

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
KOLKATA**

REGIONAL BENCH – COURT NO.1

Excise Appeal No. 454 of 2009

Arising out of Order-in-Original No.04 to 15/Commissioner/CE/KOL-IV/2009 dated 31.03.2009 passed by Commissioner of Central Excise, Kolkata.

Commr. of Central Excise, Kol-IV

Custom House, M. S. Building,
(7th Floor), 15/1, Strand Road, Kolkata-700001

Appellant

VERSUS

M/s. India Jute & Industrial Ltd.

(Carpet Division), 3, William Carrey Road,
P. O. Serampore, Dist. Hooghly, W.B. 712201

Respondent

APPEARANCE:

Shri K. Chowdhury, Authorized Representative for the Appellant

Ms. Chandreyee Alam Gupta, Adv. & Subhajit Das, Adv. for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)

FINAL ORDER NO.75463/2022

Date of Hearing : 27.07.2022

Date of Decision : 27.07.2022

PER SANJIV SRIVASTAVA :

This appeal has been filed by Revenue, directed against Order in Original No.04 to 15/Commissioner/CE/KOL-IV/2009 dated 31.03.2009 passed by Commissioner of Central Excise, Kolkata. By the said Order, Commissioner has dropped the proceedings initiated by the Show Cause Notice as detailed in table below:-

Sl No.	Show Cause Cum Demand Notice No. & date	Period	Duty not paid (Rs.)
1	CE-8(14)ARJC/R-V/DAN/93/31 dated-19-01-95	July'94 to Dec'94	2,01,69,254/-
2	CE-8(14)ARJC/R-V/DAN/93/772 dated 19-08-94	March'94 to June'94	26,58,462/-
3	CE-8(14)ARJC/R-V/DAN/93/379 dated 09-06-95	January' 95 to 15-03-95	60,64,149/-
4	CE-8(14)ARJC/R-V/DAN/93/766 dated 11-10-95	July'95 to Aug'95	30,03,100/-
5	CE-8(14)ARJC/R-V/DAN/93/195 dated 28-	Sept'95 to Dec'95	64,18,273/-

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	02-96		
6	CE-8(14)ARJC/R-V/DAN/93/365 dated 21-05-96	January'96 to April'96	19,38,226/-
7	CE-8(14)ARJC/R-V/DAN/93/628 dated 30-09-96	May'96 to 22-07-96	40,36,140/-
8	DGAE F. No. 10/CAL/CE/2000/1180 dated 24-09-2000	July'99 to July'2000	51,83,482/-
9	CE-8(14)ARJC/R-V/DAN/93/257 dated 15-03-94	Oct'93 to Feb'94	21,942/-
10	CE-8(14)ARJC/R-V/DAN/93/754 Dated 11-08-94	Mar'94 to Jun'94	30,240/-
11	CE-8(14)ARJC/R-V/DAN/93/29 Dated 18-01-95	July '94 to Dec' 94	54,225/-
12	CE-8(14)ARJC/R-V/DAN/93/381 Dated 09-06-95	01.01.95 to 15.03.95	8,558/-

2. Respondent is a manufacturer of floor coverings/carpets. During the period from March' 94 to July, 2000 they cleared the said carpets by classifying them under sub-heading 5702.20/5702.29/5702.12 of the Central Excise Tariff Act, 1985 availing the benefit of exemption Notification No.50/90 dated 20.03.90, 50/91 dated 25-07-91, 32/93 dated 28.02.93, 34/94 dated 25-04-94, 29/95 dated 16.03.95 as prevailed during the period attracting duty either @ 5% Adv./Nil rate of duty as against Department's proposal for classification under Chapter Sub-heading 5701.11/5702.22/5702.19 as per Section Note 14(B)(1) of Section XI of Central Excise Tariff being Textile materials other than Jute attracting higher rate of duty of either 24% Adv./25%Adv/30% Adv.

3. Accordingly, the Show Cause Notices as detailed in Para 1 above were issued to the appellant to the Respondent Commissioner. Commissioner dropped the Show Cause Notices as per the impugned order.

4. We have heard Shri K. Chowdhury, Authorized Representative for the Revenue and Ms. Chandreyee Alam Gupta, Advocate for the Respondents.

5. Arguing for the Revenue, Authorized representative while reiterating the grounds stated in the appeal filed by the revenue submits that:

- The entire dispute in the matter is in respect of the application of Sub-heading note 2, to Section XI the First Schedule to Central Excise Tariff Act. This sub-heading note reads as follows -

"2. (A) Products of Chapters 56 to 63 containing two or more textile materials are to be regarded as consisting wholly of that textile material which would be selected under Note 2 to this Section for the classification of a product of Chapters 50 to 55 consisting of the same textile materials.

(B) For the application of this rule:

- i. where appropriate, only the part which determines, the classification under Interpretative Rule 3 shall be taken into account;*
- ii. in the case of textile products consisting of a ground fabric and a pile or looped surface no account shall be taken of the ground fabric;*
- iii. in the case of embroidery of heading 5810 and goods thereof, only the ground fabric shall be taken into account. However, embroidery without visible ground, and goods thereof, shall be classified with reference to the embroidering threads alone."*

- The impugned goods cleared by the respondents were carpets having ground fabric and pile. In view of department the carpets manufactured and cleared by the respondents are having ground fabric made of jute. In terms of this sub heading note, by application of 2B(ii) the quantum of Jute which formed the ground fabric was to be ignored. If this quantum had been ignored then these goods would merit classification as per Show Cause Notices issued to the respondents.
- Commissioner has in the impugned order relied upon the test reports of the earlier periods and the adjudication/ appellate orders based on these test reports to hold that the issue in respect of the classification of these goods for the entire period of demand has been settled in the favour of the respondents and these demands cannot survive. However the expert opinion obtained by the department in 1999, states the contrary.

6. Arguing for the respondents, Ld. Counsel submits that the issue was earlier considered for the same periods on the basis of the test reports of the samples and decided in their favour. No ground has been put forth for differing with the opinion arrived on the basis of the test reports. In respect of samples drawn in '91, '92, Commissioner has rightly found that the issue has been earlier decided in their favour and dropped the show cause notices.

7.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments.

7.2 While adjudicating the case in favour of the respondents and dropping the show cause notices Commissioner has observed as follows:

"12. While going through the records of the instant cases, we find that the issue of actual description of the said goods was decided in favour of the said assessee when for the period Feb'99 to June'99, the ACCE, Dankuni Division vide Adjudication Order No.60/DKN/99 dated 10.09.99 decided that their manufactured carpets are classifiable under S.H. No. 5702.12. The department preferred appeal before the Commissioner of Central Excise (Appeals) and vide O-I-A No.66/RA/KOL-IV/2002 dated 25.10.2002, the matter was decided in favour of the said assessee. Relevant portion from the Order is mentioned below:

"12. Now the area of the dispute remains in the application of sub-heading Note No. 2(A) of Sec. XI Sub heading not 2(B)(ii) says that for the application of

this rule [ie. Sh. Note 2(A)], in the case of textile products consisting of a ground fabric and a pile or looped surface no account shall be taken of the ground fabric.....Further, in all the certificates/reports given by various organization, viz. IKRA, Textile Commission, Indian Institute of Carpet Technology, Viswabharati University, it has been categorically stated that the impugned goods do not have base fabrics. Since existence of jute contents in the products is not under dispute, such cfts/reports would, virtually, indicate that such jute contents do not form the character of base fabric as separate entity. The Chemical Examiner in his report, dated 19.03.99 has also opined that in the pertinent case, no separate ground fabric without pile surface is formed as in the case of some forms of other carpets, viz tufted carpets, where separate or pre-existing ground fabric is used to produce a tufted carpet. The department has relied upon the other part of the observations of the Chemical Examiner, wherein he had opined that carpet was found to have a strong, heavy ground fabric covered by cut warp piles forming the exposed surface and thus, has the characteristics of woven warp pile carpet and the ground fabric is clearly visible at the back of the carpet. In this context, I find that the aforesaid comment of the chemical examiner is vitiated by one postulation that a base or ground woven fabric is always necessary for anchoring the piles around warp or weft yarns of the ground fabric. In the premises, the observations of the Tribunal in the case of CCE, Kanpur vs. Classic Rugs (P) Ltd. [1998 (27) RLT 68 (CEGAT)] are pertinent, wherein the Tribunal held that there was no substance in the claim that it was not possible to produce a woven carpet without a base fabric or a ground fabric. The Chemical Examiner himself observed that the process of manufacturing adopted in the instant case to produce the pile carpet, piling operation and bifurcation of pile yarn go on simultaneously. **Therefore, there is no requirement of jute fabrics playing the role of ground or base fabrics within the meaning of S.H.Note 2B(ii) in the manufacture of the impugned products.** Thus, considering the arguments, counter-arguments and evidences on record I find that for the purpose of pacification of the impugned goods, sub-heading note 2(A) of Sec XI is relevant and since jute predominates over other textile materials, such goods merit classification of jute carpets under sub-heading no.5702.12.

13. I also find that judicial pronouncements also go overwhelmingly in favour of the respondents. Andhra Pradesh High Court in the case of Charminar non-wovens limited vs CCE first held that jute floor covering made of jute fabrics with polypropylene is classifiable as jute carpet. Following the decision of the Andhra Pradesh High Court, several cases have been disposed of by different benches of the Tribunal holding similar views. Reference of such case laws are mentioned here under:-

- a. CCE vs Classic Rugs Pvt. Limited-1998 (27)RLT 68 (CEGAT)
- b. Bajaj Carpet Industries vs CCE-1999 (105) ELT 235 (TRI)

- c. CCE Vs Feather Touch Polychem (P) Ltd-2001 (131) ELT376 (TRI)
- d. Uni Products(I) Ltd. vs. CCE-2000 (119)ELT 325 (TRI)

CEGAT Calcutta in the case of CCE, BBSR-I vs M/s Champadani Industries Ltd. vide order no. A-1641/Cal/2000 dated 26.9.00, while dealing with classification of jute carpets having exposed surface of polypropylene, disposed of the case following the Andhra Pradesh High Court. I also find that the Jurisdictional Commissioner vide order-in-original no.02/Ch,57/Commr/Cal-IV/Adjn/02 dated 29.01.02 in another case of the respondents for earlier period also classified the goods as jute carpets. Thus, in view of the foregoing, I hold that the impugned goods have been correctly classified by the lower authority under subheading no.5702.12 as Jute carpet and the application of the department is devoid of merit.

14. Accordingly the impugned order of the lower authority is upheld and the application of the department is rejected.”

13. Further, I find that for the period from Dec’91 to Aug’93 and Sept’93 to Feb’94, the same issue was decided by the earlier Commissioner of Central Excise, Kolkata-IV in favour of the said assessee vide O-I-O No. 02/Ch-57/2002 dated 29.01.02. Relevant portion from the Order is mentioned below:

“As discussed earlier, the Test Memo No.2/JC/R-V/91-92 dated 17.12.92 has revealed that Jute Yarn has predominated over any other single textile material. But I feel that only one sample can not be the representative of the whole lot of the goods. Hence, I take into consideration the results of other samples which were obtained over a period of time and available along with the second Show Cause Notice dated 29.03.94. The relevant results are reproduced below:-

Test Memo No.1/Jute Carpet/R-V/91-92 dated 16-08-91

Ptc. Of Jute Yarns including Jute Piles-92.0 by wt.

Test Memo No.1/Jute Carpet/R-V/92-93 dated 7-4-92

Ptc. Of Jute-86.9 by wt. and cotton 10.6 by wt. and rest of flooring materials

Test Memo No.1/Jute Carpet/R-V/91-92 dated 16-08-91

Ptc. Of jute 45.3 by wt. ptc. of cotton by 13.8 by wt. ptc. of crylic 38.5 by wt. and rest is flooring materials.

Thus, I find that in all the 4 cases the jute yarn has predominated over any other single textile material. Hence, it appears that this product merits classification under sub-heading No.5702.20 & there is no force in departmental charges and it fails to prove by any other evidence that other than jute carpet has been manufactured or cleared by the assessee from this factory.’

14. Both the Orders of the Commissioner of Central Excise (Appeals) and Commissioner of Central Excise, Kolkata-IV were accepted by the Department and accordingly, the matter already attained finality for the period Dec'91 to Feb'94 to June '99. Consequently, for the Show Cause cum Demand Notices mentioned at Si. No. 1 to 7 (Para 1.1 supra) covering period from 01.03.94 to 22.07.96, the legal maxim *res judicata* is applicable in as much as the issue is identical and based on similar facts as in the Show Cause cum Demand Notices covering period Dec'91 to Feb'94 and Feb'99 to June '99.

15. Now, regarding actual nature and description of the said goods, the decision in the case of CCE, BBSR-I vs. Champdany Industries Ltd, reported in 2006 (193) ELT 295 (Tri-Kolkata) is also found relevant, which reads as follows:

"Facts relating to Appeal No. 416/2000 are given below :

2. This appeal has been filed by the Department against the Order-in-Appeal dated 13th March, 2000, passed by the Commissioner of Customs & Central Excise (Appeals), Shillong. The Commissioner (Appeals) allowed the appeal filed by the Respondent's Company against the order dated 26-11-1999 passed by the Assistant Commissioner of Central Excise & Customs, Bhubaneswar. The period involved is December, 1991 to February, 1999. The process of manufacture of the carpets as disclosed by the Respondents at the factory of the Respondent Company is as under :

The said carpets are manufactured by interlacement of three yarns which are simultaneously interlaid on the looms during the weaving process. For manufacture of the said carpets, the respondent buys or procures from its other units different types of yarn, such as, jute yarn, cotton yarn and polypropylene yarn. The said carpets are manufactured by the respondents only and exclusively out of yarn and the same do not consist of any base fabric. In the said carpets, jute always predominates by weight over each of the other single textile material. Earlier, the matter went to the Commissioner (Appeals). He passed Order-in-Appeal dated 27-6-1995. By the said order, the Commissioner (Appeals) remanded the matter to the adjudicating authority with the following remarks :

".....That being the case, I remand the matter to the original Adjudicating Authority to decide the case afresh after obtaining the necessary technical report as mentioned supra, also allowing the natural justice to the appellant in accordance with law. The case disposed of accordingly."

After the remand order, the Department sent the samples of the carpets to the jute Commissioner's Office for testing purposes. The Jute Commissioner, thereafter, got the said samples tested by the expert body on Jute Industry, namely, Indian Jute Industries Research Association. As per the reports of Indian Jute industries Research Association, jute predominated by weight over each of the other single textile material in the said carpets and the extent of jute therein

was found to be 51.02%, 49.37%, 50.12%, 51.45% & 52.10% in different samples. The said expert body also found that the said carpets do not have any base fabric.

3. The Deputy Commissioner of Central Excise as well as the Departmental Chemical Examiner also visited the respondent Company and examined the entire process of manufacture and also tested the samples drawn on the spot. The Departmental Chemical Examiner also found and opined that the said carpets do not have any base fabric and that jute predominated therein, by weight over each of the other single textile material and the percentage of jute was in fact more than 50%. This position was also admitted by the Assistant Commissioner in the show cause notice issued on 28-5-1999. The Assistant Commissioner rejected the submissions of the respondent's Company vide order dated 26-11-1999. The Respondent's Company filed an Appeal before the Commissioner (Appeals) who allowed the same by Order-in-Appeal dated 13th March, 2000. It is against the aforesaid order dated 13th March, 2000 passed by the Commissioner (Appeals) that the Appeal No. ER-416/2000 has been filed by the Department.

Facts relating to Appeal No. ER-14/2001 are given below :

4. Consequent to the Assistant Commissioner's Order dated 26-11-1999, the Superintendent of Central Excise issued two show cause notices dated 8-2-2000 and 23-2-2000 seeking to demand differential duty for the period from December 1992 to January 2000. The demand was confirmed by the Assistant Commissioner vide his Order dated 30th March, 2000. The respondent company filed an appeal before the Commissioner (Appeals). The Commissioner (Appeals) following the earlier order dated 13-3-2000, allowed the said appeal vide Order-in-Appeal dated 25th August, 2000. Against this order, the present Appeal No. ER-14/2001 has been filed by the Department.

5. We have heard Shri J.R. Madhiam, Id. JDR for the Appellant-Revenue and Shri S.K. Bagaria, Id. Sr. Advocate along with Shri Partha Banerjee, Id. Advocate for the respondents.

6. Shri Madhiam submits that instead of rectified Assistant Commissioner's order for revising classification list with effect from December 1991 till April 1994, the Commissioner (Appeals) committed an error by deciding afresh issue of classification during the aforesaid period which had already attained finality. He, therefore, submits that the Commissioner's (Appeals) order on classification pertaining to the period December 1991 to April 1994, is not legal and correct. He submits that in respect of the period w.e.f. 25th April, 1994 and onwards while deciding the issue of classification, the Commissioner (Appeals) did not take into account Chapter Note No. 1 to Chapter 57. The Chapter Note 1 to Chapter 57 defines the term, 'carpets and other textile floor coverings' means floor coverings in which textile materials serve as the exposed surface of the article when in use. So far, rate of duty is applicable only on these floor coverings of jute which specifies its parameter given in Note 1 to Chapter 57. He submits that Chapter

Note 1 to Chapter 57 describes that to be classified as jute carpets. The jute materials should serve as exposed surface of the carpet. In the present case, the polypropylene materials consisted the exposed surface of the product. By application of Chapter Note read with Rules for interpretation of schedule product cannot be classified as jute carpet. He, therefore, submits that the exemption benefit allowed by the Commissioner (Appeals) does not appear to be legal and correct. He, therefore, submits that both the appeals may kindly be allowed and the orders of the Commissioner (Appeals) may kindly be set aside.

7. ShriBagaria submits that in view of the undisputed factual position, there is no scope to classify the said carpets as otherwise than jute carpets. He submits that it is admitted by the Department that the said carpets, jute predominated by weight over each of the other single textile materials. He also submits that the said carpets have got no base fabric and it has been admitted by the Departmental Chemical Examiner as well as by the Indian Jute Industries Research Association. This position has been admitted by the Assistant Commissioner. He submits that carpets and floor coverings of jute during the entire relevant period were covered by specific sub-headings as mentioned above. Accordingly, the said carpets, during the entire relevant period were correctly classifiable as jute carpets. He submits that only ground in the Department's appeal for classifying the said carpets otherwise than as jute carpets is the purported reliance on Chapter Note 1 of Chapter 57 of the Central Excise Tariff. He submits that the said Chapter Note only defines the expression carpets and other textile floor coverings for the purposes of Chapter 57. The limited use of the said Chapter Note is to decide the issue as to whether the goods in question are carpets for the purposes of Chapter 57 or not. He submits that there is no dispute at all in the present case. According to the Department, the goods are classifiable as carpets falling under Chapter 57. He submits that whereas the goods are carpets falling under Chapter 57, the role of Chapter Note 1 comes to an end. The classification of such carpet has to be decided based on description of such heading/sub-heading read with the relevant Section Notes and Chapter Notes. For this purpose, the said Chapter Note 1 is not at all relevant. He submits that the carpets manufactured by the respondent company, the exposed surface was made of polypropylene yarn which was also a textile material falling under Chapter 55. Thus by applying Chapter Note 1 of Chapter 57, the goods in question were carpets and there was no dispute. He submits that in the carpets manufactured by the respondent company, jute admittedly predominates by weight over each of the other single textile material. The said carpets do not have any base fabric. In such cases, the test of predominance of jute over each of the other single textile material is the deciding factor for classification purposes as statutorily laid down in Section Note 2(A) read-with Section Note 14(A) of Section XI of Central Excise Tariff. This position prevailed up to 1994-95. From 1995-96 onwards, the same position continued to prevail under Section 2(A) read with sub-heading Note 2(A) of Section XI of the Central Excise Tariff. He, therefore, submits that the said carpets containing two

or more textile materials are to be regarded as consisting wholly of that textile material which predominates by weight over any other single textile materials. In the present case he submits that the jute predominates by weight over each other single textile material, the said carpets could only be classified as jute carpets. He submits that the classification lists were initially approved by classifying the said carpets as jute carpets. Subsequently, two provisional assessments orders were passed on 18-6-1993 and 24-7-1995 as stated in the order of the Assistant Commissioner dated 26-11-1999. Thereafter, for the entire period from December, 1991 onwards, the classification was changed as other than jute carpets vide the said order dated 26-11-1999 of the Assistant Commissioner. The respondent company had filed the appeal against the said order of Assistant Commissioner before the Commissioner (Appeals). No appeal was filed by the Department against the said order dated 26-11-1999. The Commissioner (Appeals) accepted the respondent Company's submissions relating to classification, obviously, such decision of the Commissioner (Appeals) applied to the entire period covered by the Assistant Commissioner's Order. He submits that so far Appeal No. ER 14/2001 is concerned, this is only consequential to the classification issue and there is no new ground in this appeal. He, therefore, submits that both the appeals filed by the Revenue may kindly be dismissed.

8. After carefully considered the submissions made from both the sides, we find that the only ground in the Department's appeal for classifying the said carpets otherwise than as jute carpets is the purported reliance on Chapter Note 1 of Chapter 57 of the Central Excise Tariff. The said Chapter Note 1 is set out herein below :

".....For the purposes of this Chapter, the term 'carpets and other textile floor coverings' means floor coverings in which textile materials serve as the exposed surface of the article when in use and includes article having the characteristics of textile floor coverings but intended for use for other purposes."

The carpets manufactured by the respondents-company, the exposed surface was made of polypropylene yarn which was a textile material falling under Chapter 55. Thus by applying test incorporated in Chapter Note 1 of Chapter 57, the goods in question were carpets and there was no dispute. As can be seen from this Note at the top of the Chapter 57, it defines only the term 'carpets and other textile floor coverings' and does not deal with the manner in which a carpet made out of different textiles are to be classified. This situation is dealt in Note 2(A) read with Section Note 14(A) of Section XI of the Central Excise Tariff. Section 2A and Section Note 14(A) of Section XI of Central Excise Tariff states as follows :

"2 (A) Articles classifiable in Chapters 50 to 55 or in Heading No. 58.06 or 59.02 and of a mixture of two or more textile materials are to be classified as if consisting wholly of that one textile material which predominates by weight over any other single textile material.

14(A) Predicts of Chapters 56 to 63 containing two or more textile materials are to be regarded as consisting wholly of that textile material which would be selected under Note 2 above for the classification of a product of Chapters 50 to 55 consisting of the same textile materials.

(B) For the application of this Rule :-

(i) In the case of textile products consisting of a base fabric and a pile or looped surface, no account shall be taken of the base fabric.

(ii) In the case of embroidery, only the base fabric shall be taken into account."

This criterion, however, does not apply to a case where the textile product consisting of ground fabric and piled or looped surface in which case no account is to be taken of the ground fabric.

9. In the carpets manufactured by the respondent-company, jute admittedly predominates by weight over each of the other single textile material. The Assistant Commissioner has admitted in his order dated 26-11-1999 that the said carpet, jute always predominated by weight over each of the other single textile material. As per the tests done by the Departmental Chemical Examiner on the spot and during visit to the respondent-company's factor, the percentage of jute in the said carpets was found to be 51.45 and 52.56. As per different test reports of Indian Jute Industries Research Association, the percentage of jute in the said carpets was found to be more than 50%. As per Indian Jute industries Research Association, the said carpets have got no base fabric. The same position was also found by the Departmental Chemical Examiner on testing the goods during his visit to the factory. The aforesaid factual position was specifically admitted by the Assistant Commissioner in his order and he has held that in the said carpets jute predominated by weight over each of the other single textile material and the said carpets did not have any base fabric. In such circumstances, the test of predominance of jute over each of the other single textile material is the deciding factor for classification purposes as statutorily laid down in Section Note 2(A) read with Section Note 14(A) of Section XI of the Central Excise Tariff. This position prevailed up to 1994-95. From 1995-96 onwards, the same position continued to prevail under Section Note 2(A) read with sub-heading Note 2(A) of Section XI of the Central Excise Tariff. As per the said statutory provisions, the said carpets containing two or more textile materials are to be regarded as consisting wholly of that textile material which predominates by weight over any other single textile material. In the present case, in the said carpets, jute predominates by weight over each other single textile material, the said carpets could only be classified as jute carpets. Therefore, it is clear from the criteria, where two textile materials are mixed to produce the goods in question, the textile material which predominates by weight over the other-textile material has to be taken as the proper classification of the goods. It is clear from the reasons mentioned above, the interpretation sought to be given by the Department to Chapter Note 1 of Chapter

57 is totally contrary to and inconsistent with the said Chapter Note itself and is wholly misconceived. The said carpets can only be classified as jute carpets and nothing else. As stated above, the said carpets, jute predominates by weight over each of the other single textile material and the said carpets did not have any base fabric. In view of the aforesaid position, the carpets can only be classified as jute carpets. We are entirely in agreement with this approach of the Appellate Commissioner and we are of the opinion that as the Section and Chapter Notes, stand, this is the correct position and the goods of the respondents have been rightly classified as jute carpet.

10. In so far as the ground in Appeal No. ER-416/2000, the position is factually incorrect. For the period mentioned in the said ground, the classification lists were initially approved by classifying the said carpets as jute carpets. Subsequently, two provisional assessments order were passed on 18-6-1993 and 24-7-1995 as stated by the Assistant Commissioner's Order dated 26-11-1999. Thereafter, the classification was changed for the entire period from December, 1991 and onwards and it was classified other than jute carpets vide the said order dated 26-11-1999 of the Assistant Commissioner. The respondent company had filed the appeal before the Commissioner (Appeals). No appeal was filed by the Department against the said order dated 26-11-1999. When the Commissioner (Appeals) accepted the respondent-company's submissions relating to classification, obviously, such decision of the Commissioner (Appeals) is the final and applied to the entire period covered by the Assistant Commissioner's Order. Therefore, we do not find force in the contentions raised by the appellant-Revenue.

11. In so far as the ground in Appeal No. ER-14/2001 is concerned, this is only the consequential to the classification issue.

12. In view of the aforesaid discussions, we are of the opinion that there is no force in both the appeals filed by the Revenue. Consequently, we dismiss both, the appeals filed by the Revenue. Ordered accordingly."

Even, for the Show Cause Notice DGAE F.No.10/CAL/CE/2000/1180 dated 24.09.2000 for the period July'99 to July'2000 (Sl. No. 8 of Para 1.1 supra), principles of res judicata is applicable in as much as investigation of the then DGAE (presently DGCEI) did not bring any new light on the issue unveiling new facts, excepting wide technical discussion on the applicability of Chapter Notes and Section Notes, which were also the subject matter of the cases decided by the Commissioner of Central Excise (Appeals) vide O-I-A No. 66/RA/KOI-IV/2002 dated 25.10.2002 and the earlier Commissioner of Central Excise, Kolkata - IV vide O- I-O No. 02/Ch-57/2002 dated 29.01.02 in favour of the said assessee, as well as the inapplicability of different case laws vis-à-vis the Adjudication Order of the ACCE, Dankuni Division vide No.60/DKN/99 dated 10.09.99. The Chemical Examiner's reports against Test Memos No. 1 to 4/2000 dated 09.02.2000 on the samples

collected by the then Officers of DGAE were found to be somewhat different from the previous test reports, in as much as in the previous chemical test report dated 19.03.99 given by Sri D. K. Majumder, the Chemical Examiner, there was mention that 'the samples contained no base fabric(s)' and in the subject chemical test reports against test memos dated 09.02.2000 issued by the same Chemical Examiner, there was mention that 'the sample appeared to be an incompletely woven carpet and contained base fabric(s) of Jute', which revealed the intermediate/semi- finished nature of the said goods, out of which the samples were drawn by the officers of DGAE. However, the said assessee prayed cross examination disputing the reports of the Chemical Examiner by citing certificates of different authorities, which was also referred by them on earlier occasions. Now, in view of the report given by the Office of the Textile Commissioner, in the final form, the carpet, as manufactured by the said assessee during the period from Dec'94 to June'99, had no base fabric and accordingly, the classification should be determined on the basis of the predominance factor. In the case of CCE, Kanpur vs. M/s. Classic Rugs Pvt. Ltd. [1998 (103) ELT 322 (T)], it was held by Hon'ble CEGAT that it was possible to produce a woven carpet without a base fabric or a ground fabric. It is an admitted position that there was no change in manufacturing process as well as nature of the said goods for the material period of July'99 to July'2000, in as much as the same was not disputed in the Show Cause Notice dated 24.09.2000. However, for the sake of argument, ignoring the fact that the sample appeared to be an incompletely woven carpet i.e. semi-finished goods and relying solely on the allegation brought in the show Cause Notice dated 24.09.2000, if it is considered that the said goods of the said assessee contained base fabric for the material period, that would not result in change of description and classification of the said goods in view of (the decision in the case of Uni Products (I) Ltd vs. CCE, Delhi, reported in 2006 (200) ELT 278 (Tri - Del), which reads as follows:

The issue in all these appeals is in respect of the classification of the Carpets manufactured by the appellants. The appellants classified the said product, as a "Jute floor coverings" falling under Chapter sub-heading No. 5703.20 while the Revenue wants it to be classified as falling under Chapter sub-heading No. 5703.90.

2. Learned Counsel for the appellants submits that the carpets manufactured by the appellants are liable to be classified as 'Jute carpets' under Chapter sub-heading No. 5703.20 only. He submits that the manufacturing process involves the tacking of fibres of jute and Polypropylene together and then Needle punching the same to a Hessian cloth in a single processing, with polypropylene at the top layer. He takes us through the Chapter Note No. 1 of the Chapter 57, and according to him this Chapter note is for the purpose of the classification of the Carpets in the Chapter 57, based upon the exposed surface being of some textile material, and once the carpets are classified under Chapter 57, this Chapter note is not attracted

for sub-heading level classification. For this proposition he relies upon the Tribunal's decision in the case of CCE, Bhubaneswar v. Champdany Industries Ltd. 2006 (193) E.L.T. 295 (T) = 2005 (70) RLT 76 (CESTAT- Kol). He also submits that the sub-heading level classification of the carpets manufactured by the appellants will have to be done, by resorting to the Section note 2A and sub-heading Section notes 2A and 2B to the Section XI of the CETA, 1985. He submits that according to these section notes the classification of the appellants products will be under 5703.20 by virtue of the predominance test i.e. which Textile material predominates by weight over the other textile materials in the product. He further submits that they have been selling these carpets as 'jute carpets' from 1988 and are still selling them as 'jute carpets'. Thus, the commercial identity of the item is jute carpet. The learned Advocate also would submit that the intention and practice of the Government always had been to give the benefit available to jute items to composite items in which jute was a part. The learned Advocate has referred to the exemption notification No. 93/94 which defined carpets of even 35% jute as jute carpets and granted exemption from payment of duty. For these reasons he submits that the correct classification of the appellants products will be under sub-heading No. 5703.20.

3. The learned SDR on the other hand submits that the appellants classification of the product under the sub-heading No. 5703.20 is totally wrong and is misplaced. He submits that the carpets manufactured by the appellants would be correctly covered under sub-heading No. 5703.90. He submits that the carpets as manufactured by the appellants would be known in the market as Polypropylene carpet as the exposed surface of the carpet is made up of said textile materials. He also further submits that the carpets manufactured by the appellants were not known in the market as Jute carpet. He also relies upon technical literature on carpets which would make it amply clear that the carpet is known in the market by its exposed surface. He states that the commercial parlance theory is applicable in this case. He also further submits that the Chapter Note No. 1 of the Chapter 57 is also applicable for the purposes of sub-heading level classification, and by applying the same the product is liable to be classified as falling under sub-heading No. 5703.90. According to him section notes of sub-heading 2B would apply, more so, the sub-note (1) which makes application of Rule 3 of Interpretative Rules to C.E.T.A. 1985, and on application of the same the product is classifiable under sub-heading No. 5703.90. He further submits that if the predominance test is to be applied, even then, since the exposed surface consists of polypropylene the products will be classified under 5703.90.

4.1 Considered the submission made by both sides. In order to appreciate the rival claims it is necessary to reproduce the Chapter sub-headings in question :

"57.03		Other carpets and other textile floor coverings, whether or not	
		Made up	
5703.10	-	Of coconut fibres (coir)	Nil
5703.20	-	Of jute	5%

5703.90	-	Other	30%”
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Thus, it is seen that at sub-heading level, what is relevant is the textile material of which the carpet is made. Chapter Note No. 1 to the Chapter 57 which has been relied upon by the revenue reads as under :

‘1. For the purposes of this Chapter, the term “carpet and other textile floor coverings” means floor coverings in which textile materials serve as the exposed surface of the article when in use and includes article having the characteristics of textile floor coverings but intended for use for other purposes.’

4.2 It may be noted here that this note relates to Chapter 57 as a whole and separates out the goods covered by this Chapter from goods covered by other Chapters of the Tariff. It is not in dispute that the exposed surface of the carpets as manufactured by the appellants is polypropylene, which is a textile material and the said products will merit classification under Heading 57.03. The dispute is in regard to the applicability of this note, to sub-heading level classification. It is seen from the manufacturing process as explained by the learned Advocate that the carpet is manufactured in a continuous process and the said carpet is to be considered as of one identity rather than as having separate identity of having a exposed surface and under surface. The tacking of the fibres of polypropylene and jute, to be further needle punched into Hessian cloth brings into existence one commodity that is Carpet. That Chapter Note No. 1 of Chapter 57 is relevant only for the classification of products in that Chapter 57 remained settled by this Tribunal’s decision in the case of Champadany Industries Ltd. case (supra). We have to now revert to the section notes and sub-heading notes to section XI of the CETA, 1985 which are reproduced below :

“2.(A) Products of Chapters 56 to 63 containing two or more textile materials are to be regarded as consisting wholly of that textile material which would be selected under Note 2 above for the classification of a product of Chapters 50 to 55 consisting of the same textile materials.

(B) For the application of this rule:-

(i) where appropriate, only the part which determines the classification under Rule 3 for the interpretation of the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) shall be taken into account;

(ii) in the case of textile products consisting of a ground fabric and a pile or looped surface no account shall be taken of the ground fabric;

(iii) in the case of embroidery of Heading No. 58.05 and goods thereof, only the ground fabric shall be taken into account. However, embroidery without visible ground, and goods thereof, shall be classified with reference to the embroidering threads alone.”

4.3 As can be seen from the above section notes and sub-heading notes the classification of the products falling under Chapters 56 to 63 should be done on the basis of the predominance test, that is to say, the textile materials which predominates by weight over other single textile material. It has been claimed before the adjudicating authorities, that the carpets manufactured by the appellants has jute contents of 75% to 85%. The revenue has not disputed this. This takes us to the second question whether the Hessian cloth has to be separated for the purposes of the predominance test or not. We are of the opinion that the Sub-heading notes as reproduced above specifically indicates the situations when to include the base fabric and when not to include the base fabrics for the predominance test. Since Section Note to Section XI clearly laid down [(ii) of 3 on the last page] when to exclude and when to include the base fabric while determining the predominance test, it would not be permissible to exclude base fabric (Hessian cloth) in the appellants case, while determining predominance. Hence the predominance test "the appellant's products has to be done taking the product manufactured by the appellants as a whole and not separating the layers and then applying the predominance test. We would also note that sub-heading Note 2B(i) would apply only if the product is made up of textile materials and a non-textile material. We also feel that the different technical literature produced by both sides do not help us in any way to come to conclusion that the products manufactured are not Jute carpets as the said literature have no material to throw any light on the subject. We find from the records as produced by the appellants that they sell their products to their wholesalers and retailers as "Floor Coverings of Jute". The revenue's reliance on a single dealer's statement indicating that the appellant's jute carpet are known in the market as "Synthetic Carpet" will be of no consequence as the said statement is unsubstantiated by further evidence in any form and contrary to the description of the goods in sales documents. Further, it has been the intention and practice of the Government that products manufactured partly out of jute also has to be encouraged through exercise exemptions. This is clear from the fact that the Notification No. 50/90 as amended by notification No. 93/94 treats carpets containing 35% of jute also as "jute carpets" eligible for the exemption. The said notification does not specify that only material at the exposed surface should be taken into account for determining the percentage of jute in the carpet. Nor is such a determination practicable.

5. In view of the above we hold that the Carpets manufactured by the appellants would be appropriately classified under Chapter sub-heading No. 5703.20 as carpet "of jute" and not as "other " carpet under 5703.90. Appeals allowed.

17. However, since the DGAE Officers did not collect sample from the stock of the said goods, in finished form, as admitted by the Chemical Examiner in his reports, I do not find any justification to accept the test reports of the Chemical Examiner's Reports against Test Memos No. 1 to 4/2000 dated 09.02.2000.

Moreover, nature of the samples was never disclosed in the Show Cause Notice. As mentioned in Para 16, there was no change in manufacturing process as well as nature of the said goods for the material period of July'99 to July'2000 in comparison with the period of Dec'91 to June'99. Hence I do not find any reason to accept the change in the nature of the said goods manufactured by the said assessee during the material period. In this connection, Hon'ble Tribunal in the case of *Regal Industries Ltd. vs. CCE, Chandigarh* [2001 (130) ELT 176 (Tri-Del)] held as follows:

" 10. The revenue authorities had drawn samples of the product, in question, and the same were sent to the C.R.C. L. , New Delhi and as per test report, the coir contents in the samples were 55.5 percent and the contents of latex were only 33.8 percent. Therefore, as per the above circular the product in question is entitled for the benefit of Notification 115/75-C.E. This report was not relied upon by the adjudicating authority only on the ground that the demand was for the prior period and the appellants might have changed the manufacturing process. But we find that there is no evidence on record in respect of change of manufacturing process. Thus, this finding is without any evidence."

18. Therefore, in view of the legal position discussed in para 12, 13, 14, 15 & 16 supra, I do not find any justification to allow cross examination of the Chemical Examiner in the instant case in as much as it is an admitted position that the nature and description of the said goods is no longer *res integra* and is settled as 'Carpets and floor coverings of jute'. Accordingly, there is no merit in the allegations brought vide Show Cause cum Demand Notices mentioned under Sl. No. 1 to 8 at para 1.1 supra.

Consequently, in respect of the Show Cause cum Demand Notices mentioned at Sl. No. 9 to 12 (Para 1.2 supra), the demand of duty on Jute yarn manufactured and captively consumed towards 'Carpets and floor coverings of other than jute' become liable to be dropped ' in as much as it has been held that 'Carpets and floor coverings' are of 'jute' not of 'other than jute' for the period 01.10.93 to 15.03.95 also."

7.3 The decision of Champdany Industries relied upon by the Commissioner has been affirmed by the Hon'ble Supreme Court, as reported at 2009 (241) ELT 481 (SC)]. Hon'ble Apex Court held as follows:

"3. In the case of M/s. Champdany Industries Limited, at an earlier stage of the proceedings an order was passed by the Commissioner (Appeals) on 27-6-1995, whereby the Commissioner (Appeals) remanded the matter to the original adjudicating authority to decide whether the carpets manufactured by M/s. Champdany Industries Limited have separate base fabric. The Commissioner found that the said question is technical in nature and in order to remove any doubt, matter was referred to an expert body like Jute Commissioner Office for its opinion."

4. Pursuant to the said remand order, the Department drew samples of the carpets manufactured by the respondent and sent the same to the Jute Commissioner's office. The Jute Commissioner got these samples tested by the expert body of the Jute Industry, namely, Indian Jute Industries Research Association and the report of the said association shows that jute predominates by weight over each other single textile material in the said carpets and the said carpets did not have any base fabric.

5. In the show-cause notice, which has been issued in this case, these facts are admitted. In the adjudication order passed in this case by Assistant Commissioner of Central Excise and Customs, Bhubaneswar, this fact has also been noted and from the said adjudication it will appear that the jute content in those carpets is 51.45% in B.L. and 52% in S.M. Those B.L. and S.M. are the varieties of carpets manufactured by the respondent-company and in these two Civil Appeals, namely C.A Nos. 7075-7076 of 2005 we are concerned with those two varieties of carpets.

6. Despite the said report, the Revenue's case is that the surface of the carpet being entirely of polypropylene, the same cannot be classified as jute carpet.

7. Apart from the aforesaid opinion of the expert, the Deputy Commissioner of Central Excise as well as Department's Chemical Examiner also visited the respondent's factory and examined its process of manufacture and tested the samples drawn on the spot. The Department's Chemical Examiner also found that those carpets do not have any base fabric and the jute predominates by weight over each other single textile material and the percentage of jute was more than 50%. This also appears from the adjudication order of the Assistant Commissioner of Central Excise and Customs, Bhubaneswar.

8. The Revenue even after accepting those reports issued a show-cause notice, inter alia, on the ground that the surface of the jute carpets was entirely of polypropylene and therefore, as per Note 1 of Chapter 57 of the First Schedule to the Central Excise Tariff Act, 1985 those carpets cannot be classified as jute carpets but are classifiable as polypropylene carpets. The said notice related to the period from December 1991 to May 1999.

9. Respondent-company, however, disputed the said contention of the Revenue and an adjudication order was passed on 26-11-1999 by the Assistant Commissioner. In the said order, the Assistant Commissioner accepted the reports referred to hereinabove and also accepted the position that in those carpets jute predominates by weight over each other single textile material and those carpets do not have any base fabric. In spite of the aforesaid position, the Assistant Commissioner relying on Chapter Note 1 of Chapter 57 held that those carpets cannot be classified as jute carpets but they are polypropylene carpets.

10. Against the said order dated 26-11-1999 the respondent-company filed an appeal before the Commissioner (Appeals) and the Commissioner (Appeals) by an

order dated 13-3-2000 allowed the appeal. In the said order, the Commissioner (Appeals) held that the interpretation of the Assistant Commissioner of Chapter Note I of Chapter 57 was not correct and the Commissioner (Appeals) came to a conclusion that as per the Section Notes any product which contains two or more textile materials are to be classified as consisting of that textile material which predominates by weight over similar textile materials. It may be noted that following the classification order dated 26-11-1999 the Assistant Commissioner passed a quantification order dated 30-3-2000, but since the appeal of the respondent-company in respect of the classification order of Assistant Commissioner dated 26-11-1999 was allowed, the appeal against the quantification order was also allowed by the Commissioner (Appeals) on 25-8-2000 by following order dated 13-3-2000 in the classification proceedings.

11. Against those orders dated 13-3-2000 and 25-8-2000 the Revenue filed two appeals before the Customs, Excise and Service Tax Appellate Tribunal (hereinafter referred to as "the Tribunal"). Thereafter, the Tribunal by an order dated 26-9-2000 dismissed both the appeals filed by the Revenue.

12. It may be noted in this connection that before the Hon'ble Andhra Pradesh High Court petitions were filed in relation to classification at the stage of show-cause notice. The High Court of Andhra Pradesh interfered in those show-cause proceedings. As the Revenue filed their appeal against those show-cause proceedings, this Hon'ble Court held by a judgment and order dated 5-5-2004 that the High Court ought not to interfere in matters of classification at the show-cause stage. Thus, the judgment of the High Court was set aside and the matter was remanded to the authority for adjudication. Thereafter, the Tribunal heard the matter afresh and dismissed the appeal of the Revenue by an order dated 5-4-2005. Against the said order of the Tribunal this appeal has been filed by the Revenue.

13. The order of the Tribunal which has been impugned herein has been reported in 2006 (193) E.L.T. 295. In paragraph 9 at page 299 of the report, the Tribunal held that in the carpets manufactured by the respondent-company jute predominates by weight over each of the other single textile material. The Tribunal found that this has been admitted by the Assistant Commissioner in its order dated 26-11-1999 in view of the tests done by the Departmental Chemical Examiner on the spot and during the visit to the factory of the respondent-company which has also been admitted from the reports of Indian Jute Industries Research Association. Therefore, this factual position is admitted by the Revenue.

14. In view of such admitted factual position, the Tribunal held that such carpets were clearly classifiable as jute carpets as the test of predominance of jute over other single textile material is the deciding factor for classification purposes.

15. Admittedly, the case of the Revenue is that the product falls under Chapter 57 and it contains two or more textile materials. In fact that is the case of the Revenue in the Show-cause notice and in the order of the Assistant Commissioner.

16. The necessary corollary from the aforesaid stand of the Revenue is that once the goods are falling under Chapter 57, Chapter Note 1 to Chapter 57 becomes relevant. The said Chapter Note is set out below :

“For the purposes of this Chapter, the term ‘carpets and other textile floor coverings’ means floor coverings in which textile materials serve as the exposed surface of the article when in use and includes article having the characteristics of textile floor coverings but intended for use for other purposes.”

17. The Revenue also placed reliance on the said Chapter Note. In fact the Revenue wanted to classify the said carpets as otherwise than jute carpets by relying on the said Chapter note.

18. In our view the said stand of the Revenue is not correct. A perusal of the said Chapter note makes it clear that the same merely defines the term carpet and other floor coverings “for the purposes of this Chapter”, namely, Chapter 57.

19. Here we must be conscious of the limited role played by Chapter Note. It is only to decide whether the goods in question are carpets and other textile floor coverings for the purposes of Chapter 57 or not. Once the goods are carpets and falling under Chapter 57, the role of Chapter Note 1 comes to an end. It is also the case of the Revenue that the Chapter Note 1 cannot be pressed into service for the purpose of classification.

20. Reference in this connection may be made to the relevant statutory provisions laid down in Sections 2(A) and 14(A) of Section XI of the Central Excise Tariff Act, 1985. Those provisions are set out below :-

“2(A) Articles classifiable in Chapters 50 to 55 or in Heading No. 58.06 or 59.02 and of a mixture of two or more textile materials are to be classified as if consisting wholly of that one textile material which predominates by weight over any other single textile material.”

“14(A) Products of Chapters 56 to 63 containing two or more textile materials are to be regarded as consisting wholly of that textile material which would be selected under Note 2 above for the classification of a product of Chapters 50 to 55 consisting of the same textile materials.

(B) For the application of this rule :

(i) In the case of textile products consisting of a base fabric and a pile or looped surface, no account shall be taken of the base fabric;

(ii) In the case of embroidery, only the base fabric shall be taken into account.”

21. The classification thereafter has to be covered under one heading or sub-heading of Chapter 57. The question of classification of such carpets under one or other heading or sub-heading of Chapter 57 has to be decided on the basis of description of such heading/sub-heading read with the relevant Section Notes and Chapter Notes. This also flows from Rule 1 of the "General Rules for the Interpretation of the said Schedule" and these Rules are part of the Central Excise Tariff Act, 1985.

22. Rule 1 of the said Rules provides that classification shall be determined according to the terms of the Headings and any relative Section or Chapter Notes.

23. In the instant case as per Section Notes 2(A) and 14A for the period between 1994-1995 and Section Note 2(A) read with sub-heading Note 2(A) thereafter, the inter se classification has to be done under different headings and sub-headings.

24. Since the goods admittedly fall under Chapter 57 and consist of more than two or more textile materials, it has to be classified on the basis of that textile material which predominates by weight over any other single textile material. As in the goods in question jute admittedly predominates by weight over each other single textile material, the said Carpet could only be classified as jute carpets and nothing else.

25. This Court finds that this logic and reason is in consonance with the interpretation of the Chapter Note, Section Note and the sub-headings. The contrary interpretation given by the Revenue is not correct. In fact the Revenue wanted to classify the carpets under the residuary sub-heading 5702.90 of Heading 57.02. Both Headings 57.01 and 57.02 are set out below :

"57.01 Carpets and other textile floor coverings, knitted, woven, tufted, or flocked, whether or not made up (excluding dari, sataranji, namdahs, jute carpets and coir carpets)	
- In or in any relation to the manufacture of which any process is ordinarily carried on with the aid of machines :	
5701.11 - Not embossed	30%
5701.12 - Embossed	30%
5701.90 - Other	Nil
57.02 Carpets and other textile floor coverings (other than those of heading No. 57.01) including floor coverings of felt, whether or not made up	
5702.10 - Floor coverings of Coir	Nil
702.20 - Floor coverings of jute	0%
702.90 - Other	0%
5702.10 Floor coverings of Coir	Nil

26. The relevant entries from the Central Excise Tariff 1997-98 are extracted below :

"57.02 - Carpets and other textile floor coverings (other than those of heading No. 57.01) knotted, woven, tufted or flocked, whether or not made up

	- In or in relation to the manufacture of which any process is ordinarily carried on with the aid of machines :	
5702.11	- Of coconut fibres (coir)	Nil
5702.12	- Of jute	Nil
702.19	- Other	25%
5702.90	- Other	il"
57.03	- Other Carpets and other textile floor coverings, whether or not made up	
5703.10	- Of coconut fibres (coir)	Nil
	- Of jute	Nil
5703.20		
5703.90	- Other	25%"

27. The aforesaid tariff has come into effect on 23-7-1996.

28. In this connection we may refer to Notification No. 50/90-C.E., dated 20-3-1990. From the aforesaid Notifications it would appear that the total exemption was granted in respect of jute blankets, jute felt, jute mats and mattings, jute carpets and bleached, dyed or printed jute fabrics falling under Chapter 53, 56, 57 or 63 of the Schedule to the Central Excise Tariff Act, 1985 with the condition that exemption shall not be available if the jute content is less than 50% in the aforesaid commodities.

29. Later on by a subsequent Notification No. 93/94-C.E., dated 25-4-1994, the said 50% has been lowered to 30%. By a subsequent Notification No. 29/95-C.E., dated 16-3-1995, total exemption was granted in respect of floor coverings of jute.

30. On a conjoint reading of the aforesaid Tariff and the exemption Notifications issued by the Government, the stand of the Revenue cannot be sustained.

31. Apart from that the revenue's stand in this case is contrary to the decision of this Court in *HPL Chemicals Ltd. v. Commissioner of Central Excise, Chandigarh* - (2006) 5 SCC 208. Commenting on the reliance placed by the Revenue on the residuary item in Heading 38.23 (renumbered 38.24), this Court observed that the CEGAT erred in relying on the residuary article by reading the residuary heading as if it was specific heading. This Court observed as under : -

"31....In the present case since the goods were covered by a specific heading i.e. Heading 25.01, the same cannot be classified under the residuary heading at all. This position is clearly laid down in Rule 3(a) of the Interpretative Rules set out above. As per the said Interpretative Rule 3(a), the heading which provides the most specific description shall be preferred to the heading providing a more general description..."

32. In coming to the said conclusion, this Court relied on an earlier three-Judge Bench decision of this Court in *Dunlop India Ltd. v. Union of India and others* - (1976) 2 SCC 241, para 35. In the said paragraph this Court very elegantly clarified the position in the following words :-

“35. When an article has, by all standards, a reasonable claim to be classified under an enumerated item in the Tariff Schedule, it will be against the very principle of classification to deny it the parentage and consign it to an orphanage of the residuary clause....”

33. That principle has also been upheld by another three-Judge Bench decision of this Court in M/s. Bharat Forge and Press Industries (P) Ltd. v. Collector of Central Excise, Baroda, Gujarat - (1990) 1 SCC 532 (at page 534 para 4):-

“4. The question before us is whether the department is right in claiming that the items in question are dutiable under tariff entry 68. This, as mentioned already, is the residuary entry and only such goods as cannot be brought under the various specific entries in the tariff should be attempted to be brought under the residuary entry. In other words, unless the department can establish that the goods in question can by no conceivable process of reasoning be brought under any of the tariff items, resort cannot be had to the residuary item....”

34. It is, thus, clear that the aforesaid principle has virtually been hardened into a rule of law by reason of the consistent view taken by this Court. The Revenue’s stand in this case in purporting to justify the classification of the goods manufactured by the respondent company under a residuary heading, therefore, cannot be appreciated.

35. Learned Counsel for the Revenue argued that in a case where there is some doubt relating to classification of the goods, the essential characteristic of the goods will have to be looked into. Relying on this concept of essentiality test the learned counsel argued as the exposed surface of the carpet is polypropylene fiber and not jute, these goods cannot be classified as jute carpets. It was also argued if these goods are to be classified as jute carpets, then the exposed surface of the carpets must be of jute.

36. This argument is contrary to the principle discussed above, namely, the predominance test. It is not disputed by the Revenue that by the predominance test the content of the jute in the carpet is highest and more than 50%. Polypropylene fiber has also been accepted by the Revenue as a textile material falling under Chapter 55.

37. Therefore, the mere fact that the surface of the carpet is polypropylene fiber, it does not cease to become jute carpet. So this Court is constrained to hold that this argument by the Revenue on the basis of surface or essentiality test is erroneous.

38. Learned counsel for the Revenue also argued that the common parlance test should be applied for classifying the carpets as the carpets to the common man would not appear to be jute carpet but polypropylene carpet.

39. *In Collector of Central Excise, Hyderabad v. Fenoplast (P) Ltd. (II) - 1994 (72) E.L.T. 513 (S.C.), a three-Judge Bench of this Court held that while interpreting statutes like the Excise Tax Acts or Sales Tax Acts where the primary object is to raise revenue and for such purpose the various products and goods are classified, the common parlance test can be accepted, if any term or expression is not properly defined in the Act "if any term or expression has been defined in the enactment then it must be understood in the sense in which it is defined but in the absence of any definition being given in the enactment the meaning of the term in common parlance or commercial parlance has to be adopted".*

40. *Going by the aforesaid principle, we cannot hold that common parlance test has any application here.*

41. *In laying down this preposition, the Court relied upon a decision of this Court in M/s Indo International Industries v. Commissioner of Sales Tax, Uttar Pradesh - (1981) 2 SCC 528.*

42. *Learned counsel for the Revenue argued that for the purpose of classification in this case Rule 3 of the 'Rules for the Interpretation of the Schedule to the Act' should be applied and by applying the said Rule the goods manufactured by the respondent Company should be covered under the heading "others".*

43. *This Court is unable to accept the said submission for the following reasons.*

44. *In order to appreciate the said submission, the said Rule 3(a)(b) and (c) is quoted below :-*

"3(a). The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

(b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets, which cannot be classified by reference to (a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

(c) When goods cannot be classified by reference to (a) or (b), they shall be classified under the heading which occurs last in the numerical order among those which equally merit consideration."

45. *From a perusal of the said Rules it appears that the dominant intention in the said Rule, especially clause (a) thereof is that the heading which provides the most specific description shall be preferred to the heading providing a more general description.*

46. *In the case in hand, following the said interpretation, the goods manufactured by the respondent-company are to be classified as jute carpet or jute floor coverings.*

47. *Clause (b) and Clause (c) of the said Rule 3 will apply only in those cases which cannot be classified under Clause (a). Since in the instant case following the dominant intention of Clause (a), the goods manufactured by the respondent-company can be classified, Clause (b) and Clause(c) of the said Rule need not be pressed into service.*

48. *Reference in this connection may be made to a three-Judge Bench decision of this Court in Commissioner of Central Excise, Nagpur v. Simplex Mills Co. Ltd. - (2005) 3 SCC 51. In paragraph 11 of the said report, the purport of the said Rule has been discussed. While discussing the said Rule, this Court held that the Rule having been framed pursuant to the powers under Section 2 of the Central Excise Tariff Act, 1985 is statutory in nature. Learned Judges also made it clear that for the purposes of classification primacy should be attached to the section and chapter notes along with terms of the headings. If on application of Section and Chapter Notes, 'no clear picture emerges' then only can one resort to those rules.*

49. *In the instant case from the above discussion, it is clear from a perusal of the Chapter and Section Note, that the goods manufactured by the respondent-company can be classified as jute carpets/jute floor coverings. Thus, the argument on behalf of the Revenue cannot be accepted.*

50. *Apart from that, the point on Rule 3 which has been argued by the learned counsel for the Revenue was not part of its case in the show-cause notice. It is well settled that unless the foundation of the case, is made out in the show-cause notice, Revenue cannot in Court argue a case not made out in its show-cause notice. {See : Commissioner of Customs, Mumbai v. Toyo Engineering India Limited - (2006) 7 SCC 592, para 16}.*

51. *Similar view was expressed by this Court in the case of Commissioner of Central Excise, Nagpur v. Ballarpur Industries Ltd. - (2007) 8 SCC 89. In paragraph 27 of the said report, learned Judges made it clear that if there is no invocation of the concerned rules in the show-cause notice, it would not be open to the Commissioner to invoke the said Rule.*

52. *Learned counsel for the Revenue also relied on some judgments.*

53. *It relied on the case of Oswal Agro Mills Ltd. and Ors. v. Collector of Central Excise and Ors. - 1993 Supp. (3) SCC 716. In that case the Court allowed the appeal*

filed by the assessee and did not accept the interpretation of the Revenue on 'Toilet Soap'. Learned judges relied on the age old principle that where the words of the statute are plain and clear, there is no room for applying any of the canons of interpretation which are merely presumption in cases of ambiguity in the statute.

54. *Applying the said principle in the present case, we hold that the ratio in Oswal Agro (supra) does not at all advance the case of the Revenue. Apart from that the said decision was rendered under the old Tariff Act when there was nothing like Chapter Note and Section Note. Oswal Agro (supra) has no application here.*

55. *Learned counsel relied also on the decision of this Court in Novopan India Ltd, Hyderabad v. Collector of Central Excise and Customs, Hyderabad - 1994 Supp. (3) SCC 606. In that case, the Court interpreted the provision of Old Tariff Act with regard to exemption and held in paragraph 16 that a person invoking an exemption provision must establish clearly that he is covered by the said provision. In case of doubt or ambiguity, the benefit of exemption cannot be claimed by the assessee.*

56. *In the present case, those questions are not at all relevant as we are concerned with the provisions of the new Central Excise Act of 1985 which came into force on 22-2-1986 with Section Notes, Chapter Notes, Headings and sub-headings. Therefore, the ratio in Novopan (supra) has no relevance in the facts of the present case.*

57. *Learned counsel also relied on the decision of this Court in Hindustan Poles Corporation v. Commissioner of Central Excise, Calcutta - (2006) 4 SCC 85. In fact the judgment in that case does not at all advance the case of the Appellant-Revenue. In paragraph 39 of the judgment it has been held that the residuary entry is meant only for those categories of goods which clearly fall outside the ambit of specified entries and unless the Department can establish that the goods in question can, by no conceivable process of reasoning, be brought under any of the tariff items, resort cannot be had to the residuary item.*

58. *Following the said principle, as we must, In the instant case, the goods manufactured by the respondent-company fall clearly under the specified items as discussed above.*

59. *Revenue also relied on another decision of this Court in Kemrock Industries & Exports Ltd. v. Commissioner of Central Excise, Vadodara - (2007) 9 SCC 52, for the purpose of essentiality test. As noted above, there is no whisper of the essentiality test in the show-cause notice. As no case of essentiality test has been made out in the show-cause notice, the same cannot be argued for the first time before this Court. As such the judgment in Kemrock (supra) on essentiality test is of no avail."*

7.4 The decision of Uni Products Ltd., relied upon by the Commissioner has been approved by the Hon'ble Apex Court as reported at [2009 (241) ELT 491 (SC)]. Hon'ble Apex Court observed:

10. Learned counsel for the respondents submitted that despite the aforesaid finding, the present show-cause is wholly unnecessary.

11. However, in the said show-cause proceedings the Commissioner ultimately dropped all penal proceedings and also the duty demand for the period beyond six months.

12. Ultimately, the matter rested when the appeal was filed before the Tribunal by the assessee and the tribunal in its order dated 30-9-2005 held as follows :

"...It is seen from the manufacturing process as explained by the learned advocate that the carpet is manufactured in a continuous process and the said carpet is to be considered as of one identity rather than as having separate identity of having a exposed surface and under surface. The tacking of the fibers of polypropylene and jute to be further needle punched into Hessian cloth brings into existence one commodity that is carpet."

13. The tribunal after discussing the Chapter Notes, Sub-headings and also the Section Notes returned a finding that the classification should be done on the basis of the predominance test, that is to say, on the basis of textile materials which predominate by weight over other single textile material.

14. The tribunal noted that before the adjudicating authorities it has been claimed that the carpets manufactured by the appellants has jute contents of 75% to 85% and the tribunal noted that "the revenue has not disputed this".

15. After opining as above, the tribunal went on to discuss the second question, namely, whether the Hessian cloth has to be separated for the purposes of the predominance test or not?

16. After discussing the matter in detail, the tribunal came to a finding that while determining the predominance test, it would not be permissible to exclude base fabric (Hessian cloth).

17. The tribunal came to the conclusion that the predominance test of the assessee's products has to be done taking the product manufactured by it as a whole and not by separating the layers and then applying the predominance test.

18. *The tribunal also noted that the revenue's reliance on a single dealer's statement indicating that the assessee's jute carpets are known in the market as "Synthetic carpet" is of no consequence especially when such statement is not substantiated by any evidence.*

19. *It is well known that the tribunal being the last authority on fact, it is not proper for this Court, in exercise of its power under Section 35L(b) of the Central Excise Act, 1944, to disturb such findings of the tribunal since such findings are based on evidence.*

20. *For the reasons discussed above, we find no merit in this appeal. The appeal is dismissed.*

21. *Since the same questions are involved in the other appeals with slight factual modification, those appeals for the reasons discussed above and also for the reasons given in Civil Appeal Nos. 7075-7076 of 2005 are also dismissed.*

7.5 We find that Commissioner in a very cogent manner examine the issue vis a vis the earlier test reports and the orders deciding the issue in the favour of the appellant. There is no question of res judicata in the issue relating to classification. However, for a change in opinion, there has to be cogent reasons stated in the grounds. It is settled principle in law that such changing opinion could have been only prospective. Revenue relies upon test reports in respect of samples drawn in 1999 to justify change of classification made as per the orders on the basis of samples drawn in 1991, 1992. No sample during the period for which the show cause notices have been issued wherever drawn. Reliance placed by the Revenue on the samples subsequently drawn for changing the classification and the samples availed by the Respondent cannot be justified in this manner. In case of Charminar Non Wovens Ltd [2009 (241) ELT 494 (SC)] Hon'ble Apex while following its decision in case of Champadany, observed as follows:

"6. Against the said order, an appeal was filed by the Revenue and the said appeal came to be decided by the Commissioner of Customs and Central Excise (Appeals), Hyderabad. In the course of hearing of the appeal, the appellate authority noted why the adjudication authority decided that the classification of the product in question should be under sub-heading 5703.20. The appellate

authority also noted that the said carpet was physically examined by the adjudicating authority, and after doing so, the adjudicating authority came to a finding that floor covering was neither piled nor looped, rather the goods were manufactured by needle punching process. The adjudicating authority, therefore, came to a concurrent finding that the goods in question were correctly classified under chapter sub-heading 5703.20 and are not to be classified under "other" under chapter sub-heading No. 5703.90. The appellate authority also held that the decision of CESTAT in the case of Uni Products (supra) is applicable in the facts of the case. With the said finding, the appellate authority rejected the appeal of the Revenue.

7. When the Revenue further took the appeal up to Tribunal, the Tribunal referred to its decision in the case of Commissioner of Central Excise, BBSR-I v. Champdany Industries Limited - 2006 (193) E.L.T. 295 (Tri.-Kolkata), and held that the issue is covered by the decision in Champdany Industries (supra). The appeal filed against the same decision rendered in the Champdany Industries (supra) has been dealt with by this Court in the case in Civil Appeal Nos. 7075-7076 of 2005. In that judgment, all the issues raised by the Revenue have been discussed in detail. After such detailed discussion, the contentions of the Revenue have been rejected.

8. Following the same parity of reason contentions of the Revenue, which are identical in this case, are also rejected. Apart from that, it appears that in this matter the Revenue's case has been constantly rejected at all the three levels, namely, in the adjudication order passed by the Addl. Commissioner of Central Excise, in the appellate order passed by the Commissioner (Appeals) and in the Tribunal. Such decisions have been rendered on the basis of the relevant materials and after analyzing the evidence on record as also the provision of Section Notes and Chapter Notes. Such concurrent findings by the lower authorities are interfered with by this Court in exercise of its jurisdiction under Section 35L of Central Excise and Salt Act, 1944 only when such findings are patently perverse or are based on manifest misreading of any legal provision. Here none of these situations is present.

9. Reference in this connection may be made to the decision of Sidharath Pharmaceuticals v. Collector of Central Excise, Ahmedabad - 2003 (157) E.L.T. 502 (S.C.). In that judgment, the learned Judges of this Court held that with the concurrent finding of facts reached by lower authorities in classification on the basis of evidence and on analysis of relevant legal provision interference is not called for by this Court in exercise of its power under Section 35L of the Central Excise Act, 1944.

10. Similarly, in the case of Auto Control (P) Ltd. v. Collector, quoted in 2006 (199) E.L.T. A127, this Court held where there is a concurrent finding of fact by the authorities below in support of respondents claim for classification normally this Court does not interfere with such concurrent findings.”

8. We do not find any infirmity in the Order of the Commissioner which is based on the decision which stands approved by the Hon’ble Apex Court.

9. The Impugned Order is upheld and the appeal filed by the Revenue is dismissed.

(Operative part of the order was pronounced in the open Court.)

Sd/

(Sanjiv Srivastava)

Member (Technical)

Sd/-

(P.Dinesha)

Member (Judicial)

Pooja