

(1980) 12 CAL CK 0034

In the Calcutta High Court

Case No : Appeal from Original Order No. 170 of 1975

Collector of Central Excise and Others

APPELLANT

Vs

Dunlop India Ltd.

RESPONDENT

Date of Decision : 11-12-1980

Acts Referred:

Central Excises and Salt Act, 1944 — Section 3, 3(1), 4
Constitution of India, 1950 — Article 226
Sea Customs Act, 1878 — Section 30

Citation : (1981) 8 ELT 398

Hon'ble Judges : A.N. Sen, C.J;M.M. Dutta, J

Bench : Division Bench

Judgement

M.M. Dutta, J.—This appeal has been preferred by the Central Excise Authorities and the Union of India against the judgment of Masud J., dated December 12, 1974. By the said judgment the learned Judge, though he discharged the Rule Nisi obtained by the respondent, Dunlop India Limited, on its application under Article 226 of the Constitution of India, directed that the appellants would deal with the pending applications of the respondent regarding levy of excise duty u/s 4(a) of the Central Excises & Salt Act, 1944 in accordance with the principles of law laid down by the Supreme Court in A.K. Roy and Another Vs. Voltas Limited, . The respondent has also filed a cross-objection assailing the propriety of the judgment discharging the Rule Nisi.

2. The case of the respondent, Dunlop India Limited, is that it is a manufacturer of diverse excisable goods including rubber tyres and tubes for motor vehicles, cycles and other vehicles and also of various rubber products. The respondent has a factory at Sahaganj, in the district of Hooghly, West Bengal and another factory at Madras. The respondent has been paying excise duty as levied by the Central Excise Authorities on the "basic price" of rubber tyres and tubes for Motor Vehicles manufactured at the said Sahaganj factory since 1951. It is the case of the respondent that the products of the respondent are sold to the dealers who are appointed by it at various places all over India. The price fixed

by the respondent in respect of each product is uniform throughout India, but actual sales to consumers are made by the dealers and not by the respondent. The price payable by the dealer to the respondent includes the basic price, and the excise duty levied by the appellants on the basic price consists of manufacturing costs and post-manufacturing profits or selling profits. The post-manufacturing expenses include all selling and administrative expenses e.g. salaries, wages and bonus, rates and taxes, depreciation, rents, insurance, advertisement and travelling expenses, bank charges, auditor's fees, miscellaneous and other expenses and diverse other items, more particularly set out in the balance-sheet and profit and loss accounts of the respondent for each year. The post-manufacturing expenses and selling profits are all reasonably ascertainable and can, as a matter of fact, be ascertained, inter alia, from the balance-sheet in respect of each year. It is alleged that the manufacturing cost as would appear from the balance-sheet consists of the price of raw materials and finished goods, salaries, wages and bonus of workmen and staff welfare expenses, consumption of stores and spare parts, fuel, light and water, depreciation etc. It is contended that the selling profit and the manufacturing profit out of the said total gross profit can be easily ascertained and/or have been ascertained according to well recognised principles of apportionment and regular practice.

3. The further case of the respondent is that the appellants had no authority or jurisdiction to assess excise duty on the respondent's products more than the manufacturing cost and manufacturing profit only. It is alleged that the respondent has all along paid the excise duty as assessed and demanded by the appellants on a mistaken belief that such duty was payable also in respect of selling costs and selling profits, whereas in fact and in law, no such duty was payable. The respondent discovered the mistake only upon coming to know during the last week of December, 1972 of the judgment of the Supreme Court in *Voltas* case referred to above. The respondent, after it had discovered the said mistake, called upon the appellants to cancel the orders of assessment for the period 1951-1971 and to refund the excess duty which had been illegally assessed and recovered by the appellants on the post-manufacturing costs and selling profit and to refrain forthwith from assessing and recovering excise duty on the post-manufacturing costs and selling profits of the products of the respondent. As the appellants had not complied with the said demand of the respondent, the respondent moved an application under Article 226 of the Constitution before this Court and obtained the Rule Nisi. It was contended by the appellants that levying and realisation by the appellants of excise duty on post-manufacturing costs and post-manufacturing profits during the years 1951-71 were illegal, inoperative and void and was without jurisdiction and, as such, should be set aside and the appellants should be directed to refund to the respondent the sum of Rs. 7,95,90,000/- for the year 1951-1971 as mentioned in the schedule to the writ application. Prayers were made in the writ petition for the issuance of appropriate writ or writs in that regard.

4. As stated already, the learned judge, after considering the facts and circumstances of the case and the submission made on behalf of either part, overruled the contentions of the respondent and discharged the Rule Nisi so far as the claim of the respondent to the setting aside of the assessment orders for the years 1951-1971 and the refund of the said sum of Rs. 7,95,90,000/- were concerned. The learned Judge, however, directed the appellants to deal with the pending applications of the respondent relating to the levy of excise duty u/s 4(a) of the Central Excises and Salt Act, 1944, hereinafter referred to as the "Act", on the principles of law laid down by the Supreme Court in the Voltas Case (Supra), i.e., on the basis of the wholesale cash price comprising only manufacturing costs and manufacturing profits. The appellants felt aggrieved by the said direction of the learned Judge in regard to the pending application of the respondent and preferred this appeal. The respondent also, as stated earlier, filed a cross-objection to the judgment of the learned Judge discharging the Rule Nisi.

5. In order to consider, the contentions of the parties, it is necessary to refer to the provisions of Sections 3(1) and 4 of the Act which are set out below:-

"3. (1) There shall be levied and collected in such manner as may be prescribed duties of excise on all excisable goods other than salt which are produced or manufactured in India and a duty on salt manufactured in, or imported by land into, any part of India as, and at the rates set forth in the First Schedule.

4. Where, under this Act, any article is chargeable with duty at a rate dependent on the value of the article, such value shall be deemed to be-

(a) the wholesale cash price for which an article of the like kind and quality is sold or is capable of being sold at the time of the removal of the article chargeable with duty from the factory or any other premises of manufacture or production for delivery at the place of manufacture or production, or if a wholesale market does not exist for such article at such place, at the nearest place where such market exists, or

(b) where such price is not ascertainable, the price at which an article of the like kind and quality is sold or is capable of being sold by the manufacturer or producer, or his agent, at the time of the removal of the article chargeable with duty from such factory or other premises for delivery at the place of manufacture or production, or if such article is not sold or is not capable of being sold at such place, at any other place nearest thereto.

Explanation.-In determining the price of any article under this Section, no abatement or deduction shall be allowed except in respect of trade discount and the amount of duty payable at the time of the removal of the article chargeable with duty from the factory or other premises aforesaid."

6. The first question that requires consideration by us relates to the principle that should be followed in assessing and levying excise duty under the Act on the goods manufactured by the respondent. It is contended by Mr. A.K. Banerji,

learned Counsel appearing on behalf of the appellants, the Central Excise Authorities, that excise duty should be levied on the wholesale cash price of excisable goods manufactured by the respondent at its Sahaganj factory in terms of the provision of Section 4(a) of the Act. On the other hand, Mr. Subrata Roy Choudhury, learned Counsel appearing on behalf of the respondent, submits that excise duty can be levied only on the manufacturing costs and manufacturing profit of any excisable goods and not on post-manufacturing cost and post-manufacturing profit. It is contended by him that if the wholesale cash price of any excisable goods consists of not only manufacturing costs and manufacturing profit, but also post-manufacturing cost and post-manufacturing profit, it is illegal to levy excise duty on such wholesale cash price. In such a case, in assessing and levying excise duty the post-manufacturing cost and post-manufacturing profit should be deducted from the wholesale cash price of the goods concerned. The learned Counsel submits that Section 3(1) of the Act which is the charging Section authorises the Central Excise Authorities to levy and collect duty on the manufacturing of excisable goods and postulate that such duty can only be levied on the manufacturing cost and manufacturing profit. Section 4 is the machinery provision and it cannot alter the nature of the charge as imposed by Section 3(1). It is contended that if Section 4 of the Act be held to authorise the Central Excise Authorities to levy duty on the elements of selling costs and selling profits, the said Section would be contrary to the charging Section and would also be ultra vires the provision of Entry 84 of List I of the Seventh Schedule of the Constitution of India. In order to show that the wholesale cash price at which the rubber tyres and tubes manufactured by the respondent at its Sahaganj factory consists of selling costs, selling profits, the Learned Counsel for the respondent has referred to us the modus operandi of the respondent in making the wholesale of the rubber tyres. The tyres manufactured by the Respondent of the said factory are not sold at the factory gate, for there is no market at the site of the gate. The respondent has a separate sales and technical service organisation independent of its manufacturing unit for the purpose of effecting the sale of their tyres. The respondent does not make any direct sale of the tyres, but after these are manufactured, the respondent make the same available to the consumers throughout India through its dealers at a uniform price. It is not disputed by the appellants that the products of the respondent are taken from the said factory to various sales depots throughout India from which they are sold to various dealers of the respondent. The Price at which the tyres are sold by the respondent to its dealers is called the "billing price" which is a uniform price at which the tyres are sold to the dealers anywhere in India. The excise duty that is being levied includes post-manufacturing expenses which will appear from the balance-sheets under the heading "Distribution", selling and Administrative expenses", besides the manufacturing costs. It also includes selling profits, which it is submitted, can be easily ascertained. Some method of finding out the selling profits has been suggested on behalf of the respondent. It is, accordingly, submitted on behalf of the respondent that the Central Excise Authorities have been illegally charging

excise duty on the billing price, which also includes selling costs and selling profits.

7. In support of the above contentions, the Learned Counsel for the respondent has placed reliance on a number of decisions of some High Courts, besides the decision of the Supreme Court in Voltas case (Supra) and in Atic Industries Ltd. Vs. H.H. Dewa, Asstt. Collector of Central Excise and Others, . The said decisions are: Madras Rubber Factory v. Union of India (1975) Census 101 D (Kerala); Bangalore Belting Co. v. Union of India 1978 E.L.T. (J 561) (Ker.) Indian Tobacco Company Ltd. v. Union of India and Ors-1978% ELT (J 137); Union of India v. Jyoti Ltd., Baroda 1978 ELT (J 238) (Patna) Madras Rubber Factory Ltd. v. Asstt. Collector of C.E. Kottayam and Ors. 1979 ELT (J 399) (Ker.); Cibatul Ltd. v. Union of India A Ors. 1979 ELT (J 407) (Gujarat); Nepal Petro-Chem. Ltd. v. Asstt Collector of Central Excise, Madras 1979 ELT (J 117) (Madras); Bombay Tyres International Ltd. v. Union of India and Ors.-1979 ELT (j 625) (Bombay)"Indian Tobacco Company Ltd. v. Union of India and Ors - 1979 ELT (J 476) (Bombay); Indo-National Ltd., Nellore-4 v. Union of India & Or.sr. 1979 ELT (J 334) (A.P.); Madras Rubber Factory Ltd. v. Union of India and Ors. 1979 ELT (J 173) (Delhi); Alkali & Chemical Corporation of India Ltd. v. Union of India and Ors 1979 ELT (J. 57) (Calcutta); Hindustan Milk Food Manufacturers Ltd. v. Union of India and Ors. 1980 ELT (J 457) (Delhi); Peice Electronics & Electricals Ltd. v. Union of India and Ors. 1980 ELT (J 689) (Bombay) and Union of India and Ors. v. Vazir Sultan Tobacco Co. Ltd. 1978 ELT (J 461) (AP).

8. All the above High Court decisions undoubtedly support the contentions of the respondent. It has been held in those decisions that if the wholesale cash price, even at the factory gate, includes any post-manu-idcvurmng costs and post-manufacturing profits, that should be deducted from me wholesale cash price so as to arrive at the net amount on which the excise duty can be levied. Some of the post-manufacturing expenses which have Deen held to be deductible from the wholesale cash price are expenses for advertisement, publicity, godown charges, insurance, sale promotion, marketing and distribution, freight packing and interest. The selling costs and selling profits have also been held to be excluded from the wholesale cash price. The view that has been expressed in those decisions is that under the charging Section 3 of the Act, excise being the tax on manufacture, it can-only be levied on manufactunng costs and manufacturing profits. If, the price charged by me manufacturer from his first buyer includes post-manufacturing costs or expenses which are unrelated to the manufacture or production, the price must be relieved of such loading for the purpose of determining assessable value u/s 4. It has been observed that if the term "wholesale cash price is construed to include within it the post-manufacturing costs and post-manufacturing profit, it would be contrary to the provision of Entry 84 of List I of the Seventh Schedule of the Constitution of India.

9. Besides the above decisions, two unreported decisions of the Madras high

court have also been relied on by the respondent writ petitions Nos. 2180 of 1972 and 1242 of 1975 disposed of on 13-2-1976. Writ petitions Nos. 2182 and 2183 of 1975 disposed of on 17-2-1976. It may be mentioned here that the writ petition No. 2182 of 1975 was filed by the respondent Dunlop India Limited before the Madras High Court claiming refund of the excess excise duty levied on the goods manufactured by it at its Madras factory. In these two unreported decisions of the Madras High Court a similar view has been taken, namely, that before levying excise duty on the wholesale cash price, the post-manufacturing cost and post-manufacturing profit should be deducted. The respondent succeeded before the Madras High Court.

In all the above decisions, the conclusion that post-manufacturing cost and post-manufacturing profit should be deducted from the wholesale cash price was reached on the interpretation of the observations made by the Supreme Court in *Voltaf* case and in *Atic's* case. It is, therefore, not necessary for us to consider in detail those decisions separately, but we propose to consider the contentions of the parties on the interpretation of the provisions of Sections 3 and 4 of the Act in the light of the said two Supreme Court decisions.

10. There can be no doubt that Section 3 is the charging Section and Section 4 is the machinery provision for the purpose of levying excise duty. The question that arises for our consideration relates to the construction of the term "wholesale cash price" used in Section 4. The excise duty has to be levied on the value of the article. By a deeming provision Section 4 provides for the determination of the value of any article that is chargeable with duty. Such value shall be deemed to be the wholesale cash price of the article at the time of its removal from the factory or if there be no wholesale market, at the factory gate, at the nearest place where such market exists. Where such price is not ascertainable the price at which the article is sold or is capable of being sold by the manufacturer or purchaser at the factory gate or if it is not sold or capable of being sold at the gate, at any other place nearest thereto. The only deduction that is permissible to be made from the wholesale cash price is the trade discount and the amount of duty payable at the time of the removal of the article from the factory or other premises, as the case may be, as provided in the explanation. The explanation enjoins that besides the trade discount and the amount of duty payable at the time of the removal of the articles, no abatement or deduction shall be allowed in determining the price of any article.

11. "Wholesale cash price" has been used in Section 4 as distinguished from retail price. It is clear from the provision of Section 4 that it contemplates only the first wholesale and not any subsequent sale, be it wholesale or retail sale. The explanation has given sufficient indication as to what amount should be deducted from the wholesale cash price in determining the price of the article chargeable with duty. There is no doubt that excise duty is levied on the value of the goods manufactured and chargeable to such duty. Section 4 provides that such value shall be the wholesale cash price at the places mentioned in the

Section. In *Voltas*" case (supra) Mathew, J. who delivered the judgment of the court observed as follows:-

"20. The next question is : What exactly is the meaning of the term the "wholesale cash price"? In AIR 1932 168 (Privy Council) it was held that the term means the price paid by retail traders on wholesale purchase. The essence of the idea is that the purchase must be a wholesale purchase and not a retail one. In other words, the sale must be wholesale and not a retail one in order that the price realised may be termed the "wholesale cash price". In that case the appellants before the Privy Council imported at Bombay, very large quantities of lubricating oil of a particular manufacture and mark. They sold it direct to numerous customers, never to dealers. The price they charged was the same whether a large or small quantity was brought, except that if a consumer contracted to buy from them all his requirements for a year, he was entitled to a discount from 2\ to 15 per cent according to the quantity bought in the year. No other lubricating oil of a like kind and quality was sold in Bombay. On the question whether the appellant was bound to pay customs duty on the basis of Clause (a) or Clause (b) of Section 30 of the Sea Customs Act, 1978, the Privy Council held that since the sales were to customers direct, the real value of the goods cannot be ascertained under Clause (a) of Section 30 and that Clause (b) of Section 30 was applicable. Their Lordships said that in determining the price which is to represent the real value of the goods to be taxed," the price must be conservative in every respect and free in particular from any loading for any post-importation charges incurred in relation to the goods". "The price is to be a price for goods, as they are both at the "time" and "place" of importation. It is to be a "cash price", that is to say a price free from any augmentation for credit or other advantage allowed to a buyer it is to be a net price, that is to say it is a price "less trade discount". Their Lordships, therefore, held that the words the "wholesale price" were used in the Section in contradistinction to a "retail price" and that not only on the ground that such is a well-recognised meaning of the words but because their association with the words "trade discount" indicates that sales to the trade are those in contemplation, and also because only by attaching that meaning to the words is the "wholesale price" relieved of the loading represent"ng post-importation expenses which, is a matter of business, must always be charged to the consumer and which are eliminated".

"21. Excise is a tax on the production and manufacture of goods (see *Union of India v. Delhi Cloth and General Mills* (1963) Su 1 SCR 586. Section 4 of the Act therefore provides that the real value should be found after deducting the selling cost and selling profits and that the real value can include only the manufacturing cost and the manufacturing profit. The Section makes it clear that excise is levied only on the amount representing the manufacturing cost plus the manufacturing profit and excludes post-manufacturing cost and the profit arising from post-manufacturing operation, namely selling profits. The Section postulates that the wholesale price should be taken on the basis of cash payment thus eliminating the interest involved in wholesale price which gives credit to the

wholesale buyer for a period of time and that the price has to be fixed for delivery at the factory gate thereby eliminating freight, octroi and other charges involved in the transport of the articles. As already stated it is not necessary for attracting the operation of Section 4(a) that there should be a large number of wholesale sales. The quantum of goods sold by a manufacturer on wholesale basis is entirely irrelevant. The mere fact that such sales may be few or scanty does not alter the true position". The above principle of law as contained in paragraph 21 of the judgment of the Supreme Court in *Voltax*" case has been relied on in the decisions referred to above. This principle has been laid down by the Supreme Court after considering the observation of the Privy Council in *Vacuum Oil Company*"s case in paragraph 20 of the judgment explaining as to what the real meaning of the term "wholesale cash price" is. As the Privy Council has observed the term means that the sale must be wholesale and not a retail one in order that the price realised may be termed the "wholesale cash price". As in Clause (a) or Clause (b) of Section 30 of the Sea Customs Act, 1878, so in Clause (a) or Clause (b) of Section 4 of the Act with which we are concerned, the words "wholesale cash price" have been used in contradistinction to "retail price". In *Voltas* case, excise duty was levied on the retail price and not on the wholesale cash price. There can be no doubt that in a retail sale, besides the manufacturing cost and manufacturing profit some more expenses are incurred by the retailer and he sells the articles at a profit, that is, at a higher price than the wholesale price at which he purchased the article, What the statute directs is to levy excise duty on the wholesale cash price and not on the retail price which is higher than the former. In the context of the facts of the case before the Supreme Court, it has been observed that excise is levied only on the amount representing manufacturing cost plus manufacturing profit and excludes post-manufacturing cost and the profit arising from post-manufacturing operation namely selling profit. The said observation of the Supreme Court, in our opinion, should be understood in the light of the facts of the case before it and not de hors the same. It is not the decision of the Supreme Court in *Vollas*" case that when excisable articles are sold at arms length to dealers at wholesale cost price, a further enquiry should be made whether such price also includes¹ post-manufacturing cost and post-manufacturing profit. This is also apparent from the decision of the Privy Council in *Vacuum Oil Company*"s case relied on by the Supreme Court for the purpose of (ascertaining the real meaning of the term "wholesale cash price". The only deduction that is permissible to be made from the "wholesale cash price", for the purpose of levy of excise duty is the trade discount and the amount of duty paid at the time of removal of the article. It is true that in *Voltas* case, it has been observed that selling profit which is a post-manufacturing operation is excluded from the levy of excise, but¹ that should be understood in the context of the facts of the case, which in our opinion, unmistakably refers to the pcofit arising out of the retail sale of articles charged with excise duty. The concept of selling cost and selling profit in the wholesale cash price could not be thought of by the Supreme Court in *Voltas*" case, for there was no scope for such thinking in view of the facts involved in that case.

Indeed, no such argument was advanced before the Supreme Court. In the circumstances, it will be quite unreasonable to assume that in Voltas case, the Supreme Court laid down the concept of selling cost and selling profit in wholesale cash price.

12. The position has been clarified by the Supreme Court in a later decision in Atic's case (supra). In that case, the appellant Atic Industries sold in wholesale certain dye-stuffs, manufactured by it in its factory, to two dealers, -I.C.I. (India) Ltd. and Atul Products Ltd. These two dealers, in their turn, sold a part of the goods in wholesale to distributors at a price higher than the wholesale price or basic selling price, as it was called, at which they purchased. They also sold another part of the goods to other large consumers at the basic selling price. In levying excise duty, the Excise authorities took the price at which I.C.I. and Atul Products Ltd. sold part of the goods in wholesale to distributors. In setting aside the assessments to excise duty and in directing the Excise Authorities to refund to the appellant the amount collected in excess of the correct duty of excise leviable, Bhagwati J. who delivered the judgment of the court observed as follows:-

"12. In the first place, as pointed out by Mathew J. in Voltas" case (supra), excise is a tax on the production and manufacture of goods, Section 4 of the Act, therefore, provides that the real value should be found after deducting the selling cost and selling profit and that the real value can include only the manufacturing cost and manufacturing profit. The Section makes it clear that excise is levied only on the amount representing the manufacturing cost plus the manufacturing profit and excludes post-manufacturing cost and the profit arising from post-manufacturing operation, namely, selling profit. The value of the goods for the purpose of excise must take into account only the manufacturing cost and the manufacturing profit and it must not be loaded with post-manufacturing cost or profit arising from post-manufacturing operation. The price charged by the manufacturer for sale of the goods in wholesale would, therefore, represent the real value of the goods for the purpose of assessment of excise duty. If the price charged by the wholesale dealer who purchases the goods from the manufacturer and sells them in wholesale to another dealer were taken as the value of the goods, it would include not only the manufacturing cost and the manufacturing profit of the manufacturer but also the wholesale dealer's selling cost and selling profit and that would be wholly incompatible with the nature of excise. It may be noted that wholesale market in a particular type of goods may be in several tiers and the goods may reach the consumer after a series of wholesale transactions. In fact the more common and less expensive the goods, there would be greater possibility of more than one tier of wholesale transactions. For instance, in a textile trade, a manufacturer may sell his entire production to a single wholesale dealer and the latter may in his turn sell the goods purchased from the manufacturer to different wholesale dealers at State levels, and they may in their turn sell the goods to wholesale dealers at the district level and from the wholesale dealers at the district level the goods may

pass by sale to wholesale dealers at the city level and then ultimately from the wholesale dealers at the city level, the goods may reach the consumers. The only relevant price for assessment of value of the goods for the purpose of excise in such a case would be the wholesale cash price which the manufacturer received from sale to the first wholesale dealer, that is, when the goods first enter the stream of trade. Once the goods have entered the stream of trade and are on their onward journey to the consumer, whether along a short or a long course depending on the nature of the goods and the conditions of the trade, excise is not concerned with what happens subsequently to the goods. It is the first immediate contact between the manufacturer and the trade, that is made decisive for determining the wholesale cash price which is to be the measure of the value of the goods for the purpose of excise. The second or subsequent price, even though on wholesale basis, is not material. If excise were levied on the basis of second or subsequent wholesale price, it would load the price with a post-manufacturing element, namely, selling cost and selling profit of the wholesale dealer. That would be plainly contrary to the true nature of excise as explained in the *Voltas*" case (supra). Secondly, this would also violate the concept of the factory gate sale which is the basis of determination of value of the goods for the purpose of excise".

"13. There can, therefore, be no doubt that where a manufacturer sells the goods manufactured by him in wholesale to a wholesale dealer at arms length and in the usual course of business, the wholesale cash price charged by him to the wholesale dealer less trade discount would represent the value of the goods for the purpose of assessment of excise. That would be the wholesale cash price for which the goods are sold at the factory gate within the meaning of Section 4(a). The price received by the wholesale dealer who purchases the goods from the manufacturer and in his turn sells the same in wholesale to other dealers would be irrelevant to the determination of the value and the goods would not be chargeable to excise on that basis. The conclusion is, therefore, inescapable that the assessable value of the dye-stuffs manufactured by the appellants must be taken to be the price at which they were sold by the appellants to ICI and Atul less 18% trade discount, and not the price charged by ICI and Atul to their dealers".

It is clear from the above observations of Bhagawati J. that the price charged by the manufacturer for sale of the goods in wholesale represents the real value of the goods for the assessment of excise duty. It is also manifestly clear that the question of post-manufacturing operation involving post-manufacturing cost and profit will arise only when, after the goods enter the stream of trade, that is, after the first wholesale by the manufacturer, there is a further sale of the goods, retail or wholesale. It has been categorically laid down that if excise duty were levied on the basis of second or subsequent wholesale price, it would load the price with a post-manufacturing element, namely, selling cost and selling profit of the wholesale dealer. In our opinion, there can, therefore, be no doubt that there is no question of post-manufacturing operation giving rise to selling cost and

selling profit so long as the goods chargeable to excise duty do not enter into the stream of trade or, in other words, so long as there is no wholesale of the goods after they are manufactured. The post-manufacturing operation will start after the goods are first sold in wholesale and are put on onward journey and, before that, there is no question of any such post-manufacturing operation.

13. The same interpretation, as given by us on the Supreme Court decisions in *Voltas*" case and *Atic*"s case, has been given by a Division Bench of the Gujarat High Court in *Gplden Tobacco Company Limited v. Union of India* 911 E.L.T. (J 113). It has been held in that case that the question of exclusion of post-manufacturing expenses would come in only after the first wholesale has taken place and the second or the subsequent sale price is the basis of levy. But if the second or subsequent sale price is not the basis for assessment, it is obvious that no adjustment should be made by way of post-manufacturing expenses.

14. Mr. Roy Chowdhury, learned Counsel for the respondent has, however, strongly, relied on the decision of the Andhra Pradesh High Court in *Union of India and Ors. v. Vazir Sultan Tobacco Company Limited* 1978 E.L.T. (461) : (1978) Cencus 979, which has expressly dissented from the view expressed in *Golden Tobacco Company*"s case (*supra*). It is also submitted by the learned Counsel that in *Electric Lamp Manufacturers (India) Pvt. Ltd- v. Collector of Central Excise* 1980 (2) C.H.N. 49, hereinafter referred to as *ELMI*"s case, My Lord the Chief Justice and S.C. Ghosh J. has referred to *Vazir Sultan*"s case and has taken a similar view. In *Vazir Sultan*"s case, it has been observed that even if on the first sale to the first wholesale dealer there was an element other than that of manufacturing costs and manufacturing profits and so the first price charged to the wholesaler -includes post-manufacturing costs, such post-manuffcturing costs must be deducted by the Excise Authorities in assessing the duty leviable on manufacturing costs and manufacturing profits. We have already expressed our view on the question and, we are afraid we are unable to agree to the proposition of law as laid down in *Vazir Sultan*"s case. It is not correct to say that in *ELMI*"s (*supra*), this Court has expressed the same view as in *Vazir Sultan*"s case, in *ELMI*"s case, this Court has followed the principles of law as laid down by the Supreme Court in *Voltas*" case and *Atic*"s case that the real value for the purpose of levy of excise duty u/s 4 of the Act is the wholesale cash price of the goods chargeable to such duty consisting of only manufacturing cost and manufacturing profit. The Excise Authorities, however, in that case, took the second wholesale price of the goods sold by the dealers of the manufacturers to their customers at a higher price which included post-manufacturing cost and profit and accordingly, the assessments were quashed. The Excise Authorities were directed to make fresh assessments for the periods in question and to refund to the appellant the amount found to be in excess of the correct excise duty. In view of the facts involved in *ELMI*"s case, there was no scope for the Court to embark upon a consideration whether the first wholesale cash price should be stripped of post-manufacturing cost arrd post-manufacturing profit. It is true that while considering the contentions of the parties, this court referred to

certain decisions including the decision in Vazir Sultan's case, but it will not be correct to say that this Court relied on Vazir Sultan's case and expressed a similar view.

15. It is urged on behalf of the respondent that as the rubber tyres and tubes that are manufactured by it are not sold at the factory gate, but have to be sent to depots at different places in India for sale to the dealers through the selling organisation of the respondent, the price at which the goods are sold cannot be the same as the wholesale cash price at the factory gate, for it obviously includes some additional costs and profits. It is submitted that such costs are unrelated to the manufacture of the goods and, in any event, the wholesale price at which they are sold at the depots not being the wholesale cash price at the factory gate, such costs and profits should be excluded so as to get the wholesale cash price at the factory gate for the purpose of levy of excise duty. This contention, in our opinion, overlooks the provision of Section 4(a). u/s 4(a), the wholesale cash price at the factory gate shall be the value of the article, provided a wholesale market exists at the factory gate and, if not, the wholesale cash price at the nearest place where such market exists. Admittedly, the respondent does not sell the goods at the factory gate, but the goods are sent to the different depots of the respondent for sale to the dealers. So, in view of the provision of Section 4(a), there is no market for the goods at the factory gate of the respondent and, therefore, there is no question of wholesale cash price at the factory gate. In the absence of a market at the factory gate, the different depots at which the respondent sells the goods in wholesale will obviously be the nearest place where such market exists within the meaning of Section 4(a). It may be that the price at which the goods of the respondent are sold at the depots includes some additional costs, nevertheless that price should be regarded as the wholesale cash price within the meaning of Section 4(a). In this connection, we may refer to the explanation to Section 4 of the Act. It provides inter alia that in determining the price of an article no abatement or deduction shall be allowed except the trade discount and any duty payable at the time of removal of the article. In case the Legislature had intended that the cost that might be incurred by a manufacturer for wholesale of the goods chargeable to excise duty at the nearest place where a market for such goods might exist, it would have surely made a provision in that regard. But what has been provided for is that except the trade discount and any duty that may be payable at the time of removal of the goods, no abatement or deduction shall be allowed. Our attention has been drawn by the learned Counsel for the respondent to the observation made by a Division Bench of the Bombay High Court in *Indian Tobacco Company Limited v. Union of India and Ors.* 1979 E.L.T. (476) in paragraph 15 of the Report. With great respect, we regret, we are unable to adopt the interpretation of the explanation to Section 4 as given by the learned Judges of the Bombay High Court in the said decision. In our view, the wholesale cash price at the factory gate or at the nearest place where a market exists, as the case may be, does not admit of any deduction therefrom except

the trade discount and the duty payable at the time of removal of the goods from the factory or place of manufacture.

16. It is, however, contended on behalf of the respondent that if Section 4 is interpreted in the manner as we have done, namely, that the wholesale cash price either at the factory gate or at the nearest place where the goods are sold, shall be the value for the purpose of levy of excise without any deduction therefrom the post-manufacturing cost and profit, Section 4 will be ultra vires the provision of Entry 84, List I, of the 7th Schedule of the Constitution. Apart from that, it is submitted such interpretation will be contrary to the provision of Section 3(1) of the Act. It is contended that both u/s 3(1) of the Act and under Entry 84, the duty is charged on manufacture, that is, ad valorem on the value of the goods after they are manufactured and not on any post-manufacturing cost and profit. It is submitted that any cost that is incurred and any proportionate profit that is made on, account of such cost should be regarded as post-manufacturing cost and post-manufacturing profit, and such cost and profit should not be taken into consideration in determining the value of the goods for the purpose of levy of excise duty. A question naturally arises as to what is meant by the word "value". In common parlance, the value of an article is the price of the article one has to pay to procure it. The purchaser does not enquire whether the price includes any post-manufacturing cost and profit. The price of the article goes as the value of the article. In the matter of levy of excise duty, the value of the article is the wholesale cash price at the factory gate or at the nearest place where the article is sold. Such wholesale cash price will undoubtedly include all costs incurred by the manufacturer plus the profit. To a purchaser who purchases the article in wholesale, the wholesale price that he has to pay will be the value of the article. Accordingly, Section 4 provides that the value of any article shall be deemed to be the wholesale cash price of the article at the places mentioned in the Section, excluding, however, the trade discount and the duty leviable on it at the time of its removal. Thus the wholesale cash price which represents the value of the article does not include within it any post-manufacturing cost and profit.

17. There may be cases where even the wholesale cash price at the factory gate may include some cost which is unrelated to the manufacture of the goods in question. For instance, in the case of a manufacturer having a very big factory, the goods after they are manufactured, have to be carried to the factory gate, and that means labour and cost. It is not the contention of either party that such cost should also be regarded as post-manufacturing cost deserving exclusion from the levy of the excise duty. Similarly, there may be other costs of this nature which, we cannot, at the present moment, illustrate. If any manufacturer has to take the goods away from the place of manufacture to some other place through its selling organisation for the purpose of making a wholesale of the same to its dealers, the cost incurred by the manufacturer may be considerable but, in our opinion, such cost and the profit cannot be treated as the post-manufacturing cost and post-manufacturing profit for the same reason as in the

case of cost incurred by the manufacturer for carrying the goods, after they are manufactured within the factory, to the factory gate. Considered from this point of view also, the concept of post-manufacturing cost and profit cannot be introduced into the wholesale cash price.

18. If there was any question of post-manufacturing cost and post-manufacturing profit even before the goods are sold in wholesale, the Legislature would have, instead of wholesale cash price, provided that the manufacturing cost plus the manufacturing profit should be the value of the goods for the purpose of levy of the excise duty. Even assuming that there may be post-manufacturing cost and post-manufacturing profit before the goods are sold in wholesale, the value of the goods being the price of the goods as discussed above and, for the purpose of levy of excise duty the value being the wholesale cash price, such post-manufacturing cost and post-manufacturing profit cannot be excluded from the wholesale cash price. In our opinion, therefore, the construction put by us on the term "wholesale cash price" in Section 4, is quite consistent with the provision of Section 3 of " the Act and the provision of Entry 84, List I, Schedule 7, of the Constitution of India. The contention of the respondent in this regard is rejected.

19. Now, we may consider as to what is meant by "post-manufacturing profit", for much argument has been made about the same on behalf of the respondent. When a manufacturer produces or manufactures an article, he incurs cost. This cost is manufacturing cost. He then sells the article in wholesale at a profit. The profit is undoubtedly manufacturing profit. The purchaser of the article sells the same in retail or in wholesale at a higher price. The difference between the price at which the purchaser purchased the article in wholesale and the price at which he sells the same in retail or wholesale, is the aggregate of cost that he incurs in selling the article in retail or in wholesale and the profit he earns. The subsequent cost and the profit are undoubtedly the selling cost and selling profit as in the Supreme Court decisions in Voltas case and Atic's case. This is quite understandable. But what is not readily understandable is the selling profit or post-manufacturing profit in the first wholesale cash price of the goods. The respondent manufactures the goods in question at its factory at Sahagunj. If the goods were sold at the factory gate, the wholesale cash price would consist of manufacturing cost and manufacturing profit. The goods are, however, taken to the depots of the respondent through its selling organisation for selling them in wholesale to the dealers. There can be no doubt that in taking the goods to the depots, the respondent incurs cost. No doubt the respondent adds this cost to the manufacturing cost, so that the wholesale price at which the respondent sells the goods to the dealers is the aggregate of the manufacturing cost, the subsequent cost and the manufacturing profit. There is, therefore, no scope for any additional profits over and above the manufacturing profit. Now, what amount of profit the manufacturer wants to earn depends upon certain factors. If the manufacturer carries on a monopolistic business and there is demand for the goods he manufactures, he may earn any profit. In such a case, the profit is fixed arbitrarily by the manufacturer or producer. In other cases, the producer

has to determine the amount of profit to be included within the price of the goods keeping in view the demand for the goods, the competition he has to face in the market and the economic condition of the consumers of such goods. Thus the above analysis reveals that there is no scope for any selling profit or post-manufacturing profit as claimed by the respondent, nor is there any reasonable method of ascertaining such selling profit or post-manufacturing profit.

20. The respondent has, however, suggested a method for ascertaining the selling profit or post-manufacturing profit. Under the suggested method, the percentage of selling profit in the wholesale cash price can be obtained by multiplying the ratio of post-manufacturing expenses to the total expenses by one hundred. "Applying this method, it is shown by the respondent that in 1951, the selling profit or post-manufacturing profit was 6.5 per cent of the wholesale cost price. We are afraid, we are unable to accept the method for calculating the profit. We have not been able to understand the logic of the arithmetic, nor has any attempt been made on behalf of the respondent to substantiate the reasonableness of the method by any authority. In the circumstances we hold that there is no question of selling profit in the first wholesale cash price as claimed by the respondent.

21. It has, however, been urged on behalf of the appellants that even assuming that all the above contentions of the respondent are correct, still the respondent has immense difficulty in succeeding on the writ petition. In the writ petition, the respondent has prayed for the quashing of the assessments of excise duty for the period from 1951 to 1971 and for refund of the sum of Rs. 7,95,90,000/- alleged to have been collected by the Central Excise Authorities in excess of the amount of the correct excise duty. It is the contention of the respondent that in making the said assessments and in realising the sum, the Central Excise Authorities have acted illegally and without jurisdiction or in excess of jurisdiction. It may be stated that at the time of the assessments of excise duty, the respondent placed before the assessing authority the price lists of the goods manufactured by it. The price lists, copies of which have been annexed to the writ petition, only show the "basic price" of the goods and the excise duty paid thereon at the time of removal of the goods from the factory. It was never the case of the respondent before the assessing authority at any stage of assessment during the period from 1951 to 1971 that the basic price included within it several items of post-manufacturing expenses and post-manufacturing profits. No attempt was made by the respondent to place before the assessing authority the break up of the basic price alleged to include selling costs and selling profits. The assessing authority accepted the basic price as submitted by the respondent as the wholesale cash price and levied excise duty accordingly. It is, however, contended on behalf of the respondent that all the particulars as to the break up of the basic price could be had from the balance-sheet for each year, but as has been pointed out by the learned Judge, neither the balance-sheets for the break up of the basic price were ever placed by the respondent before the assessing authority and no statement was ever made by the

respondent before the assessing authority that the basic price included the selling costs and selling profits. Further, it has been pointed out by the learned Judge that the respondent manufactures not only the excisable goods, such as tyres and tubes of motor vehicles, but also non-excisable goods, namely, tyres and tubes of bicycles and rickshaws, Dunloppillo, latex foam and other non-excisable goods. The manufacturing costs that can be ascertained from the balance-sheets represent such costs of all the excisable and non-excisable goods manufactured by the respondent. It is not possible to get from the balance-sheets as to what the "manufacturing costs of the excisable goods are. Thus there was no material before the assessing authority to show that the basic price of the excisable goods also included the selling costs and selling profits. We have, however, come to this conclusion that the wholesale cash price referred to in Section 4 of the Act is the first wholesale cash price and there is no question of any element of post-manufacturing cost and profit or, selling cost or selling profit, in such wholesale cash price. Further in our opinion, the term "wholesale cash price" in Section 4 does not admit of any other interpretation and, the interpretation that we have given to the term is quite consistent with Section 3 of the Act and the provision of Entry 84 of List I of Schedule 7 to the Constitution. As the above conclusion is sufficient to dispose of the appeal and the cross-objection, we do not think it necessary to decide the point raised and urged on behalf of the appellants that, as there were no materials and evidence before the assessing authority of the existence of the alleged selling cost and selling profit within the first wholesale cash price of the goods in question, the assessing authority cannot be held to have acted illegally and without jurisdiction on the basis of the materials and evidence that were placed for the first time before this Court by the respondent, even assuming that levy of excise duty on such selling cost and selling profit is not permissible u/s 4 read with Section 3 of the Act. No other point has been urged on behalf of either party.

22. In spite of all the above, we are unable to finally dispose of the appeal and the cross-objection for the reasons stated hereafter. We are told by the learned Counsel for the respondent that recently a judgment was delivered by a Division Bench of this Court on the identical question and it was submitted by him that the said judgment should also be considered by us. As the judgment was not then available, we could not consider the same during the hearing. After the conclusion of the hearing and while we had proceeded much in writing out this judgment, the judgment of the Division Bench dated 3-10-1980 in *East Anglia Plastics (India) v. The Collector of Central Excise, Calcutta* (Appeal No. 231 of 1975) was available to us. In that case, it appears, the Division Bench consisting of S.C. Ghosh and R.N. Pyne JJ. had to consider a similar question as involved in this appeal and cross-objection, and expressed a view contrary to that expressed by us. It has been held that If any post-manufacturing cost or profit arising from post-manufacturing operation is included in the price charged by the manufacturer to a first wholesale dealer, then that has to be excluded for the purpose of levy of excise. The above conclusion was reached by the learned

Judges of the Bench mainly upon an interpretation of the observation of the Supreme Court in Voltas" case and Atic"s case and also relying on the decisions of the different High Courts referred to above.

23. In our opinion, no such interpretation of the observation of the Supreme Court in Voltas" case and Atic"s case is possible, particularly in view of the facts involved therein. Moreover, it is significant to be noticed that in these two Supreme Court cases no claim was made that while levying excise duty on the first wholesale cash price, a further deduction should be made therefrom of the post-manufacturing cost and post-manufacturing profit. It will not be unreasonable to presume the existence of such cost and profit, in Voltas" and Atic"s but no claim was made in those cases and, in our opinion, rightly, to the deduction thereof from the wholesale cash price. In our considered view and, as discussed above, the concept of post-manufacturing cost and post-manufacturing profit or, selling cost or selling profit is absent in the first wholesale cash price and there is, therefore, no question of deduction of the same from such wholesale cash price before levying excise duty. It is significant to be noticed that while it has been held in the above High Court decisions and also in the above Bench decision of this Court that selling cost and selling profit should be excluded from the first wholesale cash price for the purpose of levy of excise duty, in none of these decisions any attempt has been made to lay down what the selling profit is in the first wholesale cash price, its proportion in the entire profit and how to determine the same. It has been already pointed out by us that there is no question of selling cost or selling profit in the first wholesale cash price. For all this we are unable to agree to the view expressed in the above Bench decision of this Court in East Anglia Plastics {India) Ltd. v. The Collector of Central Excise, Calcutta. As the view taken by us is contrary to that expressed in the above Bench decision the matter should be referred to a larger Bench.

24. In the circumstances, we refer the appeal and the cross-objection to a Full Bench to be constituted by the learned Chief Justice, under Rule 1 of Chapter XXXI-A of the Original Side Rules of this Court