chemical composition. Department, therefore, contended that since Hypanol is classifiable under Chapter 39 of the Customs Tariff, TS-430 should also be classified under the same Chapter.

82.3 In case of *Collector of Customs* v. *National Insulated Cables Co. Ltd.* - 1994 (74) E.L.T. 568 (Cal.) = 1994 (46) ECC 101, a Division Bench of the Calcutta High Court has categorically found and held that Hypanol although consisting of a saturated substance is classifiable under Chapter 40 of the Customs Tariff as synthetic rubber and not under Chapter 39. The Division Bench upheld the findings of the ld. trial judge that though Hypanol did not correspond to the definition of synthetic rubber as given in Note 4 to Chapter 40 to the extent it was not an unsaturated substance it materially corresponded with other qualities as specified in Note 4. This judgment has been accepted by the Department and no appeal has been filed to the Supreme Court. There is also no contrary judgment of any other High Court. This judgment is, therefore, binding on the Department. Since the entire genesis and the very basis of the case of the Department is that TS-430 is the same as Hypanol and both are classifiable under the same heading of the Tariff, it follows that TS-430 must be classified under Chapter 40 of the Customs Tariff as synthetic rubber only.

83. TS-430 is known in the trade as synthetic rubber. It consists of unsaturated substances within the meaning of Note 4(A) to Chapter 40 of the Customs Tariff. In support of this contention, he referred to the Report of Indian Manufacturers

Research Association - Page 236 of the Appeal papers, Report of Indian Institute of Technology, Bharatpur - Page 237 and Expert Opinions of Prof. M.V. Pandey - Page 238 and Prof. Sengupta - Page 240 and Prof. Abhijeet Banerjee - P 245. He also referred to certain affidavits to the effect that the product is known in the market as synthetic rubber. These reports and affidavits have either not been considered or have been brushed aside on the grounds which are not tenable and without cross-examining any of the persons who made these reports and affidavits. In fact, doubts raised by the Collector in regard to these reports were never put to the appellants and no opportunity was given to them to deal with the same. Appellant has through out maintained that product TS-430 is unsaturated substance. The Deptt. has jumped to the conclusion that product is classifiable under Customs Tariff Chapter 39 as plastics without subjecting the product to the Test for determination whether it is plastics. Collector has referred to the failure to conduct Tests for Plastics as forgiveable mistake. This is not a forgiveable mistake but a fatal mistake which goes to the very root of the matter. Goods cannot be classified under Chapter 39 unless these are specifically tested to establish that they respond to the requirements of Chapter 39. No such Tests were carried out by the Deptt. and this is admitted by the Collector himself in Para 48 of his Order.

84. The reliance placed on HSN by ld. V.P. is misconceived. In fact, Notification No. 345/86, dated 16-6-1986 indicates that chlorosulpho-polythelene can fall under either Chapter 39 or Chapter 40. In view of the statutory provisions HSN cannot be followed. Apart from this, HSN are not binding for classifying goods and have at best only persuasive value.

85. There is no suppression of facts to justify extended period. Throughout the relevant period from 1984 till 1991, the Deptt. repeatedly tested the products which were imported and independently came to the conclusion that the same were synthetic rubber or polychloro butadiene. The appellants did not have anything to do with the Tests carried out by the Deptt. They did not declare Poly chloro butadine in the Bill of Entry, but it was the Deptt. itself which indicated the sample to be Poly chloro butadine type. It was only subsequently that the same was adopted by the appellant. The appellants, therefore, cannot be charged with misleading the Deptt. and there could be no question of suppression or misrepresentation on the part of appellants. In support of his contention he cited the case of *Silver Chem. Industries* v. *C.C.E.* - 1990 (49) E.L.T. 634 (T). The observations in the Order of Hon'ble Vice President. to the fact that the chemical examiner appears to have obliged by giving absolutely incorrect indeed false Test Reports describing the product as polychloro butadine are not at all supported by any evidence or material on record. It was never the case of the Department that the Chemical Examiner has given an allegedly false report to oblige the appellant and, in fact, no such finding has been given by the Collector. The facts and circumstances of the case would clearly establish that there was no *mens rea* and the Department having tested the samples arrived at its classification and, therefore, imposition of penalty is wholly unwarranted.

85.2 He cited the case of *Pushpam Pharmaceuticals Company* v. *Collector of Central Excise* - 1995 (78) E.L.T. 401 (S.C.) wherein Hon'ble Apex Court held that when the facts are in possession of both sides, extended period cannot be invoked. In this case the description chloro butadine was given by Customs Deptt. itself as it would be clear from the reverse of the Bill of Entry. The Deptt. also examined the literature and came to the conclusion that it was chloro butadine. They have nothing to do with this. What they declared in the Bill of Entry was synthetic rubber TS-430 and this is how the product was known in the market. This cannot be called a wrong description. In any case, nothing was suppressed when the sample itself was offered for test and in fact, was tested.

86. Ld. Advocates, Sh. Lakshmikumaran and Sh. Shridharan appearing for the appellants 5 and 6, adopted the arguments of ld. Sr. Advocate, Sh. Sorabjee, adding that :-

86.1 Chapter Note 4(a) mainly states that the expression 'synthetic rubber' "applies to" and does not say "applies only to". In other Chapters such as Chapter 29 and 39, the Notes specifically mention "applies only to".

86.2 In their case consignments were imported in April, 1988 to April, 1991 and Show Cause Notice was issued only in April, 1993. The first consignment imported was assessed by the Customs House on the basis of the Test Report of the Customs House Laboratory in relation to imports by some other party. No details were called from them. They have declared goods correctly as per invoice and shipping document as TS-430 and TS-530 Grades. They did not describe the goods as Polychloro butadiene. The manufacturers catalogue was not available with them till Dec., 1991. They had claimed assessment under Tariff Item 40 in the *bona fide* belief that the similar material was being assessed under this tariff item. The manufacturers catalogue, even while describing the goods as Chloro Sulphonated Polyethylene, indicated it only as a synthetic rubber.

86.3 He submitted that even ISI-6380 of 1984 indicates that chlorosulphonated polyethylene is synthetic rubber.

86.4 There is no basis for the allegation that correct description was suppressed. They had declared the goods as TS-530 synthetic rubber. In fact, even when Hypanol was imported, all the details of chemical composition were not given and the goods were described as synthetic rubber hypanol-40. If there was no mis-declaration in that case, describing their goods as synthetic rubber TS-530 could not be called mis-declaration. Even if they knew the impugned goods were Chloro Sulphonated Polyethylene, there was no evidence to suggest that failure to mention composition they knew would take the goods under Tariff Item 39. Mere omission does not justify extended period.

86.5 Maintaining that the goods are terminal vinyl type unsaturated product, he submitted that if Collector had any doubts about the evidence of experts he ought to have put them on Notice and called them for cross-examination. He relied

upon the case reported in 1995 (79) E.L.T. 613 (sic) and 1988 (34) E.L.T. 393.

86.6 The goods ought to have been tested with reference to various criteria mentioned in Chapter Note 4(a) and the Customs House Laboratory does not have the equipment to conduct the saturation tests.

87. Ld. DR submitted that the products in question are TS-430 and TS-530 and not Hypanol-40 and, therefore, ratio of Calcutta High Court judgment will not apply here. The description given was Polychloro butadine and this amounted to mis-declaration. He, however, fairly conceeded that this description of the product was initially given by the Customs House and not by the appellants. The appellants ought to have given complete description to enable Customs House to arrive at correct classification. He submitted that earlier Test Reports were wrong and only the last Test Report on the basis of which case against the appellants is made out is correct. He, however, admitted that he is not in a position to say how wrong Test Reports happened to have been given in the past. The appellants knew that the product was Chloro Sulphonated Polyethylene and this product is classifiable as plastics under Chapter 39. Referring to plea of time bar, he said that the appellants only gave commercial description of the goods and did not give technical details and composition of goods. In absence of technical details and composition the goods could not be properly classified. It was their duty to have placed all the facts before the Department and, having failed to do so, they cannot say the facts were in possession of both sides. Hon'ble Apex Court judgment in case of *M/s. Pushpam Pharmaceuticals*, therefore, can't help their case. They knew that the products were identical to Hypanol-40 which they were previously importing and which were being assessed under Tariff Item 39 at higher rate of duty. To this extent, therefore, there was suppression.

88. In the rejoinder, the ld. Sr. Advocate submitted that Department can't have it both ways. If the impugned goods TS-430 are the same as Hypanol and if the Deptt. knew that they are the same, then on merits the case goes straight in their favour as Hypanol has been held to be classifiable under Tariff Item 40. Department cannot have it both ways in holding on the one hand that the goods are not Hypanol and on the other that these are same as Hypanol.

89. I have heard both sides. Show Cause Notice placed at Page-311 of the appeal papers alleges, in Para 3, that the Department was assessing the Hypanol, Chloro Sulphonated Polyethylene, marketed by DUPONT as plastic under Chapter 3901 while consignments of exactly similar materials, viz., TS-430 marketed by M/s. Toyosoda, Japan, were being assessed under Chapter 40.02.

89.2 Para 13 of the Show Cause Notice indicates that as Hypanol as well as TS-430 were chemically composed of chlorosulphonated polyethylene [CSP], the two products appear to merit the same classification under the Customs Tariff. Para 57 of the Show Cause Notice again refers to Chloro Sulphonated Polyethylene elastomer as being equivalent to Hypanol-40, as being within the knowledge of the appellant.

89.3 In para 3 of his Order Collector refers to information received that TS-430 Grade material imported by appellants were goods *exactly similar* to material Hypanol [chemical name chlorosulphonated polyethylene (CSP)] which was not synthetic rubber as defined under the Customs Tariff Chapter 40 and which was being regularly assessed to customs duty under CH 39.01.

89.3.2 Collector again in Para 69 of his order placed at page 90 of the Appeal papers, observed that it is on record that the importer were clearly aware that the impugned goods TS-430 are a substitute for Hypanol-40 by virtue of having identical chemical composition.

90. The Department, therefore, proceeded from the premise that what was imported as TS-430 Grade declared as synthetic rubber was, in fact, exactly similar material having identical chemical composition as Hypanol. Both were, in fact, Chloro Sulphonated Polyethylene. In other words, the appellants knew that what they were importing was a substitute with the same chemical composition of Hypanol which attracted higher duty under Tariff Item 39 as was the case with Hypanol. Since Hypanol was classifiable under Tariff Item 39 the impugned goods ought to have been classified under this item if they had been correctly described. In fact, Collector proceeded also in his Adjudication Order from this very premise.

90.2 In view of this, classification of the impugned product, Hypanol, itself is of basic relevance.

91. The Condensed Chemical Dictionary revised by Gessnerg' Hawley describes Hypanol as a trade mark for Chloro Sulphonated Polyethylene, a synthetic rubber.

91.1 Gardner's Chemical Synonyms and Trade Names describes Hypanol as "a proprietary trade name for synthetic rubber [Chloro Sulphonate Polyethylene]".

91.2 Encyclopedia of Polymer Science and Engineering Vol. - VI refers to Chloro Sulphonated Polyethylene in these words :

> "Chloro Sulphonated Polyethylene [CSM] is the basis of a family of synthetic elastomers prepared by simultaneous chlorination and sulphonation of Polyethylene.....'. Commercially Sulphonated Polyethylene (Hypanol) offers the advantages of superior resistence to oil, ozone and heat compared with standard synthetic rubber.....".

91.3 This encyclopedia at Page 516 of Vol. - VI while showing commercially Chloro Sulphonated Polyethylenes in Table 1 states that commercially CSM Polymers have been recently introduced by Denki and Toyo Soda Manufacturing Ltd. in

Japan.

91.4 The Technical Bulletin of Toyo Soda Manufacturing Co. Ltd. describes the product TS-430, TS-530 as Chloro-Sulphonated-Polyethylene elastomer.

91.5 We are, therefore, considering here classification of the product known as Chloro Sulphonated Polyethylene which is marketed with Trade name of Hypanol by DUPONT and marketed also with Trade name of TS-430 and TS-530 by Toyo Soda Manufacturing Co. Ltd.

92. The Division Bench of Calcutta High Court in case of *Collector of Central Excise, Calcutta* v. *National Insulated Cables Ltd.* supra held that Hypanol-40 is classifiable as synthetic rubber under Tariff Item 40.02. They held that the product has all the functionalities and properties of synthetic rubber. Even going by the report of testing by Customs Authorities, which indicated Hypanol-40 is a fully saturated substance, the Division Bench held that this by itself would not preclude the classification of the item as synthetic rubber when it has all the functionalities and properties of synthetic rubber. They held that the product was known and/or found to contain qualities of synthetic rubber. They also held that the Departmental testing was negatively and selectively oriented. The Test was directed only for the ouster of Hypanol-40 from the classification of synthetic rubber. Another loophole the Court observed that "it made a leap for the conclusion that it was a synthetic resin, though exclusion from synthetic rubber does not necessarily bring item under synthetic resin" and the item not being synthetic rubber has again to be approved by Test whether it is synthetic resin. The Customs Authorities, the Court observed, did not carry out any Test in that direction [Reported in 1994 (74) E.L.T. 568 (Cal.) = 1994 (46) ECC 101 (Calcutta)].

92.2 It was contended that this judgment has been accepted by the Department and no appeal has been filed. There has been no rebutal to contrary. It was also contended before me that there is no contrary judgment of any other High Court. The question that arises, therefore, is whether the ratio of the judgment would not be applicable to the facts of the case.

92.3 The Customs House Test Report in case of *National Insulated Cables Co. Ltd.* - 1987 (28) E.L.T. 248 (Cal.) was placed before the ld. Single Judge of the Calcutta High Court. The Bench examined this Report as also the Report of Indian Institute of Technology and Rubber Technology Centre in the context of Chapter Note 4 of Chapter 40 of the Customs Tariff Act, 1975. The Court observed that Hypanol was not specifically tested to find out whether it responded to the composition of synthetic resin as specified in the Chapter 39 of the Customs Tariff Act. The Court concluded that though Hypanol 40 does not correspond to the definition of rubber as given in Note 4 to the Chapter 40 to the extent that it is not an unsaturated substance, it materially and substantially corresponds with other qualities as specified in Note 4. Division Bench upheld this judgment, in case of *Collector of Customs, Calcutta* v. *National Insulated Cables Co.* - 1994 (74) E.L.T. 568 (Cal.) = 1994 ECC 101 (Cal.) observing that even the fact of being saturated substance would not preclude it from being synthetic rubber when it has "all the functionalities and properties of synthetic rubber."

93. Admittedly Hypanol-40 is Chloro Sulphonated Polyethylene. TS-430 also admittedly, as held by the Customs Authorities, and also revealed by Customs House Test Report, is Chloro Sulphonated Polyethylene. Hypanol is a trade mark of DUPONT while TS-430 and TS-530 are trade marks of Chloro Sulphonated Polyethylene manufactured by Toyo Soda of Japan. Department throughout alleged that the impugned goods were materials exactly similar to Hypanol with identical composition. It is difficult, therefore, to accept that the ruling rendered by the Hon'ble Calcutta High Court would cover the case only of Hypanol and not that of TS-430. The entire case of the Department, in fact, is that the goods were exactly similar to Hypanol and it was a case of mis-declaration when the correct description of Chloro Sulphonated Polyethylene, which appellants knew was the material imported, was not given. The ld. Commissioner appears to have erred when he attempted, with reference to Calcutta High Court judgment, to distinguish Hypanol-40 from CSM Grade TS-430 without indicating essential differences in chemical composition such as would in the background of Calcutta High Court judgment take TS-430 away from Chapter 40 and place it under Chapter 39.

94. Ld. Vice President in Para 49(iii) has in this context recorded that various TS Grades such as 530, TS-430, TS-420, etc. not only differ among themselves but also differ from Hypanol in important features such as moony viscosity etc. This para, however, does not indicate what are those essential differences between the two as would, compared to Hypanol, take TS Grade 430 outside the purview of Chapter 40 when considered in the light of Calcutta High Court judgment.

95. A plea was pressed into service that Customs Notification No. 345/86, dated 16-6-1986 refers to Chloro Sulphonated Polyethylene as classifiable both under Chapter 39 and Chapter 40 and this, therefore, is contemporary exposition of Law at the material time to indicate that Chloro Sulphonated Polyethylene was classifiable also under Chapter 40. While an Exemption Notification does not lay down standards for classification of the product, its purpose being only to grant exemption, this Notification certainly indicates that either there was doubt about correct classification of the product, or the same product could in different circumstances be classified under Chapter 39 or Chapter 40 and, since presumably the intention was to exempt the product - Chloro Sulphonated Polyethylene - its classification was indicated either under Chapter 39 or 40. It is in this context, therefore, that specific test in regard to plastics was necessary and this was not a mere mistake but, as was contended, was really fatal.

96. Rosato's Plastics Encyclopedia and Dictionary indicates two categories of Chloro Sulphonated Polyethylene.

(i) Chloro Sulphonated Polyethylene elastomer and

(ii) Chloro Sulphonated Polyethylene plastic.

This also indicates that term rubber and elastomer are used interchangeably. This encyclopedia indicates, with reference to elastomers, that standard ASTM-1566 defines an elastomer as a macro molecular material that is capable, at room temperature, of recovering substantially its shape and size after the removal of a deforming load. Basically, an elastomer must be capable of retracting within 1 minute to less than 1.5 times its original length after being stretched at room temperature to twice that length and being held for one minute prior to release. "Chloro Sulphonated Polyethylene elastomer" is indicated among others, specifically under the heading elastomer. The encyclopedia indicates that Chloro Sulphonated Polyethylene elastomer is used among others in wires and cables covers whereas Chloro Sulphonated Polyethylene plastic is totally resistant to ozone.

97. Citing from Encyclopedia of Science and Engineering Vol. -VI Ld. V.P. indicated that raising the Chlorine content above 43% increases glass transition temperature and stiffness, yielding a nearly plastic material.

97.2 The technical literature of Toyo Soda Manufacturing Co. Ltd., relied by the Deptt. itself, however, indicates that both TS-430 and TS-530 have a chlorine content of 35% only.

97.3 All this points to the desirability of tests specifically conducted with reference to plastics. In absence thereof, the Test Reports submitted from the experts could not be lightly brushed aside. It was held in case of *Honsur Plywood Works Limited* v. *C.C.E., Bangalore* - 1988 (34) E.L.T. 393 (T) by Tribunal that certificates issued by Deputy Conservator of Forests, Bangalore and the Indian Institute of Plywood, Bangalore, could not be brushed aside only on the ground that the Customs were not in the know of the examinations carried out by them and that the certificates produced could have been put to test by the Addl. Collector by summoning the authorities who conducted the test or at any rate subjecting the goods to re-examination by the Customs.

97.4 In this case also the doubts raised could have been put to test by Collector through cross-examination of the persons who gave these Test Reports.

98. The position boils down to this :

Hypanol, the trade mark of DUPONT, is a Chloro Sulphonated Polyethylene; TS-430 and TS-530, trade marks of Toyo Soda Manufacturing Co. Ltd. of Japan, is also admittedly Chloro Sulphonated Polyethylene. This is alleged in the Show Cause Notice; it is admitted in the Order of the Collector and, in fact, the entire case is made on the ground that TS-430 is a material exactly similar to and with identical composition of Hypanol. In view of the grounds made out in the Show Cause Notice, it is not now open to the adjudicating authority to say that TS-430 and TS-530 are different from the Hypanol and, therefore, the ruling rendered by the Calcutta High Court in case of Hypanol would not support the case of the appellants for one cannot give an adverse finding on the grounds different or even diametrically opposed to those mentioned in the Show Cause Notice. Since both products are Chloro Sulphonated Polyethylene, the ratio of Calcutta High Court judgment rendered in case of Hypanol which is Chloro Sulphonated Polyethylene will squarely apply to TS-430, which is also admittedly Chloro Sulphonated Polyethylene.

99. In regard to HSN Notes, even while they have no binding force [See *Frozen Foods Pvt. Ltd.* v. *C.C.E.* - 1992 (59) E.L.T. 279] they do have persuasive value, a great persuasive value, indeed. But the question is : how do we persuade ourselves in the face of Hon'ble Calcutta High Court judgment to the contrary. The Test Reports were considered in detail by the Hon'ble Court and the matter examined specifically with reference to Chapter Note 4(a) of Chapter 40 and the Court held that Hypanol-40 was classifiable under Chapter 40 of Customs Tariff. It was contended before me that this judgment has become final and the Deptt. has not even filed an appeal to the Supreme Court nor was there any contrary judgment of any other High Court.

99.2 As was contended during hearing by ld. Sr. Advocate, Sh. Sorabjee, no matter what all the literature all over the world may say about the impugned product, the product *is* what the Courts in India say it to be.

99.3 There is in my opinion nothing to proceed from the premise that "full facts had not been brought to light". I agree when ld. Member (J) in Para-15 has recorded that the judgment should have been applied as it had gone in very great details on all technical aspects including Note 4(a) to Chapter 40 of the Customs Tariff.

> "In any case, even assuming that full facts had not been brought to light, will the judgment be any the less binding"? Hon'ble Apex Court in case of *Shiv Chand Kapoor* v. *Amar Bose* - 1990 (1) SCC 383 cited with approval the following passage from Wades Administrative Law, "Unless the necessary proceedings are taken at law to establish the cause of invalidity to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders".

99.4 The essence of the matter, therefore, is that the Hypanol has been held to be classifiable under Chapter 40 by Hon'ble Calcutta High Court and the impugned products alleged to be exactly similar and indeed also held to be so in the Order of Collector himself cannot be classified differently. In the result, therefore, these products have to be held to be classifiable under Tariff Item 40.02.

100. Ordinarily in the light of findings recorded by me, it would not be necessary to answer other points of difference. Since, however, the role of Third Member is limited in that he has to agree on each point of difference as framed with one or the other Member, I am proceeding to answer the remaining points of difference as framed.

101. It was forcefully submitted that the samples were drawn by the Customs and were tested and the fact that goods were Chloro butadiene was written by Customs themselves. The Test Result indicated on the reverse of the Bill of Entry bearing Rotation No. 1816 for consignment of 1000 kgs. indicates that the sample is Chloro Butadiene type and in the case of Skytone it was contended that they declared the product only as TS-530, Synthetic Rubber.

102. When samples were submitted and tested by the Customs Deptt., suppression cannot be invoked [See *Silver Chem Industries* v. *C.C.E.* - 1990 (49) E.L.T. 634]. It was held by Hon'ble Apex Court in case of *Pushpam Pharmaceuticals Co.* v. *C.C.E., Bombay* (supra) that when the facts were known to both the parties the omission by one to do what he might have done and not he must have done does not render it suppression. It was not the case of the Deptt. that the Chemical Examiner obliged the appellants by giving a false report. Nor indeed was it the case that wrong samples were tested. Since the goods were examined and tested, one cannot hold that there was any suppression for when samples were drawn and sent for test, the Appellants ceased to have any power to suppress anything in relation to character and composition of goods.

103. In the circumstances, unless demand is sustained, penalty is not imposable [See *C.C.E.* v. *H.M.M. Ltd.* - 1995 (76) E.L.T. 497 (S.C.)]

104. In the result, the points of difference are answered as under :-

(1) The product was synthetic rubber of a type classifiable under Heading 40.02.

(2) The appeals were required to be accepted on merits.

(3) No mis-declaration or suppression of facts was involved.

(4) Appellants are not liable to the penalty.

(5) Demands were time-barred also.

(6) Appeals were required to be accepted on the grounds of both on merits and time-bar.

Sd/-

(Shiben K. Dhar)

Member (T)

FINAL ORDER

In view of the majority opinion, the appeals are accepted.

Sd/-	Sd/-
(S.L. Peeran)	(S.K. Bhatnagar)
Member (J)	Vice President
9-8-1996	9-8-1996

...

Judicial Analysis

for

Universal Cables Ltd. vs. Collector of Customs, Bombay

2001 (136) ELT 1195 (Tri.-Del)

This case was:

- ❑ **Maintained in 2005 (186) ELT A115 (Supreme Court)**