

(2000) 05 GUJ CK 0075
In the Gujarat High Court

Case No : Special Civil Application No's. 9065 of 1998 and 3032 of 1999

Cadila Laboratories Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 09-05-2000

Acts Referred:

Citation : (2001) 1 GLR 48

Hon'ble Judges : R.K. Abichandani, J;D.H. Waghela, J

Bench : Division Bench

Advocate : P. Chidambaram and Mihir J. Thakore and B.H. Chhatrapati, in Special Civil application No. 3032 of 1999 and S.B. Vakil and B.H. Chhatrapati, in Special Civil application No. 9065 of 1998, for the Appellant; P.P. Malhotra D.N. Patel Advocate and Jayant Patel in Special Civil Application No. 3032 of 1999, Public Prosecutor Malhotra Akshay Mehta and M.R. Shah, Jayant Patel, Manisha Lavkumar and S.D. Patel in Special Civil Application No. 9065 of 1998, for the Respondent

Judgement

R.K. Abichandani, J.—In these two petitions, the petitioner companies against whom recovery is sought to be made of the dues said to have accrued into the Drug Prices Equalisation Account (DPE Account) under Para 17 read with Para 7 (2) of the Drugs (Prices Control) Order, 1979 (hereinafter referred to as the Control Order of 1979), have challenged the validity of the provisions of Paragraph 7 (1) (a) of the Control Order of 1979 as being ultra vires the provisions of the Essential Commodities Act, 1955 and Articles 14, 19, 300A and 265 of the Constitution of India.

2. In Special Civil Application No.3032 of 1999, which has been argued as the lead matter, a declaration is sought that the notice dated 8.5.1985 and the revised demand notice dated 17.7.1997 purporting to make recovery under Paragraph 7 (2) (a) read with Paragraph 17 of the Control Order of 1979 are without jurisdiction and illegal and that the respondents have no authority or jurisdiction to issue any notice or demand after the repeal of the Control Order of 1979 and coming into force of the Drugs (Prices Control) Order, 1987 on

26.8.1987 and the Drugs (Prices Control) Order, 1995 on its coming into force on 6.1.1995. The impugned recovery under the notice is challenged as illegal and unconstitutional and not warranted by the provisions of Section 7A of the Essential Commodities Act, 1955.

2.1 The recovery under the impugned notice was being effected against the petitioner No.1 company (Cadila Laboratories Ltd.) which, as stated in paragraph 2 of the said petition, was engaged in the manufacture of drugs and pharmaceuticals, was restructured pursuant to the order dated 2.5.1997 under Sections 391 and 394 of the Companies Act, 1956 and consequently the petitioner No.2 and 3 companies had succeeded equally and jointly to the assets, liabilities and business of the petitioner No.1 company except land and building mentioned therein and, therefore, the petitioners Nos.2 and 3 have also joined as the co-petitioners since they would be affected by the result of the present proceedings.

2.2 According to the petitioner No.1 company, it manufactured and marketed formulations of bulk drug Dexamethasone under the brand name "DEXONA" in different forms, like tablets, injections, eye-drops etc. It is stated that the Government fixed individual retail prices of formulations at certain intervals for strengths/packing and fixed leader price under Paragraph 13.6 of the Control Order of 1979 on some occasion. According to the petitioner No.1 company, it received letters on 4.11.1992, 18.4.1994 and 9.6.1994 addressed to it requiring the company to furnish the requisite details pertaining to the procurement of both the imported and indigenous bulk drug, namely, Dexamethasone, during the period between 1.4.1979 and 28.8.1987, when the Control Order of 1979 operated, and stating that if the particulars were not so furnished in the stipulated time, the Government would be left with no alternative but to work out the liability against the petitioner No.1 company from whatever data that becomes available with the Government and from whatever sources that it may find.

2.3 Thereafter, a demand notice dated 8.5.1995 was issued on the petitioner No.1 company for a sum of Rs.47,99,160 as per Annexure-6 to the petition. In that letter, the petitioner No.1 company was informed that it had failed to furnish the requisite information despite the opportunity being given to it and the Government was, therefore, left with no alternative but to work out the liability against it from the data and sources available with the Government. The amount of unintended benefit enjoyed by the petitioner No.1 company in terms of Paragraph 7 (2) of the Control Order of 1979 on the basis of the information as available with the Government was worked out on a tentative basis at Rs.47,99,160 as per the details given in the annexures to the said letter on account of the difference between the price of bulk drug Dexamethasone allowed in the formulation price and the actual procurement price by the petitioner No.1 company during the currency of the Control Order of 1979. It was stated that this was without prejudice to any further amount that may be assessed by the

Government under Paragraph 7 (2) of the Control Order of 1979 read with Paragraph 14 of the Control Order of 1987 and Paragraph 12 of the Control Order of 1995. The petitioner No.1 company was, therefore, directed to deposit the said amount along with interest due thereon into the DPE Account within 15 days from the date of receipt of the said letter.

2.4 On receiving the said demand dated 8.5.1995, the petitioner No.1 company challenged the same in Special Civil Application No.4457 of 1995. That petition was disposed of on 27.6.1995 by the Hon"ble Mr.Justice J.M.Panchal by giving directions to the effect that the petitioner shall make a representation to the respondent No.2 therein to point out that the drugs covered under Annexure-C were not used by it for manufacturing any formulation during the relevant period and also make a representation against the impugned order raising all the grounds therein including those raised in the petition. The petitioner was directed to furnish the data from the sources as may be available to it and the respondent No.2 therein was directed to supply relevant data to the petitioner on the basis of which the impugned order was passed. It was further directed that the representations which may be made by the petitioner No.1 company shall be considered by the respondent No.2 therein on merits and after giving an opportunity of being heard to the petitioner. A direction was also given to the petitioner No.1 company to deposit Rs.12 lakhs with the respondent No.2 on or before 15.9.1995 and it was clarified that, if the amount was not so deposited, the respondent No.2 need not consider the representations which may be addressed by the petitioner. It was directed that till the representations which may be submitted by the petitioner were decided by the respondent No.2, the impugned orders shall not be implemented. The petition was, accordingly, disposed of.

2.5 Pursuant to the said order, the petitioner No.1 company made a representation to the concerned officer on 12.9.1995, a copy of which is at Annexure-8 to the petition. In that representation, the petitioner No.1 company challenged the validity of the demand notice dated 8.5.1995 on the ground that it was issued without jurisdiction and that the demand was illegal and unconstitutional. It was stated by the petitioner No.1 company that it did not have all the records of the period in question but, on the basis of such material as could be gathered from the records, they were giving the reply. It was also stated that the petitioner No.1 company had referred the reports of Organization Research Group (ORG Reports) which were made the basis of calculation by the Department while issuing the demand notice for tentative calculation of the unintended benefits alleged to have been taken by the petitioner No.1 company in the said notice. The petitioner No.1 company also contended that it had suffered unintended losses, because: it had procured the drugs at a price higher than the allowed price; it had distributed free samples of formulations to doctors; it had paid higher trade discount and incurred higher packing material cost and higher conversion charges and had incurred losses also due to added overages of bulk drug in the formulations. According to the petitioner No.1 company, it had

suffered losses to the tune of Rs.1,95,38,628 on account of lower costs of inputs allowed to the petitioner No.1 company, higher discounts paid, disbursement of free samples, addition of overages etc. and, therefore, that amount should be paid to the petitioner No.1 from the DPE Account. Other legal contentions against the validity of Paragraph 7 (2) read with Paragraph 17 of the Control Order of 1979 were also taken in the representation and an opportunity of personal hearing was sought.

2.6 In response to this representation, the Government of India issued the communication dated 17.7.1997 to the petitioner No.1 company in which it was stated that despite the direction of the High Court in Special Civil Application No.4457 of 1995, the petitioner No.1 company did not furnish any information/data relating to procurement/consumption of bulk drug in question and instead the quantity already taken by the Department in the computation sheet attached to the earlier demand notice dated 8.5.1995 was taken as the basis for claiming set off in respect of free samples, excess commission paid, higher packing material cost, higher conversion cost etc. It was stated that the contents as well as the data furnished by the petitioner No.1 company under its letter dated 12.9.1995 were examined in detail by the Department and the petitioner was informed that no such set off was permissible under the provisions of the Control Order of 1979 and, therefore, the claim could not be accepted. It was further stated that in absence of any authenticated information/data being supplied by the petitioner No.1 company relating to procurement/ consumption of bulk drug Dexamethasone and its salts in the formulations during the period covered by the Control Order of 1979, based on the information/data to the extent available with the Department from the records pertaining to price fixation of formulations based on the said bulk drug and its salts manufactured/marketed by the petitioner No.1 company during the period covered by the Control Order of 1979, it was observed that the company was engaged in manufacture of a large range of formulations based on the said bulk drug and its salts, whereas while communicating the liability of Rs.47,99,166 under the Department's letter dated 8.5.1995, complete range of formulations was not considered. Based on the information and data available with the Department and after taking into account the complete range of formulations in which bulk drug Dexamethasone and its salts were used by the company during the said period, it was observed that the company had enjoyed an unintended benefit, on a tentative basis, of Rs.2,76,13,134, as per the computation sheets attached, on account of difference between the price of bulk drug Dexamethasone and its salts allowed in formulations prices and the actual procurement price of the petitioner No.1 company from time to time during the currency of the Control Order of 1979. It was stated that this was without prejudice to any further amount that may be assessed by the Government under Paragraph 7 (2) of the Control Order of 1979 read with Paragraph 14 of the Control Order of 1987 and Paragraph 12 of the Control Order of 1995. The petitioner No.1 company was, accordingly, directed to deposit the said amount in the DPE Account within 15 days from the date of

receipt of the said letter of demand. In paragraph 4 of the said letter, the petitioner No.1 company was informed that if it was not satisfied with the liability so determined, it was being offered by this letter an opportunity of being heard by the Department through the Drug Prices Liabilities Review Committee (DPLRC) constituted by the Department for the purpose, in accordance with the directions given by the High Court.

2.7 Thereafter, the petitioner No.1 company made a review petition against the impugned decision dated 17.7.1997 on 19.9.1997. In that review petition cum representation, the petitioner No.1 company, against whom the impugned demand notices were issued, joined the petitioners Nos.2 and 3 as co-applicants on the ground that under the Scheme of Reorganisation approved by the High Court, the assets and liabilities of the petitioner No.1 company were divided between the petitioners Nos.2 and 3 and that they will have to discharge the liability in equal proportion in the event of the decision going against the petitioner No.1 company. However, even if the petitioners Nos.2 and 3 are joined by the petitioner No.1 company as co-applicants or co-petitioners, the liability, if any, of the petitioner No.1 company for all the dues under the Control Order of 1979 will remain the same. In the said review petition, it was contended that the increased demand under the impugned Order dated 17.7.1997 was arbitrary and without justification and that it was made with a view to punish the petitioner No.1 company for having approached the High Court. It was also contended that the petitioner No.1 company had incurred losses on the quantity of the formulations in which Dexamethasone was used. It was also contended that the demand was highly belated. It was also contended that the respondent had erred in calculating and accepting the figures reported in the ORG Reports. The petitioner No.1 company now urged that it had suffered total net unintended losses of Rs.7,34,86,467 on account of lower cost of inputs allowed to it, higher discounts paid, disbursing of free samples, addition of overage etc. and the petitioner No.1 was entitled to recover that amount from the DPE Account. While the said review application was pending, the petitioner No.1 company made an application on 25.5.1999 before the Committee seeking directions for hearing five preliminary issues suggested in paragraph 21 of the application. The petitioner No.1 company had on 20.4.1999 already filed the present petition. In this background, the Committee, by its Order dated 3.6.1999, postponed the hearing of the application which was scheduled to be heard on 9.6.1999. According to the petitioners, the Review Committee would have no jurisdiction to go into the aspect of set off of the losses incurred by the petitioners and that the other aspects, such as, the authority of the Under Secretary to raise the demand under the Control Order of 1979 after its repeal, the constitutional validity of the demand and its being outside the scope of the Essential Commodities Act cannot be appropriately dealt with by the Review Committee.

2.8 The case of the respondent authorities, as emanating from the affidavit-in-reply filed on their behalf is that, the liabilities into the DPE Account for the period covered under the Control Order of 1979 had already been incurred by the

petitioner No.1 company under Paragraph 7 (2) of that Order and that the company was entitled to recover the amount after the Supreme Court upheld the validity of the Drugs (Prices Control) Order, 1979 in its decision in Union of India (UOI) and Another Vs. Cynamide India Ltd. and Another etc., . According to the respondents, under Paragraph 7 (2) of the Control Order of 1979, the Government was empowered to recover the difference between, the price of bulk drug allowed by it in the price of formulation, and, the actual procurement price of bulk drug incurred by the manufacturer of the formulation. This recovery power was saved in the subsequent Control Orders after the repeal of the Control Order of 1979. It is stated that, in accordance with the provisions of the Control Order of 1979, the Government fixed the prices of bulk drugs and formulations of the controlled categories in respect of various companies during 1980-81 and such companies preferred writ petitions in 1981 in the High Court of Delhi challenging the Government's competence to control the prices of drugs and also the reasonableness of the prices which were fixed by the Government. In December 1984, the High Court of Delhi decided those cases in favour of the companies and quashed the price-fixing notifications and orders which were issued under the Control Order of 1979. However, the Supreme Court in CYANAMIDE INDIA case (supra), upheld the validity of the provisions of the Control Order of 1979 and set aside the judgment of the Delhi High Court. During the period of litigation, the pharmaceutical companies had not scrupulously followed the provisions of the Control Order of 1979 which had resulted in accrual of undischarged liabilities towards DPE Account. After the judgment of the Supreme Court (which was rendered on 10.4.1987), the Government became competent to make recoveries from the drug companies in accordance with the Control Order of 1979. According to the respondents, such recoveries were divided into two categories, namely, when there was overcharge in cases where a drug company had sold its medicines at prices higher than those notified by the Government by virtue of the stay granted by the Court or otherwise in violation of the Control Order of 1979; and the second category of unauthorised retention by companies from whom recoveries arising out of the provisions of Paragraphs 7 (1) and 7 (2) of the Control Order of 1979 were to be made by requiring them to deposit into the DPE Account the excess amount determined by the Government in respect of the quantity of drugs which had been procured either indigenously or through import at prices less than the prices allowed by the Government in fixing the prices of the formulations. According to the respondents, a number of companies having collected monies from the consumers (in the form of sale of medicines at a particular authorised price), had prevaricated from depositing the excess amounts into the DPE Account and had enriched themselves with such unintended benefits. As the companies were not responding to the notices issued by the Government eliciting details relevant to determining the unauthorised retention of amounts, it had become difficult to assess their liabilities. Since the Supreme Court while allowing the SLP in CYANAMIDE INDIA case (supra) directed the Government to decide the Review Applications after giving notice of hearing to the manufacturers, with

a view to hear the companies a three-member Committee, namely, Drugs Prices Liabilities Review Committee (DPLRC) headed by a retired High Court Judge with one costing expert and one expert in industrial administration was set up. Besides the 12 pharmaceutical companies, there were numerous companies whose liabilities under Paragraph 7 (2) of the Control Order of 1979 had been assessed by the Government and they had sought review under Paragraph 27 of the Control Order of 1979. Due to a large number of review petitions, the Government decided to give an opportunity to all such companies of being heard by the three-member Committee. The respondents' case is that, in accordance with the order dated 27.6.1995 passed by the learned Single Judge in Special Civil Application No.4457 of 1999, the petitioner No.1 company was requested by the respondents to furnish the relevant details for the purpose of computing their liability. Based on the data furnished by the petitioner No.1 company, their liability was re-computed and while so doing, it was noticed that the respondents had not earlier taken into account the full range of the formulations manufactured by the petitioner No.1 company based on the bulk drug Dexamethasone. After taking into account the entire range of formulations manufactured by the petitioner No.1 company, their liability was revised to Rs.2,76,13,134 as communicated to it under the impugned demand dated 17.7.1997. The petitioner No.1 company on 19.9.1997 submitted a representation against the said demand but instead of appearing before the Committee, it had rushed to this Court by way of the present petition. It is also contended that the interim relief which was granted by the Bombay High Court in the petition filed by the Association of Companies was with regard to issuance of fresh notice for computing fresh liabilities and the said interim relief had nothing to do with the cases where the liabilities had already been communicated to the companies. According to the respondents, both the Associations had furnished letters to the respondents clarifying that the interim stay obtained by them from the Bombay High Court did not cover the cases where actions to recover the amounts were taken during the period of the Control Order of 1979. It is contended that in the case of the petitioner No.1 company, steps were taken during the currency of the Control Order of 1979 by issuing a letter on 28.5.1984 (at Annexure R/4 to the reply) on the petitioner No.1 company and asking it to furnish the details with regard to the bulk drug Dexamethasone and its salts for determining the liability under Paragraph 7 (2) of the Control Order of 1979. This was followed by reminders dated 22.8.1989, 29.6.1990, 4.12.1990, 31.1.1991, 26.5.1992 and 4.11.1992 (at Annexure R/5 to the reply). However, the petitioner No.1 company did not furnish the requisite details. At last, the petitioner No.1 company by its letter dated 20.3.1993 informed the respondents that the task of separating and locating records and furnishing the requisite details to the respondents would take time and requested for six months time for furnishing the requisite details. Even thereafter, no such details were furnished. The respondents, therefore, worked out the liability of the petitioner No.1 company suo moto, and subsequently on the basis of the data that was submitted by it on the direction of the Court, determined the liability of the petitioner No.1

company. It is contended that the petitioners have made an attempt to confuse and mislead the High Court and to linger on the matter with a view to escape the recovery of the amount enjoyed by them at the cost of the poor consumers. According to the respondents, the allowed price, as well as the procurement or manufacturing price are facts which can be collected or ascertained or identified with a little diligence. In paragraph 3.21 of the reply it is stated that the companies were aware of the notified price or the landed cost of the bulk drugs which were taken as allowed price in formulations. It is contended that the losses said to have been incurred by the petitioner No.1 company have nothing to do with its liability that it had incurred on account of difference between the price of bulk drug allowed in the formulation price and the actual procurement price thereof. It is also contended that the date of accrual of liability under the Control Order of 1979 should not be confused with the date of calculations of the specific amount of liability and notice to discharge the liability served on the petitioner No.1 company.

3. In Special Civil Application No.9065 of 1998, the petitioner (The Pharmaceutical & Chemical Industries: Prop. PCI Chemicals Pharmaceuticals Ltd.), besides claiming the same relief against the validity of Paragraph 7 (2) (1) of the Control Order of 1979, has challenged the notice dated 19.5.1984 issued by the respondent (at Annexure-E to the petition) seeking to recover an amount of Rs.87,99,326.50 ps. on account of difference between the price of the bulk drug Rifampicin allowed in the formulations and its actual import price during the years 1979-80 to 1983-84, and the second demand notice dated 22.12.1997 (at Annexure-L to the petition) requiring the petitioner No.1 company to deposit the same sum of Rs.87,99,326.50 ps. with interest amount of Rs.1,68,88,213 in accordance with the provisions of Section 7A of the Essential Commodities Act for being credited into the DPE Account. The recovery notice issued by the Revenue authority dated 28.8.1998 (at Annexure-O to the petition) on the basis of these demands, is also challenged.

3.1 Besides raising the contentions against the validity of the recovery proceedings after the repeal of the Control Order of 1979, the petitioner has contended that the demand notice dated 19.5.1984 did not amount to determination, because, in paragraph 3 of the demand notice while being asked to deposit the amount on or before 31.5.1984, the petitioner No.1 company was given an option to show cause as to why the amount mentioned therein should not be recovered from the company before the said date failing which action will be taken under the Control Order of 1979 and the Essential Commodities Act. It appears from the communication dated 13.2.1984 (at Annexure-B to the petition) that the petitioner No.1 company was repeatedly requested to furnish the information for ascertaining its liability to pay into the DPE Account. It was asked by the said letter to show the amount due from it on account of difference between the price of Rifampicin allowed in the formulations and its actual landed cost of import for the current year as current liability in its balance sheet and for the past i.e. for the years 1979-80 to 1982-83 as the contingent liability in the

annual accounts of the company. It was required to specifically show that these liabilities were in respect of the DPE Account. The petitioner No.1 company was again asked to furnish the information. Thereafter, by its communication dated 1.3.1984 (at Annexure-C to the petition), the petitioner No.1 company annexed a statement showing the landed cost of imports of Rifampicin bulk drug for the years 1979-80, 1980-81, 1981-82 and 1982-83, its consumption, various other costs etc. and sales realization on the formulations. It was stated by the petitioner that it had incurred losses in respect of the formulation. It is also stated that the terminal profits made by the company were far below those prescribed under the Control Order of 1979. The figures which were furnished in the statement attached to this communication regarding import of the bulk drug and its consumption were made the basis of working out the difference between the price of Rifampicin allowed in the formulation and the actual import price paid by the petitioner during the period in question in the demand notice dated 19.5.1984 (at Annexure-E to the petition). It was stated therein that additional expenses if incurred by the petitioner company cannot be adjusted from the sale amount which was payable into the DPE Account.

3.2 It appears that the Government intimated about this liability of the petitioner No.1 to the Review Committee, which, by its communication dated 15.2.1996, required the petitioner No.1 to furnish its submission or representation that it may desire to make against the said demand. It was stated therein that after receiving such submission, the date will be fixed for a personal hearing. Again, on 21.6.1996, the Committee wrote a letter to the petitioner No.1 giving one more opportunity to the petitioner No.1 to file its representation or submission before 31.7.1996. The petitioner No.1 was informed that if it made no submission or representation by the time allowed, it will be presumed that it had nothing to say against the liability assessed by the Department. On 7.10.1996, the Committee again referring to the earlier communications and finding that there was no response from the company, gave one more opportunity, in the interest of justice, to the petitioner No.1 to make a representation on or before 5.11.1996 and informing it that if this was not done, it will be presumed that the company had nothing to say about the liability which was assessed by the Department. Since the petitioner No.1 company did not respond, the Government, on the basis of the request of the Revenue Committee, issued a demand notice dated 22.12.1997 seeking to recover the principal amount of Rs.87,99,326 and interest amount of Rs.1,68,88,213 (i.e. in all Rs.2,56,87,539) in accordance with the provisions of Section 7A of the Essential Commodities Act, 1955 for being paid into the DPE Account under Paragraph 7 (2) (a) read with Paragraph 17 (1) (a) (i) of the Control Order of 1979.

3.3 In the affidavit-in-reply filed on behalf of the respondents, the respondents have taken up all legal issues and contentions similar to those that they have taken in Special Civil Application No.3032 of 1999 and, on facts, have stated that the liability of the petitioner company was already determined by the Government in the impugned demand notice which was issued on 19.5.1984 and

the show cause notice was only in respect of recovery of that amount. It is stated that the liability was determined after taking into account the information which was supplied by the petitioner company in its letter dated 1.3.1984. It is also contended that the overall profits or losses made by the petitioner company were not relevant for the purpose of Paragraph 7 (2) of the control Order of 1979. It is stated that the liability had accrued as soon as the actual procurement price fell below the allowed price of bulk drug which was utilised in the formulations. It was also stated that the pre-tax profit of 8% on sales turnover under the Fifth Schedule of the Control Order of 1979 was the maximum permissible return and not the guaranteed return and, therefore, the petitioner company's claim on that basis was not warranted. Though a contention regarding jurisdiction was taken up in paragraph 3.18 of the affidavit-in-reply, during the arguments, no such contention was raised and it was made clear that it was not being pressed.

4. In the background of the aforesaid facts, the learned senior counsel appearing for the petitioner in Special Civil Application No.3032 of 1999 raised the following contentions of which all the legal contentions were adopted by the learned senior counsel appearing for the petitioner in Special Civil Application No.9065 of 1998.

4.1 It was contended by the learned senior counsel that the provisions of Paragraph 7 (2) of the Control Order of 1979 had certain postulates which included that there must be a "price allowed" and that, if there is such price allowed in respect of a bulk drug used in the formulation while fixing its retail price, the procurement price of such bulk drug must be lower than the price allowed. It was argued that the power under Paragraph 7 (2) was discretionary in nature as was clear from the words "may require". The fact that two options were available for the exercise of such power, either (a) to determine the excess amount or (b) to fix the sale price, show that the authority was required to apply its mind. When option (a) was exercised, it was an exercise of a quasi-judicial power in the process of determining the excess amount. It was contended that the petitioner No.1 company was not given any opportunity of being heard before reaching its decision under the said provision. The impugned order dated 8.5.1995 was passed on assumptions which were not warranted and it was made without issuing any show cause notice and hearing the petitioner No.1 company in the matter, contended the learned counsel. Even after the order dated 12.9.1995 made by Justice J.M.Panchal, which required hearing to be given, the respondents acted with impunity and issued the subsequent demand notice dated 17.7.1997 without giving any hearing to the petitioner No.1 company. It was further contended that, if the annexure to the demand notice dated 8.5.1995 and the annexures to the demand notice dated 17.7.1997 were compared, there would appear discrepancies in the price allowed for the bulk drug in the retail price of the formulations which has not at all been explained. It was submitted that this showed non-application of mind and arbitrariness in issuing the demand notice. It was also submitted that the petitioner No.1 company was never informed about any change in the price allowed and there was no way to reconcile the figures of price allowed appearing in the statements

annexed to the demand notice dated 8.5.1995 and those annexed with the demand notice dated 17.7.1997. It was argued that the concept of price allowed is completely mythical, irrational and arbitrary and, therefore, it vitiated the impugned orders. It was further submitted that when retail price did not undergo any change over a period of time, there should not be any variation in the price allowed of the bulk drug used while fixing the retail price of the formulation. It was submitted that since retail price was there since the Control Order of 1970, there could not have come into existence any different "price allowed" for the bulk drug in such retail price of the formulation. It was further submitted that it would not be possible to calculate the price allowed unless the norms were disclosed. It was contended that if an opportunity was given to the petitioner No.1 company, it could have satisfied the Government that this was not a case for exercising its option under Paragraph 7 (2) (a) of the Control Order of 1979, in view of the two options available to the Central Government. The Government, therefore, had issued the demand totally oblivious of its power under the two options provided in Paragraph 7 (2) and thereby denied an opportunity to the petitioner to persuade the Government to exercise or not to exercise a particular option. It was then contended that assuming that the Government had a right to take such action under the Control Order of 1979, that right ceased on 25.8.1987 when the the Control Order of 1979 was repealed by the Control Order of 1987 unless saved under the repealing provision. It was argued that the provisions of Section 6 of the General Clauses Act were not applicable to this case, because the Control Order of 1987 was not an Act or Regulation within the meaning of that provision. It was submitted that Paragraph 30 of the Control Order of 1987 had the effect of repealing the Control Order of 1979 and since there was no provision corresponding to Paragraph 7 (2) of the Control Order of 1979 in the Control Order of 1987, there was no question of the Central Government proceeding to determine the amount under the repealed provision after the new Control Order came into force. It was submitted that Paragraph 14 of the Control Order of 1987 was only a recovery provision and not a substantive provision under which a determination could be made as was permissible under Paragraph 7 (2) of the Control Order of 1979. It was submitted that the moot question was whether any action had already been taken prior to 25.8.1987 when the Control Order of 1979 was repealed and that, did any amount accrue under that Order. It was submitted that mere procuring of bulk drug or use thereof did not result in any liability. The liability under Paragraph 7 (2) (a) arose only when the Government decided to invoke that provision prior to 25.8.1987 and decided to invoke Paragraph 7 (2) (a) rather than Paragraph 7 (2) (b) of the Control Order of 1979.

4.2. It was submitted that for accrual of liability one more step was required, namely, that the Government must have determined the amount that had accrued and this ought to have been done prior to repeal of the Control Order of 1979. It was submitted that the action under Paragraph 7 (2) could have been taken suo moto by the Central Government and it did not have to wait for several

years for initiating the action. It was also argued that the Account created was only a temporary account and the repeal was intended to put an end to all the liabilities that would have arisen under the provisions of the repealed Order.

4.3 Referring to the counter filed by the respondent No.3, the learned counsel pointed out from paragraph 3.19 that the quantity of bulk drug shown to have been consumed on the basis of the ORG figures was doubled in case of petitioner No.1 company. It was submitted that there was no rational explanation as to why it was so doubled [In the said paragraph it has been stated that, "Since the ORG Report contains figures with regard to sales through retail outlets only and do not include the sales made in bulk to Government institutions, hospitals etc., the quantity of bulk drug arrived (consumed) on the basis of ORG figures has been doubled in order to cover the sales made to Government institutions, hospitals, etc."]. It was also argued that there was no valid explanation as to why set off should not be allowed in respect of the losses which were incurred by the petitioner No.1 company. It was submitted that set off was given in two cases. It was also argued that ORG Report on which reliance was placed by the Government was a private publication and could not, therefore, be treated as an authentic source of information for the purpose of determining the liability under Paragraph 7 (2) of the Control Order of 1979. It was contended that the right to receive the amount under an account had not reached a degree of perfection which could create a corresponding duty on the part of the petitioner company to pay the amount and, far from it, it was only a right still-born or an inchoate right which could not be enforced after the repeal of the Control Order of 1979. It was also argued that Paragraph 7 (2) (a) was discriminatory because it created hostile discrimination against the manufacturers of formulations by providing no benefit to them from the DPE Account which was available to the manufacturers of bulk drugs. It was finally contended that the exaction in form of compulsory credit in the Account was expropriatory and unconstitutional. There was no reason why the provision was invoked in the petitioner's case when in some other cases the action was not taken, said the learned counsel.

4.4 The learned senior counsel in support of his submissions, relied upon the following decisions:

(a) Union of India (UOI) and Another Vs. Cynamide India Ltd. and Another etc., , in which validity of the said Control Order of 1979 was upheld, was cited with a view to point out that, the question that is arising in the present petition regarding the liability under Paragraph 7 (2) of the Control Order of 1979 did not arise in that case and, therefore, the questions involved in these petitions are not covered by the ratio of the decision in CYNAMIDE's case. It was pointed out that what was challenged in CYNAMIDE's case was the notifications fixing the maximum prices at which various indigenously manufactured bulk drugs were required to be sold by the manufacturers as well as the notifications fixing the retail prices of formulations. These were quashed by the Delhi High Court and the validity of that decision was questioned before the Supreme Court. It was

submitted that the validity of the provisions of Paragraph 7 (2) of the Control Order of 1979 and Paragraph 17 thereof which created the Account was not in issue at all.

(b) Reference was made to the decision of the Supreme Court in *M.S. Shivananda Vs. Karnataka State Road Transport Corporation and Others*, , in which it was held that mere right existing under the repealed Ordinance to take advantage of the provisions of the repealed Ordinance, was not a right accrued. In the same decision, it was also observed that in considering the effect of an expiration of a temporary Act, it would be unsafe to lay down any inflexible rule. It was held that, if the right created by a statute is of an enduring character and has vested in the person, that right cannot be taken away because the statute by which it was created has expired. It was also held that in order to ascertain whether the rights and liabilities under the repealed Ordinance have been put an end to by the Act, the line of enquiry would be not whether the new Act expressly keeps alive old rights and liabilities under the repealed Ordinance but whether it manifests an intention to destroy them.

(c) Reliance was also placed on the decision in *Zohrabi Vs. Arjuna and Others*, in which, referring to the decision in *ABBOT v. MINISTER OF LAND* 1895 AC 425, it was held by the Supreme Court that, ever since that decision, it has been held that mere right to take advantage of the provisions of an Act is not an accrued right. In the case before the Supreme Court, the application for possession was made long after the amendment came into force and it was observed that, even the right to institute a proceeding did not appear to have accrued before the amendment because the notice terminating the tenancy was also issued after the provision was amended.

(d) Reference was made to the decision in *Commissioner of Income Tax, West Bengal-II, Calcutta Vs. Hindustan Housing and Land Development Trust Ltd.*, , which was rendered in context of the provisions of the Income Tax Act, in which it was held that the words "arising or accruing" in Section 5 of the Income Tax Act describe a right to receive profits, and that there must be a debt owed by somebody. Unless and until a right is created in favour of the assessee to a debt due by somebody it cannot be said that he has acquired a right to receive the income or the income has accrued to him. The question involved was limited to the point whether, on the facts and circumstances of the case, the Revenue could claim that the amount which was claimed by the assessee as compensation can be said to have accrued to the assessee as income during the previous year relevant to the assessment year. Though the award was made by the Arbitrator on July 29, 1955 enhancing the amount of compensation payable to the assessee, the entire amount was in dispute in the appeal filed by the State Government. In this context, it was held that there was no absolute right to receive the amount at that stage. If the appeal was allowed in its entirety, the right to payment of the enhanced compensation would have fallen altogether. In paragraph 6 of the judgment, the Supreme Court pointed out the distinction

between the cases where the right to receive payment is in dispute and it is not a question of merely quantifying the amount to be received and cases where the right to receive payment is admitted and the quantification only of the amount payable is left to be determined in accordance with settled or accepted principles.

(e) *Isha Valimohamed and Another Vs. Haji Gulam Mohamad and Haji Dada Trust*, was referred to by the learned senior counsel in context of the provisions of Section 6 of the General Clauses Act, 1897 and for its proposition that, if the law required something to be done before the right could accrue then on failure to do that there would be no right to survive the repeal. In that decision it was held that the provision to institute an eviction proceeding against a tenant on ground of sub-letting did not amount to an accrued right or privilege to recover possession where it was necessary to validly terminate the tenancy. In paragraph 16 of the judgment, the Supreme Court found that the Saurashtra Act nowhere insisted that the landlord should issue a notice and terminate the tenancy before instituting a suit for recovery of possession u/s 13(1)(e) on the ground that the tenant had sub-let the premises. The position, therefore, was that the landlord was entitled to recover possession of the premises u/s 13 (1) of the Saurashtra Act on the ground that the tenant sub-let the premises. It, therefore, followed that a right accrued to the landlord to recover possession u/s 13 (1) of the Saurashtra Act when the tenant sub-let the premises during the currency of that Act and the right survived the repeal of that Act under proviso (2) to Section 51 of the Bombay Act and, therefore, the suit for recovery of possession of the premises u/s 13 (1) read with clause (e) of the Saurashtra Act after the repeal of that Act on the basis of the sub-letting during the currency of the Saurashtra Act was maintainable.

(f) The learned senior counsel also referred to *P. Mariappa Gounder (Dead) by Lrs. Vs. Commissioner of Income Tax, Madras*, in which it was held that where a decree was passed by the Court for mesne profits, it only created an inchoate right in favour of the appellant and it was only when the trial Court determined the amount of mesne profits that the right to receive the same accrued in favour of the appellant. In other words, the liability became ascertained only with the order of the trial court and not earlier. Therefore, following the mercantile system of accounting the mesne profits awarded were rightly taxed in the assessment year in question and it was wholly irrelevant as to when the amount awarded was in fact realised by the assessee.

(g) Reference was also made to *Gajraj Singh etc. Vs. The State Transport Appellate Tribunal and others etc.*, in which it was held that grant of renewal of permit/licence was a mere privilege and not an accrued or vested right. It was held that permit would lapse after expiry of the period for which it was initially granted unless an application for renewal was pending u/s 58 of the repealed Act as on the date of commencement of the new Act and in absence of such application, fresh application for grant of permit must be made under the new Act. Reliance was placed on the holding to the effect that, when an Act is

repealed, it must be considered, except as to transactions past and closed, as if it had never existed and that the effect thereof was to obliterate the Act completely from the record of the Parliament as if it had never been passed. It was held that repeal was not a matter of mere form but would be a matter of substance depending on the intention of the legislature. If the intention indicated either expressly or by necessary implication in the subsequent statute was to abrogate or wipe off the former enactment wholly or in part, then it would be a case of total or pro tanto repeal.

(h) The learned senior counsel also referred to the decision of the Privy Council in *DIRECTOR OF PUBLIC WORKS AND ANOTHER v. HO PO SANG AND OTHERS* reported in (1961) 2 All England Law Reporter 721 in which it was held that a mere notice of intention to grant re-building certificate by Director of Public Works did not confer any right thereto, since various conditions had remained to be satisfied before the certificate could be granted and that the repeal rendered all such steps abortive for it destroyed the prospect of such steps leading to the grant of a re-building certificate.

5. The learned counsel appearing for the petitioners in Special Civil Application No.9065 of 1998 adopted all the legal contentions raised by the learned senior counsel and also relied upon the decisions cited by him. On facts, he submitted that even in the case of the petitioner company, determination of the amount could not have been said to have taken place prior to repeal of the Control Order of 1979, because in the impugned demand notice dated 19.5.1984, even though the amount worked out by the Government was required to be deposited, an opportunity was not given to the petitioner to show cause as to why it should not be recovered. It was submitted that the Central Government had only given a tentative figure and, therefore, it could not be said that there was a final determination of the amount under Paragraph 7 (2) of the Control Order of 1979 on that date. It was submitted that final determination, if at all, was done on 22.12.1997 under the second demand notice, which was not warranted after the repeal of the Control Order of 1979. It was submitted that till 26.8.1987, there was no determination of the amount under Paragraph 7 (2) even in case of this petitioner. It was submitted that without such determination, there could not be any accrual of the amount into the account and, therefore, Paragraph 14 of the Control Order of 1987 did not permit the Government to effect any such recovery. It was submitted that it was not open to the Central Government to transfer the function of determination to the Review Committee, particularly after the repeal of the Control Order of 1979.

6. The learned senior counsel appearing for the respondent authorities contended that the liability had already accrued in both these cases prior to the repeal of the Control Order of 1979. It was submitted that merely because ascertainment of the amount of such liability was not done, it cannot be said that the liability did not arise when the Control Order of 1979 was in operation. It was submitted that the delay was caused only because of the litigation pending in the Delhi High

Court which had set aside the notifications and the orders of price fixation. These were revived after the Supreme Court on 10.4.1987 decided the CYNAMIDE's case (supra) in favour of the Department by upholding the validity of the Control Order of 1979 and the notifications issued thereunder regarding price fixation. Therefore, it cannot be said that the power was being exercised by the respondent authorities after any undue delay. The learned counsel pointing out the provisions of the Control Order of 1979 and relying upon the averments made in the affidavit-in-reply of the respondents contended that the liability under the Control Order of 1979 in respect of the petitioner company in both these petitions had already accrued and all that was required to be done was to recover the amounts for which the repealing Order made ample provisions.

6.1 The learned senior counsel for the respondent authorities cited the following decisions in support of his contentions:

(a) Commissioner of Income Tax, Madras Vs. K.R.M.T.T. Thiagaraja Chetty and Co., was cited to point out that, profits in context of Section 4 of the Income Tax Act (1922) did not accrue unless and until they were actually computed. The computation of the profits whenever it may take place cannot possibly be allowed to suspend their accrual.

(b) E.D. Sassoon and Company Ltd. Vs. The Commissioner of Income Tax, Bombay City, was referred to for its proposition that accrual did not depend on accounting. It was held that accounts may be made up at a much later date and that the accrual of income does not depend upon its ascertainment by the assessee. The amount of income, profits or gains may thus be ascertained later on when the accounts are made up. It was held that computation of the profits whenever it may take place cannot possibly be allowed to suspend its accrual. The quantification of the amount was not a condition precedent to its accrual.

(c) The Commissioner of Income Tax, Madras Vs. A. Gajapathy Naidu, was cited for the proposition that the words "accrue" and "arise" (in Section 4 (1) (b) (i) of the Income Tax Act, 1922) were used in contradistinction of "receive" and indicate a right to receive. They represent a stage anterior to the point of time when the income becomes receivable and connote a character of the income which is more or less inchoate. An income, therefore, accrues or arises when the assessee acquires a right to receive the same.

(d) Commissioner of Income Tax, Bombay, City II Vs. Goverdhan Ltd., was cited for its proposition that the income may accrue to an assessee without actual receipt of the same and if the assessee acquires a right to receive the income, the income can be said to have accrued to him though it may be received later on, on its being ascertained. It was held that the legal position was that a liability depending upon a contingency was not a debt in praesenti or in futuro till the contingency happens. But if it is a debt, the fact that the amount has to be ascertained does not make it any the less a debt if the liability is certain and what remains is only a quantification of the amount: debitum in praesenti,

solvendum in futuro.

(e) Amadalavalasa Cooperative Agricultural and Industrial Society Ltd. and Another Vs. Union of India (UOI) and Another, was referred to for pointing out the proposition that a liability that had become absolute did not depend upon the subsequent determination of the amount.

(f) Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others, was cited for pointing out from the observations made therein in paragraph 108 of the judgment (page 631) that unjust enrichment is a just and salutary doctrine and no person can seek to collect the duty from both ends. It was submitted that the manufacturers who did not deposit the excess amount were unjustly enriching themselves.

7. Section 3 of the Essential Commodities Act, 1955 empowers the Central Government to issue orders for regulating or prohibiting the production, supply and distribution of essential commodities and trade and commerce therein, when it is of opinion that it is necessary or expedient so to do for maintaining or increasing supplies of essential commodity or for securing their equitable distribution and availability at fair prices or for securing any essential commodity for the defence of India or the efficient conduct of military operations. Without prejudice to this power conferred by sub-section (1) of Section 3, the Central Government is also, inter alia, empowered to make orders for controlling the price at which any essential commodity may be bought or sold under sub-section (2) (c) thereof.

7.1 In exercise of the powers conferred by Section 3 of the said Act, the Central Government made the Drugs (Prices Control) Order, 1979. In the said Order, an account known as "Drug Prices Equalisation Account" was created under Paragraph 17, which was required to be maintained by the Government and in which amounts indicated therein were required to be credited by a manufacturer/importer/distributor. It, inter alia, provided that the amount determined under Sub-paragraph (2) of Paragraph 7 of the said Control Order was required to be credited in it. Paragraph 7 and Paragraph 17 of the Control Order of 1979 read as under:

"7. Power to fix retention price and pooled price for the sale of bulk drugs specified in First Schedule or Second Schedule indigenously manufactured as well as imported- (1) Where a bulk drug specified in the First Schedule or the Second Schedule is manufactured indigenously and is also imported, the Government may, having regard to the sale prices prevailing from time to time in respect of indigenously manufactured bulk drugs, by order, fix with such adjustments as the Government may consider necessary;

(a) retention prices for individual manufacturers, importers, or distributors of such bulk drug;

(b) a pooled price for the sale of such bulk drugs;

(2) Where a manufacturer of formulation utilises in his formulations any bulk drug, either from his own production or procured by him from any other source, the price of such bulk drug being lower than the price allowed to him in the price of his formulations, the Government may require such manufacturers-

(a) to deposit into the Drug Prices Equalisation Account referred to in paragraph 17 the excess amount to be determined by the Government; or

(b) to sell the formulations at such prices as may be fixed by the Government."

"17. Drug Prices Equalisation Account - (1) The Government shall maintain an Account to be known as the Drugs Prices Equalisation Account to which shall be credited-

(a) by the manufacturer, importer or distributor, as the case may be-

(i) the amount determined under sub-paragraph (2) of paragraph 7;

(ii) the excess of the common selling price or, as the case may be, pooled price over his retention price;

(b) such other sums of money as the Central Government may, after due appropriation made by Parliament by law in this behalf, grant from time to time.

(2) The amount credit under sub-paragraph (1) shall be spent only-

(a) for paying to the manufacturer, importer or distributor as the case may be, the short-fall between his retention price and the common selling price or, as the case may be, the pooled price for the purpose of increasing the production, or securing the equitable distribution and availability at fair prices, of drugs;

(b) for expenses incurred by the Government in discharging the functions under this paragraph.

(3) Every manufacturer, importer or distributor may, if he has any claim under clause (a) of sub-paragraph (2), make an application to the Government and the Government may, in settling the claim require the manufacturer, importer or distributor, as the case may be, to furnish such details as may be specified by it in this behalf.

(4) The Government shall maintain account of all moneys credited to and expended from out of the Drug Price Equalisation Account and such other reports and returns as it may consider necessary relating to the said account."

7.2 The Control Order of 1979 came to be repealed by the Drugs (Prices Control) Order, 1987 which was made by the Central Government on 26.8.1987. The repealing and saving clause contained in Paragraph 30 of the Control Order of 1987 reads as under:

"30. Repeal and Saving:- (1) The Drugs (Prices Control) Order, 1979 is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken including any notification or order made, direction given, notice issued or exemption granted under the Drugs (Prices Control) Order, 1979, shall in so far as it is not inconsistent with the provisions of this order, be deemed to have been done, taken, made, given, issued or granted, as the case may be, within corresponding provisions of this Order."

7.3 In the same Control Order of 1987, a provision was made for recovery of dues that had accrued under the Control Order of 1979 into the Drug Price Equalisation Account, in Paragraph 14 thereof, which reads as under:

"14. Power to recover dues accrued under the Drugs (Prices Control) Order, 1979, into the Drug Price Equalisation Account- (1) Notwithstanding anything contained in this Order, the Government may, by notice require the manufacturer, importer or distributor, as the case may be, to deposit the amount which has accrued on account of the actions under the Drugs (Prices Control) Order, 1979, on or before the commencement of this Order, into the Drugs Price Equalisation Account and the manufacturer, importer or distributor, as the case may be, shall deposit the said amount into the said account within such time as the Government may specify in the said notice.

(2) The existing amount, if any, in the Drugs Price Equalisation Account on or before the date of commencement of this Order, and the amount deposited under sub-paragraph (1) shall be used for the purposes stipulated in the Drugs (Prices Control) Order, 1979."

The Control Order of 1987 was replaced by the Control Order of 1995 which also provided in Paragraph 12 for power to recover dues accrued into the Account under the Control Order of 1979. Paragraph 12 thereof reads as under:

"12 (1) Notwithstanding anything contained in this Order, the Government may by notice, require the manufacturer, importer or distributor, as the case may be, to deposit the amount which has accrued under the provisions of the Drugs (Prices Control) Order, 1979 on or before the commencement of this Order into the Drugs Prices Equalisation Account and the manufacturer, importer or distributor, as the case may be, shall deposit the said amount into the said Account within such time as the Government may specify in the said notice.

(2) The existing amount, if any, in the Drugs Prices Equalisation Account on or before the date of commencement of this Order, and the amount deposited under sub-paragraph (1) shall be utilised for:-

(a) paying to the manufacturer, importer or distributor, as the case may be, the short-fall between his retention price and the common selling price or, as the case may be, the pooled price for the purpose of increasing the production, securing the equitable distribution and availability at fair prices, of drugs;

(b) meeting the expenses incurred by the Government discharging the functions under this paragraph; and

(c) promoting higher education and research in Pharmaceutical Science and Technology and for the purposes incidental thereto."

8. It will be seen that the liability of a manufacturer of formulation arises under Paragraph 7 (2) of the Control Order of 1979 when he utilizes in his formulation the bulk drug either from his own production or procured by him from any source at a price lower than the price allowed to him for such bulk drug in the price of the formulation.

8.1 The maximum sale price of bulk drug is notified under Paragraph 3 of the Control Order of 1979 with a view to regulating the equitable distribution of a specified bulk drug which is indigenously manufactured and for making it available at a fair price. However, when it is considered by the Government to be necessary or expedient for the purpose of increasing the production of an indigenously manufactured specified bulk drug, it may fix a retention price, which is said to be the price applicable to the manufacturer of the bulk drug, who retains the bulk drug and does not sell it, or it may fix a common sale price which would mean the price at which the bulk drug is to be sold by such manufacturer. Where specified bulk drug is manufactured indigenously as well as imported, the Government may, keeping in view the prevailing sale price of indigenously manufactured bulk drug, fix by orders under Paragraph 7 (1) (a) and (b) retention prices for individual manufacturers, that is, prices applicable to such bulk drugs if it is retained, as for example, for captive consumption, and a pooled price for the sale of such bulk drug. The manufacturer of bulk drug is bound to credit the excess of the common selling price [fixed under Paragraph 4] or pooled price for sale [fixed under Paragraph 7 (1) (b)] over his retention price [fixed under Paragraph 7 (1) (a)] as required by Paragraph 17 (1) (a) (ii) of the Control Order of 1979. For a manufacturer of formulation, who utilizes in his formulation a bulk drug from his own production, the retention price fixed for him as the manufacturer of that bulk drug for captive consumption would be taken to be the cost of the bulk drug used and, therefore, the price of such bulk drug allowed to him in the price of his formulation. If he is not the producer of the bulk drug and procures it from some other source, then, a common selling price or pooled sale price at which he could have procured the bulk drug may be taken to be the cost incurred by him while fixing the price of his formulation. The retention price, the pooled sale price or the common selling price of the bulk drugs which are fixed reflect the cost of such bulk drug when utilized for manufacturing a formulation. When fixing the retail price of the formulation, the cost at which the material is obtainable is taken into account and it is obvious that when the Government itself had fixed the retention price or pooled sale price or common selling price of a bulk drug, then, that would ordinarily be taken to be the cost of such bulk drug when used in the formulation while fixing its retail price under the price fixation formula prescribed in Paragraph 10. From the scheme of fixation of retail price of formulations, it is clear that the retail price incorporates the cost of the bulk drug used in the formulation as a constant factor. Such constant factor has to be adopted because retail price fixation

cannot be as sporadic in fluctuation as the actual cost to the manufacturer who procures the bulk drug which may vary for a variety of reasons. The idea underlying the provisions of the Control Order of 1979 was to secure equitable distribution and availability of the drugs at fair prices at which they may be bought or sold as envisaged by Section 3 of the Essential Commodities Act, which Act has been included in the Ninth Schedule to the Constitution at Entry No.126. Section 7A of the Essential Commodities Act, which was inserted with effect from 1.7.1984, empowers the Central Government, inter alia, to recover the amount that any person is liable to deposit to the credit of any Account or Fund constituted by any Order made u/s 3 of the said Act if he makes any default in depositing it, whether such Order u/s 3 is made before or after the coming into force of Section 7A and whether the liability to deposit such amount arose before or after that date, with interest, as an arrear of land revenue or as a public demand. It will, thus, be seen that even the Parliament when it inserted the provisions of Section 7A with effect from 1.7.1984 contemplated creation of such Account by an Order issued under the provisions of Section 3 of the said Act. It is, thus, clear that the amount that a person was liable to deposit under Paragraph 7 (2) to the credit of the DPE Account under the Control Order of 1979, if not deposited, could be recovered with interest as arrears of land revenue. The question that, however, arises on the basis of the contentions of the petitioners in these two petitions is whether the amount had at all accrued under Paragraph 7 (2) of the Control Order of 1979 for being deposited into the Account before that Order was repealed. The case of the petitioners is that the amount did not so accrue because there was not made any determination by the Central Government as envisaged by Paragraph 7 (2) which alone could have been made the basis of requiring the deposit of the amount being made into the DPE Account created under Paragraph 17 of the Control Order of 1979.

9. The calculation of retail price of formulations was required to be made as per the formula prescribed under Paragraph 10 of the Control Order of 1979. This formula included consideration of material cost (MC), which included the cost of the bulk drug and other pharmaceutical aids used including overage, if any, process loss thereon, in accordance with such norms as may be specified from time to time by notification in the Official Gazette. Even the conversion cost (such as of smaller quantity or unit) was to be worked out as per the norms specified by notification in the Official Gazette. The retail prices of the formulations were required to be calculated as per such norms mentioned in Paragraph 10. The leader prices of the specified formulations in Category I and II of the Third Schedule could be fixed or revised by the Government under Paragraph 12 of the Control Order of 1979 by notification in the Official Gazette and when fixed it operated as the ceiling price for every manufacturer of such formulation. The retail price of formulations specified in Category III of the Third Schedule could be fixed by the Government in accordance with Paragraph 10 of the Control Order of 1979. Such retail price once fixed under Paragraph 13 (1), could not be increased by the manufacturer without the prior approval of the

Central government. Every manufacturer was required to submit to the Government within six months of the close of the accounting year, information for that year in Form 6 as per Paragraph 25 of the Control Order of 1979. Such information included information as to allocation of sales and expenses to bulk drugs and formulations. The expenses on the raw materials consumed were also to be indicated under Item No.6 Head B of that Form. It will be noticed from the provisions of Paragraph 13 (2) of the Control Order of 1979 that whenever the Government fixed or revised the price of any bulk drug under the provisions of that Order and a manufacturer utilised such bulk drug in his formulations specified in Category III of the Third Schedule, he was required to make an application to the Government in Form 3 or Form 4, as the case may be, and the Government could, thereupon, if it considered necessary, fix or revise the price of the formulation. It will be seen from Form 3 that the particulars which were required to be furnished by the manufacturer of the bulk drug, who made such application under Paragraph 13 (1), included the breakup of retail price in which material cost was required to be indicated as per the details which were required to be given at Item 15 (d).

10. Thus, the data as regards the procurement price or cost of the bulk drug used in the formulation, the retail price of the formulation, the quantity sold (turnover) are matters that would form the basis of liability to credit the Account with the difference in the price of bulk drug allowed in the price of the formulation and the actual price of such bulk drug. Only the amount was required to be ascertained by reference to the material that was available. The price of bulk drug allowed in the formulation was reflected in the formula adopted for fixing the retail price of the formulation and it would be only a matter of clerical calculation with reference to the quantity of the bulk drug utilized in the formulation. The procurement price of such bulk drug was also a matter of record required to be maintained by the manufacturer of the formulation. The course of determination of the amount required to be credited was only the process of ascertainment of the liability that had already accrued at the end of the accounting year on the basis of the retail price which included a leader price as defined under Paragraph 2 (r) of the Control Order of 1979 already fixed by the Government, the bulk drug already procured and utilised in the formulation and the data/ information required to be maintained and supplied by the manufacturer. If the manufacturer does not furnish the requisite data on the basis of which it could be ascertained whether there existed a difference that was required to be credited by him in the Account, it cannot be said that the liability by virtue of the provisions of the Control Order of 1979 did not accrue till the quantification of liability was determined. Determination is only for the purpose of ascertaining the excess amount and is a process to find out what amount had accrued by way of such liability that he can be required to deposit in the Account. It may be recalled that the Supreme Court, in CYNAMIDE's case (*supra*) in context of the Control Order of 1979 and the challenge against the notifications fixing prices observed in paragraph 31 of its

judgment that the manufacturer of bulk drugs who claimed to be affected by the Control Order belonged to class of persons who were well and fully informed of every intricate detail and particular which was required to be taken into account in determining the price. In most cases, they were the sole manufacturers of the bulk drug and even if they were not the sole manufacturers, they belonged to the very select few who manufactured the bulk drug. It was observed in paragraph 28 of the judgment that manufacturers of bulk drug were either one or a few in number and generally they may be able to take care of themselves, and had the assistance of accountants. It was observed that in the context of Drug industry and in regard to the said Control Order one must proceed on the basis that the manufacturers of bulk drugs are generally persons who know all that is to be known about the price fixed by the Government. It was held that from the legislative nature of the activity of the Government, it was clear that the Government was under no obligation to make any disclosure of any information received and considered by it in making the order.

11. The retail price of formulations calculated as per the formula prescribed by Paragraph 10 includes "MU", i.e. Mark-Up referred in Paragraph 11 of the Control Order of 1979. This Mark-Up includes the distribution cost, outward freight, promotional expenses, manufacturers' margin and the trade commission, which was not to exceed 40% in the case of formulations in Category 1 of the Third Schedule and 55% in the case of formulation of Category II and 100% in the case of formulations of Category III. It will be noted from the scrutiny of Paragraphs 10 and 11 of the Control Order of 1979 that the components of the retail price fixed are so regulated that there would be no scope for a higher profit margin to the manufacturer than what would be permissible within the range of the retail price fixed. The particulars required to be shown in Form 6 read with Paragraph 25 of the Control Order of 1979 by the manufacturer of the formulations would reflect his profit and the expenses incurred on the raw materials used which would include the bulk drugs. As noticed from Paragraph 10 of the Control Order of 1979, the material cost, which includes cost of the bulk drug used, is to be calculated as per the norms specified by the Government. On the basis of the information supplied by the manufacturer under Paragraph 25 (2) read with Form 6 within six months of the close of the accounting year, the Government would know whether there was any indirect mode of getting a larger margin of profit than permissible under the Price Control Policy enshrined in the Control Order of 1979 and if it is noticed, it can be determined and the excess recovered by the Government. The cost of drug used in the formulation which is specified by the Government as per the norms notified as envisaged by Paragraph 10 would be the price allowed to the manufacturer in the price of his formulation and the cost at which he has procured such raw material as should reflect in the information given by him in Form 6 (see Item 6, Rule B-4) would be basis for working out the excess of the allowed price of the bulk drug used in the formulation over its actual procurement price to the manufacturer. The process of determination of the amount under Paragraph 7 (2) is thus only a matter of

working out the amount of excess on the basis of the data that has been crystallized by the price fixation done and the activities of the manufacturer already recorded in his books under Paragraph 25 read with Form 6 of the Control Order of 1979. No manufacturer who withholds information vital to working out the difference under Paragraph 7 (2) (a) which he was liable to deposit, can take advantage of his own wrong on the basis of the delay caused by him by not furnishing the information in Form 6. The word "determine" in Paragraph 7 (2) (a) would in the context mean to find out precisely the extent of the amount that the manufacturer is liable to deposit in the Account. The liability to pay the amount that had accrued into the Account is thus found out by the process of determination, not that it had not been incurred until its extent was precisely found out or worked out.

12. Paragraph 17 of the Control Order of 1979 requires the Government to maintain the DPE Account and imposes a duty on the manufacturer of formulation to credit in it the amount determined under Paragraph 7 (2) and the manufacturer of the bulk drug to credit in it the excess of the common selling price or as the case may be the pooled price over his retention price. The common selling price, pooled price and retention price are all fixed under the Orders issued by the Central Government as can be seen from the provisions of Paragraphs 4 and 7 (1) of the Control Order of 1979. Thus, the duty of the manufacturer of the bulk drug to credit the excess amount of the common selling price or pooled price over the retention arises by virtue of the orders issued under Paragraphs 4 and 7 as provided under Paragraph 17 (1) (a) (ii) of the Control Order of 1979, just as the duty of the manufacturer of formulations arises to credit the amount as may be ascertained under Paragraph 7 (2) (a) of the Control Order of 1979. The process of determination of the excess amount of the price allowed of bulk drug in the price of formulation over its actual procurement price is necessary, because, while the price allowed can be ascertained from the orders/notifications fixing retail price of the formulations, the prices of bulk drug and the norms laid down for working out the material cost factor in the formula, the actual procurement price of the bulk drug used in such formulation would be to the personal knowledge of the manufacturer who has to keep account and furnish information to the Central Government in that regard. This process of ascertaining the correctness of the procurement price of the bulk drug so used in the formulation is not involved in case of the manufacturer of bulk drugs, because, that can be worked out on the basis of the orders fixing common selling price, pooled price and the retention price which all are issued by the Central Government under Paragraphs 4 and 7 (1) of the Control Order of 1979. Therefore, the manufacturer of bulk drug is required to credit the excess of common selling price/ pooled price over his retention price without any need for the Government to ascertain the amount of his liability which is evident on the basis of the orders already issued under Paragraphs 4 and 7 (1) of the Control Order of 1979, while for the manufacturer of formulations the Central Government is required to find out precisely the excess amount that such

manufacturer of formulation is bound to deposit in the Account by working out the said difference in context of the retail price fixed and the component of material cost included therein on the basis of the notified norms envisaged in the formula prescribed in Paragraph 10 of the Control Order of 1979. It cannot be said that while the liability to credit the excess amount contemplated in Paragraph 17 (1) (ii) of the Control Order of 1979 arose in case of manufacturer of bulk drug before it was repealed, similar liability of the manufacturers of formulations did not arise simply because the precise excess amount was to be worked out on the basis of the liability that had already accrued in view of the price of the bulk drug allowed in the retail price fixed by orders/ notifications already issued being higher than the actual procurement price of the bulk drug utilised in the formulation before the repeal of the Control Order of 1979. In fact, in the process of working out the precise excess amount under Paragraph 7 (2) (a), the Central Government does not pass any order of the nature of the orders/ notifications which are made reviewable under Paragraph 27, which obviously referred to the orders mentioned in Paragraph 7 (1) which pertained to fixing of retention price or pooled price. Paragraph 7 (2) as can be noticed does not use the expression "by order" or "by notification", that occurs in the Paragraphs which refer to notification or orders made reviewable under Paragraph 27 of the Control Order of 1979.

13. The Government by notification under Paragraph 3 (1) was empowered to fix the maximum price of indigenously manufactured bulk drug specified in the First or Second Schedule to regulate its equitable distribution at fair price and no person shall sell a bulk drug at a price exceeding the notified price plus taxes payable thereon. The price fixation of bulk drug, thus, would ensure their availability at a fair price to the manufacturers of formulations in which such bulk drugs are used as raw material. Under Paragraph 9 of the Control Order of 1979, the Government was empowered to direct the manufacturer of bulk drug to sell bulk drugs to such manufacturers of formulations as may be specified by general or special order. It is evident that the regulation of the prices of bulk drugs would have its impact on the price of formulations with which the ultimate consumer is concerned. The price of a bulk drug has a direct nexus with the price of formulation in which it is used. The margin of profit permissible to the manufacturers of formulation was based on the parameters fixed under the Price Fixation Orders and Notifications which include the cost of raw material, that is, bulk drugs used in the formulation as one of the factors in the formula prescribed for fixing the retail price of the formulation. Therefore, when the bulk drug is obtained at a cheaper price than the price allowed for it as per the formula, it would result in a surplus amount in the hands of the manufacturer which, if allowed to be appropriated by him, would result in a higher profit margin to him than what was intended under the Price Control Policy. His profit margin is determined by fixation of the retail price which takes care of the "manufacturer's margin" in the price formula, the price at which he can sell the formulations to the wholesaler or retailer as provided by Paragraph 24 and also the price fixation,

if any, under Paragraph 15 keeping in view the pre-tax return specified in the Fifth Schedule. The manufacturer of formulations is not allowed to profiteer from the purchases of bulk drug which he uses in his formulation because there is a Policy of price fixation for bulk drugs to ensure their supply to manufacturers of formulations at a fair price. Even the profit margin of the manufacturer of bulk drug is regulated. Thus, if the manufacturer of formulation who happens to obtain the bulk drug that he uses in the formulation at a price lower than the one allowed in fixing the retail price is permitted to appropriate the difference as unintended profit, the equilibrium tried to be attained by the Price Control Policy would be clearly disturbed. When the retail price of formulation is fixed under Paragraphs 10 and 11, the cost of drugs and pharmaceutical aids used including overages, if any, and profit loss thereon, is the cost determined as per the norms notified by the Government and this forms part of the formula in the first bracket which comprises of Material Cost, Conversion Cost, Cost of Packing Material and Packaging Charges (MC + CC + PM + PC). Mark-Up which includes distribution cost, onward freight, promotional expenses, manufacturer's margin and the trade commission as per the percentage prescribed in Paragraph 11 falls in the second bracket of the formula, namely, $[1 + MU + ED \text{ (i.e. excise duty) }]$. The total of the components of the first bracket is to be multiplied by the total of the components of the second bracket to fix the retail price. When the amount of difference between the actual lower price at which the bulk drug used in the formulation was obtained and the price of the bulk drug allowed in the retail price fixed as per the above formula is taken away from the manufacturer, the price structure of the formulation of such manufacturer gets equalised with the retail price fixed for the formulation. The purpose of requiring such manufacturer to deposit the amount in the DPE Account is to ensure that he does not draw his profit beyond the permissible margin by taking advantage of the higher price of bulk drug taken as the cost of material used in the formulation while fixing the retail price of the formulation as per Paragraphs 10 and 11 to the extent that he has not really incurred that higher cost but has procured the bulk drug at a lower price. This process, in pith and substance, is directly linked with the Price Control Policy adopted in the Control Order of 1979 made u/s 3 of the Essential Commodities Act and there is no question of imposition of any tax by subordinate legislation on the manufacturers of formulations. There is, therefore, no substance in the contention that the amount required to be credited in the DPE Account is a tax imposed by the subordinate legislation.

14. The amount of excess which is ascertained by the Government under Paragraph 7 (2) has to be credited by the manufacturer in the DPE Account under Paragraph 17 (1) (a) (i). The liability for the amount had already accrued before it was found out or established precisely. Therefore, the fact that the process of determining the amount of liability that had already accrued under the Control Order of 1979 took time will not extinguish the liability of such manufacturer and the recovery which was delayed could be made under the specific provisions made in the subsequent Orders which saved such recovery

notwithstanding the repeal of the Control Order of 1979.

15. The Drugs (Prices Control) Order 1987 came into force from 26.8.1987 when it was published in the Gazette of India. Paragraph 14 kept intact the power of the Central Government to recover dues accrued under the Control Order of 1979. As noted above, every manufacturer was duty bound under Paragraph 25 of the Control Order of 1979 to submit information for the accounting year within six months of the close of the year. This would mean that the process of ascertainment of liability that may be accrued during the currency of the Control Order of 1979 would ordinarily be done by the Central government after such information is furnished. In all cases falling in the period immediately preceding the repeal of the Control Order of 1979, determination of the excess amount under Paragraph 7 (2) could never have been done until the information was furnished by the manufacturer as stipulated in Paragraph 25 (2). Therefore, if what the petitioners contend is accepted, it would result in waiver of the liability of all the manufacturers that had already accrued and was only to be determined by finding out the precise amounts payable by ascertaining the relevant data for the period in question. Since six months from the date of the closure of the accounting year was the time permitted to such manufacturer, if the accounting year ended on 31st March 1987, he could have waited upto 30.9.1987 to submit the information in Form 6 to the Government about his turnover, use of raw material, profit margin etc. Therefore, in all such cases, the dues that had accrued under the Control Order of 1979 cannot be recovered under Paragraph 14 of the Control Order of 1987 despite the power to recover them having been specifically saved thereunder. This patent absurdity cannot be attributed to the provisions of Paragraph 14 of the Control Order of 1987 or corresponding Paragraph 12 of the Control Order of 1995. The scheme of saving the power to recover the dues under the Control Order of 1979 into the DPE Account reflected in Paragraph 14 of the Control Order of 1987 is to be understood in context of the Account which continued to operate in respect of the amounts credited therein and those which were meant to be credited in it under Paragraph 17 of the Control Order of 1979, which provided that the Government shall maintain the DPE Account to which shall be credited by the manufacturer the amount determined under paragraph 7 (2) (a) of the Control Order. Therefore, the power to determine the dues that had already accrued under the Control Order of 1979 is necessarily implied in the power to recover the dues "accrued on account of the actions under the Drug (Prices Control) Order, 1979" under Paragraph 14 of the Control Order of 1987 or the expression "accrued under the provisions of the Drug (Prices Control) Order, 1979" occurring in the corresponding Paragraph 12 of the Control Order of 1995. If the subordinate legislation intended that only the sums already determined under the Control Order of 1979 could be recovered and not the amounts that may have accrued under the Order but were yet to be ascertained, nothing could have been more simple than merely stating that the Government may require the manufacturer to deposit the amount determined under Paragraph 7 (2) (a) prior to coming into force of the Control Order of

1987. This nullifying meaning cannot be attributed to Paragraph 14 of the Control Order of 1987 which operated notwithstanding the repeal of the Control Order of 1979 by Paragraph 30 of the Control Order of 1987 as is clear from its non obstante clause.

16. Under the saving clause of Paragraph 30 (2), anything done, any action taken including any notification or order made, direction given, notice issued or exemption granted, shall be deemed to have been done etc. within corresponding provisions of the Control Order of 1987. Therefore, the retail price of the formulations specified in Category I of the Third Schedule by notification issued under the Control Order of 1979 as per Paragraphs 10 and 11 thereof, is deemed to have been fixed under the corresponding provisions of the Control Order of 1987. By virtue of the actions taken including issuance of notifications and orders, the liability to credit the amount which had accrued in the DPE Account arose when the manufacturer of formulation utilised in it bulk drug procured by him at a price lower than the price of bulk drug allowed in the retail price of his formulation. The word "may" in the phrase "the Government may require such manufacturer" in Paragraph 7 (2) of the Control Order of 1979 was only meant to give an option to the Government either to require such manufacturer to deposit the amount that may be ascertained or to sell the formulation at the price that may be fixed by the Government for the formulation of such manufacturer. It did not give any discretion to the Government to waive the liability of the amount that had accrued in the Account as a result of the higher price of bulk drug allowed in the price of formulation than the price of procurement of such bulk drug.

17. The distinction between the "rights accrued" and "liability incurred" is overlooked in the submissions made on behalf of the petitioners. It was the liability of the manufacturer of formulations to credit the amount under Paragraph 17 (1) (a) (i) read with Paragraph 7 (2) (a) that is in question and not the question of any right being accrued in favour of the Government under the Control Order. The power of the Government to determine the amount and recover it can be exercised after the events have occurred only with a view to find out or ascertain the exact extent of liability that had been incurred for the amount meant to be credited into the DPE Account. Just as rights accrued cannot be taken away, the liability incurred does not get extinguished by the repeal of the Order. The liability on the part of the manufacturer of formulations that had arisen by virtue of use of bulk drug procured at a price lower than the price allowed in the retail price of the formulation, is to be enforced by exercising the power to recover the amount which entails ascertainment of the exact amount. When the power to recover the amount that has accrued into the DPE Account, since it had become payable into it during the currency of the Control Order of 1979, was expressly saved by Paragraph 14 of the Control Order of 1987 and Paragraph 12 of the Control Order of 1995, the fact that the amount was required to be ascertained will not make it any the less a debt when the liability was certain and what remained was only a quantification of the amount. The

exercise of power to determine and recover the amount depends upon the liability that had arisen under the opening words of Paragraph 7 (2) of the Control Order of 1979 and not vice versa.

18. If under the repealed Order a liability has already arisen on the basis of the orders/notifications made and things done but in respect of which some investigation or proceeding is necessary, the liability is then unaffected and preserved even if a process of quantification is necessary. The process of determination contemplated under Paragraph 7 (2) is for finding out the extent of liability that had arisen and is not a process of deciding whether or not some liability should be imposed. It is one thing to invoke the repealed provisions for the adjudication of the liability which has already been incurred prior to repeal of that law and it is quite another matter to say that a liability which did not arise under the repealed law should be imposed after the repeal of the provisions. In other words, no new liability can be created under the provisions of law after their repeal but the liability that had already been incurred would not vanish on such repeal so as to prevent such quantification and recovery of dues that already had accrued, though not received into the DPE Account as envisaged in Paragraphs 14 and 12 of the subsequent Control Orders, notwithstanding the repeal of the Control Order of 1979.

19. The question whether the amount became payable in the Account by the manufacturer of formulations or not depended upon all the happenings that took place during the currency of the Control Order of 1979. From the fixation of retail price of formulations, done under that order or deemed to be done thereunder if done earlier and saved by it, the price of bulk drug allowed therein could be easily ascertained, because, it had gone in as a component of the price fixation formula that had already taken place, and only the figure of the allowed cost of bulk drug used could be worked out on the basis of the existing data. The utilization of the bulk drug of the price lower than the price allowed in the formulation had also taken place during the currency of the Control Order of 1979 and such price of the bulk drug would be a matter to the personal knowledge of the manufacturer of formulation who had procured it from other sources. In fact, if the manufacturer maintained the records as strictly required and furnished the necessary information of the purchases and utilisation of the bulk drug in the formulations, it was just a matter of opening the books and checking up the figures for ascertaining the quantity of bulk drug used and its price. If, however, the manufacturer failed in his duty to provide the requisite information, the provisions creating liability cannot abort nor will his liability be postponed till he makes a disclosure. The liability had come to stay during the currency of the Control Order and it was only to be unearthed or discovered by finding out its extent. The Government would be justified in resorting to other sources to ascertain the procurement price of the bulk drug and extent of its utilisation and from its record of price fixation of bulk drugs which is done by issuing notifications and orders it could work out the extent of liability that may have arisen under Paragraph 7 (2) of the Control Order of 1979. The recovery of

the dues that have thus accrued into the DPE Account by virtue of the liability arisen due to things done and actions taken while the Control Order of 1979 was in force is specifically saved in the subsequent Control Orders of 1987 and 1995 in Paragraphs 14 and 12 thereof respectively as a measure of enforcing such liability by effecting the recovery of the amounts which became payable under the repealed Order but only remained to be quantified.

20. The Courts have power to interpret the statutory provisions even in absence of statutory aids to interpretation. The search for statutory interpretation does not begin and end with the provisions of Section 6 of the General Clauses Act, 1897. Even where the provisions of Section 6 apply, they are subject to different intention that may appear in the repealing statute. The extent of saving can be judged from the provisions of the repealing enactment. Even if the law is repealed without express saving, the repeal is not retrospective and cannot obliterate the rights accrued and liabilities incurred by virtue of its operation, and they would carry with them their incidences of enforcement like any other existing right or liability after the repeal, even in absence of a saving clause. The rights and liabilities of enduring nature that are already accrued and incurred would, therefore, remain enforceable. They do not require any support of a saving clause unless by a substantive provision the remedies are taken away and the rights accrued and liabilities incurred are made statutorily ineffective. If a right has once been acquired or an enduring liability incurred by virtue of some statute, it will not be abrogated by the repeal of such statute. The law itself may be repealed by its author but the rights accrued and liabilities incurred must still remain; for together with a law to take away all its precedent effects would be a high piece of injustice. Therefore, a clause in the repealing statute that "this repeal shall not affect any right or liability acquired, accrued or incurred" is apparently unnecessary, and only inserted *ex abundanti cautela*. In order to ascertain whether rights accrued or liabilities incurred under the repealed Order are put an end to, the line of inquiry would be not whether the new Order expressly keeps alive such rights and liabilities but whether it manifests an intention to destroy them. The intention here is loud and clear - to recover the dues on the basis of the liability that was incurred under Paragraph 7 (2) (a) read with Paragraph 17 (1) (a) (i) of the the Control Order of 1979. To say that merely because the amount of liability was not quantified prior to the repeal and therefore it cannot be quantified thereafter would fly in the face of the specific recovery provision incorporated in the repealing Control Order. In our opinion, the power to recover the amount of liability already incurred necessarily implied the power to find out as to what was the amount that was required to be recovered under the Control Order of 1979. We, therefore, hold that Paragraph 7 (2) of the Control Order of 1979 was a constitutionally valid provision and that the recovery of the liability that had been incurred by the petitioner companies of these two petitions under Paragraph 7 (2) of the Control Order of 1979 can be enforced even after the repeal of that Control Order under Paragraph 14 of the Control Order of 1987 and thereafter under the corresponding Paragraph 12 of

the Control Order of 1995 by determining the exact amount that had become payable under Paragraph 7 (2) (a) read with Paragraph 17 (1) (a) (i) of the Control Order of 1979. The challenge of the petitioners against the impugned recovery proceedings, therefore, fails in both these petitions.

21. Both the petitioner companies have contended in these two petitions that their alleged losses be adjusted while determining the amount of liability incurred under Paragraph 7 (2) for making the deposit into the DPE Account. Paragraph 7 (2) (a) requires determination of the excess amount of the price of the bulk drug utilized by the manufacturer in his formulations when the price of the bulk drug is lower than the one which is allowed. Thus, the only consideration that would go into such determination would be to ascertain in cases where the manufacturer of formulation uses bulk drug produced by him a retention price fixed for such captive use, and if the bulk drug is procured by him from some other sources, to ascertain as to what was the price at which it was procured by him. On the basis of this material and the price of the utilized quantity of bulk drug allowed in the price of the formulation, the excess amount would be worked out. Additional expenses or gains passed on to the wholesalers or retailers would be wholly irrelevant in this process in the context of determining the excess amount under Paragraph 7 (2) (a). Such expenses incurred by the manufacturer of formulations form part of the normal "Mark-up" allowed while fixing the prices of formulations and the additional expenses would be a charge on the manufacturer's profits and cannot be adjusted out of the money due into the DPE Account under Paragraph 7 (2) (a) read with Paragraph 17 of the Control Order of 1979. If the costs and charges which have already been taken into account in the calculation of retail price of formulations are to be reopened in this indirect manner, the whole idea underlying fixation of retail price by the legislative notifications and orders will be frustrated and the formula devised in Paragraph 10 read with Paragraph 11 of the Control Order of 1979 will become redundant. The prolonged challenge that was raised against the price fixation notifications which paralysed the provisions of the Control Order of 1979 till it failed before the Supreme Court in CYNAMIDE case (supra) will get accepted in this indirect manner, which cannot be countenanced. As held by the Supreme Court in CYNAMIDE INDIA LTD. (supra):

"It was open to the subordinate legislating body to prescribe and adopt its own mode of ascertaining the cost of production and the items to be included or excluded in so doing. The subordinate legislating body was under no obligation to adopt the method adopted by the income tax authorities in allowing the expenses for the purpose of ascertaining income and assessing it. There may be many items of business expenditure which may be allowed by income tax authorities as legitimate expenses but which may never enter the cost of production."

The losses, if any, as are sought to be claimed for adjustment or set off towards the liability incurred, have thus no relevance to the process of determination of

the excess amount under Paragraph 7 (2) (a) of the Control Order of 1979. The maximum pre-tax return specified in the Fifth Schedule as per Paragraph 15 of the Control Order of 1979 was not meant to be a guarantee of profit to the manufacturers of formulations. It was only a safeguard against profiteering and not an insurance against losses. The claim that unless profit of 8% is exceeded all such adjustments should be made is not at all warranted by the provisions fixing upper ceilings of profit margins of the manufacturers of formulations. Even where the price of bulk drug utilised by the manufacturer in the formulations is same as the price allowed in the price of formulations and there is no occasion to determine the excess amount, the losses, if any, incurred by such manufacturer on other suggested counts will remain on him and no question of adjustment can ever arise under Paragraph 7 (2) of the Control Order of 1979. Therefore, the contention of the petitioner companies in these petitions that the amounts of losses allegedly incurred by them on various counts should be adjusted while determining the amount under Paragraph 7 (2) (a) or reimbursed to them from the DPE Account is wholly misconceived and not warranted by law or justice.

22. The contention that the petitioner companies -manufacturers of formulations were denied reimbursement of their losses pursuant to the price fixation though required to make deposit of the amount determined under Paragraph 7 (2) into the DPE Account, while the manufacturers of bulk drugs are more favourably treated by being paid the difference of shortfall between the retention price and the common selling price or pooled price and therefore Paragraph 17 (2) (a) is discriminatory and violative of Article 14 of the Constitution is wholly misconceived. The prices of bulk drugs have a direct bearing on the prices of formulations in which they are used. The payments to the manufacturers of bulk drugs of the said shortfall are not to be mechanically made. They have nexus with the purpose of increasing the production, or securing the equitable distribution and availability at fair prices of drugs [i.e. medicines, substances and bulk drugs and formulations as defined in Paragraph 2 (d)]. The manufacturers, importers and distributors of bulk drugs form a distinct class from the manufacturers, importers and distributors of formulations and separate price fixation orders and norms govern them. Such classification is based on a rational criteria having nexus with the Drug Control Policy that regulates the prices of bulk drugs as well as formulations made from such bulk drugs. The availability of bulk drugs is the basic requirement which requires a provision of reimbursing the shortfall named in Paragraph 17 (2) (a) (ii) to the manufacturer. No other losses which are chargeable to profits of such manufacturer are reimbursable from this Account. The provisions of Paragraph 17 (2) (a) (i) cannot, therefore, be termed as arbitrary or discriminatory. The amounts required to be credited in the DPE Account are to be recovered to maintain the pricing policy which is intended to ensure supply, equitable distribution and availability at fair price of the bulk drugs utilized in the formulations and also of the formulations. Such price regulation is contemplated by Section 3 of the Essential Commodities Act which falls in the Ninth Schedule to the Constitution.

The subject of price control is within the domain of both the Parliament and the State Legislatures under Entry 34 of the Concurrent List. The creation of DPE Account is principally connected with controlling the prices by ensuring that the amount not meant to be retained by the manufacturer under the price regulations is credited by him in the Account. If this were not done, the very purpose underlying fixing profit margins to regulate prices and make the essential commodities available at fair prices sought to be achieved by issuing notifications/ orders and norms for price fixation would be frustrated. The DPE Account obviously was intended to maintain the equilibrium of the pricing policy and the provisions of Paragraph 7 (2) read with Paragraph 17 are, in pith and substance, relatable to Entry 34 of the Concurrent List and the amount required to be credited in the DPE Account is not a tax as was sought to be contended on behalf of the petitioners.

23. There can hardly be any dispute about the fact that the process of recovery which involved determination, under Paragraph 7 (2) of the Control Order of 1979, of the excess amount was not a legislative process. Therefore, the Central Government has to determine the amount on the objective material that could be ascertained from the data supplied or gathered. If the manufacturer did not cooperate and failed in his statutory duty to maintain and provide the data and information that was to his knowledge, the determination of the amount can be done by gathering the relevant material regarding the quantity of the bulk drug used, its procurement price etc. from the other sources that may be available. The amount so ascertained cannot thereafter be assailed by the manufacturer who had withheld the information that he was statutorily obliged to furnish.

24. As noted above, in the earlier writ petition (Special Civil Application No.4457 of 1995) filed by the petitioners of Special Civil Application No.3032 of 1999 (Cadila Laboratories Ltd. and others), the learned Single Judge had by the order dated 27.6.1995 given a direction that the petitioners shall make a representation against the order dated 8.5.1995 directing the petitioner company to deposit the amounts stated therein in the DPE Account. As recorded in that order, the Central Government had produced the extracts from the Indian Pharmaceutical Guide and ORG Report to point out that the petitioner company was concerned with the manufacture of products from the two drugs covered under the demand. The petitioner No.1 was directed to furnish the data to the Government and the respondent No.2 was directed on an application being made to supply the relevant data to the petitioner No.1 on the basis of which the impugned Order dated 8.5.1995 was passed. The representations of the petitioner No.1 was to be considered by the respondent No.2 on merits and after giving an opportunity of being heard to the petitioner No.1. The petitioner No.1 thereafter made representation on 12.9.1995. In paragraph 3.1 thereof the petitioner No.1 clearly stated that it had referred the reports of the Organization Research Group (ORG reports) which were made the basis of calculation by the Government. In that reply, instead of furnishing the necessary data and information required to be statutorily maintained and furnished under Paragraph

25 of the Control Order of 1979 read with Form 6 thereof, by way of a counterblast, the petitioner No.1 company referred to various losses that it had suffered during the year 1979 to August 1987 and submitted that the petitioner company should be paid a sum of Rs. 1,95,38,628 from the DPE Account on account of "total net unintended losses" suffered by the company during 1979-80 to August 1987. The petitioner company also took up a contention that no amount could be said to have been accrued into the DPE Account under the provisions of the Control Order of 1979. It also questioned the notification/orders of price fixation and norms issued under the Control Order of 1979. The representation of the petitioner did not disclose any information of the quantity of bulk drug procured and used by the petitioner company during the period in question nor the procurement price which the petitioner company ought to have disclosed since it was to the personal knowledge of the petitioner company. A personal hearing was sought in that representation. The Government by the impugned order dated 17.7.1997 taking note of the fact that the petitioner No.1 company did not furnish any information/data relating to procurement/consumption of the bulk drugs in question and instead, taking the quantity already taken by the Department in the computation sheet attached to its earlier letter dated 8.5.1995, had claimed set-off of free samples, excess commission paid, higher packing material cost, higher conversion cost etc., held that no such set-off was permissible under the provisions of the Control Order of 1979. Based on the information/data which was available with the Department and taking into account the complete range of the petitioner No.1 company's formulations based on the bulk drug in question manufactured/ marketed by the petitioner No.1 company during the period when the Control Order of 1979 operated, the Government on the basis of the calculations reflected in the sheets attached found on tentative basis that the excess amount of the price allowed for the bulk drug over its procurement price was Rs.2,76,13,134 which the petitioner company was directed to deposit along with interest under the Control Order of 1979. In view of the petitioner company's persistent default in supplying the requisite information from which the quantity of the bulk drug used and its actual procurement price could have been ascertained in context of Paragraph 7 (2), the Government was fully justified in relying upon the data it had gathered (ORG Report) which was disclosed as recorded in the order of the learned Single Judge and admitted to have been referred to and made the basis of the representation of the petitioner dated 12.9.1995, as can be seen from that representation, more particularly at paragraph 3.1 thereof. The matter should have rested here finally but for the offer of the Department giving an opportunity of being heard to the petitioner No.1 company if it was not satisfied with the amount of the liability determined under the said impugned demand notice dated 17.7.1997. In fact, the determination under Paragraph 7 (2) of the Control Order of 1979 was not an "order" or "notification" which alone were made reviewable under Paragraph 27 of the Control Order of 1979. The petitioner filed a detailed review petition on 19.9.1997 as offered in the impugned order dated 17.7.1997 which was registered as Case No.71 of 1997 before the Drug Prices Liabilities Review

Committee. In that application, the petitioner made an application for seeking directions for hearing preliminary issues suggested in paragraph 21 of the application including the issue that the Committee had no jurisdiction over the subject-matter and that when no amount was determined in accordance with Paragraph 7 (2) of the Control Order of 1979, no action could be taken after that Order was repealed on 26.8.1987. The learned senior counsel for the respondent authorities stated that even now the respondent Government is prepared to give personal hearing to the petitioner No.1 company in respect of the amount tentatively determined under Paragraph 7 (2) of the Control Order of 1979 before effecting recovery of the dues that may have accrued into the DPE Account. The personal hearing now will be germane only to the question as to on what basis the difference of price of the bulk drug allowed in the price of the formulation over the procurement price of the bulk drug utilised by the petitioner No.1 company was worked out in the tentative determination with a view to find out the precise amount that had accrued into the DPE Account as on the date of the repeal which could be recovered under Paragraph 12 of the Control Order of 1995 corresponding to Paragraph 14 of the Control Order of 1987 read with Section 7A of the Essential Commodities Act. This exercise may be completed by the Central Government within one month of the date of receipt of the writ of this order. The Central Government may by itself or through its agency, such as, Review Committee, give a personal hearing to the petitioner No.1 company, but the final determination of the liability that had been incurred by the petitioner No.1 company under Paragraph 7 (2) read with Paragraph 17 (1) (a) (i) of the Control Order of 1979 shall be done by the Central Government on the basis of such hearing if it is availed of by the petitioner No.1 company. The Central Government, being a juristic person and not a living being, has to give personal hearing through human agency like officers of appropriate rank or a Committee of persons constituted for such personal hearing. Therefore, there can be no objection if personal hearing is decided to be given by the Central Government through agency of its officers of appropriate level or a Committee to which it may entrust the work. If the Review Committee is used as such agency by the Central Government for giving personal hearing, that will be the Central Government's own choice and cannot be questioned by the petitioner. The final decision, however, should be taken only by the Central Government on the basis of the relevant record including the record of such personal hearing. Subject to the completion of the stage of hearing that may be given to the petitioner No.1 company as directed hereinabove, this petition must fail. Till such final determination is done by the Central Government, the question of coercive recovery of dues shall stand postponed.

25. In Special Civil Application No.9065 of 1998, the petitioner company (Pharmaceutical & Chemical Industries Prop. PCI Chemicals & Pharmaceuticals Ltd.) had, as noted above, sent statements with its letter dated 1.3.1984 showing the landed cost of imported bulk drug Rifampicin for the years 1979-80 to 1982-83, its consumption etc. It had also claimed losses on the ground of

higher value of imports etc. According to the company, no unintended benefits accrued to it on account of sales of Rifampicin or on account of the total overall profitability of the company. The information supplied by the petitioner company to the extent it was relevant for determination of the amount under Paragraph 7 (2) of the Control Order of 1979 was considered and it was found that the petitioner company made an unintended profit of Rs.87,99,326.50 ps. on the import of Rifampicin on account of difference between the price of Rifampicin allowed in the formulation and the actual import price during the years 1979-80 to 1983-84. The petitioner, therefore, was asked to deposit the excess amount before 31.5.1984 or to show cause as to why the amount should not be recovered. The petitioner company raised objections on 28.7.1984 against the said recovery, inter alia, contending that the Control Order of 1979 was unconstitutional, that the import price of the bulk drug was fixed arbitrarily, and further, that the company was entitled to minimum 8% of pre-tax return. The Central Government thereafter informed about the liability of the petitioner to the Drug Prices Liabilities Review Committee which in turn offered the petitioner company by its letter dated 15.2.1996 an opportunity of hearing in the matter. The petitioner company was again by letters dated 21.6.1996 and 4.10.1996 given further opportunities to make submissions/ representations, if any, against the demand notice dated 19.5.1984. Since the petitioner company did not respond, the Committee held that the liability as fixed by the Department was correct. The Central Government thereafter issued the impugned order dated 22.12.1997 seeking to recover the principal amount of the demand notice, i.e. Rs.87,99,326, and interest thereon (i.e. Rs.1,68,88,213) payable u/s 7A of the Essential Commodities Act. It is clear that the liability of the petitioner company that had accrued during the currency of the Control Order of 1979 for the years 1979-80 to 1983-84 was determined by the Central Government on the basis of the information furnished by the petitioner company in respect of the procurement price of the bulk drug and the quantity utilized in the formulation and the import price fixed which was the price of the bulk drug allowed in the formulation. The petitioner company did not at all respond to the repeated requests of the Review Committee of making a representation if it so desired against the demand notice. The Central Government, therefore, made the impugned order dated 22.12.1997 requiring the petitioner company to discharge the liability by depositing the amount into the DPE Account under Paragraph 7 (2) (a) read with Paragraph 17 (1) (a) (i) of the Control Order of 1979 read with Paragraph 12 of the Control Order of 1995. The contention that there was no determination made prior to the repeal of the Control Order of 1979 is wholly misconceived because in this case the determination of the amount was already made on 19.5.1984 on the basis of the information supplied by the petitioner company itself and only an opportunity to show cause against recovery was given. However, even if final determination was not made, it could be made after the repeal of the Control Order of 1979 as held above since the liability was already incurred before such repeal and only the final quantification was required to be made. None of the petitioners were entitled to get their overall losses

adjusted during such determination or get reimbursement on that count from the DPE Account - a claim that has no legal basis at all. The impugned order finally made on 22.12.1997 cannot, therefore, be said to be illegal or arbitrary and this petition must, therefore, fail.

26. Rule is, therefore, discharged in both these petitions with costs. Interim relief stands vacated in both the matters.