

(1980) 10 CAL CK 0002
In the Calcutta High Court
Case No : Appeal No. 231 of 1975

East Anglia Plastics (India) Ltd.

APPELLANT

Vs

Collector of Central Excise and Others

RESPONDENT

Date of Decision : 03-10-1980

Acts Referred:

Central Excise Rules, 1944 — Rule 173C, 173C(2A), 173E, 173G(3), 173J
Central Excises and Salt Act, 1944 — Section 11, 2, 3, 32, 35
Constitution of India, 1950 — Article 14, 19(1), 226, 265, 32
Customs Act, 1962 — Section 14
Sea Customs Act, 1878 — Section 30

Citation : (1983) 12 ELT 126

Hon'ble Judges : S.C. Ghose, J; R.N. Pyne, J

Bench : Division Bench

Final Decision : Allowed

Judgement

R.N. Pyne, J.—This appeal, which is directed against a judgment and order dated September 27, 1974 of Masud, J. involves mainly questions regarding determination of "value" u/s 4(a) of the Central Excises and Salt Act, 1944 (hereinafter referred to as "the Act"), interpretation and scope of the said Section as also the Notifications dated September 1, 1962 and November 26, 1966.

2. Since 1962 the appellant (the petitioner in court of the first instance) has been manufacturing diverse types of "Cellulose Acetate Moulding Granules" (hereinafter referred to as "the said goods") used in the manufacture of plastic- end products which are excisable under item 15-A of the Central Excise Tariff. During the period relevant to this appeal the Appellant sold and still sells the said goods, "all over the country to various customers and dealers at a uniform price fixed by the appellant from time to time. According to the appellant it granted and still grants long term credit facilities to about 90 days to its various dealers in Bombay, Calcutta and Delhi to whom commission was also paid @ Rs. 410/- per ton. In allowing such commission and fixing the prices

various expenses or charges such as interest on long credit, transport charges, freight, insurance, handling charges, storage charges and godown charges were and are included in the selling costs and selling profits because they relate to post-manu- facturing operation. Before May 11, 1968, the date of introduction of the "Self Removal Scheme", assessment of duty used to be made on physical control basis according to which the assessing officer in each case after being satisfied with the selling price allowed clearance upon production of evidence of pay- ment of the duty payable to the Collector of Central Excise, Calcutta and Orissa Collectorate. After the introduction of the "Self Removal Procedure" the appellant had been filing with the appropriate Excise Officer for his verification list of goods manufactured by the appellant in various statutory form out or forms prescribed by the Collector of Central Excise showing the prices of the said goods.

3. The Government of India, Ministry of Finance, in exercise of the powers under R. 8(1) of the Central Excise Rules, 1944 issued the Notification No. 166/62-Central Excise, dated September 1, 1962. The said notification is set out hereunder :-

"GSR. In exercise of the powers conferred by Sub-rule (1) of Rule 8 of the Central Excise Rules, 1944, as in force in India and applied to the State of Pondicherry, the Central Government exempts with effect from the 1st September, 1962 "Plastics, all sorts" falling under item 15A of the First Schedule to the Central Excises and Salt Act, 1944 (1 of 1944), in respect of which the list fixing the price at which they would be sold to the consumers is available, from so much of the duty of excise leviable thereon as is in excess of 20% of the value calculated after allowing a discount of 12.5% on the price specified in the said list :

Provided that the procedure of assessment elected by the manufacturer shall apply uniformly to all the "Plastics, all sorts" cleared by him :

Provided further that the aforesaid exemption shall be admissible only if the list of price referred to above represents the prices at which the "Plastics, all sorts" are ordinarily sold to consumers."

4. The above notification was amended by the following notifications :-

(a) Notification No. 5/63, dated 12th January, 1963, (b) Notification No. 77/67, dated 12th January, 1963 (c) Notification No. 77/67, dated 26th May, 1967, (d) Notification No. 229/69, dated 6th December, 1969 and (e) Notification No. 27/72, dated 17th March, 1972.

5. As a result of the said amendments exemption was extended to artificial and synthetic raisins (resins ?) and plastic materials but not articles thereof and the exemption was granted to the extent of the duty leviable in excess of 30% and thereafter 40% of the value calculated after allowing a discount of. 12.5% of the price specified in the customer's list price,

6. Here, it may be mentioned that by another notification dated 26th November, 1966 issued under Rule 8(1) of the Central Excise Rules (herein- after referred to as "The said Rules") the Central Government exempted "Cellulose Acetate Moulding Compound" falling under item 15A of the First Schedule to the said Act from so much of the duty of excise leviable thereon under the said item as is equivalent of Rs. 425/- per metric ton.

7. Excise duty was demanded from the appellant and required to be paid on the basis of the selling price except for deduction, mentioned in the said notification dated September 1, 1962, as amended. The appellant filed price lists for the purpose of assessment of excise duty under protest. According to the appellant price lists were submitted on the basis of selling price to the customers and dealers and they included the costs and expenses of post- manufacturing operations because it was only on that basis the respondents assessed excise duty and approved the price list submitted by the appellant. Several assessment orders in Form A.R.I, before the introduction of the self removal procedure and in Form R.T. 12 under Rule 173-E after the introduction of the said procedure, were made on the basis of the amount mentioned in the statements filed before the Excise Officers by the appellant.

8. On March 2, 1973 the appellant came to know about the decision of the Supreme Court in the case of A.K. Roy and Another Vs. Voltas Limited, and thereupon it discovered that the duty had been realised in the past on a grossly exaggerated value. The appellant further discovered that the amounts so far levied and collected by the respondents were not exigible under law and/or that the respondents never had any power or authority to assess excise duty on the appellant's products over anything more than or apart from the manufacturing cost and manufacturing profit and/or that the real value in terms of Section 4 of the Central Excises and Salt Act, 1944 could be determined only after deducting selling cost and selling profit, and post-manufacturing operations must be excluded.

9. Thereafter, on March 6, 1973 the appellant wrote a letter to the Excise authorities enclosing new price list on the basis of the said Supreme Court decision for approval. They also applied for refund of Rs. 44,52,000/- on account of excess duty paid from 1st April, 1962 to 30th June, 1972.

10. According to the appellant post-manufacturing expenses i.e. selling cost and selling profit included all selling and administrative expenses and overheads. These would include interest on long term credit, transportation charges, freight insurance, handling charges, godown charges, storage charges, advertisement and travelling expenses, bank charges and miscellaneous other items. These post-manufacturing expenses i.e. selling cost and selling profit, were distinct from the manufacturing cost and manufacturing profit which consist, inter alia, price of raw materials, salary wages, bonus, staff welfare, consumption of stores and spare parts, fuel, electricity, steam light, water etc. These post-manufacturing expenses and cost were distinctly separate from the

manufacturing cost and profit and were easily ascertainable under standard accountancy procedure.

11. The appellant's case is that the respondents never had nor have any power or authority or jurisdiction to assess excise duty on the appellants products over anything more than the manufacturing cost and manufacturing profit. Further, the appellant had all along been obliged to pay the alleged excise duty as assessed and demanded by the respondents whereas, in fact, and in law, much lesser duty was payable. According to the appellant the price lists mentioned earlier were submitted under protest and all payments for alleged duty demanded from it were made and were allowed to be adjusted in the accounts under protest and without prejudice to the appellant's rights and contentions.

12. Appellant's further case was that assessments and/or levy as also recovery and/or collection of the alleged excise duty on and from the appellant on the basis of the selling cost and selling profits as aforesaid were beyond the jurisdiction of the respondents and contrary to the provisions of Article 265 of the Constitution of India.

13. On the 6th of March, 1973 the appellant wrote a letter to the Collector of Central Excise with copies to the other respondents, enclosing a statement of price list showing the correct value of the goods manufactured by it for the purpose of Section 4 of the Central Excises and Salt Act, 1944 in accordance with the provisions of the judgment of the Hon'ble Supreme Court in *Voltas* case. According to the appellant the said list was the correct price list in terms of Rule 173C of the Central Excise Rules. On the said date the appellant also made an application for refund of the excess amounts realised by the Excise Department.

14. Appellant's further case was that the notification dated 1st September, 1962 made under Rule 8(1) of the Central Excise Rules, 1944 to the extent of its proviso viz., "Provided that the procedure of assessment elected by the manufacturer shall apply uniformly to all the "Plastics, all sorts" cleared by him" was contrary to or beyond the scope of the said Rule and, therefore, bad and the same should be struck down.

15. In its writ application made in the Court of the first instance the appellant challenged the various orders of assessment on the ground, inter alia, that the assessment and/or levy and/or collection of excise duty on the appellant on the basis of selling cost and selling profit was without authority or jurisdiction and/or contrary to the provisions of Article 265 of the Constitution of India. Further, the respondents never had nor have any power, authority or jurisdiction, to assess excise duty on the appellant's products over anything more than the manufacturing cost and manufacturing profits.

16. According to the appellant orders of assessment and the amounts levied and/or collected as duty on the post-manufacturing costs and selling profits made by the respondents during the years 1962 to date were without jurisdiction and/or in excess of jurisdiction and/or in usurpation of a jurisdiction that the

respondents never had and are ultra vires the said Act. Further, the orders of assessment made during the years 1962 to date originally in the form A.R. 1 and after the introduction of self removal procedure in the year 1968 in form R.T. 12 were without jurisdiction and/or in excess of jurisdiction, illegal and/or without any authority under the said Central Excises and Salt Act and should be set aside and quashed.

17. The appellant after demanding justice by its Solicitor's letter dated March 10, 1973 moved the application under Article 226 of the Constitution of India on March 13, 1973 and obtained a rule nisi.

18. It was stated by the appellant that on March 29, 1973 he wrote another letter to the Excise authorities repeating its request for the scrutiny of the appellant's Books of Accounts and also asked for a reply to its letter dated March 6, 1973. On June 19, 1973 a certificate of a Cost Accountant regarding cost and expenses of the appellant's manufactured goods were sent to the Excise authority. On September 15, 1973 and also on September 27, 1973 similar new price lists on the basis of the principles of law as laid down in the Voltas" case were submitted by the appellant under Rule 173-C of the said Rules. On January 31, 1974 the Assistant Collector of Central Excise replied to the appellant's letter requesting it to intimate before February 7, 1974 whether the appellant desired to avail of the procedure for provisional assessment and if it was agreeable to make a written request under Rule 173-C (2A). The Assistant Collector also asked the appellant for certain information connected with the matter of according approval to its new price list. On February 7, 1974 the appellant informed in writing to the Assistant Collector that it was agreeable to apply for provisional assessment as suggested in the said letter dated January 31, 1974. On March 1, 1974 the said notification dated September 1, 1962 was cancelled. On March 1, 1974 a revised price list was again submitted in terms of the said Supreme Court decision along with the certificate of a Cost Accountant. Similarly, on March 15, 1974 the appellant submitted its price list on the same line for approval by the Excise authorities.

19. In its writ petition the appellant prayed for quashing the orders of assessment passed by the Excise Officers for the period from 1962 to June 30, 1972 with a claim for refund of a sum of Rs. 44,52,000/- which was alleged to be the excess duty illegally collected by the respondents. The appellant also prayed for an appropriate writ directing the respondents to refrain from levying and collecting any duty in excess of the jurisdiction of the Excise officers with effect from July 1, 1972.

20. The respondents' case as made out in the affidavit-in-opposition filed in the Court of the first instance was that during the period April, 1962 to 15th April, 1965 the appellant company cleared its products after payment of the duty on the basis of the value determined in accordance with the provisions of Section 4 of the said Act. It from time to time submitted price lists showing therein the ex-factory wholesale cash price inclusive of Central Excise Duty, the assessable

value ""calculated after deducting the amount of duty payable from the said ex-factory wholesale cash price, rate of duty and amount of duty and price lists were duly approved by the proper Central Excise Officer after necessary verification.

21. From 16th April, 1965 the appellant company had withdrawn from the procedure of assessment u/s 4 of the said act and availed of the procedure of concessional assessment under the Notification No. 166/62, dated 1st September, 1962. In accordance with prevailing procedure the appellant from time to time submitted price lists showing the consumers' list price exclusive of Central Excise Duty and the assessable value calculated after deducting 12.50% rebate, the rate of duty and amount of duty and the said price lists were duly approved by the proper officer and the goods were cleared after payment of duty on the said value. Such approved price lists did not show the manufacturing or post-manufacturing expenses or manufacturing or post-manufacturing profits. There was nothing to indicate in the said price lists as to the items which were included in the price specified therein. Further, it did not appear from the price specified in such lists as to whether it included post-manufacturing expenses or profits. In fact, such price lists were submitted by the appellant and approved by the proper officer in terms of the partial exemption from duty granted under Notification No. 166/62, dated 1st September, 1962 and such price lists had nothing to do with Section 4 of the said Act.

22. With regard to removal of the goods under self removal procedure it was stated on behalf of the respondents that within seven days after the close of each month, the appellant filed with the proper officer a monthly return under Rule 173-G(3) in form R.T. 12 wherein it also included the assessable value, which was same as declared by the appellant in the price lists and approved by the proper officer from time to time. The assessable value was calculated after deduction of 12.5% of rebate from the customer's list price exclusive of duty, rate of duty and the total amount of duty so determined by the appellant was debited by it in such account. Such return also did not refer to any manufacturing or post-manufacturing expenses or profits. The appellant had withdrawn from the procedure of assessment u/s 4 of the said Act and had been availing the concessional assessment under Notification No. 166/62, dated 1st of September, 1962. The price fixed and declared by the appellant from time to time was the ex-factory price at which the goods were available for sale at the factory gate of the appellant and in fact numerous sales were made by the appellant in the usual course of business in which the goods on sale were delivered to the buyers at the factory gate to be transported to the buyers' premises at the cost of the buyers. The appellant had no wholesale market for its products. Further, no trade discount was ever granted by the appellant on any sale of its products at the ex-factory price.

23. It was further stated that the price list submitted by the appellant showing the price at which the goods were ordinarily sold to the consumers was in terms of the provisions of the Notification No. 166/62, dated 1st Sept., 1962 issued by

the Central Government under Sub-rule (1) of Rule 8 of the said Rules whereby partial exemption from duty was granted subject to observance of the terms and conditions mentioned in the said notification. According to the respondents the procedure of concessional assessment as provided in the said notification was alternative to the procedure of assessment u/s 4 of the said Act and it was absolutely optional on the part of the appellant to avail of the concessional procedure under the said notification. The appellant by its letter dated 15th April, 1965 clearly withdrew from the procedure under the said Section 4 of the said Act and elected to adopt the concessional procedure under the said notification. The price list showing the consumers' price submitted by the appellant at all material times were in terms of the provisions of notification dated 1st September, 1962 as an alternative to the provisions under Rule 173-C and the appellant elected the said alternative procedure and availed of the benefit thereof. According to the respondents there was nothing in the notification dated 1st September, 1962 which could be said to be in conflict with the provisions of Rule 173-C of the said Rules or Section 4 of the said Act. Further, the appellant having exercised such option and taken benefit thereunder was not entitled to challenge the validity of such procedure.

24. The main question that arose for consideration in the court of first instance was whether various orders of assessments of the appellant's manufactured goods as stated hereinbefore were passed in contravention of the provisions of Section 4 of the Act as construed and explained by the Voltas" case and, therefore, were without jurisdiction and as such nullities.

25. Masud J. by his judgment and order dated 27th September, 1974 discharged the Rule. His Lordship however gave directions to the effect that in respect of matters on which final order was not yet passed, the appellant would submit a revised price list, if not already done, on the basis of the principles laid down in the Voltas" case clearly showing the manufacturing costs and manufacturing profits of the appellant in respect of the goods sold or to be sold by them to the buyers and the respondents were directed to determine the assessable value and levy duty after proper verification and scrutiny of such price list. The respondents were also directed to dispose of the pending assessment cases in accordance with law.

26. With regard to the four periods, i.e., 27-2-62 to 31-10-62, 1-11-62 to 13-3-63., 14-3-63 to 15-4-65 and 16-4-65 to 5-3-73 Masud, J held that the appellant used to remove goods from its factory on the basis of the amount mentioned by it under the column "real value" in the A.R. 1 forms. One of the columns in the said form mentioned "real value" and Note II of the said Form stated that-"Real value is the value referred to in Section 4 of the Central Excises and Salt Act, 1944". Therefore, value declared by the appellant in the said form should be deemed to be the "wholesale cash price on the basis of which the duty was to be levied. Hence, it could not be said that the excise duty collected by the Excise Officer was levied outside Section 4 of Excise Act. According to his

Lordship the Excise Officer on the basis of the ex-factory wholesale cash price submitted by the appellant levied excise duty. Further as Excise Duty was determined on the basis of the real value as shown by the appellant in Form A.R. 1 there was no question of refund of any excess duty paid by the appellant. The question of sale by the appellant at the factory gate involved disputed question of facts which could not be determined by the Court without any materials acceptable to both the parties. According to the learned Judge, from the original records which were shown to Court it is clear that the Excise Officer levied duty on the ex-factory wholesale price and, therefore there was no question of any error of fact or jurisdiction on the part of the Excise Officer who acted in accordance with Section 4 read with Rule 9 and Form A R. 1.

27. Learned judge further held that there was suppression of material facts by the appellant viz., it was submitting statements on different occasions sometimes under the notification although it was giving declaration that it would be governed by concessional rate under the notification.

28. According to the learned Judge, under the said notification the concept of wholesale cash price had been shown to be irrelevant as specific concessional rate of duty was agreed upon between the appellant and the Excise Department. Further, at no stage the appellant preferred any appeal or revision against the levy of duty as fixed on the basis of the statement filed by the appellant.

29. Masud, J. although observed that it was true that in levying duty u/s 4 on the basis of the assessment of wholesale cash price, the Supreme Court had clarified the correct method of calculating the levy of excise duty and directed that the Excise Department would have to determine in future all orders of assessment u/s 4 by excluding post-manufacturing costs and profits yet he did not accept the appellant's submission that all the orders of assessment from 1962 to 1972 were invalid in law on the simple ground that the Supreme Court laid down on 1st December, 1972 the mode of calculation in clarification of the provisions of Section 4 or that all the impugned orders of assessment prior to December 1, 1972 were nullities or that they were made by the Excise Officers in excess of their jurisdiction. His Lordship further observed that the Excise Officer's jurisdiction to assess the excise duty of the manufactured goods had not been challenged. Similarly, the validity of Rules and statutory forms had not been questioned. Even if it was argued that they were not in consonance with the principles of law laid down in the *Voltas* case it could not be urged that the Excise Officers exceeded their jurisdiction in levying duty in the past or acted without any jurisdiction.

30. Further, according to the learned Judge of the Court of the first instance the question whether in calculating the duty on an ad valorem basis, as in the present case, the Excise Officer was justified in including or excluding a particular amount on the ground that the assessable value included the cost of packing charges, freight and commission for distribution etc., was a matter for decision for the Excise Officers and if they erred in including the amount which was not

permissible in law there were provisions for appeals or revision in Section 35 and Section 36 of the said Excise Act.

31. Learned Judge further held that if the manufacturer committed any mistake in determining the wholesale cash price by including in it extraneous matters, they themselves were to be blamed for such mistakes. It was the duty of the manufacturers themselves to exclude post-manufacturing expenses, if any, while submitting the real assessable value for levy of duty after deduction of the rate of discount and the excise duty of Explanation to Section 4 provides. Therefore, there was no question of any error of law committed by the petitioner company.

32. According to the learned Judge Voltas" case has only corrected the Department"s contention of including post-manufacturing cost in the determination of Excise Duty u/s 4 and even assuming that the said case had impliedly laid down some new proposition of law embedded in Section 4 itself and as such by legal fiction a new law was declared by Supreme Court such law could only be prospective in operation, otherwise every clarification of law by the Supreme Court on the construction of a sub Section of any Section of any Statute would open the floodgate of litigation in a civil Court of law. Further the appellant having failed to prefer any appeal or revision against those impugned orders of assessment which had been passed by an Excise Officer who had the jurisdiction to levy duty u/s 4 could not be allowed to claim any refund at this stage when the special period of limitation provided in Rule 173-J had long expired.

33. Masud, J. also held that the impugned orders of assessment having been made by the Excise Officers in good faith, the amended section of Section 40(1) had debarred the petitioner from challenging the validity of the impugned orders of assessment which had been finally made u/s 4. Therefore, according to the learned judge the impugned orders could not be held to be nullities or ultra vires Section 4 of the said Excise Act.

34. Regarding the said notification learned Judge observed that assessments u/s 4 and the said notifications were not conjunctive, but disjunctive. It was the manufacturer"s option to take advantage of the exemption of the concessional rate provided in the notification. The notification dated 1st September, 1962 in the instant case, expressly provided an alternative mode of assessment under which the manufacturer could take advantage of a concessional rate of the duty. The question whether Section 4 and the notification under Rule 8(1) were disjunctive or conjunctive had not been discussed in the decision of Voltas" case in the way it had been done in the instant case. Further, the power to exempt duty under the notification connotes the power of the Central Government to levy a duty by a special mode or manner. The mode, manner and nature of exemption is to be examined in determining the ultra vires character of a notification under Rule 8. Even in cases where Section 4 and the notification under Rule 8 are conjunctive and consistent the Central Government while exempting a particular article from duty in fact first assesses some duty. The scope of Rule 8 according

to learned Judge is very wide. The duty can be assessed on ad valorem basis by a notification or percentage basis and can even increase or reduce the rates fixed in Schedule 1 to the said Act. The appellant having elected to be assessed under the said notification for the period between 14th March, 1963 and 15th April, 1965 and 31st March, 1972 the Excise Officers cannot be said to have collected duty in excess of the amount that was legitimately due under the said notification.

35. On the question of refund of duty Masud J. observed that admittedly the appellants submitted their price list from 27th February, 1962 to 31st October, 1962 on the basis of the real value u/s 4(a) of the Act. It did not disclose the consumer's price or price list. The assessee themselves showed the ex-factory wholesale cash price per kg. The note of Form A.R. 1 also showed the real value on which the duty was to be levied. Therefore, the Excise Officers did not commit any error of law or of fact inasmuch as they levied duty on the basis of the real value submitted by the appellant. Further, during the period from 1st November, 1962 to 13th March, 1963 the appellant paid duty in accordance with the notification dated 1st September, 1962 and during this period it accepted the special procedure of assessable value and on that basis it took advantage of the concessional rate. Therefore, not only the appellant elected to be governed by the said notification but also it gave the declaration that the excise duty should be levied on the basis of the said notification. However between 14th March, 1963 and 15th April, 1965 the appellant submitted its Return not under the notification but they wanted to be assessed u/s 4(a). During this period the appellant showed in their Return post delivery charges per kg. for which deduction had been given. In its letter dated October 8, 1963 the appellant stated that it did not include post-delivery charges on the ground that they were not dutiable. Thus the duty paid during this period was collected by the Excise Officers on the basis of its own representation in the price list. The Excise Officers having exercised their jurisdiction in levying duty u/s 4(a) could not be said to have realised money in excess of their jurisdiction and if there was any error in calculation of the duty the appellant could have preferred an appeal or revision under the said Act. Masud, J. however held that the appellant was not entitled to get refund in the facts and circumstances of the case for various reasons as would appear from his Lordship's Judgment.

36. The appellant filed the instant appeal against the said judgment and order of Masud, J. dated 27th September 1974.

37. Counsel for the appellant has submitted that impugned assessments were made on the basis of price charged by the appellant to its various customers in different parts of India. Such prices included various items of post-manufacturing expenses i.e., selling cost and selling profits as also selling and administrative expenses and overheads. The above would also include interest on long term credit, transportation charges, freight, insurance, handling charges godown charges, storage charges as well as advertisement travelling expenses,

bank charges and miscellaneous other items. According to counsel, from the various returns, assessment orders and other documents disclosed in this case it would appear that apart from the delivery charges various other items which related to post-manufacturing cost and profit were not excluded from the assessable value of the goods. Such items in view of the decision in Voltas" case could not be included in determining the real value or the "whole- sale cash price".

38. According to counsel, the appellant is an organisation having two wings, viz., (a) manufacturing of products and (b) sale thereof. For sale of the product manufactured by the appellant its selling organisation incurred and incurs various expenses stated above. It was the submission of the counsel that price list of the appellant's product included and includes both manufacturing cost and expenses as also post-manufacturing cost and expenses i.e., selling cost. There is a finding by the Court of the first instance that the appellant's prices include manufacturing cost and expenses as also selling cost.

39. Regarding the said notification which were applied to the assessments made during the periods as stated in judgment of Masud, J counsel submitted that such notifications were not notification under the Act as stated in Section 38 thereof. They are not the notifications as if enacted under the Act. If they do not form part of the Act then they cannot create an alternative method or mode of assessment contrary to Section 4 of the Act. Therefore, the scope and effect of the said notification have to be confined within the limits imposed by Section 37(xvii) of the Act and Rule 8 of the Rules. Referring to the said notifications counsel has submitted that they mention clearly that they are notifications under Rule 8. Therefore, the scope of the said notifications can only be to grant exemption from the payment of duty imposable u/s 3 read with Section 4 of the Act. They cannot do away with the provisions contained in Section 4 of the Act which deal only with the question of determination of value for purpose of imposition of duty.

40. According to the appellant's counsel there is no provision in the Act or the Rules whereunder an alternative procedure of assessment (i.e., the procedure alternative to the procedure laid down in Section 4) can be made by the Central Government. There is also no provision in the Act or the Rules whereunder an assessee can elect to be governed by a particular procedure of assessment introduced by the Central Excise Authorities in the place of procedure laid down under the Act, i.e. by Section 4.

41. It has been further submitted by the appellant's counsel that assuming the said notifications are notifications as if enacted under the Act still they cannot validly lay down any alternative procedure of assessment. Those notifications have been issued by the Central Govt. pursuant to the powers conferred by the Rules. The delegated authority, i.e., the Central Government cannot supersede or superimpose a substantive provision contrary to a specific provision of the Act. Even if the Rule has the strength of the provision of an act by virtue of the

language of Section 38 still the Rule or the notification has to be reconciled with the Act, only then it will have the force and effect of the Act. If they are contrary to or inconsistent with any provision of the Act they must give way to the provision of the statute. Prima facie the said notification are contrary to and inconsistent with the essence and character of an excise duty. The facture and production of goods can be levied on the manufacturing costs and manufacturing profits only. By the said notification besides manufacturing cost and manufacturing profits selling expenses are taken into consideration for the determination of the value for the purposes of assessment of duty. This is beyond the legislative competency of the Parliament itself. It has been further submitted that how can a delegated authority make a notification which even Parliament cannot make or pass. It is the submission of the counsel that by Section 38 of the Act greater force is given to the notification issued under the said Act than the notification issued under the said Rules because latter notifications are not required to be placed before the Parliament. Counsel has further submitted that the said notifications are contrary to the basic structure of the Act inasmuch as they are altering the amount of levy as laid down u/s 3 and calculated u/s 4. Under the said notification instead of calculating the amount upon the value determined u/s 4 calculation of duty at 20% is based on a different value. Therefore, by the said notification the amount of duty is charged as also the rate is fixed. In support of the above submission reliance has been placed on the following cases : P.V. Sivarajan Vs. The Union of India (UOI) and Another, ; The Chief Inspector of Mines and Another Vs. Lala Karam Chand Thapar etc., ; Banarasi Devi Vs. Income Tax Officer, Calcutta, ; Bimal Chandra Banerjee Vs. State of Madhya Pradesh etc., ; Brojendra Kumar Saha Vs. Union of India (UOI), . Counsel also relied on Odger's Construction of Deeds & Statute (5th Edn.) page 425.

42. Regarding source of power to levy excise duty counsel has referred to the Constitution, List I item 84 (excise duty) and Entry 45 in the Federal Legislative list i.e., List I in Schedule II to the Government of India Act 1935. He has also referred to the preamble and Section 2(f) of the Act.

43. Relying mainly on the decisions of the Supreme Court in the cases or A.K. Roy and Another Vs. Voltas Limited, and Atic Industries Ltd. Vs. H.H. Dewa, Asstt. Collector of Central Excise and Others, counsel has submitted that for determination of "wholesale cash price" u/s 4(a) of the Act for the purpose of levy of excise duty manufacturing cost and manufacturing profits only are to be taken into consideration and selling costs and selling profits should be excluded. In other words, value of the goods for the purpose of excise duty must not be loaded with post- manufacturing cost or profit arising from post-manufacturing operation. In this connection counsel has also relied on an unreported decision of a Division Bench of this Court in Appeal from Original Order No. 119 of 1975 (Electric Lamp Manufacturers India P. Ltd. v. Collector of Central Excise, Calcutta and Orissa). He has also relied on the case of Union of India v. Vazir Sultan Tobacco Co. Ltd., 1978 ELT (J 461). For the purpose of showing that various

items which are to be excluded while determining value u/s 4(a) of the Act counsel has relied on various decisions, to wit, Indian Tobacco Company Ltd. v. Union of India 1979 ELT (476) (Bom) ; Madras Rubber Factory Ltd. v. Superintendent of Central Excise 1979 ELT (485) (Mad.); Premier Tyres Ltd. v. Assistant Collector of Central Excise 1979 ELT (J) 490 (Ker); Superintendent of Central Excise v. Madras Rubber Factory Ltd. 1979 ELT (J 89); Indo-National Ltd. v. Union of India, 1979 ELT (J 334) (AP) ; Cibatul Ltd. v. Union of India 1979 ELT (J 407) (Guj) ; Golden Tobacco Co. Ltd. v. Union of India, 1980 ELT (J 311) (Guj) ; American Universal Electric (India) Ltd. v. Union of India, 1979 ELT (J 125) (P & H); Alkali & Chemical Corporation of India Ltd. v. Union of India 1979 ELT (57) (Cal.) and Bata Shoe Company Private Ltd. v. Collector of Central Excise (1972) 76 CWN 519.

44. Referring to the observation at paragraph 7 of the judgment reported in Orient Weaving Mills (P) Ltd. Vs. The Union of India (UOI), and the contention of the respondents to the effect that the notifications issued under the Rules shall have the effect as if enacted under the Act appellant's counsel submitted that in the said case the court was concerned only with the questions whether the impugned notifications issued under R. 8 were bad on the ground that they violated the provision of Articles 14 & 19(1) (f) and (g) of the Constitution. The point as to whether the said notification (issued under Rule 8) had the effect of as if enacted under the Act was not required to be decided in that case and, therefore, that point was not decided by the Supreme Court in that case. In this connection counsel also referred to the case of Ranchhoddas Atmaram Vs. The Union of India (UOI), .

45. On the question of determination of value u/s 4(a) of the said Act for the purpose of levy of excise duty counsel for the respondents has submitted that once wholesale dealings at arms length are established the determination of the "wholesale cash price" for the purpose of Section 4(a) of the Act may not depend upon the numbers of such wholesale dealings. Counsel for the respondents further submitted that according to the excise authority price fixed and declared by the appellant from time to time was the ex-factory price at which the goods were available for sale at the factory gate of the appellant and in fact numerous sales were made by it in the usual course of business in which the goods upon sale were delivered to the buyers at the factory gate and were to be transported to the buyers premises at the cost of the buyers. It was also the case of the excise authority that the appellant had no wholesale market for its products and no trade discount was ever granted by it on any sale of its products at the ex-factory price. In this connection reference was made to paragraph 38 of the Affidavit-in opposition at page 292 of Vol. I of the paper book.

46. Counsel for the respondents has further submitted that the appellant in paragraph 29 of its Affidavit-in-reply (Paper Book Vol. I page 362) has stated that very seldom has a buyer taken delivery of the goods at the factory gate. Counsel has also submitted that sale of its products at the factory gate is,

therefore, admitted by the appellant. According to counsel the appellant's case is not that the price charged by it at the factory gate sale was different to the price charged by it in respect of sales made otherwise than at the factory Gate. Therefore, there was no question of any involvement of post-manufacturing expenses or profit in the assessable value of the goods of the appellant. Further, the price charged by the manufacturer (i.e., the appellant) for sale of its goods represented the real value of the goods for the purpose of assessment of excise duty. The only relevant price for assessment of value of the goods for the purpose of excise duty in a case, according to counsel, would be the wholesale cash price which a manufacturer would receive from its sale to the first wholesale dealers, that is, when the goods first enter the stream of trade. For the purpose of imposition of duty it is the first immediate contact between the manufacturer and the trade that made decisive for determining the wholesale cash price and that is measure of the value of the goods for the purpose of assessment of duty. It is also the submission of the counsel that 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 duty. That would be the wholesale cash price for which the goods are sold at the factory gate within the meaning of Section 4(a) of the Act. A wholesale market does not mean physical existence of a market where articles are sold and bought on a wholesale basis, the potentiality of the articles being sold on a wholesale basis would be enough. In this connection reference was made to the cases of *A.K. Roy and Another Vs. Voltas Limited*, and *Atic Industries Ltd. Vs. H.H. Dewa, Asstt. Collector of Central Excise and Others*, .

47. According to counsel the point that the duty ad valorem ought to be calculated on the ex-factory price and not on the price charged to the Distributors which includes within itself the cost of packing, charges for freight and distribution commission was decided along, before the *Voltas*" case and the nature of duty was explained before the said case in cases by the Federal Court, Judicial Committee and the Supreme Court. Counsel's further submission is that the question whether in calculating the duty ad valorem, the Excise authority was or is justified in including in the price the cost of packing charges for freight and commission for distribution or not, is a matter for the decision of the authority constituted under the Central Excises and Salt Act such decisions are subject to such appeal and revision as provided in the Act and the same are not matters for consideration directly under Article 226 or Article 32 of the Constitution. In the above connection counsel relied on the cases of *British India Corporation Ltd. Vs. Collector of Central Excise*, ; *Vacuum Oil Co. v. Secy, of State* AIR 1932 PV 168 ; AIR 1938 15 (Privy Council) ; In the AIR 1939 1 (Federal Court) and *Province of Madras v. Boddu Paidanna & Sons* AIR 1942 FC 33.

48. Analysing *Voltas*" case respondent's counsel submitted that the admitted facts in that case were : (1) *Voltas* had selling organisation. (2) Expenses of

selling organisation were not manufacturing cost but these expenses were incurred, after manufacture, in connection with sale. (3) In the price list of Voltas necessarily those expenses had been neglected. (4) If that (was so then when the Supreme Court observed that wholesale price was the list price less 22% trade discount it impliedly held that other expenses relating to sales might be post-manufacturing expenses but deductible in case of first wholesale sale to a wholesale dealer at arms length. Had the position been otherwise then the Supreme Court, according to counsel, would have said that the list price less selling expenses as also less 22% discount, would represent the wholesale cash price u/s 4(a) of the Act.

49. Counsel has further submitted that it is for assessee while filing its price list and at the time of assessment to say that the listed price includes something which cannot be taken into account in arriving at the assessable value.

50. Respondents counsel also submitted that if post-manufacturing expenses of the manufacturer were excludible for the purpose of arriving at the assessable value then the appellant would have claimed and got such exemption. Therefore, in the impugned assessments the assessable value determined by the Department did not include any post-manufacturing expenses. It was further submitted that the appellant had full knowledge that post-manufacturing expenses could not be assessable value of the goods manufactured by it. In this connection reference was made to the letters dated December 12 and 14, 1962 and June 13, 1966 (Paper Book, Vol. IV, pp 2193, 2238 and 2249), Counsel for the respondent submitted that according to Atic case, the expression "selling profit" (which expression appears in paragraph 21 of the judgment in Voltas" case) meant profit arising out of second sale. Counsel has also submitted that not all post-manufacturing expenses, if any, incurred after removal of the goods from the factory gate should be excluded.

51. Referring to the two decisions of Privy Council in the case of Vacuum Oil Co. v. Secy. of State, 59 Ind App 258 and Ford Motor Co. v. Secy of State, 65 Ind App 32. Counsel submitted that both the said decisions dealt with the question of deemed value u/s 30(a) of Sea Customs Act, 1878 which provided that the value had to be determined at the time and place of importation. Inasmuch as the said section provided that the deemed value was to be ascertained with reference to the time of importation it postulated that all post importation expenses were not at all relevant and could not be considered and had to be excluded in arriving at the deemed value at the time of importation. This was implicit in Section 30(a) and is implicit in Section 14 of the Customs Act, 1962. Since the section specifically mentioned the time (i.e., the time of importation) when the deemed value of the goods would be determined for the purpose of customs duty the Privy Council had given effect to the said provision of the 1878 Act by saying that post importation expenses were to be excluded. In other words, the value at the time of importation should not be loaded with any post-importation expenses.

52. Counsel for the respondent further submitted that in the instant case the

appellant had full knowledge that ex-factory wholesale cash price could not include post-manufacturing expenses as would be evident from its letter dated 8th October, 1973, (Page 221 Vol. IV of the Paper Book). Therefore, it cannot be said that appellant for the first time came to know from the judgment of the Supreme Court in *Voltas*" case that post-manufacturing expenses or profits, could not be included or taken into consideration for the purpose of determining ex-factory wholesale cash price. The appellant also accepted the assessments and did not prefer any appeal therefrom. Hence, it cannot now question such assessments. In this connection reliance was placed on the cases reported in THVL. *Bombay Ammonia Pvt. Ltd. Vs. The State of Tamil Nadu*, , (*Gurram Sreeramulu, Garlapati Anjanayulu Sc Co. v. State of Andhra Pradesh*) ; *Sales Tax Officer Vs. Indian Wood Products Co. Ltd.*, and *The Commissioner of Income Tax, Bihar and Orissa Vs. Sri Ramakrishna Deo*, .

53. It is also the submission of the counsel that the appellant has made applications for refund of duty u/s 11 of the Act which are still pending. Therefore, the writ application is not maintainable. In this connection counsel relied on the cases of *Mahaluxmi Rice Mills v. Addl. Commr. of Commercial Taxes, West Bengal* (1963) 67 CWN 405 and *Tilokchand and Motichand and Others Vs. H.B. Munshi and Another*, .

54. Regarding the said notifications counsel for the respondents had submitted that Rule 8 of the Central Excise Rules, 1944 empowers the Central Government to grant exemption from payment of excise duty in special cases. On the basis of that power the Central Government may from time to time by notification in the Official Gazette, exempt subject to the such conditions as may be specified therein, any excisable goods from the whole or in part of the duty leviable on such goods. Rule 8(1) required that exemption from the whole or any part of duty leviable on any goods must be done by a notification in the Official Gazette. It has been further submitted that rates of duty for different excisable commodities are specified in the First Schedule of the Central Excises and Salt Act, 1944 and under Rule 8 the Central Government can exempt any excisable goods from the whole or part of the duty leviable thereon. Therefore, the actual rate of duty with which any excisable goods can be charged with has to be determined in terms of the exemption notification.

55. It is also the submission of the counsel that by virtue of Section 38 of the Act, Rules made and Notification issued by the Central Government are required to be published in the Official Gazette and thereupon those rules and Notification shall have effect as if enacted in Act. It is, therefore, manifest that the Notification dated 1st September 1962, as also similar other exemption notifications mentioned earlier have become part of the taxing statute. The appellant in its petition made in the court of the first instance had not challenged the vires of the Act. The appellant's writ petitions was directed, inter alia, against Rule 8 and part of the Notification (see ground No. 16E) granting certain exemption to a class of manufacturers from payment of excise duty levied on the

basis of Section 3 read with First Schedule to the Act as also Section 4 of the Act. In this connection counsel relied on the case of Orient Weaving Mills (P) Ltd. Vs. The Union of India (UOI), and Western India Plywoods Ltd. v. Union of India 1973 Tax LR 2081 (Ker)..

56. Counsel has further submitted that the impugned notification does not in any way contravene the provisions of Section 4 of the Act. The notification provides as to how the exemption has to be calculated and given effect to. Further, the notification lays down the conditions which are required to be fulfilled by a manufacturer in order to avail of the exemption from duty.

57. Counsel has also submitted that the appellant having opted for the exemption available under the notification as also having enjoyed the benefit under the same cannot now raise any question regarding its validity. There has been a complete waiver and acquiescence on the part of the appellant. Reference was made to the case of THVL. Bombay Ammonia Pvt. Ltd. Vs. The State of Tamil Nadu, .

58. According to counsel no illegality is attached to the said notifications. Further, Section 4 of the Act does not lay down any principle or formula for determination of the value for exemption from duty. The expression "value" in Section 4 of the Act is different from the expression "value" used in a notification for exemption. Under Rule 8 exemption is granted in respect of excisable goods from the whole or any part of duty leviable thereon. That means that the goods should be both "excisable goods" and be "leviable" with the duty. Therefore, the "value" for purposes of exemption from duty is the real and/or actual value after the duty has been paid and not the deemed value of Section 4 of the Act "for the purpose of the duty". Further, Rule 8 is a part of the Act by virtue of Section 38 thereof. Therefore, a notification issued under Rule 8 is also part of the Act, Counsel has relied on the case of Bata Shoe Company Private Limited v. Collector of Central Excise, Calcutta & Orissa (1972) 76 CWN 519.

59. The main question for our determination in the instant appeal is whether the impugned assessments made during the four periods as mentioned earlier (i.e., 27th February to 31st October, 1962; 1st November, 1962 to 13th March, 1963; Nth March, 1963 to 15th April, 1965 and 16th April, 1965 to 5th March, 1973) were made according to law and valid. As stated earlier during two periods assessments were made pursuant to Section 4(a) of the Act and regarding other two periods assessments were made pursuant to the said notifications. The question is whether those assessments were made in accordance with the provisions of the Act as interpreted by the various decisions of the Supreme Court and the other High Courts.

60. According to Section 4(a) the value for the purpose of excise duty is deemed to be the "wholesale cash price" as stated therein and in this appeal we are concerned with the question what is the true meaning and connotation of the said expression. We are also concerned with the true scope, correct meaning and

proper interpretation of the said notifications. For determination of the above question it is necessary to refer to the relevant provisions of the Act (as it stood before 1973 amendment) and the said rules and the same are set out hereunder.

61. Preamble of the Central Excises and Salt Act, 1944 states that "whereas it is expedient to consolidate and amend the law relating to Central duties of Excise on goods manufactured or produced in certain parts of India and to salt."

62. According to Section 2(f) "manufacture" includes any process incidental or ancillary to the completion of a manufactured product.

63. Sections 3 and 4 of the said Act are as follows :

"3. Duties specified in the First Schedule to be levied.-(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. Determination of value for the purposes of duty.-Where under this Act, any article is chargeable with duty at a rate dependent on the article, such value 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".

64. Section 37(2)(xvii) empowers the Central Government to make rules for exempting any goods from whole or any part of the duty imposed by the Act.

65. Section 38 is as follows :-

"38. Publication of rules and notification.-All rules made and notification issued under this Act shall be made and issued by publication in the Official Gazette. All such rules and notifications shall thereupon have effect as if enacted in this Act :

Provided that every such rule shall be laid as soon as may be after it is made before Parliament while it is in session, for a total period of thirty days which may be comprised of one session or of two or more sessions, and if before the expiry of that period, (Parliament makes any modification in the rule or directs) that the rule should not be made, the rule shall there- after have effect only in such modified form or be of no effect, as the case may be".

Rule 8 of the Central Excise Rules, 1944 provides that :-

"8. Power to authorise exemption from duty in special cases.-

(1) The Central Government may from time to time, by notification in the Official Gazette, exempt (subject to such conditions as may be specified in the notification) any excisable goods from the whole or any part of duty leviable on such goods.

(2) The Central Board of Revenue may by special order in each case exempt from the payment of duty, under circumstances of an exceptional nature, any excisable goods."

66. To appreciate the background relating to the enactment of Section 4 and placing it on the statute book reference may be made to Entry 84 in the List I (Central List) of the 7th Schedule to the Constitution of India which reads as follows:-

"84. Duties of excise on tobacco and other goods manufactured or produced in India except-

(a) alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drug and narcotics but including medicinal and toilet preparations containing alcohol or any substance included in sub-para (b) of this entry."

67. The corresponding entry in the Government of India Act, 1935 was Entry No. 45 of List I i.e., Federal List.

68. Relevant decisions on the point may now be referred to.

69. In the case of A.K. Roy and Another Vs. Voltas Limited, , facts were that Voltas Limited carried on amongst others the business of manufacturing air conditioners, water coolers and component parts thereof. It organised the sales of these articles from its head office at Bombay as also from its branch offices at Calcutta, Delhi, Madras, Bangalore, Cochin and Lucknow. From those offices it effected direct sales to consumers at list prices and the sales so effected came to about 90 to 95 per cent of its production of the above articles in the factory in question during the relevant period. Apart from those sales, it also sold the articles to wholesale dealers from different parts of the country in pursuance of agreements entered into with them. The agreements with the wholesale dealers for the relevant years contained terms and conditions similar to those mentioned

in Exhibit "A" annexed to the writ petition. The agreements provided, among other things, that the dealers should not sell the articles sold to them except in accordance with the list prices fixed by the respondent, that the respondent would sell them the articles at the list prices less 22 per cent discount, that the dealers would not be entitled to any discount on the prices of accessories mentioned in the price schedule and that the dealers should give service to the units sold in their territory.

70. Excise duty on the basis of ad valorem value was imposed on air conditioners, water coolers and parts of water coolers from March, 1, 1961. Voltas' case was that the list price after deducting the discount of 22 per cent allowed to the wholesale dealers would constitute the "wholesale cash price" for ascertaining the real value of the articles. That case was accepted by the excise authorities and assessments were made up to the end of 1962 on that basis. In April 1964, the Superintendent of Central Excise intimated Voltas that excise duty would be assessed and levied not on the footing of the "wholesale cash price" but on the basis of retail price and by his three orders dated September 5, 1964 and one dated September 10, 1964, he assessed Voltas to excise duty in respect the sales on of the footing of list prices for sale to consumers for the period from January 1, 1963 to December 31, 1963, and a notice of demand dated October 8, 1964, was served on Voltas calling upon it to pay the above sum. Voltas filed an appeal against the orders but that was dismissed by the Department by order dated May 2, 1967 and that was the main order which was challenged in the writ petition.

71. In that case the question that arose before that High Court was whether assessment would be made under Clause (a) of Section 4 or whether on the basis of the price payable by the wholesale dealers after deducting 22% discount under Clause (a) of Section 4. The High Court held that the price for which articles were sold to the wholesale dealers less the discount to them under the agreement represented the "wholesale cash price" and that excise duty was chargeable u/s 4(a) of the Act. In appeal against the said decision the Supreme Court held that the High Court was right in its conclusion. In its decision the Supreme Court however interpreted and explained Section 4(a) of the Act. The Supreme Court observed that: (paras 9, 10, 18, 19 and 21):

"We do not think that for a wholesale market to exist, it is necessary that there should be a market in the physical sense of the term where articles of a like kind or quality are or could be sold or that the articles should be sold to so-called independent buyers.

* * * * Even if it is assumed that the latter part of Section 4(a) proceeds on the assumption that the former part will apply only if there is a wholesale market at the place, of manufacture for articles of a like kind and quality, the question is what exactly is the concept of wholesale market in the context. A wholesale market does not always mean that there should be an actual place where articles are sold and bought on a wholesale basis. These words can also mean the

potentiality of the articles being sold on a whole- sale basis. So, even if there was no market in the physical sense of the term at or near the place of manufacture where the articles of a like kind and quality are or could be sold, that would not in any way affect the existence of market in the proper sense of the term provided the articles themselves could be sold wholesale to traders, even though the articles are sold to them on the basis of agreements which confer certain commercial advantages upon them. In other words, the sales to the wholesale dealers did not cease to be wholesale sales merely because the wholesale dealers had entered into agreement with the respondent under which certain commercial benefits were conferred upon them in consideration of their undertaking to do service to the articles sold, or because of the fact that no other person could purchase the articles wholesale from the respondent. We also think that the application of cl. (a) of Section 4 of the Act does not depend upon any hypothesis to the effect that at the time and place of sale, any further articles of like kind and quality should have been sold. If there is an actual price for the goods themselves at the time and place of sale and if that is a "wholesale cash price" the clause is not inapplicable for want of sale of other goods of a like kind and quality.

* * * * If a manufacturer were to enter into agreements with dealers for wholesale sales of the articles manufactured on certain terms and conditions, it would not follow from that alone that the price for those sales would not be the "wholesale cash price" for the purpose of Section 4(a) of the Act if the agreement were made at arm's length and in the usual course of business.

* * * * There can be no doubt that the "wholesale cash price" has to be ascertained only on the basis of transactions at arm's length. If there is a special or favoured buyer to whom a specially low price is charged because of extra-commercial consideration, e.g., because he is relative of the manufacturer, the price charged for those sales would not be the "wholesale cash price" for levying excise u/s 4(a) of the Act.

* * * * Excise is a tax on the production and manufacture of goods [see *Union of India v. Delhi Cloth and General Mills*, (1963) Supp 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 profit. 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

whole-sale 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."

In *Voltas*" case the dispute was whether in calculating the wholesale cash price the consumer's list price or the consumer's list price less 22% discount as was paid by the wholesaler was the real value of the goods u/s 4(a) of the Act. In deciding that question the Supreme Court had to interpret and explain the meaning and scope of the term "wholesale cash price" appearing in Section 4(a) of the said Act. According to the Supreme Court-

"Excise is a tax on the production and manufacturing of goods. 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 profit".

72. Therefore, in the context of the facts of that case and for the determination of the dispute that arose in that case, namely, whether price mentioned in the price list or the price mentioned in the price list less discount as was paid by the wholesale dealers, was the real value u/s 4(a) and the Supreme Court held that the price in the price list less 22% discount as paid by the wholesale dealers was the real value. But the Supreme Court has also interpreted and explained the expression "wholesale cash price" and the same is to be taken to be the law as laid down by the Supreme Court and, as such, is binding on all High Courts.

73. In *Atic Industries Ltd. Vs. H.H. Dewa, Asstt. Collector of Central Excise and Others*, facts were as follows :-

"Atic sold dye-stuffs manufactured by it in wholesale to wholesale buyers- "ICF and "ATUL" under respective agreements entered into between Atic and ICI and Atul. 70% of the goods were sold to ICI and 30% to Atul. Prices charged to both of them were uniform price described as the "Basic sale price" less the trade discount of 18%. ICI and ATUL in their turn sold the goods to two categories of buyers - (i) Textile Mills and other large consumers, (ii) distributors. Sales to Textile Mills and other large consumers were at basic sale price but without any discount, but sales to distributors were at a higher price but with trade discount. Price charged by ICI was a little higher but 10% trade discount was allowed. ATUL charged a slightly lower price but allowed 21/2% trade discount. The prices were so adjusted that the net selling prices charged by ICI and ATUL to the distributors were almost the same. The distributors resold the goods to the small consumers at slightly higher price i.e. "small consumers price". No discount was given by the distributors to the small consumers."

74. The question was how the value of the goods manufactured by Atic should be determined on a proper application of rule laid down in Section 4. Appellant's

contention before the authorities was that the value would be the price at which goods were sold to ICI and ATLJL less a uniform trade discount of 18% given to them. Department's view was that value was the price at which ICI and ATUL sold the goods to the distributors, and no deduction should be allowed in respect of the discount given by them to the distributors.

75. The Supreme Court came to the conclusion 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. The Supreme Court also directed the respondents in that case to refund to the appellants the amount collected in excess of the correct duty of excise leviable in accordance with the principles laid down in that judgment.

76. In *Atic's* case while explaining the expression "wholesale cash price" in Section 4(a) as interpreted by *Voltas*" case the Supreme Court observed as follows (paras 12 and 13) :-

"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 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 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 whole- sale 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 trans- actions. 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 by him from the dealers at State level, and they may in their turn sell the goods to wholesale dealers at the district level and 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 receives 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 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 for determination of value of the goods for the purpose of excise.

There can, therefore, be no doubt that where a manufacturer sells the goods manufactured by him in wholesale to a wholesale dealer at arm's 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."

77. It should be noted that in *Atic*"s case the principle for determination of real value as enunciated in *Voltas*" case was followed. But with reference in sale by wholesale dealer after his having purchased the goods from the manufacturer to another dealer it was observed that the price charged by such wholesale dealer 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. In paragraph 12 of the report Bhagwati, J. explained the principle as laid down in *Voltas*" case with reference to cases where wholesale market in a particular type of goods might be in several tiers and the goods might reach the consumer after a series of wholesale transactions. We are unable to accept the respondent's contention that *Atic*"s case has not followed the principle laid down in *Voltas*" case or that the price charged by the manufacturer to a wholesale dealer at the factory gate in no case would include any post-manufacturing cost or profit arising from post-manufacturing operation.

78. Similar question was considered by a Division Bench of this Court in Appeal from Original Order No. 119 of 1975 (*Electric Lamp Manufacturers (India) P. Ltd. v. Collector of Central Excise, Calcutta & Orissa*), (1980)2 Cal HN 49.

79. In that case effect and scope of Section 4(a) and the meaning and connotation of "wholesale cash price" was considered in the light of the said

decisions of the Supreme Court and of other High Courts. We do not think it is necessary to set out in detail the facts of that case but a reference to the relevant portion of this judgment would, in our view, serve the purpose. The Division Bench observed as follows :-

"In our opinion, the description of the commodity in the declaration form or the other items in the declaration forms filled in by the manufacturer for the purpose of assessment of Excise Duty cannot be final and binding on the manufacturer. It should be noted that there cannot be in the first instance an estoppel against statute and secondly, no tax can be collected except under the express authority of law. Assessment, it should be remembered, is a quasi-judicial function and has to be determined or quantified in accordance with express provision of law. Assessment made without application of mind thus would be bad and null and void."

80. Reference in this connection may be made to the case of Assistant Collector of Central Excise, Calcutta Division Vs. National Tobacco Co. of India Ltd., . Liability to assessment for duty would depend upon whether the appellant in fact manufactures dutiable item and the duty is payable thereon under the express provisions of law. See in this connection Photo Optical Company Pvt.. Ltd. v. Union of India 1976 Tax LR 1430 (Cal.).

81. The respondent's contention in the instant case is that the ex-factory wholesale cash price is not ascertainable on account of the secret internal arrangement or agreement between the appellant and its customer companies who are, according to the respondent, favoured customers and/or related persons because of the relationship between the customer companies and the holding company of the customer companies as well as that of the appellant as stated hereinbefore. But because of the aforesaid facts we are unable to hold that the customer companies are favoured customers or "related person" especial- ly in view of the decisions mentioned hereinabove in Hindlamp v. Union of India (1972) 2 Cen Cus 83D : 1978 ELT(J 78) (Delhi) and Hindlamp Limited v. Union of India (1975) 3 Cen Cus C 44 : 1977 ELT (J 1) (All.). In our opinion it cannot be denied that the transactions between the appellant and its customer companies were transaction at arm's length. The impugned assessments in the instant case appear to us to be vitiated by error of law apparent on the records because ex- facie assessments were made on the basis of the price lists of the customer companies. The mistake came to be discovered as has been stated, on coming to know of the decision in the Voltas" case. It has to be held that the principle of law laid down in the said case shall have to be treated to have always been implicit in Section 4(a) of the said Act, that is to say the "wholesale cash price" must be construed as price that includes only manufacturing cost and manufacturing profit. If the said mistake was discovered in the beginning of 1973, we are unable to hold that the application of the appellant is barred by laches or is belated.

82. From what has been stated hereinabove, it appears to us that none of the

points urged by Mr. Mukherjee can be sustained and although this court in exercising its discretionary powers in the constitutional writ jurisdiction does not sit in appeal over the impugned orders of assessments, this court can, in our opinion quash the impugned assessments made in violation of law as laid down in the Voltas" case and Atic"s case. In our opinion, the impugned decisions or orders of assessments made between 1961 and the date of application were nullities and not real determination because in making the said impugned orders the respondents took into consideration the factors, that is to say, the sums in excess of manufacturing cost and manufacturing profit which the deciding officer had no jurisdiction.

83. The Division Bench passed the following order :-

"For the reasons stated hereinabove, we allow the appeal and set aside the judgment of the court of first instance in so far as it relates to the assessments already made and quash and set aside the assessments of Excise duty made by the Excise Authorities between 1961 and the date of the application on the products manufactured by the appellant. We direct the respondents to assess the products manufactured by the appellant on the basis of manufacturing cost and manufacturing profit only for the year 1961 to the date of the application and direct the respondents to refund to the appellant the amount found to have been levied and collected in excess of the correct duty of Excise leviable in accordance with the principles laid down in this judgment."

84. In the case of Union of India v. Vazir Sultan Tobacco Company Limited 1978 ELT (J 461), similar question came up for consideration before a Division Bench of the Andhra Pradesh High Court and following the decisions in Voltas and Atic cases the court held that excise duty, which was a duty payable on manufacture or production of goods, could only be levied on the aggregate of manufacturing costs and manufacturing profits. Even if on the first sale to the first wholesale dealer there was an element other than that of manufacturing cost and manufacturing profit and so the price charged to the first wholesale included post-manufacturing cost, such post-manufacturing cost must be deducted by the Excise Authorities in assessing the duty leviable on manufacturing cost and manufacturing profit.

85. In Vazir Sultan"s case the Court after considering the relevant provisions of the Constitution and the various cases on the point including that of Voltas and Atic observed as follows (paras 18, 21, 32 and 37) :-

"It is therefore, clear that, when considering Section 4, one has to bear in mind that the section provides for machinery of collection of excise duty for administrative convenience. If, in enacting Section 4 and Explanation thereto, any words are used which are capable of being construed as enabling the excise authorities to calculate the excise duty on anything other than manufacture or production of goods by the well known doctrine of "Reading Down", which has been evolved by Courts of law, first in Australia and then followed in India, the

language of Section 4 must be confined to the power of the Legislature referable to Item 84 in the Union List in the Seventh Schedule to the Constitution, viz., that only the manufacture or production should be taken into consideration by the excise authorities while fixing the value of the goods for the purpose of excise duty when excise duty is leviable on an ad valorem basis.

As we have observed earlier, if the machinery section in the Act seeks to bring within its scope any item of cost incurred by the manufacturer, which is not referable to production or manufacture of the goods, then it is not an excise duty but something else altogether and therefore it is not within the purview of the excise authorities functioning under the four corners of the Act and the rules made thereunder while levying excise duty.

Thus, in the context of Section 4 of the Central Excises and Salt Act, 1944 and especially with reference to Section 4(a), the Supreme Court has now laid down in *Voltas*" case 1977 E.L.T. (J 177), 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. If in certain case, there are costs necessarily incidental to manufacturing process, they can be rightly said to form part of the manufacturing costs and thus they are also to be included in the real value including only the manufacturing costs and the manufacturing profit. Anything other than the manufacturing costs and manufacturing profit is not within the purview of Section 4(a).

As we have observed above, if there are items of costs, which are necessarily incidental to the process of manufacture, they will also be part of the manufacturing costs. But if it can be demonstrated by a particular manufacturer that, even on the first sale to the first wholesaler there is an element other than that of manufacturing cost and manufacturing profit and thus the price charged to the first wholesaler includes post-manufacturing cost must be eliminated by the excise authorities from their calculations. It must be pointed out that there may be two broad categories of manufacturers. The first category consists of manufacturers who only manufacture in the case of *Atic Industries* case but do not sell the goods except to the first wholesaler with whom they have arrived at an agreement at arm's length. The second category is the category of manufacturer who not only manufacture, but also sell and incur the expenditure for the sale of goods as distinguished from manufacturing cost and manufacturing profit and if it can be demonstrated that, when the manufacturer of the second category sells the goods to the first wholesaler and incurs some post-manufacturing costs which have entered into the calculations and that the price charged to the first wholesaler by the manufacturer includes the post-manufacturing costs then such post-manufacturing cost must be eliminated by the excise authorities from their calculations. Applying the process of "reading down" it must be held that any Item other than manufacturing costs, including costs which are necessarily incidental to manufacturing process and manufacturing profit, must be excluded for the purpose of arriving at wholesale

cash price. If such loading of post-manufacturing costs even in the price charged by the manufacturer to the first wholesaler with whom an agreement was entered into at arm's length is permitted, the concept of excise duty being a duty payable on the manufacturer or production of goods, would be violated."

86. It should also be noted that Andhra Pradesh High Court in Vazir Sultan's case dissented from the views expressed by the Gujarat High Court in the case of Golden Tobacco Company Limited, Bombay v. Union of India 1977 E.L.T. (J 113).

87. In the facts of the Vazir Sultan's case it was held that the respondent company was entitled to deduct from the price which they charged their distributor any expenditure incurred by them towards sales but not connected with the manufacture or production viz., advertisement expenses, selling expenses and freight charges and held that those deductions had to be worked out between the appellant and the Excise Deptt.

88. Most of the High Courts have also followed the principle laid down in the cases of Voltas, Atic and Vazir Sultan and applied the same to the peculiar facts involved in the cases decided by them. Those cases are : Superintendent of Central Excise, Kottayam v. Madras Rubber Factory Ltd. 1979 E.L.T. (J 89) ; Premier Tyres Ltd. v. Assistant Collector of Central Excise, Ernakulam 1979 E.L.T. (J 490) (Ker) ; Indo-National Ltd. v. Union of India 1979 E.L.T. (J 334) (AP) ; Cibatul Ltd. v. Union of India, 1979 E.L.T. (J 407) (Guj.) ; Indian Tobacco Company Ltd. v. Union of India, 1979 E.L.T. (J 476) (Bom.) and Golden Tobacco Company Ltd. v. Union of India, 1980 E.L.T. (J 311) (Guj.).

89. In the above cases it was held that where two prices were fixed for products- (i) billing price ("billing prices" were prices at which goods were sold at depot to dealers and were same all over India) and (ii) the price at which goods were sold to the consumers (i.e. prices at which dealers were to sell to the consumers were again uniform throughout India) billing price reflected not only the manufacturing cost and manufacturing profit but also the freight, insurance and the sale promotion cost and promotion cost attributable to over- heads of sales organisation and therefore it could not represent the wholesale cash price of an article u/s 4(a). Again where various products of the company were sold on its uniform price list and according to the company the list prices comprised not only manufacturing cost and manufacturing profit but also post-manufacturing expenses, octroi, freight, interest, service charges, royalty, publicity, advertisement charges and selling expenses incurred in the marketing and distribution, those post-manufacturing cost and expenses were to be excluded for the determination of value u/s 4(a). Similarly, where net dealer price of the company regarding tyres and other goods included equalised freight, insurance expenses and distribution expenses referable to sales organisation alone, travelling expenses of sales and inspection staff and advertisement expenses wholly attributable to sale promotion and all interests upon the finished goods stored at the depot outside the factory, it was observed that the net dealer-price by which sales were effected included a particular amount which could be

representing only post-manufacturing expenses being the average of the total expenses involved under the said heads. It was held that those items of expenses, were excludible in the assessable value for the purpose of excise duty. Where in the matter of calculation of the "wholesale cash price" on the basis of company's price lists deductions were claimed under four heads, namely (i) marketing and distribution expenses, (ii) advertisement expenses, (iii) freight and (iv) interest on the basis that they were post-manufacturing expenses it was held that in the matter of calculation of value some of those items should be excluded and some of them were to be bifurcated and a part only to be eliminated in calculating the "wholesale cash price".

90. The Gujarat High Court in the case of *Golden Tobacco Co. Ltd. v. Union of India* 1977 E.L.T. (J 113) took a contrary view in the matter under consideration. It should however be noted that the High Court in a later decision i.e. *Golden Tobacco Co. Ltd. v. Union of India* 1980 E.L.T. (J 311), while considering Section 4(1)(a) of the said Act as amended in 1975 relied on the decision of the Gujarat High Court in *Cibatul Ltd. v. Union of India* 1979 E.L.T. (J 407) in which relying on *Atic's* case it was observed that :-

"In the opinion of the Supreme Court, the excise duty should be levied on the amount of manufacturing costs and manufacturing profits and post-manufacturing costs and post-manufacturing profits arising from post-manufacturing operations viz., the sale ought to be excluded."

91. In 1980 E.L.T. (J 311) the Gujarat High Court also relied on the cases of *Vazir Sultan* 1978 E.L.T. (J 461) ; *Indo-National*, 1979 E.L.T. (J 334) (AP); *Bombay Tyres* 1979 E.L.T. (J 625) and *Indian Tobacco*, 1979 E.L.T. (J 476) (Bom.). It appears that in paragraph 21 of 1980 E.L.T. 311 the Gujarat High Court distinguished the decision reported in 1977 E.L.T. (J 113). We are unable to accept the views of Gujarat High Court expressed in 1977 E.L.T. (J 113) as the same conflicts with the decisions of the Supreme Court and that of the various High Courts including this Court.

92. In the cases of *Vacuum Oil Co. v. Secretary of State* (1932) 59 Ind App 258 : 1978 ELT (J 260) and *Ford Motor Co. Ltd. v. Secretary of State* (1938) 65 Ind App 32 : 1978 ELT (J 265), the expression "wholesale cash price" was considered by the Judicial Committee in the context of import duty leviable under the Sea Customs Act, 1878. It however appears that the question of determination of real value u/s 4 and the expression "wholesale cash price" appearing in Section 4(a) of the Central Excises and Salt Act, 1944 for the first time directly arose for consideration and was determined in *Volta's* case. Therefore, it cannot be said that the law with which we are concerned in this appeal was amply clear in view of the decisions of the Judicial Committee.

93. The case of *British India Corporation Ltd. Vs. Collector of Central Excise*, also in our view, is of no assistance to the respondents in the instant appeal. The observation in para 10 of the report relied upon on behalf of the respondents, it

appears, was made on the basis of the concession made by the appellant in that case.

94. In AIR 1939 1 (Federal Court) and AIR 1942 FC 33 (Province of Madras v. Boddu Paidanna and Sons) the Federal Court while considering the question of two Acts, namely, Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938 and Madras General Sales Taxation Act, 1939 explained the difference between the tax on the manufacture of goods and sales of such goods by the manufacturer. In AIR 1942 FC 33 it was observed that :

"If the taxpayer who pays a sales tax is also a manufacturer or producer of commodities subject to a Central duty of excise, there may no doubt be an overlapping in one sense, but there is no overlapping in law. The two taxes which he is called on to pay are economically two separate and distinct imposts....It is the fact of manufacture which attracts the duty, even though it may be collected later; and we may draw attention to the Sugar Excise Act in which it is specially provided that duty is payable not only in respect of sugar which is issued from the factory but also in respect of sugar which is consumed within the factory. In the case of a sales tax the liability to tax arises on the occasion of a sale, and a sale has no necessary connexion with manufacture or production. The manufacturer or producer cannot of course sell his commodity unless he has first manufactured or produced it; but he is liable; if at all, to a sales tax because he sells and not because he manufactures or produces; and he would be free from liability if he chose to give away everything which came from his factory."

95. It is, therefore, well settled that when excise duty is leviable ad valorem then for determination of value or wholesale cash price only manufacturing cost and manufacturing profit should be included. Therefore, post- manufacturing cost and profit arising from post-manufacturing operation shall be excluded. In the instant case the department's case was that ex-factory price charged by the appellant at the factory gate was the real value or the "whole- sale cash price" u/s 4(a) and levy was made accordingly. Further, as claimed by the appellant delivery charges were not included in the matter of calculation of value. It is true that price charged by the manufacturer at the time of first sale to a wholesaler should be taken as the value or wholesale cash price u/s 4(a) but the question to be determined is whether such price includes any element other than manufacturing costs and manufacturing profits. 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 according to the decision of the Supreme Court and of other High Courts as stated earlier. In the instant case stress was mainly given on behalf of the Department on the facts that price charged by the appellant to a wholesale dealer in respect of sale at the factory gate should be taken as "wholesale cash price" and further the price declared by the appellant from time to time in various forms and price lists were stated to be the wholesale cash price and duty was calculated and levied on that basis. According to Department such price lists were binding on the

appellant. But if such price lists were not in accordance with the law then neither they could be said to be binding on the appellant nor would create any estoppel against it. Considering the pleadings and the records of the case it appears that the prices declared by the appellant in its various returns, forms and in the price lists submitted to the Department from time to time on the basis whereof excise duty was levied could not be said to include only manufacturing costs and manufacturing profits. If that be the situation then Excise Officers in the matter of calculation of value and levy of duty took extraneous matters into consideration and, therefore, the impugned assessments cannot be said to be valid. Hence all the assessments for the period covered by the impugned orders of assessments i.e. from June 1962 to June 30, 1972 which were made according to Section 4(a) should be made according to law as laid down by the Supreme Court mentioned earlier and excise duty for that period should be levied accordingly.

96. Now we shall deal with the notifications referred to hereinbefore. The said notifications were applied to the assessments made during the period already mentioned. The said notifications being exemption notifications were issued by the Central Government in exercise of the power conferred by Rule 8 of the Central Excise Rules. In view of the decision of the Supreme Court in the case of *Orient Weaving Mills v. Union of India* (supra) the said notifications are to be treated as incorporated in the statute i.e. the said Act. In the above case the validity of Rule 8 pursuant to which two impugned notifications were issued, was challenged as violating the appellant's fundamental right under Articles 14 and 19(1) (a) and (g) of the Constitution. Regarding notifications issued under Rule 8 the Supreme Court in view of Section 38 of the Act observed that it was manifest that the notifications and the Rule impugned in that case had been incorporated into Act itself and became part of the taxing statute. It should also be noted that the observations of P.M. Mukherji J : (as his Lordship then was) in the case of *Brojendra Kumar Saha Vs. Union of India* (UOI), also supports the respondents' contention on this point.

97. Considering the above decisions we are unable to accept the sub- mission of the appellant's counsel that the validity of Rule 8 and the effect of the notifications issued thereunder were not required to be decided in *Orient Weaving Mills*" case. The position, therefore, is that the notifications with which we are concerned in this appeal should be treated as incorporated in or part of the Act. Therefore, the question that arises for determination is whether an alternative procedure for assessment of excise duty as contended on behalf of the Department, has been laid down by the said notifications and, if so, what is the effect thereof.

98. The Department's case is that the said notifications provide, for an alternative method of assessment and the appellant has availed of the procedure of concessional assessment under the said notifications.

99. According to the said notifications "value" is to be calculated on the price

specified in the price list and that the procedure of assessment elected by the manufacturer shall apply uniformly to all the "Plastics, all sorts" cleared by him. It appears to us that the said notifications are not legal or valid. Whether they are considered as part of the Act or not the same result would follow. The notifications were issued pursuant to Rule 8 which was made in exercise of the power conferred by Section 37(2)(xvii). The scope of the said clause and the said Rule is limited to the grant of exemption from duty. They cannot be construed as providing for an alternative mode of assessment, far less any mode of assessment which is contrary to any of the statutory provisions. Calculation of value on the basis of price list as stated in the said notifications for the purpose of assessment and not for the purpose of grant of exemption appears to be contrary to Section 4(a) of the Act as explained by the various decisions referred to hereinbefore. As stated earlier the law, as settled by the various decisions, is that real value for the purpose of assessment would include manufacturing costs and manufacturing profits only. All costs and profits relating to the period not connected with manufacture or any process incidental or ancillary to the completion of manufactured product are to be excluded for the purpose of determination of "real value" or "wholesale cash price". Calculation or determination of value on the basis of the price list being contrary to Section 4(a) as interpreted by the Supreme Court would result in exceeding the power to levy tax conferred by the Item 84 of List I (Union List) of Seventh Schedule of the Constitution and Section 3 of the Act. In the aforesaid view of the matter assessments made on the basis of the said notifications cannot be said to be valid. Therefore, all assessments made pursuant to or on the basis of the said notifications cannot be sustained.

100., In our view, the decision of the Supreme Court in the case of THVL. Bombay Ammonia Pvt. Ltd. Vs. The State of Tamil Nadu, is distinguishable in view of the facts and circumstances of that case. That case mainly related to the exercise of suo motu power of revision u/s 32 of the Madras General Sales Tax Act, 1959. There two questions arose for determination, namely, (i) the scope of the suo motu power u/s 32 of the Act, and (ii) whether the Deputy Commissioner rightly refused to exercise discretion u/s 32 of the Act in favour of the appellants. In connection with the second question the Supreme Court in paragraph 16 of the report made certain observations with regard to the appellants not claiming before the assessing authority that a substantial portion of the turnover related to works contract and as such was exempted from the tax liability and that it also acquiesced to the order of assessment passed by the assessing authority.

101. As in our view the impugned assessments were made without jurisdiction and as such were void the questions regarding appellant's waiver, or acquiescence or the following an alternative remedy or making application for refund of duty are of no relevance in view of the decision in the case of Electric Lamp Manufacturers (India) P. Ltd. (1980) 2 Cal HN 49 : 1981 ELT 37 (Cal). Further, as stated hereinbefore the law on the point became well settled directly in the Voltas" case.

102. Therefore, the above Supreme Court decision, in our view, is of no assistance to the respondents. In the above view of the matter other decisions referred on behalf of the respondents viz. Gurram Sreeramulu Garlapati Anjaneyulu & Co. v. State of Andhra Pradesh (1972) 30 STC 120; Sales Tax Officer Vs. Indian Wood Products Co. Ltd., and The Commissioner of Income Tax, Bihar and Orissa Vs. Sri Ramakrishna Deo, also do not help the respondents.

103. It, therefore, appears that for the purpose of determination of value u/s 4 of the Act in connection with the assessment of excise duty post-manufacturing cost and profits arising from post-manufacturing operation are to be excluded. In the instant case, it appears, that assessments were made on the basis of the prices declared by the appellant in the relevant forms and the price lists submitted by it with the Excise Authorities. In view of the respective contentions of the parties herein and on the materials disclosed in this case it has to be examined whether the aforesaid prices could be said to be the real value or the "wholesale cash price" in the light of the principles laid down by the Supreme Court and the different High Courts following the view of the Supreme Court in various decisions stated hereinbefore. The learned Judge of the Court of the first instance was of the view that the assessments already made were to be considered in the light of the aforesaid principles but in view of his other reasons as will appear from the judgment his Lordship refused to reopen the assessments already completed and rejected the appellant's claim for refund. As already stated although Masud, J. discharged the Rule Nisi yet his Lordship directed that in respect of the matters on which final order had not yet been passed, the petitioner (the appellant herein) would submit a revised price list, if not already done, on the basis of the principles laid down in the Voltas" case, clearly showing the manufacturing cost and manufacturing profits of the petitioner (the appellant herein) in respect of the goods sold or to be sold by them to the buyers and the department was directed to determine the assessable value and levy duty after appropriate verification and scrutiny of such price list. His Lordship further directed the department to dispose of the pending assessment cases in accordance with law.

104. Following the decisions of the Supreme Court and the Division Bench of this Court we come to the conclusion that in the instant case inasmuch as the impugned assessments were not made in accordance with Section 4(a) and as some of them were made on the basis of the said notifications (which according to the respondents provide for an alternative mode of assessment) which in our view are bad and invalid, they should be set aside.

105. As in our view all the impugned assessments were not properly made in accordance with the principles laid down by the Supreme Court in Voltas" case the same cannot be sustained. Further all the pending assessments and the future assessments, in our view, should be made in accordance with the aforesaid principles. In the above view of the matter, the judgment and order of the Court of the first instance cannot be upheld.

106. The appeal is, therefore, allowed. Rule Nisi is made absolute. All impugned assessments are set aside and the excise duty for the period covered by the said assessments should be reassessed in consistency with the law and the principles as laid down by the Supreme Court in Voltas case. We further direct that in future all assessments of the petitioner's goods will be made by the department consistent with the law and the aforesaid principles. There shall however be no order as to costs.

S.C. Ghose, J.

107. I agree.