
(1990) 10 RAJ CK 0015

In the Rajasthan High Court

Case No : Civil Writ Petition No's. 1849, 2039-2043, 2048 and 2108/89

D.C.M. Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 11-10-1990

Acts Referred:

Central Excises and Salt Act, 1944 — Section 4, 4(1)
Constitution of India, 1950 — Article 226

Citation : (1990) ECR 375 : (1991) 52 ELT 18

Hon'ble Judges : S.N. Bhargava, J; N.C. Sharma, J

Bench : Division Bench

Advocate : V. Lakshami Kumaran, A.R. Madhav Rao and V. Lodha, for the Appellant; Sudhir Gupta, for the Respondent

Final Decision : Allowed

Judgement

S.N. Bhargava J.

1. These writ petitions involve similar facts and questions of law, so they are being disposed of by a common order. Taking the facts of Writ Petition No. 1849/1989.

2. The petitioner is a Company registered under the Indian Companies Act, 1956 and has got several units throughout the country, out of which two units, known as Shri Ram Vinyl & Chemical Industries and Shri Ram Fertilizer and Chemicals, are located at Kota, in the State of Rajasthan. Shri Ram Vinyl & Chemical Industries has been manufacturing P.V.C. Resin, P.V.C. Compound, P.V.C. Compound MBs, Caustic Soda etc. It has been regularly paying all the demands and dues under the Central Excises and Salt Act, 1944. The petitioner has been selling nearly 70% of its manufactured articles at the factory gate and the remaining nearly 30% through its various depots at Ahmedabad, Calcutta, Delhi, Indore, Nasirabad, Kundi, Ludhiana, Madras and Meera. The excise duty is being paid regularly. For the first time, the respondent No. 3 issued a notice dated 25-8-1984 asking the petitioner to deposit the excise duty on the elements of

"Depot Service Charges" on the sale of manufactured articles through the various depots of the Company. After the reply submitted by the petitioner, the Assistant Collector, Central Excise, Kota, passed an order dated 7-11-1984, directing the petitioner to deposit excise duty on the elements of Depot Service Charges. Against this order, an appeal was filed before the Collector (Appeals), Central Excise and Customs, New Delhi, who vide his order dt. 26-4-1985, set aside the order of the Assistant Collector, dated 7-11-1984, as also the show cause notice dated 25-8-1984. Against this order, the Revenue filed an appeal before the Central Excise Tribunal, New Delhi, which was dismissed as having become time-barred. Notwithstanding the orders passed by the Collector (Appeals), respondent No. 3, Supdt. Central Excise, issued a fresh demand giving show cause notice to the petitioner in six cases during 1986-87 and the respondent No. proceeded to pass orders for payment of excise duty on Depot Service Charges and Drum Filling Expenses. The petitioner preferred six separate appeals which were allowed by the Collector (Appeals), Central Excise, vide his order dated 31-3-1987 and 12-5-1986. Still, another set of 12 demands giving a show cause notice was issued by the excise authorities for the period between 1-6-1987 to 31-5-1988 and the Assistant Collector passed an order dated 21-8-1989 confirming the demand raised by the excise authorities. Notwithstanding the earlier decision of the Collector (Appeals), dated 26-4-1985, 12-5-1986 and 31-3-1987, the petitioner was again compelled to file appeals in all these 12 cases before the Collector (Appeals) and those appeals are still pending. Still another set of demand-cum-show cause notice was issued by the Supdt. Central Excise, Kota on 1-12-1988 for the period June to September, 1988 (vide Annexure-5). On receipt of the aforesaid notice, the petitioner submitted a detailed reply dated 21-12-1988 pointing out that in view of the earlier orders, passed by the Collector (Appeals), Central Excise and Customs, between the parties and also in view of the latest decision of the Supreme Court in Indian Oxygen Ltd. Vs. Collector of Central Excise, and various decisions of the Central Excise Appellate Tribunal, the notices may be dropped. A date of hearing was fixed which was ultimately adjourned to 12-5-1989.

3. The petitioner submitted a representation on 25-4-1989 that the hearing on the show cause notice be kept in abeyance till the decision was given by the Tribunal in the appeals (vide Annexure-7). Another representation was also submitted on 28-4-1989 requesting the Assistant Collector not to proceed with the hearing. But the said representations of the petitioner were rejected and the petitioner was asked to attend the hearing on 12-5-1989. Thereupon, the present writ petitions were filed in this Court on 8-5-1989. Notices were issued to the respondents as to why the writ petition be not heard and disposed of. Meanwhile, further proceedings in pursuance of the notice dated 1-12-1988 were stayed.

4. A reply has been filed in Writ Petition No. 2108/1989 and it has been prayed that the same reply may be treated as reply in other writ petitions as well.

5. Learned counsel for the petitioners has very vehemently submitted that the petitioners' case is covered by Sec. 4(1)(a) of the Central Excises, and Salts Act, 1944 (hereinafter referred to as the "Act of 1944") and that Sec. 4(1)(b) of the Act of 1944 is not applicable to the petitioner because the normal price of the manufactured goods is ascertainable at the factory gate. He has also drawn our attention to sub-sec. 4(b) of Sec. 4 of the Act of 1944, explaining the meaning of the word "place of removal".

6. Our attention has also been drawn to *Union of India v. Bombay Tyre International Ltd.* [1983 (14) ELT 1896 SC] which is the leading case on this subject. This case was again considered by the Supreme Court in *Indian Oxygen Ltd.* (supra), and in this view of the matter, he has submitted that the interpretation of Sec. 4 of the Act of 1944 has been settled by the highest court of the land, and therefore, the respondents cannot take any action nor issue any notice in contravention of such an authoritative pronouncement. He has further submitted that till now, the judgment of the Tribunal also is in favour of the petitioners and the Department is fully bound by the same and the interpretation taken by the Commissioner, Central Excise between the parties, on the same subject unless reversed by the competent authority, and in this view of the matter, the notices should be quashed. Our attention has also been drawn to the following cases of the Tribunal :-

1. *M/s. Indian Oil Corporation Ltd. v. Collector of Central Excise* - 1987 (27) ELT 482 SC.

2. 1987 (10) ECR 360

3. 1989 (20) ECR 1 63

4. 1989 (41) ELT 655

7. Learned counsel for the respondent Revenue has also very vehemently submitted that the petitioner has got an alternative efficacious remedy provided under the Act of 1944 itself and unless it is exhausted the writ petition is prematured. He has placed reliance on *Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others*, *Assistant Collector of Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others*, and a decision of this Court in *Jaipur Syntex Ltd.* (Writ Pet. No. 626/1986, decided on 9-7-1986) and *Modern Syntex Ltd.* (Writ Petition No. 1754/1988), decided on 23-7-1989.

8. Lastly, he has drawn our attention to a decision of Punjab and Haryana High Court in *Rajaram Corn Products (Punjab) Private Limited Vs. Superintendent, Central Excise Range (PBC) and Others*,

9. On merits, he has further submitted that Sec. 4(1)(a) of the Act of 1944 is subject to the first proviso and therefore, the interpretation sought by the petitioner is not correct.

10. In rejoinder, learned counsel for the petitioner has submitted that filing of an appeal is not an alternative efficacious remedy. Moreover, the subsequent conduct of the respondents with regard to other notices issued by them against which the writ petitions had been filed but similar stay as in the present set of writ petitions could not be obtained because of strike of the lawyers in the High Court, the respondent No. 2 decided the cases against the petitioners and has levied excise duty. Moreover, he has submitted that the revenue officials or the authorities have no power to issue mandamus not to proceed with the notice. The Appellate Authority has only jurisdiction to hear an appeal which can be filed only after an order has been passed by the Assessing Authority. He has therefore submitted that the petitioner has no alternative efficacious remedy, whatsoever. He has placed reliance on a decision of the Karnataka High Court in *Y. Moideen Kunhi and Others v. Collector of Y. Moideen Kunhi and Others Vs. Collector of Central Excise, Bangalore and Others*, as also *Ram and Ram and Shyam Company Vs. State of Haryana and Others*,

11. We have given our thoughtful consideration to the whole matter and have also perused the record of the case.

12. As regards the preliminary objection raised by Mr. Sudhir Gupta, learned counsel for the Revenue that the petitioner has got an alternative remedy and therefore, the writ petitions should be dismissed, we will like to observe that *Titagurh Paper Mill's case* (supra) arose after the order of assessment was passed by the Sales Tax Officer and it was observed by the Supreme Court that the petitioner should avail his right of appeal, provided under the Act, giving a complete machinery to challenge the assessment order and therefore, their Lordships did not like to interfere in their extraordinary jurisdiction. It was also observed that there is no complete bar under Article 226 of the Constitution of India and the writ petition could be maintained if the statutory remedies are entirely ill-suited to meet the demands of extraordinary situations, as for instance where the very vires of the statute is in question or where private or public wrongs are so inextricably mixed up and the prevention of public justice require it that recourse may be had to Art. 226 of the Constitution. That was a typical case wherein the learned Single Judge had passed an interim order, allowing the benefit of the exemption to the tune of Rs. 2,93,85,000/-, for which amount the company was directed to furnish a bank guarantee, that is to say that the goods were directed to be released on the bank guarantee being furnished. The Division Bench also confirmed the said order making slight modification. On special leave petition, the Supreme Court vacated the stay order as their Lordships found on merits that the orders of the learned Single Judge as well Division Bench were wholly unsustainable and should not have been made.

13. Supreme Court in a later case in *Ram and Shyam Company* (supra), after observing the earlier cases, made observations that the court has imposed the restraint in its own wisdom. Exhaustion of alternative remedies is a rule of convenience and discretion rather than a rule of law. At any rate, it does not oust

the jurisdiction of the court. It has further been observed that where the order complained against is alleged to be illegal or invalid as being contrary to law, the petition would lie to the High Court under Article 226 of the Constitution and such a petition cannot be rejected on the ground that an appeal lies to the higher officer or the State Government. Appeal in all cases cannot be said to provide in all situations an alternative effective remedy keeping aside the nice distinction between jurisdiction and merits, and in that case, it was observed that the High Court was not justified in throwing out the petition on untenable ground that the appellant had an effective alternative remedy.

14. Keeping in mind the above observations of the Supreme Court in the latest case of Ram and Shyam Company (supra), let us examine the facts of the present case, as to whether the petitioner has got an alternative, adequate and efficacious remedy or not.

15. It has not been disputed by the Department that the Collector (Appeals) has decided the very point under issue in the present case, in favour of the petitioner on more than one occasions and the matter is still sub-judice before the Tribunal. Unless that order of the Collector (Appeals) is set aside or quashed, both the petitioner as well as the Department, are bound by the said decision of the Collector (Appeals), and therefore, it was in the fitness of things to have waited for decision of the Tribunal and not to proceed with the proceedings in pursuance of the show cause notice. Giving of a notice u/s 11A can be validly justified on the ground that the Department wants to keep alive the issue because the matter cannot be re-opened u/s 11A after a period of six months from the relevant date, and therefore, the proper course for the Department would have been to issue notice but to stay their hands and not to proceed further in pursuance of the notice, specially when the petitioner had made a representation to the Department to wait for the decision of the Tribunal before proceeding further in pursuance of the show cause notice, and therefore, the relief that has been sought by the petitioner in the present writ petition is for getting the notices quashed and for restraining the Assistant Collector from adjudicating upon the notices, which cannot be granted by any authority of the Department under any provision of the Act, hence, it cannot be said that the petitioner has got an alternative efficacious remedy, more so when in other matters in pursuance of the later notices in which the writ petitions had already been filed but the petitioner could not obtain the stay order of further proceedings as has been done in the present set of writ petitions, the Department did not wait and proceeded with and has passed the order raising the demand.

16. Ordinarily, we would not have discussed the merits of the case since the point under issue in the present matter which has been decided in favour of the petitioner by the Collector (Appeals), is still subjudice before the Tribunal and we would have waited for the decision of the Tribunal but looking to the fact that the Department is not satisfied by the order of the Collector (Appeals) and instead of pursuing the matter before the Tribunal, has been issuing notices and the

Assistant Collector has even passed assessment orders involving the same question and taking a contrary view than that of the Collector (Appeals) and the Department did not even wait but proceeded to pass the assessment order without waiting for the decision of the Tribunal in spite of repeated requests made by the petitioner, particularly when the High Court had stayed the assessment order in these writ petitions but in the later year, the petitioners could not obtain a stay order, though writ petition had been filed, because of the strike of the lawyers. The petitioner has to file writ petition every now and then. The Tribunal is not a party before us and the matter may not be decided finally by the Tribunal for a number of years. The Department will go on issuing notices and passing the assessment orders which will necessitate filing of appeals or coming to this Court which will be nothing but multiplicity of proceedings and undue harassment to the petitioner. Therefore, in these particular facts and circumstances, we are inclined to consider the merits of the case as well.

17. The petitioner is a bulk manufacturer of PVC resin, P.V.C. Compound, P.V.C. Compound MBs, Caustic Soda etc. in its unit situated at Kota. The petitioner has been regularly paying all its dues under the Act and has been complying with all the provisions of the Act and the Rules framed thereunder. The petitioner has been selling the manufactured goods at the factory gate as well as through its depots at Ahmedabad, Calcutta, Delhi, Indore, Nasirabad, Kundi, Ludhiana, Madras and Meera. It is not disputed that approximately the total sales took place at the factory gate and the remaining through various depots of the company. Excise duty is paid at the factory gate and thereafter, the goods are transported to the Depots and sold there. A demand-cum-show-cause notice (Annexure-1) was issued by the respondent No. 3 on 10-2-1989 wherein it was mentioned that the PVC Compound MBs were transferred to the different depots and further sold from there in respect of which Depot Service Charges and unloading charges have been shown in the invoice and were being charged from their customers by the Unit but the same were not included towards assessable value for the purpose of payment of central excise duty, which is necessary u/s 4 as the Depot Service Charges and unloading charges are recovered from the buyers for the services rendered by the Unit before delivery of the goods to the buyers. In the notice, a mention of the case of Bombay Tyres (*supra*) has also been made. The show cause notice had been issued as to why the Central Excise duty as per the annexure along with the show cause notice, should not be recovered u/s 11A of the Act of 1944. The petitioner, in reply to the above notice dated 10-2-1989, has submitted that since the Collector (Appeals) in earlier case has decided the point in favour of the petitioner therefore, notice should not have been issued. Then, a reference of "normal price" has been made and the Bombay Tyres" case (*supra*). It has further been submitted that the petitioner has been supplying the goods from its Depots and from the factory directly to the customers and not to the persons who would re-sell the same and therefore, the sales made at the Depots are nothing but retail sales. Depot service charges are nothing but depot administration expenses which is actually incurred by the

petitioner and hence, is recovered from the customers for whose convenience depots are maintained. Unloading charges are in fact a part of transportation charges realised from the customers and therefore, the depot service charges or the unloading charges or freight or transportation charges cannot form a part of the assessable value of the goods and have to be excluded from the normal price or the assessable value of the goods, even as per the judgment of the Bombay Tyres (supra). Reference has also been made to a later judgment of Indian Oxygen Ltd. (supra) wherein the case of Bombay Tyres" (supra) has been further explained. Reliance has also been placed on judgment in 1988 (17) ECC 128

18. It will be profitable to reproduce the relevant portions from Sees. 4 and 11A of the Act of 1944, as under:-

"4. Valuation of Excisable goods for purposes of charging of duty of excise. - (1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to value, such value shall, subject to the other provisions of this section be deemed to be -

(a) the normal price thereof, that is to say, the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal, where the buyer is not a related person and the price is the sole consideration for the sale:

Provided that -

(i) where in accordance with the normal practice of the wholesale trade in such goods, such goods are sold by the assessee at different prices to different classes of buyers (not being related persons) each such price, shall, subject to the existence of the other circumstances specified in clause (a), be deemed to be the normal price of such goods in relation to each such class of buyers;

(ii) where such goods are sold by the assessee in the course of wholesale trade for delivery at the time and place of removal at a price fixed under any law for the time being in force, or at a price, being the maximum fixed under any such law, then, notwithstanding anything contained in clause (iii) of this proviso the price or the maximum price, as the case may be, so fixed, shall in relation to the goods so sold, be deemed to be the normal price thereof;

(iii) where the assessee so arranges that the goods are generally not sold by him in the course of wholesale trade except to or through a related person, the normal price of the goods sold by the assessee to or through such related person shall be deemed to be the price at which they are ordinarily sold by the related person in the course of wholesale trade at the time of removal, to dealers (not being related persons) or where such goods are not sold to such dealers, to dealers (being related persons) who sell such goods in retail;

(b) where the normal price of such goods is not ascertainable for the reason that such goods are not sold or for any other reason, the nearest ascertainable equivalent thereof determined in such manner as may be prescribed.

(2) Where, in relation to any excisable goods the price thereof for delivery at the place of removal is not known and the value thereof is determined with reference to the price for delivery at a place other than the place of removal, the cost of transportation from the place of removal to the place of delivery shall be excluded from such price.

(3) The provisions of this section shall not apply in respect of any excisable goods for which a tariff value has been fixed under sub-sec. (2) of Section 3.

(4) For the purposes of this section -

(a) "assessee" means the person who is liable to pay the duty of excise under this Act and includes his agent;

(b) "place of removal" means (i) a factory or any other place or premises of production or manufacture of the excisable goods; or

(ii) a warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty, from where such goods are removed;

(c) "related person" means a person who is so associated with the assessee that they have interest, directly or indirectly, in the business of each other and includes a holding company, a subsidiary company, a relative and a distributor of the assessee, and any sub-distributor of such distributor.

Explanation. - In this clause "holding company", a "subsidiary Company" and "relative" have the same meaning as in the Companies Act, 1956.

(d) "value", in relation to any excisable goods -

(i) where the goods are delivered at the time of removal in a packed condition, includes the cost of such packing except the cost of the packing which is of a durable nature and is returnable by the buyer to the assessee.

Explanation. - In this clause "packing" means the wrapper, container, bobbin, pirn, spool, reel, or warp beam or any other thing in which or on which the excisable goods are wrapped contained or wound;

(ii) ...

(e) ..."

Section 11A. Recovery of duties not levied or not paid or short-levied or shortpaid or erroneously refunded. - (1) When any duty of excise has not been levied or paid or has been short-levied or erroneously refunded, a Central Excise Officer may, within six months from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should pay the amount specified in the notice :

Provided that where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud, collusion or any wilful mis- statement or suppression of facts, or contravention of any of provisions of this Act or of the rules made thereunder with intent to evade payment of duty, by such person or his agent, the provisions of this sub-section shall have effect, as if for the words "Central Excise Officer", the words "Collector of Excise" and for the words "six months", the words "five years" were substituted.

Explanation. - Where the service of the notice is stayed by an order of a Court, the period of such stay shall be excluded in computing the aforesaid period of six months or five years, as the case may be.

(2) The Assistant Collector of Central Excise, or as the case may be, the Collector of Central Excise, shall, after considering the representation, if any, made by the person on whom notice is served under sub-section (1), determine, the amount of duty of excise due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined.

(3) For the purpose of this section -

(i) "refund" includes rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(ii) "relevant date" means -

(a) in the case of excisable goods on which duty of excise has not been levied or paid or has been short-levied or short-paid -

(A) where under the rules made under this Act a monthly return, showing particulars of the duty paid on the excisable goods removed during the month to which the said return relates, is to be filed by a manufacturer or producer or a licensee of a warehouse as the case may be, the date on which such return is so filed;

(B) where no monthly return as aforesaid is filed, the last date on which such return is to be filed under the said rules;

(C) in any other case, the date on which the duty is to be paid under this Act or the rules made thereunder;

(b) in a case where duty of excise is provisionally assessed under this Act or the rules made thereunder, the date of adjustment of duty after the final assessment thereof;

(c) in the case of excisable goods on which duty of excise has been erroneously refunded, the date of such refund."

19. Their Lordships of the Supreme Court had occasion to consider Sec. 4 of the

Act of 1944 in *Bombay Tyre's* case (supra), and after considering the scope of Sec. 4 before and after the amendment of 1973, it had been held that the assessee is entitled to the deduction on account of the cost of transportation (insurance and freight) of excisable goods from the factory gate to the depot. This authority of *Bombay Tyres* (supra) was considered later on in the case of *Indian Oxygen Ltd.* (supra) which case applies on all fours and the facts in both the cases are almost identical. In the case of *Indian Oxygen Ltd.* also, the petitioners used to sell their manufactured goods at the factory gate and also from their depots, but their price at the depot were more than at the factory gate and they used to add delivery and collection charges etc. The Department's case was that this being additional charges should form part of the assessable value. Their Lordships of the Supreme Court have held in the *Indian Oxygen Ltd.* case (supra) that since the ex-factory price is ascertainable as such, the factory price shall be the basis for determination of value under Sec. 4 of the Act of 1944 and the question of transportation charges becomes irrelevant. Their Lordships have further held that the value u/s 4 is to be determined on the basis of wholesale price at which goods are sold at the factory gate (i.e. the place of removal) and therefore, the cost of transportation from factory gate to the place of delivery and transportation expenses cannot be added to wholesale price at factory gate because the duty of excise is a tax on manufacture and not on the profits made on transportation charges. Their Lordships further held that delivery and collection charges have nothing to do with the manufacture as they are for delivery of full cylinders and collection of the empty cylinders, and therefore, these charges have to be excluded from the assessable value but so far as loading charges are concerned, Their Lordships have held that if the loading of the goods is done within the factory, they are to be included in the assessable value irrespective of the fact as to who has paid for the same but the loading expenses incurred outside the factory gate are excludable. It has further been held that if the ex-factory price is ascertainable, the issue of deduction of rate from the prices ex-depots does not survive for the decision but if the ex-factory prices are not ascertainable and the goods were to be assessable ex-depot, then, it would be for the manufacturer to claim on the basis of actual evidence of the deductions should be admissible from the price list as per the provisions of the Act. In *Indian Oxygen Ltd.'s* case (supra), attention of Their Lordships of the Supreme Court was drawn to the following passages in the *Bombay Tyres'* case (supra):-

"Accordingly", we held that pursuant to the old Section 4(a) the value of an excisable article for the purpose of the excise levy should be taken to be the price at which the excisable article is sold by the assessee to a buyer at arm's length in the course of wholesale trade at the time and place of removal. Where, however, the excisable article is not sold by the assessee in wholesale trade but, for example, is consumed by the assessee in his own industry the case is one where under the old Section 4(a) the value must be determined as, the price at which the excisable article or an article of the like kind and quality is capable of

being sold in wholesale trade at the time and place of removal.

Where the excisable article or an article of the like kind and quality is not sold in wholesale trade at the place of removal, that is, at the factory gate, but is sold in the wholesale trade at a place outside the factory gate, the value should be determined as the price at which the excisable article is sold in the wholesale trade at such place, after deducting therefrom the cost of transportation of the excisable article from the factory gate to such place."

"Therefore, the expenses incurred on account of the several factors which have contributed to its value upto the date of sale, which apparently would be the date of delivery, are liable to be included. Consequently where the sale is effected at the factory gate, expenses incurred by the assessee upto the date of delivery on account of storage charges, outward handling charges, interest on inventories, (stocks carried by the manufacturer after clearance), charges for other services after delivery to the buyer, namely after-sales service and marketing and selling organising expenses including advertisement expenses cannot be deducted. It will be noted that advertisement expenses cannot be deducted. It will be noted that the advertisement expenses, marketing and selling organisation expenses and after-sales service promote the marketability of the article and enter into its value in the trade. Where the sale in the course of wholesale trade is effected by the assessee through its sales organisation at a place or places outside the factory gate, the expenses incurred by the assessee upto the date of delivery under the aforesaid heads cannot, on the same grounds, be deducted. But the assessee will be entitled to a deduction on account of the cost, of transportation of the excisable article from the factory gate to the place or places where it is sold. The cost of transportation will include the cost of insurance on the freight for transportation of the goods from the factory gate to the place or places of delivery."

20. If there was a finding that there was no real ex-factory price, then, the aforesaid observations would have required serious examination, but in the present matter, the case has not proceeded on that basis. On the contrary, there is a clear finding that there was an ex-factory price which is ascertainable.

21. Now, coming to the facts of the present case. The petitioner has been selling 60-70% of its manufactured goods at the factory gate and thus, the factory price is ascertainable, which will be the normal price as envisaged u/s 4 of the Act. Sec. 4(1) provides that where the duty of excise is chargeable on any excisable goods with reference to value, such value shall subject to the other provisions of this section be deemed to be the normal price thereof, that is to say the price at which such goods are ordinarily sold by the assessee to a buyer in the case of wholesale trade for delivery at the time and place of removal. Place of removal u/s 4(4)(b) has been defined to mean a factory or any other place or premises of production or manufacture of the excisable goods or a warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty. Duty of excise is a tax on manufacture and

not a tax on the profits made by a dealer. When the factory price is ascertainable, the excise duty has to be levied on that price. If the assessee transported the goods from its factory to the Depot, cost of transportation has to be excluded, as has been held in *Bombay Tyres*" case (supra) and in *Indian Oxygen Ltd.*"s case (supra). The depot service charges and unloading charges have nothing to do with the manufacture and therefore, that amount is not to be included to ascertain the assessable value for the purpose of payment of Central Excise duty.

22. In view of the two judgments of the Supreme Court, which have been referred above, we are of the view that the contention of the Revenue has to be rejected.

23. In the result, these writ petitions are allowed, the order dated 10-2-1989 is quashed. No order as to costs.