CASE NO.:
Appeal (civil) 7814-7817 of 2004

PETITIONER:
Commissioner of Central Excise,Hyderabad-II.

RESPONDENT:
M/s Aldec Corporation & Others

DATE OF JUDGMENT: 26/09/2005

BENCH:
B.P. SINGH & S.H. KAPADIA

JUDGMENT:
J U D G M E N T

KAPADIA, J.

The issue involved in these civil appeals under section 35L(b) of Central Excise Act, 1944 is \026 whether on the facts and circumstances of the case, the Commissioner was right in holding that the fragmented activities of M/s Aldec Corporation, M/s Vitthaleshwara Painting Industries (VPI) and M/s Srinivasa Rolling and Engineering Works (SREW) taken individually or jointly resulted in "manufacture" of a separate, independent and distinct identifiable product namely, painted aluminium slat (PAS) for venetian blinds classifiable under chapter sub-heading 7616.90.

On 8.11.1994, while patrolling, officers of Central Excise, Hyderabad inspected an auto-trolley bearing registration No.AHT-8500. On verification of the goods, being transported by the above trolley and on verification of documents produced by the driver, the officers found that the goods in transit were PAS for venetian blinds. The officers found that the goods in transit did not suffer excise duty and accordingly, they seized the vehicle on a reasonable belief that the goods in transit were excisable goods under chapter sub-heading 7616.90. On 9.11.1994, as a follow-up of the seizure, the officers visited the premises of M/s Aldec Corporation and also premises of M/s VPI and M/s SREW under the authority of the search warrant. As a follow-up, the department issued show-cause notice on 27.3.1995 alleging purchase of aluminium sheets from M/s Hindalco Industries Ltd. and paint from M/s Goodlass Nerolac Paints Ltd., which, the department alleged, was being used in the manufacture of PAS for venetian blinds measuring 50mm x .23 mm and 25 mm x .23 mm, running into mill length (over 100 ft.). According to the show cause notice, M/s Aldec Corporation bought aluminium sheets in coil form measuring 472 mm x 2.03 mm and in turn forwarded the said aluminium sheets to M/s VPI (job processor) which in turn forwarded the aluminium sheets to SREW (job processor) for slitting and re-rolling the above sheets into slats of 50 mm x .23 mm and 25 mm x .23 mm running into more than 100 ft. M/s SREW thereafter returned back the slats to VPI who after painting the slats returned them back to M/s Aldec Corporation which then sold the said PAS as trader in the market. These PAS were used in the manufacture of venetian blinds. According to the show-cause notice, M/s Aldec Corporation paid excise duty on the aluminium sheets bought from M/s Hindalco under tariff item 76.06. According to the show-cause notice, the department had examined the documents seized including balance-sheets and on that basis, it was alleged

that M/s Aldec Corporation had paid excise duty under tariff item 76.06 on behalf of so-called job processors, M/s VPI and M/s SREW. According to the show-cause notice, M/s Aldec Corporation had paid excise duty which was passed on to the customers in the past and on obtaining refund from the department in the name of M/s VPI and M/s SREW, M/s Aldec Corporation refunded the amounts received from the department to its customers. According to the show-cause notice, M/s Aldec Corporation had two partners by the name, Vinay Asar and Harish Asar, whose father Vallabdas Purushottamdas Asar was a partner of a firm M/s Sunder Das & Co. According to the show-cause notice, M/s Sunder Das & Co. had let out the premises to M/s Aldec Corporation. On behalf of M/s Sunder Das & Co., lease was signed by Vallabdas Asar as lessor whereas the lease-deed was signed by Vinay Asar as partner of M/s Aldec Corporation (lessee). There was also an agreement between M/s Sunder Das & Co. and M/s VPI. There was also an agreement between Sunder Das & Co. and M/s SREW. Both these agreements were for supply of power, lighting and water to M/s VPI and M/s SREW. According to the show-cause notice, the work assigned to M/s VPI & M/s SREW was to convert aluminium sheets measuring 472 mm x 2.03 mm into 50 mm x .23 mm thickness and 25 mm x .23 mm thickness. It was further alleged that M/s SREW collected job work charges not from M/s Aldec Corporation but from M/s VPI for the work of re-rolling and slitting. In the light of the aforestated circumstances, the department alleged that the entire control of all the aforestated activities vested in M/s Aldec Corporation and with the intention to evade excise duty, M/s Aldec Corporation called itself a "trader" and called M/s SREW and M/s VPI as job processors. According to the show-cause notice, M/s Aldec Corporation was not a trader; that it was in fact a processor and that M/s Aldec Corporation had resorted to the aforestated modus operandi with the intention to evade excise duty by fragmenting the aforestated different and distinct activities which if taken together resulted in the manufacture of an independent identifiable product, namely, painted aluminium slat (PAS), classifiable as a separate article under chapter sub-heading 7616.90. From the show-cause notice, one finds that in the year 1986, M/s VPI was asked by the Superintendent to apply for Central Excise Licence and to follow central excise procedures. Being aggrieved, M/s VPI had filed a writ petition in the High Court of Andhra Pradesh. That writ petition was disposed-of on 10.6.1987 directing M/s VPI to approach the collector. Similar immunity was also claimed by M/s SREW. The collector upheld the contentions of M/s VPI and M/s SREW holding that painting of aluminium sheets did not amount to "manufacture". The additional collector also came to the conclusion that the slitting of aluminium sheets did not amount to "manufacture". Consequently, the additional collector took the view that the aluminium sheets remained under tariff item 27(6) and there was no new article produced or manufactured from such aluminium sheets as a result of slitting and painting so as to fall under tariff item 68 (as it then stood). However, under the impugned show-cause notice, the department contended that in the earlier proceedings, notices were given only to M/s VPI and to M/s SREW; that no notice was given to M/s Aldec Corporation; that the earlier proceedings focussed on individual activity of slitting and the individual activity of painting; that the various different stages through which the original sheets had undergone different processes at the behest of M/s Aldec Corporation was not examined by the department; and that the department had proceeded on the basis that M/s VPI and M/s SREW were independent job processors. According to the

department, in the present case, on examination of the documents and from subsequent recovery, the department found that M/s Aldec Corporation was the processor and that M/s VPI and M/s SREW were only its workmen/labourers and, therefore, the impugned show-cause notice had called upon M/s Aldec Corporation to show-cause why the above activity/process taken together should not be treated as "manufacture", both on first principles as well as under section 2(f) of the said Act, 1944. The impugned show-cause notice, therefore, did not accept M/s Aldec Corporation as a trader but as a job processor/manufacturer. In the circumstances, the show-cause notice, in the present case, has alleged violation of rule 174 of Central Excise Rules, 1944 read with section 6 of the said Act, 1944. By the said show-cause notice, the department has called upon M/s Aldec Corporation to pay duty amounting to Rs.1.51 crores (approximately) for the period April 1990 to October 1994. A similar show-cause notice was also issued by the department on 5.7.1995 for recovery of an amount of Rs.9.57 lacs (approximately) for the period December 1994 to April 1995. According to the show-cause notice, the aluminium sheets bought by M/s Aldec Corporation from M/s Hindalco was ten times thicker than the slats. The value of the slat was Rs.230/- per kg. and that these slats were sold to different buyers whose names find place in the order of the Commissioner.

In reply to the show-cause notice, M/s Aldec Corporation submitted that the basis of the show-cause notice was erroneous because it ignored the previous binding orders of the additional collector and the commissioner (appeals) stating that the activities carried by M/s VPI and M/s SREW did not amount to "manufacture". It was contended that M/s Aldec Corporation was a trader in aluminium strips in the coil form and that the department was always aware of its activities as a trader. According to M/s Aldec Corporation, there was no difference between tariff item 27(6) and tariff item 68 (which existed prior to 28.2.1986) on one hand and tariff item 76.06 as well as chapter sub-heading 7616.90 under the Central Excise Tariff Act, 1985 on the other hand and, therefore, the decision taken by the department in 1986 was irreversible. In the reply, M/s Aldec Corporation contended that M/s VPI and M/s SREW were job processors, which position was accepted by the department in its earlier decisions in 1986/1987 and, therefore, it was not open to the department in the year 1995 to contend that the slats were now classifiable under sub-heading 7616.90. According to M/s Aldec Corporation, the business of the corporation was trading and, therefore, it was not required to obtain licence or registration under the Central Excise Act, 1944. According to M/s Aldec Corporation, the department had accepted that the activities of M/s VPI and M/s SREW were non-manufacturing activities and in fact refunds were sanctioned in favour of these units and, therefore, it was not open to the department now to allege evasion of excise duty by M/s Aldec Corporation, as indicated in the show-cause notice, w.e.f. April 1990. M/s Aldec Corporation, therefore, submitted that they were traders of aluminium strips in the form of coils and, therefore, there was no question of payment of excise duty on such trading activity. However, in reply to the impugned show-cause notice, vide para 14(h), M/s Aldec Corporation submitted that they were not concerned with the show-cause notices given to M/s VPI and M/s SREW. The tenor of the reply of M/s Aldec Corporation indicates that M/s Aldec Corporation was a trader whereas M/s VPI and M/s SREW were job processors whereas according to the department, in view of the complete control of all the activities by M/s Aldec

Corporation, the real processor was M/s Aldec Corporation and not M/s VPI or M/s SREW. In reply, M/s Aldec Corporation submitted that the excise duty was on the activity of 'manufacture'; the duty of excise was to be imposed on manufacture of goods; that in the case of M/s Ujagar Prints etc. v. Union of India & Others reported in 1988 (38) ELT 535, it has been held by this Court that in the case of processing-houses, duty was leviable on the processors not because they were owners of the goods but because they caused the manufacture of the goods. M/s Aldec Corporation submitted that they did not cause the manufacture of the goods in the present case and, therefore, they were not liable. According to the reply, the ownership of the goods or owners of the plant or machinery was not relevant. According to M/s Aldec Corporation (respondent herein), what was relevant was the nature of the activity and not the nature of the ownership. M/s Aldec Corporation denied the charge of fragmentation of the activities. In any event, it was submitted that the facts relating to the alleged fragmentation were known to the department at all material times including in the earlier adjudication and, therefore, it was not open to the department to claim duty amount retrospectively.

By order dated 30.11.1999, the commissioner confirmed the demands raised by the department in the show-cause notices. It was held that at the relevant time, the aluminium sheets measuring 472 mm x 2.03 mm thickness were classifiable under chapter sub-heading 7606.20 whereas other articles of aluminium as final product were classifiable under chapter sub-heading 7616.90. According to the commissioner, the process of slitting, rolling and trimming by M/s SREW constituted "manufacture" because at that stage, the width of the original aluminium sheets bought from M/s Hindalco was slitted to smaller sizes and reduced in thickness as indicated in the above dimensions, which resulted in a separate, independent identifiable product known in the market as aluminium slats. According to the commissioner, M/s Aldec Corporation had used slitting and rolling machines in the course of the aforestated activities, which resulted manufacture of a finished product known as 'painted aluminium slat' for venetian blinds. The commissioner further found that the real manufacturer of the aforestated processes was M/s Aldec Corporation and not M/s VPI and M/s SREW. The commissioner examined various documents, balance-sheets, income expenditure statements etc. and came to the conclusion that M/s VPI and M/s SREW had partners who were wage earners/employees of M/s Aldec Corporation; and that M/s VPI and M/s SREW were dummies created for the purposes of fragmenting the various activities/processes with the idea of evading excise duty. According to the commissioner, M/s Aldec Corporation had fragmented the various processes referred to above involved in the manufacture of PAS for venetian blinds with the intention to evade duty; that the customers were approaching M/s Aldec Corporation for job work and that these customers did not approach M/s VPI or M/s SREW for job work; that in fact M/s Aldec Corporation was the job worker or in any event, M/s Aldec Corporation controlled all the activities. According to the commissioner, in the present case, if one was to look to the totality of all the processes, the same would come within section 2(f) of the Act, 1944 and that PAS for venetian blinds would emerge as an independent product under chapter sub-heading 7616.90. The commissioner further held that the earlier decision of the department was not conclusive because in the earlier proceedings, no notice was given to M/s Aldec Corporation; that the decisions of the commissioner in the

earlier round in favour of M/s VPI and M/s SREW indicate that the point of classification alone was put in issue. According to the commissioner, in the earlier round of litigation, M/s VPI and M/s SREW had contended that the aluminium sheets bought from M/s Hindalco came under tariff item 27(6) and that the slats continued to remain aluminium sheets under item 27(6) and did not constitute a separate product under the tariff item 68 and, therefore, the question of manufacture under section 2(f) did not arise for determination. Consequently, the commissioner confirmed the demand raised in the show-cause notice.

Aggrieved by the aforesaid decision of the commissioner, the matter was carried in appeal by M/s Aldec Corporation (respondent herein) to the Customs, Excise & Service Tax Appellate Tribunal (hereinafter referred to as "the tribunal"). By the impugned decision, the tribunal came to the conclusion that in the present case, the aluminium sheets bought by M/s Aldec Corporation (respondent herein) were cut to aluminium strips by M/s SREW; that the thickness was reduced to .23 mm; and that slitting of sheets into strips did not amount to "manufacture". The tribunal further held that M/s VPI did painting on strips which did not amount to manufacture. The tribunal found that the issue involved in the present case stood decided as far back as 27.8.1987 vide order of the commissioner holding that the painting activity carried out by M/s VPI did not amount to "manufacture". Similarly, as far back as 26.11.1986, the collector had held that the activity of slitting and rolling did not amount to "manufacture". According to the tribunal, both the decisions dated 26.11.1986 and 27.8.1987 were accepted and, therefore, the department has no authority to claim recovery of duty from M/s Aldec Corporation commencing from April 1990. In the impugned judgment, the tribunal held that the earlier decisions dated 26.11.1986 and 27.8.1987 did not change with the introduction of the new tariff w.e.f. 28.2.1986 particularly when the processes carried out since 1985 remained unchanged. The tribunal observed that in the impugned decision of the commissioner, there is no discussion as to how painted aluminium slats for venetian blinds fell under chapter sub-heading 7616.90 and, therefore, the tribunal came to the conclusion that no new excisable product came into existence classifiable under chapter sub-heading 7616.90. In the circumstances, the appeals were allowed by the tribunal and the demand raised by the department was set aside. Hence, these civil appeals.

Shri K. Radha Krishnan, learned senior counsel appearing on behalf of the department submitted that the commissioner had examined the balance-sheets, income and expenditure statements, the lease-agreements and other documents while coming to the conclusion that the entire modus-operandi adopted by M/s Aldec Corporation (respondent herein) was to evade liability to pay excise duty. It was urged that the partners of M/s VPI and M/s SREW were workmen and employees of M/s Aldec Corporation; that they received salaries from M/s Aldec Corporation; that the expenses of M/s VPI and M/s SREW were borne by M/s Aldec Corporation; that the customers treated M/s Aldec Corporation as job processors; that excise duty was collected by M/s Aldec Corporation on behalf of M/s VPI and M/s SREW and, therefore, M/s VPI and M/s SREW were dummy companies. Learned counsel submitted that the real job worker was M/s Aldec Corporation and not M/s VPI or M/s SREW. It was urged that on examination of the documents, the commissioner correctly found that M/s Aldec Corporation was statutorily obliged to

obtain registration and licence for the manufacture of painted aluminium slats for venetian blinds and by not getting itself registered, breach of rule 174 took place for which M/s Aldec Corporation was liable. Learned counsel urged that in the entire decision of the tribunal, there is not a single word on this issue and consequently, the matter needs to be remitted to the tribunal. Learned counsel urged that in the past, notices were given by the department to M/s VPI and M/s SREW in which it was alleged that the work of painting constituted "manufacture" and, therefore, the said PAS came within the then tariff item 68. Similarly, in the past, the show-cause notices were given to M/s SREW, in which it was alleged by the department that the work of slitting resulted in a new product classifiable under item 68 and, therefore, in the past, according to the learned counsel, focus was put on individual activities of individual units, which in the present case is not there. In the present case, according to the department, if one looks to the totality of all the above activities taken, individually and/or jointly, would result in the manufacture of a different, independent identifiable product known in the market as PAS for venetian blinds. According to the learned counsel, in view of the aforestated circumstances, the decisions earlier taken in 1986/1987 by the department were not binding on the department. It was urged that in the present case, we are concerned with the concept of "manufacture" both on first principles as well as under section 2(f) of the Act, which has not been examined at all by the tribunal. Learned counsel submitted that the issue of classification was different from the issue of excisability. Learned counsel submitted that this difference has not been looked into by the tribunal. Therefore, learned counsel urged that the impugned decision is erroneous and liable to be set aside. Learned counsel submitted that the thickness of aluminium sheets was ten times more than the thickness of the strips; that there is value-addition in case of PAS for venetian blinds; that the process of slitting, trimming and re-rolling changed the structure of the original aluminium sheets resulting in a distinct identifiable commodity known in the market as PAS. Reliance was also placed on the names of the buyers of PAS referred to in the decision of the commissioner to show that PAS was an independent product both in terms of manufacture and in terms of marketability.

Shri Vellapally, learned senior counsel appearing on behalf of the assessee on the other hand submitted that the combined activity of slitting, trimming, re-rolling and painting of PAS did not result in production of a new article of aluminium falling under chapter sub-heading 7616.90. In this connection, it was submitted that if two different processes, neither of which by itself amounts to manufacture, are carried on individually in different factories, no new product comes into existence. If two factories are owned by one individual, it will make no difference. Learned counsel submitted that in the present case, the nature of the process and the nature of the finished item in contra-distinction to the aluminium sheets purchased from M/s Hindalco had to be decided and that question has not been decided by the commissioner. According to the learned counsel, "article of aluminium" is an expression used in chapter 76 to distinguish a finished product made of aluminium from commodity of aluminium which is used as a raw-material to manufacture various articles. Learned counsel submitted that in the present case, the evidence produced by M/s Aldec Corporation (respondent herein) clearly shows that the strips sold by them was a raw-material suitable for manufacture of venetian blinds, decorative, lamps etc. and, therefore, it remained under tariff item 76.06 and it did not come out of that item into chapter sub-heading 7616.90.

Learned counsel submitted that the process of rolling and slitting followed by painting did not result in production of a new article. According to the learned counsel, what M/s Aldec Corporation purchased was an "aluminium strip" and, irrespective of the ownership of the processing units, the output namely PAS still remained an aluminium strip falling under chapter heading 76.06 as no new item emerged by reason of the above activities. Learned counsel submitted that painted aluminium slats are capable of being put to use not just for venetian blinds but also for making false ceilings, lamps etc. and, therefore, in common parlance, PAS is known as "painted slats for venetian blinds". It was urged that the onus of establishing "manufacture" as also "classification" was on the department; that the department had failed to discharge its onus; that the commissioner had made repeated assertions without any supporting evidence. Learned counsel submitted that the prior history of adjudication in this regard shows that the burden was on the department in the present case on the heavier side to show that the slitting, rolling and painting resulted in emergence of a new product, both in terms of "manufacture" and in terms of "marketability". Reliance was also placed on chapter note (d) to chapter 76 which indicated that the aluminium strip remained classified under heading 76.06 notwithstanding the processing of such strip in the manner contemplated by the note. Learned counsel submitted that the strips sold by M/s Aldec Corporation continued to be classified under heading 76.06 and became an article of aluminium only when the venetian blinds were manufactured by the buyers. Learned counsel urged that the tariff heading made no difference between a polished or a coated strip vis-‘-vis unpolished or uncoated strip and, therefore, the commissioner had erred in holding that the process adopted by the respondent constituted "manufacture". Lastly, the learned counsel urged that the department had accepted orders dated 26.11.1986 and dated 27.8.1987 passed in favour of M/s SREW and M/s VPI holding that the process of trimming, slitting, re-rolling and painting etc. did not amount to "manufacture" and, therefore, it was impermissible for the department now to contend that it was in the dark about relevant facts. Learned counsel submitted that the entire issue was based on the nature of the activities and when the tribunal came to the conclusion that the different processes taken individually or jointly did not amount to "manufacture", it was not necessary for the tribunal to go into the question of ownership of the processing units. Learned counsel submitted that whether M/s Aldec Corporation was the real processor or whether M/s VPI or M/s SREW were the real processors was not the relevant question and, therefore, the tribunal was right in not deciding that question in the present case. In the above circumstances, the learned counsel urged that no interference is called for in the present case.

Before dealing with the rival contentions of the parties, we reproduce hereinbelow the relevant headings of Chapter 76 of the Central Excise Tariff Act, 1985:

CHAPTER 76: ALUMINIUM & ARTICLES THEREOF

Heading No.	Sub-Heading No.	Description of Goods
1	2	3
76.06		

Aluminium plates, sheets (including circles)
and strip, of a thickness exceeding 0.2 mm.

7606.20
Of aluminium alloys.
76.16

Other Articles of Aluminium

7616.10.
Nails, tacks, staples, screws, bolts, nuts etc.

7616.90
Others

The basic question which needs to be answered in the present case is \026 whether M/s Aldec Corporation, M/s VPI and M/s SREW were engaged in the manufacture of an independent identifiable distinct product, in terms of manufacture and marketability. Chargeability is different from liability to pay duty. Chargeability arises on manufacture under section 3 of the said 1944 Act. Liability to pay excise duty depends on classification. Therefore, there is a difference between the concept of "chargeability" and the concept of "classification". Levy is a constitutional concept as held in the case of Union of India & others v. Bombay Tyre International Ltd. reported in AIR 1984 SC 420. Therefore, under the excise law, chargeability, classification, valuation and exemption are different and distinct concepts. In the case of Moti Laminates Pvt. Ltd. v. Collector of Central Excise, Ahmedabad reported in 1995 (76) ELT 241, this Court has held that section 3 levies duty on all excisable goods, provided they are manufactured or produced. Therefore, where the goods are specified in the schedule, they are excisable goods but whether such goods can be subjected to duty would depend on whether they were produced or manufactured by the person on whom duty is proposed to be levied. The expression "produced or manufactured" has been explained to mean that the goods so produced must satisfy the test of marketability. Therefore, it is open to an assessee to prove that even though the goods in which he is carrying on business is excisable, being mentioned in the schedule, it could not be subjected to duty if it does not constitute "goods", either because they are not produced or manufactured or if they have been produced or manufactured, they were not marketed or capable of being marketed. In short, the twin test contemplated by the excise law is that the goods must not only be manufactured but they also should be capable of being marketed. In the case of Commissioner of Central Excise, Goa and Chennai v. M.R.F. Ltd., Chennai reported in (2005) 2 SCC 733, this court held that although the basic commodity was a tyre cord and the final product was a rubberised nylon tyre cord, the intermediate product, namely, dipped nylon tyre cord, could constitute a separate identifiable product in terms of manufacture and marketability. In that case, on the question of marketability, the matter had to be remitted to the commissioner (adjudication). In the case of Hindustan Zinc Ltd. v. Commissioner of Central Excise Jaipur reported in 2005 (181) ELT 170, this Court held that emergence of silver chloride by filtering sulphates from mixture of zinc chloride was a process which amounted to manufacture. However, no evidence was led by the department to show that the silver chloride which emerged out of the said process was capable of being sold in the market and, therefore, although the department succeeded in making out a good case on manufacture, it failed

on marketability for want of evidence. In the said case, this court found that silver chloride was an independent identifiable product. However, the department had failed to lead evidence as to whether the silver chloride which was sold in the market having 75% silver content and the silver chloride which emerged as a by-product in filtering sulphate from mixture of zinc chloride had the same quantity of pure silver. It was found that the silver chloride which emerged by filtering sulphate from zinc chloride had only 50-53% silver whereas silver chloride sold in the market had 75% content of silver. Since the department had failed to prove marketability, this Court did not accept the contention of the department that a new product had emerged. Further, whether an article as envisaged by section 2(f) has been manufactured or not solely depends on whether the article in question satisfies the test as laid down in the relevant chapter heading or sub-heading and is known as such in the commercial community. The coverage of the respective chapter headings has to be determined in the light of the section notes and chapter notes. Further, when an article is specified with reference to the raw material like "Articles of Aluminium", the general use to which an article is capable of will be relevant. [See: Airgrill Industries v. Commissioner of Central Excise reported in 2001 (132) ELT 646 (T) affirmed by this Court in 2002 (141) ELT A90]. Lastly, the question whether a process, taken singly or jointly, constitutes "manufacture" on first principles or under section 2(f) has to be determined having regard to the facts and circumstances of each case. The definition of "manufacture" as per section 2(f) includes any process incidental or ancillary to the completion of a manufactured product. For example, painting of steel furniture is incidental or ancillary to the manufacture of steel furniture. But if the steel furniture is sold without painting and if painting is done after the furniture is sold then painting will not amount to manufacture.

Applying the above tests to the facts of the present case, we find that Note 2 to section XV, under which chapter 76 falls, has not been considered. Similarly, section 2(b) of section XVI of the HSN has not been considered. Further, the functional utility of PAS as deflector of air-flow has not been considered. The issue as to whether the PAS in question was for general purpose or was user specific was not considered. In the present case, the commissioner has not discussed the difference between the old tariff items 27(6) and 68 vis-‘-vis chapter heading 76.06 and sub-heading 7616.90 of the Tariff Act, 1985. Even on marketability, there is no evidence as to the type of PAS (with particulars of dimension) being sold in the market. In the circumstances, we do not wish to interfere in the matter.

Ordinarily, we would have remitted the matter to the commissioner. However, in this case, we find that the department has accepted the decisions of the Commissioner (Appeals) and Additional Collector passed in 1986 and 1987 holding that each of the above process do not constitute "manufacture". The respondent herein has acted on that basis for at least ten years. Hence, we do not find any intention to evade duty on the part of the respondent. We cannot expect the respondent to collect duty from its customers for the last ten years.

In the present case, it was vehemently urged on behalf of M/s Aldec Corporation that ownership of the goods or ownership of the plant or machinery was not relevant. That what was relevant was the nature of the activity and not the nature of the ownership. It was urged that it was not necessary

for the tribunal to go into the question of ownership as it had taken the view that the activities did not constitute manufacture. We do not find any merit in this argument. The question of ownership was directly relatable to the clearances made in the names of M/s VPI and M/s SREW and, therefore, the tribunal ought to have adjudicated upon the question as to whether the clearances were made in the name of dummy firms.

Before concluding, we may state that the tribunal should have examined the effect of bifurcation of activities by M/s Aldec Corporation; it should have examined the processes involved either jointly or singly in the light of the above section notes, chapter notes, notes to HSN etc. as also the functional utility of the product. For example, painting after slitting, re-rolling etc. and before sale of PAS may have a different result vis-'-vis painting as an activity per se. Learned counsel for the respondent, on instruction, says that M/s Aldec Corporation will get itself registered under protest and without prejudice to its rights and contentions that the said process, taken jointly and/or singly, will not constitute manufacture under section 2(f) and will not make PAS classifiable under sub-heading 7616.90. We take the above statement on record and accordingly, we are not examining the question whether the bifurcation impugned was with the intention to evade duty.

Subject to above, these civil appeals are dismissed, with no orders as to costs.