
(1974) 09 CAL CK 0036
In the Calcutta High Court
Case No : Matter No. 153/73

Electric Lamp (India) Pvt. Ltd.

APPELLANT

Vs

Collector of Central Excise and Others

RESPONDENT

Date of Decision : 27-09-1974

Acts Referred:

Central Excises and Salt Act, 1944 — Section 3, 4, 4(a), 40
Limitation Act, 1963 — Article 113
Sea Customs Act, 1878 — Section 30(a)

Citation : (1978) 2 ELT 84

Hon'ble Judges : Masud, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Masud, J.—In this Writ Petition Messrs. Electric Lamp Manufacturers (India) Private Limited (hereinafter referred to as ELMI) has prayed for an order in the nature of Mandamus directing the respondents to assess-and recover excise duties u/s 4 of the Central Excises and Salt Act, 1944 on the manufacturing costs and manufacturing profits of the product of ELMI and also for an order restraining the respondents from levying and collecting any duty ELMI on the post manufacturing costs including selling costs or profits. The ELMI has also asked for a direction on the respondents to refund to it the sum of Rs. 1,98,40,969.67 and interest on the ground that the said sum had been illegally demanded and collected from ELMI from 1961 till today. The facts of the case as set out in the petition may briefly be stated as follows :-

2. ELMI is a manufacturer of diverse electric lamps including fluorescent lamps and bulbs. The petitioner has been selling its products only to a limited number of customers such as "Philips India Limited", Central Electric Company (India) Ltd. and Crompton Greaves Limited etc. The products are sold to these companies in accordance with their orders and specification in their respective brand names, "Philips," "Osram", "Mazda" and "Crompton" etc. The price at

which ELMI sells its goods to these customers includes the actual manufacturing cost and manufacturing profits. These customer-companies sell the products of ELMI in their respective brand names through their own sales organisations. Each of these customer-companies has got its own separate dealer or distribution arrangements. In or about 1955 excise duty was first levied on the products of the petitioner on "specific basis, that is to say, fixed sum of money for a fixed number of say 100 lamps. Since 1961 the excise duties were being collected by the respondents on ad valorem basis excepting miniature pre-focus lamp which was continued to be assessed on specific basis till March 16, 1972. The excise duty was being levied u/s 3 of the said Act on ad valorem basis. The petitioner's definite case is that the levy of excise duty on their products over anything more than manufacturing cost and manufacturing profits was and is illegal. The petitioner has all along been paying the excise duties as assessed and demanded by the respondents on the mistaken belief that the duty was payable also on the selling expenses incurred and selling profits made by the said customer companies. Since 1968 the petitioner has been filing with the poipet office under the respondents the price list in accordance with Rule 173B of the Central Excise Rules, 1944 for their approval. After approval of the list the petitioner allowed the said customer companies to remove the goods and the duty payable thereon is debited to the petitioner's account against the advance deposit in the account of the petitioner with the Reserve Bank of India at its Calcutta Office. The assessable value of the petitioner company has all along been determined by the respondents not on its" selling price to its customer companies but on the said customer-companies price list less the trade discount. The petitioner has now filed this application on the basis of the judgment of the Supreme Court in A.K. Roy and Another Vs. Voltas Limited, herein described as "The Voltas case". According to Mr. Subroto Roy Chowdhury, Counsel for the petitioner, respondents are entitled to levy duty only on the manufacturing costs and manufacturing profits of the petitioner company. The levy of excise duty on the basis of the price list of the customer-companies, according to the petitioner, is unwarranted in law.

3. The petitioner has, therefore, prayed for refund of the said sum of Rs. 1,98,40,969,67 with interest on the ground that the said duty was illegally collected from the petitioner since 1961 on the basis of the sale price of the Customer Companies which is much higher than the sale price of the products of the petitioner company assessed on the basis of manufacturing cost and manufacturing profits only. It is also contended that the petitioner-company, a registered dealer under the West Bengal Sale Tax Act, has been regularly paying the sales tax on the same transaction between the petitioner company and the said customer companies.

4. Relying upon the said Supreme Court judgment Mr. Roy Chowdhury has pointed out that Section 4 of the said Act contemplates the determination of the wholesale cash price on the basis of manufacturing costs and manufacturing profits only. It is his definite case that the excise duties being a tax on

manufactured goods, only, any levy on costs other than manufacturing costs and manufacturing profits is illegal. To illustrate the respondents are realising duty at a price of Rs. 148.55 per 100 bulbs which is the selling price of Philips India Ltd.. less excise duty and discount to their consumers. The latter not being manufacturers does not pay excise duty. Excise duty is to be collected from the manufacturers on the basis of his manufacturing cost and profits and not on the sale price of the customer companies.

5. Further Mr. Roy Chowdhury has argued that the Union Government cannot levy tax on sales excepting inter-state sales and the Central Government cannot include the sale price of its customer companies under the guise of excise duty. His contention therefore, is that levy of excise duty on the basis of any post-manufacturing costs such as, sale price other than the manufacturing cost and manufacturing profits is ultra vires the Constitution inasmuch as excise duty cannot be levied by adding the sales price of its customer for which sales tax has been separately paid.

6. u/s 4 of the said Excises Act, excise duties are leviable only on the wholesale cash price when such price is ascertainable u/s 4(a) of the said Act. The customer companies like Philips have been selling the goods at a higher price whereas the petitioner company's ex-factory price which is much less and which includes manufacturing costs and profits only can alone constitute the wholesale price within the meaning of Section 4(a). References have been made by him on Commissioner of Income Tax v. S.L. Mathias AIR 1939 F.C.R.I. 6, The Province of Madras v. Mis Boddu Paidanna & Sons AIR 1942 F.C. 33, Governor General in Council v. Province of Madras 72 I.A. 91, Vacuum Oil Company v. Secretary of State for India in Council 59 LA. 258, Ford Motor Company of India v. Secretary of State for India in Council 65 LA. 32, Union of India (UOI) Vs. Delhi Cloth and General Mills, , South Bihar Sugar Mills Ltd., etc. Vs. Union of India (UOI) and Others, . He has particularly paid stress on the Voltas Case in support of his main contention that the excise duty can only be levied on the wholesale price of the manufactured goods which would constitute manufacturing costs and manufacturing profits only.

7. The Counsel for the petitioner has also submitted that previously excisable goods are used to be cleared on physical control system. Under this system excise officers used to sit at the factory premises and at the time of the removal of the goods, the officers used to issue the Gate Pass and see that the payment in respect of those goods were made. On or about August 1, 1969 this procedure was changed and a new system known as Self Removal Scheme was introduced under Chapter VII-A of the Central Excise Rules, 1944. Under the Self Removal Scheme the assessee is to file a list of excisable goods known as classification list, for approval of the excise authorities. The list is to be submitted in printed Form-1 which would appear on page 21 of the Hand Book on Self Removal Procedure under the Central Excise Rules, 1944 (2nd Edition-July, 1969). This form is to be filled up in accordance with Rule 173B(1) of the Central Excise

Rules. Under Rule 173B(2), the Excise Officer shall approve the list with such modification as considered necessary by him and after approval, the assessee shall determine the duty payable by the latter. Thus in accordance with this procedure the assessee is to furnish all the information as required by the department. Under Rule 173C(1), Assessee is to file price list for approval of the Excise Officer. Under Rule 173C(2) it is the mandatory duty of the excise authorities to approve the price list after making modification as they may consider necessary for the purpose of Section 4 of the Central Excises and Salt Act, 1944, which provides that the excise duty is leviable only on exfactory wholesale cash price at the time of the removal of the excisable goods from the factory. If there is a dispute as to the rate of duty as provided under Rule 173C(2) the excise officer under Rules 173C(2B) might allow the assessee to clear its goods upon furnishing a bond under Rule 9B in Chapter III of the Central Excise Rule, 1944. It is the petitioner's case that the price list they submitted in March 1973 has not yet been approved nor has it been modified or rejected. If the assessee has complied with the provisions of Rule 173B, 173C or 173D, the assessee itself under Rule 173F shall determine its liability for the duty on the excisable goods intended to be removed and on payment of such duty, the goods could be removed. In accordance with Rule 173G, the assessee is to maintain a current account in which sufficient sum of money is to be deposited with the Reserve Bank of India so as to cover the duty in respect of the goods which would be removed on the basis of determination of the goods by the assessee under Rule 173F. The Counsel for the petitioner has urged that under the said Rules including Rule 173 I, it is incumbent upon the department to determine the assessable value and to make the assessment known to the assessee for payment of the duty. The provision as to execution of a bond or a Bank Guarantee has admittedly been complied with by the assessee.

8. Relying upon the said Rules and Sub-Rules, Mr. Roy Choudhary has contended that excise department can only levy duty on the wholesale cost price as set out in the price list under the column "ex factory wholesale cash price" (vide Annexure "D" to the Supplementary Affidavit filed by Mr. Narayanaswami affirmed on April 3, 1973). All the necessary formalities have been complied with by the assessee in this particular case but the department levied and is levying excise duty not on the basis of ex factory wholesale cash price but on the basis of the price list of the petitioner companies customer purchaser such as Philips Company. According to him the levy of excise duty on the basis of the price list of the purchaser which must necessarily include the selling cost, such as, transit cost, freight, octroi duty, sales tax and also the excised duty is invalid u/s 4 of the said Excise Act. As under the Voltas case the excise department can only levy duty on the ex-factory wholesale cash price which includes the manufacturing costs and profits only and which must exclude the huge additional cost of the purchaser. Reference has also been made by him to paragraph 45 of the Counter Affidavit affirmed by Mani Gopal Sen, Assistant Collector of Central Excise, on May 2, 1973 in support of the contention that the department has failed to

determine the exfactory wholesale price on the basis of manufacturing cost and manufacturing profits. In fact, in paragraph 37 of the said Affidavit Mr.Sen has stated that they have no knowledge of the terms and conditions of the sale transactions between the petitioner company and its customer purchasers. In paragraph 43 of the said Affidavit no particulars are given as to the break up of the price on the basis of which the department is levying duty. In fact, according to the department the manufacturing cost and manufacturing profits are not deter-minable in the present case. The department overlooked the fact that it was their mandatory duty to determine the ex-factory wholesale price on the basis of manufacturing cost and manufacturing profits. Mr. Roy Chowdhury has referred me to the said decision of the Judicial Committee and also the Supreme Court and submitted that post-manufacturing expenses or post-manufacturing profits are not assessable u/s 4 of the said Excise Act. The respondent's contention that the ex-factory wholesale cash price is not ascertainable in as much as the internal arrangement or secret agreement between the petitioner company and its favoured customer are not known, cannot be accepted nor could the department be allowed to override the provisions of Section 4(a) of the Excise Act by raising the plea that the petitioner company is only a subsidiary of four foreign companies which are really, according to them holding companies. The petitioner categorically denies that the petitioner company is a subsidiary company and that the customer buyers are holding companies on the simple ground that those "share-holders of the said customers do not hold more than 50% of the shares in the petitioner-company. In any event these extra commercial considerations or the alleged secret terms of agreement between the petitioner company and its customer buyers are irrelevant for the purpose of determination of excise duties u/s 4(a) of the said Excise Act.

9. It is also urged by Mr. Roy Chowdhury that the principles of waiver, estoppel, acquiescence as alleged in paragraph 41 of the affidavit of Mr. Sen cannot be accepted on the ground that there cannot be any estoppel against law. Even though a wrong representation has been made by the petitioner company in the past to the effect that the duty is leviable on the price list of the customer purchaser, there cannot be any estoppel against law, such levy is invalid and void under the said Excise Act and its rules. Reliance has been placed by him on Commissioner of Income Tax, Madras Vs. V. Mr. P. Firm, Muar,

10. In connection with the petitioner's prayer for refund of Rs. 1, 98,, 40,969.67 on the ground of illegal realisation of duty from the petitioner company in the past, Mr.Roy Chowdhury has submitted that the petitioner company has to pray for the refund of the sum in this Writ jurisdiction as the Civil Court of law has no jurisdiction to decide these revenue matters u/s 40 of the said Excises Act. In support of the contention that illegal recoveries can be prayed for in the writ petition, he has relied upon Korapati and Brothers v. State of Andhra Pradesh-25 Sales Tax Cases, 202, 208-209 and Union of India (UOI) Vs. A.V. Narasimhalu, and also S.K. Srivastava and Others Vs. Vullubhdas Kalyanji and Co. (P) Ltd., . At a letter stage, Mr. Roy Chowdury has stated that his client is not praying for

refund of the excess duty paid by mistake on glass shells Item 23A, sub-clause 3 in Annexure "B" to the petition, but he claims refund of a sum of Rs, 1,93,59,346.62 P. after deduction of the said excise duty paid for glass shells for the period from March 1961 to February, 1969. Relying upon the said *Korapati v. State of Andhra Pradesh* (Supra) he has also argued that if a portion of the petitioner's total claim for refund under an order of assessment is severable, order can be passed for refund of the amount which is legally recoverable. If, however, such refund is not severable the court should quash all the previous orders of assessment in entirety and should remand the matter to the excise authorities for reassessment. In this connection he has referred to the *State of Kerala v. Aluminium Industries Ltd.*, 16 S T C 689, *Hindusthan Construction Co. Ltd. Vs. State of West Bengal and Others*, in support of his contention that refund of illegal payments can be directed under Article 113 of the Indian Limitation Act, 1963, that is, within three years from the date of the mistake discovered by the party. References has also been made by him to *Himmatlal Harilal Mehta Vs. The State of Madhya Pradesh and Others*, , in support of his prayer of injunction as set out in prayer "F" as there is threat on the part of the respondents to levy excise duties on the sale price list of the petitioner companies purchasers. Relying upon *K.K. Kochunni v. State of Madras* A. 1959 S.C. 725, it is also contented that a declaratory order for not levying duty except on manufacturing costs and profits can also be passed by a writ court

11. Mr. Roy Chowdhury in anticipation of the arguments of the Counsel for the respondents has drawn my attention to *Commissioner of Police, Bombay Vs. Gordhandas Bhanji*, where Supreme Court has held that subsequent explanations affirmed on affidavits or supplementary papers or documents which are not contemporaneous should not be given importance to, but he has added that the documents placed before the Court ate matters of record which cannot be disputed.

12. The learned Advocate General with Standing Counsel and Mr. T. Bose has submitted the background of the formation of the petitioner company and its alleged four customer purchasers, namely. General Electric Company (I) Ltd., Philips (I) Ltd., Crompton Greaves Ltd. and Mazda Lamp Company Ltd. According to him the first three of the alleged purchasers are subsidiaries of four foreign companies, General Electric Company Ltd., N.V. Philips, Crompton Parkinson and Mazda Lamp Company Ltd., who collectively hold 4/5 the paid up share of the petitioner company and the Board of the petitioner company consists of a director or Cheif Executive Officer of the said four subsidiary companies in India. Previously there were five foreign companies who were the alleged purchasers of the petitioner company, namely, General Electric Company Ltd., Associated Electrical Industries Limited, N.B. Philips, Crompton Parkinson Ltd. and Mazda Lamp Company Ltd. The first four companies are admittedly foreign companies but they have their subsidiaries in India known as General Electric Company (India) Ltd., Crompton Greaves Ltd. further, according to the learned Advocate General the two foreign companies, General Electric Company and Associated

Electrical Industries Limited were merged in 1969 and known as General Electric Company Ltd. In the same year their corresponding subsidiary companies in India were also merged. Relying upon certain documents such as the Prospectus of some of the foreign companies and those of the subsidiary companies in India he has submitted that the petitioner company who actually manufactures electric lamps of specification and design of these four companies are completely dominated and. controlled by their so called customer companies. Even the goods manufactured by the petitioner company are not known in the market as ELMI lamps or ELMI products. All the manufactured goods were sold in the market in the name of Philips or Mazda or Crompton or General Electric Lamps. Thus the trade name of the manufactured goods of the petitioner company is in fact the trade names of the goods of the customer companies. On the basis of these facts he has urged that the petitioner company is really a joint venture of the four subsidiary companies which, according to the petitioner, are their customers and these customer companies are the only buyers of the goods manufactured in the petitioner company and the wholesale price of the petitioner company is calculated and fixed by the Board of Directors of the petitioner Company As stated earlier, this Board of Directors is the Managing Director or the Chief Executive Officer of the said alleged four customer companies. The petitioner's definite case is that all the goods manufactured by the petitioner company are sold to the members of the public through the said four customer companies and no other agency or purchaser or distributor. According to the petitioner's own case these four customer companies have a vast sales organisation which have their own system of distribution through which the manufactured goods are used by the members of the public. Relying upon the aforesaid fact, the learned Advocate General has argued that although juristically the said four alleged customer purchasers are not the subsidiary companies of the petitioner Company, the facts remain that the Board of Directors of the petitioner Company consists of the Managing Directors and/or the Chief Executive Officer, representing the said four customer purchaser and that these customer purchaser are admittedly the subsidiaries of four foreign companies. The result is that the decision of the petitioner Company as the quantum of the wholesale cash price within the meaning of Section 4(a) of the said Excises Act is in substance the decision of the four alleged customer companies. Collectively and factually the petitioner company itself is a subsidiary company of the said four alleged customer companies, though strictly under the Indian Companies' Act the petitioner Company may not be described as such The learned Advocate General after distinguishing the facts in the said Supreme Court decision in A.K. Roy v. Voltas Ltd. (Supra) from the facts of the present case has submitted that the principles laid down in the said decision would naturally apply if there is a bonafide sale transaction between the manufacturing company and its independent purchasers or purchasing agent in the normal course of business. He has drawn my attention to several other documents, which I shall presently discuss, in support of the said contention. In this connection he has also referred to Collector of Central Excise v. Shankar Lal Agarwalla (AIR 1969 Cal. 154 which

has also been referred to in the said Supreme Court decision A.K. Roy v. Volas Limited (Supra).

17. The point to be decided in this case is whether the Excise Authorities are entitled to levy excise duty on the wholesale cash price of the petitioner's goods in excess of the petitioner company's manufacturing costs and profits, u/s 4 of the Central Excises and Salt Act 1944. As slated earlier the petitioner company manufactures electric bulbs, lamps etc. and sells the said goods to General Electric (I) Limited, -Philips (I) Limited, Crompton Greaves Limited and Mazoa Lamp Company. The petitioner does not Sell its goods to any other person, firm or company. At all material times the petitioner duly submitted the price list in accordance with the rules prescribed under the said Excises Act. It appears from the price list submitted by the petitioner company for the period from 17-3-69 to 31-3-69 (annexure to supplementary affidavit of Narayana Swami affirmed on April 3, 1973) that the petitioner's manufactured products such as electric lamps have been valued in accordance with the prescribed forms. To illustrate, one specific category of manufactured goods is being shown as follows:-

* * * *

18. Different amounts have been mentioned in respect of different goods under those columns in the statutory return filed by the petitioner company from 196.8-69 to till "72-73 in accordance with the statutory form prevalent during the period. The Excise authorities on the basis of the said statutory form submitted by the petitioner company were all along levying duty on the basis of the amount mentioned under column 11, that is, price less assessable Excise duty. According to the counsel for the petitioner the price of the goods shown against column 11, that is to say, Rs. 167.71 as set out against Item 22 above, include the selling costs of the petitioner company to one or the other of the said four purchaser companies. Mr. Roy Chowdhury has submitted that the Excise duty could only be levied on Rs. 81/- which is the ex-factory wholesale cash price u/s 4 and not on Rs. 167.71 which represent costs of post manufacturing operation. The petitioner and the respondents have proceeds on the basis that the Excise duty u/s 4 is payable on the said sale price of its customer purchasers. There is no occasion to raise any objection to such assessment, earlier until the principle of lay underlying Section 4 of the Excises Act have been clearly laid down the Voltas case. The judgment in the said case has been delivered by the Supreme Court on December 1, 1972 but the said decision has been reported in All India Reporter in its January issue of 1973. It is clearly laid down in the said decision in the Voltas case that the real value for assessment of Excise duty u/s 4 should be found after deducting the selling costs and selling profits and that such value to be determined for duty u/s 4 can include only the manufacturing costs and the manufacturing profits. The said judgment also provides according to Mr. Roy Chowdhury, that the duty is to be levied on the basis of the price, fixed for delivery at the factory gate thereby eliminating freight, octroi and other charges involved in fixation sale price of the petitioner company's customer purchasers.

Mr. Roy Chowdhury has therefore argued that the petitioner company has paid huge sums of money to the respondents far in excess of the wholesale cash price within the meaning of Section 4 of the said Excises Act including selling costs and selling profits under a mistake of law. As the Voltas case has decided that the Wholesale cash price must exclude costs price of the petitioner company's purchasers the respondents have all along illegally realised Excise duty far in excess of the duty leviable u/s 4. It is therefore contended that respondents should refund the said sum of Rs. 1,98, 40,969.67 and interest therein as money illegally levied upon and collected from the petitioner company from 1961 till March 9,1973. It is also his contention that in future also the respondents should be directed to levy Excise duty u/s 4 of the Excises Act on the basis of the manufacturing costs and manufacturing profits only. The petitioner company has selected four wholesale purchasers who purchases the petitioner company's electrical goods and fix their own price for sale to the members of the public through the said purchaser customers or otherwise. . It is well settled that the Excise duty can only be levied from the manufacturer in respect of the goods manufactured by them. The value of such goods u/s 4 is the wholesale cash price which includes only manufacturing costs and manufacturing profits. The additional costs or charges which a purchaser should ordinarily bear cannot be included in the determination of the wholesale cash price. The octroi duty or sales tax are statutory liabilities under the State legislations which are passed in accordance with the legislative list of the State in Schedule to the Constitution of India. The purchaser companies have vast sales organisations and naturally after payment of octroi duty sales tax the price of the purchasers would be very much higher than the ex-factory whole sale cash price of the manufacturer. Thus the substance of Mr. Roy Chowdhury's arguments is that the respondents levied and are threatening to levy excise duty on the price determined by the petitioner company's customer purchasers for the selling manufactured goods to their agents, distributors or members of the public. As the respondents have no jurisdiction to levy Excise duty on the basis of the price list of the petitioner's customer purchaser an appropriate writ should be issued directing them not to levy such duty in future from the petitioner company except on the Ex-factory wholesale cash price of the petitioner company and also to refund the said sum of Rs. 1,98,40,969.67 which the respondents have illegally collected from the petitioner company.

19. In my view there is logic on the points of law argued by Mr. Roy Chowdhury, the material portions of Section 4 of the Central Excises and the Salt Act, 1944 read as follows:-

* * * *

It is clear from this section that Excise duty is payable On the wholesale cash price of the manufactured goods such as electric bulbs lamps etc, both the wholesale cash price on which the duty is to be levied shall be the price which the manufacturer fixes when those goods are taken out of the place of

manufacture or production for delivery to purchasers It is also evident from the said section that if there is a wholesale market for manufactured goods, then the wholesale price which is settled at such market place or at the nearest place where such market exists is to be deemed as the wholesale cash price for the purposes of levy of Excise duty Section 2(k) defines wholesale dealer" in the following way: "wholesale dealer means a person who buys or sales excisable goods wholesale for the purposes of trade or manufacture and includes a broker or commission agent who, in addition to making contracts for the sale or purchase of excisable goods for others, stocks such goods, belonging to others as agent for the purpose of sale. Thus a wholesale "dealer" of excisable goods may be a buyer or seller for purpose of trade or manufacture. But the Excise duty is only on goods manufactured or produced by a manufacturer. A purchaser who purchases such manufactured goods at a wholesale price may again sell those goods to its own distributors or trading agents or directly to customers at different rates. Obviously the purchaser of such goods from manufacturer and other purchasers who sell the same to such agents or members of the public would charge higher price than the ex-factory wholesale cash price of the manufacturer but the liability of pay Excise duty rests only on the manufacturer or the producer of those goods and not other purchasers. Thus Mr. Roy Chowdhury"s contention must be accepted in so far as his submission is that the Excise duty is leviable only on the wholesale cash price of the manufacturer but according to him "the wholesale cash Price" must constitute manufacturing costs and manufacturing profits. Relying upon the Voltas case he has strenuously argued the price list of the petitioner company"s customer purchaser cannot be taken into consideration in levying the Excise duty on the manufacturing goods. The wholesale "dealer" who purchases the manufactured goods must have to charge much higher price from their customers to cover their own profits, transport cost, octroi duties, sales tax and other incidental charges. The respondents have been levying duty on the wholesale cash price of the petitioner company"s customer purchasers. It is alleged that both the petitioner and the respondents under a mistake of law proceeded on the said basis since 1961 and the petitioner had to pay heavier duty than the amount which should have been paid on the basis of the wholesale cash price of the petitioner company. The Supreme Court in the Voltas case for the first time had declared the law that the wholesale cash price u/s 4 of the Excises Act cannot include the costs of post manufacturing costs such as selling costs and profits; or, in other words, the respondents should have levied Excise duty u/s 4 only on ex-factory manufacturing costs and manufacturing profits. In my view there are difficulties in applying the principles of law laid down in the Voltas case to the facts of the case.

* * * *

27. In the instant case although customer purchasers are separate juristic entities and although they cannot be held to be subsidiary companies of the petitioner in accordance with the principles of company law, petitioner"s

wholesale cash price was fixed, controlled and dictated by the said four so-called independent customer purchasers. The petitioner company admittedly does not sell goods to any member of the public or a direct consumer. The Board of the petitioner company consists of the Directors, Managing Directors or the Chief Executive or four customers' companies. The prospectus of the petitioner company show that the four foreign companies held 4/5th share in the petitioner company. It also appears that the customer purchasers of the petitioner company are mainly subsidiaries of the foreign companies in UK and Holland. Thus there is no question of any physical or notional wholesale market where sales take place at arm's length or in normal course of business. Even the terms of arrangement or agreement for sale between them, if any, have not been placed before this Court. There is nothing wrong in the petitioner's selecting these four companies as favoured purchaser of the petitioner company. The petitioner is also justified in having an internal agreements between the petitioner company and its customer purchasers, but the facts in the case reveal that the alleged sales between the petitioner company and its customer purchasers are not made in normal course of business. There is no doubt that the sale price would include transport cost, octroi duty and various other incidental expenses and therefore the price list of the customers cannot be the wholesale cash price on which the duty is to be levied u/s 4(a). But it is clear that the sales are not normal transactions between a manufacturer seller and independent wholesale customer purchasers. It may be added here that the annexure to the petition and the various other documents filed on behalf of the petitioner company show that the price list of the customer purchaser are often more than 100% of the alleged ex-factory wholesale price of the manufacturer. Further for all these past years there is not the slightest indication of the petitioner's manufacturing costs and manufacturing profit; which might persuade the Excise Officers to examine the alleged ex- factory whole cash price u/s 4. On the contrary, the petitioner company induced the department to accept for the price of duty u/s 4. the price list of the petitioner company's customer purchasers in as much as such price list was fixed and agreed upon among themselves after taking into consideration their mutual profits. Thus, the principles laid down in Voltas case do not have any applications to the facts of the present case.

28. The next difficulty in accepting Mr. Roy Chowdhury's contention is that the orders of assessment u/s 4(a) are not ex-facie illegal. It cannot be said that the excise officers have no jurisdiction to heavy duty u/s 4(a) on the basis of the Returns filed by the petitioner company in accordance with the forms prescribed by the Collector or by the Rules. There is no definite averment in the petition to the effect that the wholesale cash price for all the past years should consist of a definite amount of manufacturing costs and manufacturing profits. Although the manufacturing costs may be spelt out from the balance sheet but such costs may or may not be accepted by the department. There is nothing to show the break up of the manufacturing profits. The reasonable percentage of manufacturing

profits which the petitioner company has shown for the first time in the course of argument was not placed before the excise officers have failed to discharge their statutory duty under Rule 173C(2) by not determining the assessable value on the basis of manufacturing costs and profits only the excise officers could only be said to have made mistakes in calculation. In the absence of any break up of manufacturing costs and profits on the one hand and the costs of post-manufacturing operations on the other the excise officers cannot be said to have acted in excess of their jurisdiction. Admittedly, the said jurisdiction has not been exercised mala fide. If the calculations are wrong as submitted by the Counsel for the petitioner there were statutory provisions in the said Excises Act where the decision of the excise authorities could be challenged in appeal or revision under Sections 35 and 36. The petitioner did not choose to prefer appeals against the impugned orders of assessment and the writ jurisdiction cannot be invoked by the petitioner unless the Excise authorities passed the impugned orders of assessment in breach of Section 4 of the said Excises Act or statutory rules or prescribed forms.

* * * *

45. Admittedly the petitioner had already collected the Excise duty alleged to have been paid in excess by mistake from its alleged wholesale dealer and as such the petitioner cannot be allowed to have an unjust enrichment by claiming again refund of the same amount. This unjust enrichment amounts to fraud and principles of waiver and acquiescence would not apply.

46. I have carefully examined the contentions of the Counsel for both the parties and I am satisfied that, apart from the peculiar facts of the Voltas case, it is obvious that in ascertaining the wholesale cash price for the purpose of levying excise duty u/s 4(a) the real value of the assessable goods should consist of manufacturing costs and manufacturing profits only. The excise officers who levy the duty u/s 4(a) will have to make proper enquiry and must approve the price list in accordance with the statutory rules under Chapter VIIA and in particular Rule 173C(2) and 1731. The manufacturer will be entitled to file a revised or amended price list in which case the manufacturer should make the application for provisional assessment under Rule 173C(2A)(2B) read with Rule 9B of Central Excise Rules. Clearance of the manufactured goods out of the factory or place of manufacture or production should not be stopped if the necessary conditions in Chapter VIIA are complied with. To this extent, the contention of Mr. Roy Chowdhury should be accepted. But as discussed earlier the facts in the instant case are clearly distinguishable from the facts of the Voltas case. The petitioner's main claim is for quashing the orders of assessment passed in connection with the excise duty from the year 1961 till today. For reasons stated above, the orders of assessment which have been finally passed, cannot be quashed. Further in those years, the petitioner already realised the alleged excess excise duty from their wholesale or retail dealers and, accordingly, the petitioner cannot be allowed to realise again the said excise duty from the

respondents Refund of any sum illegally collected, as alleged, presupposes a loss suffered by the assessee. To allow the excess duty, already collected by the petitioner from their customers, again from the respondents is to allow unjust enrichment. A double reimbursement or compensation is equally bad as double taxation.

47. Again, it may be added that the Balance sheet of the company is not always sacrosanct nor the respondents are bound to devise their own formula to find out the basis of the manufacturing profits. The respondents have not admitted that in the past years the wholesale cash price included selling costs and selling profits.

48. Reference may also be made to the three other Judgments delivered by me today on Section 4 of the said Excises Act in *Messrs. Dunlop India Limited v. Collector of Central Excise* (Matter No. 117 of 1973) *Messrs Krishnalal Tairhni & Company v. Collector of Central Excise and Ors.* (Matter No. 247 of 1973) and *East Anglia Plastics (I) Ltd. v. Collector of Central Excise, Calcutta and Ors.* (Matter No. 158 of 1973), where some new points of law and new decisions have been discussed. In all the said judgments, I have discharged the Rule Nisi, obtained by the petitioner, subject to some directions.

49. It may be added here that the vires of the statutory Form A.R. 1 of Central Excise Mannar, 1969 classification list-Form I under Rule 173B and Form R.T. 12 under Rule 173G have not been challenged. Further the word "wholesale cash price" in Section 4(a) of the Central Excises Act should be construed in contradistinction to "retail" price, as laid down in *Vaccum Oil Company v. Secretary of State for India in Council* (59 I.A.259), in connection with the interpretation of analogous section in Section 30(a) of the Sea Customs Act, 1878. Even assuming that the Supreme Court in the *Voltas* case has made a new declaration of law on the construction of Section 4(a) of the said Excises Act such declaration cannot be used retrospectively in the facts and circumstances of this case.

50. For all the reasons stated above, the Rule is discharged subject to the following direction that the respondents will deal with the pending applications relating to levy of Excise duty u/s 4(a) of the said Excises Act on which final determination of duty has not yet been made in accordance with the principles of law laid down in the *Voltas* case, that is one the basis of the wholesale cash price comprising manufacturing costs and manufacturing profits only and excluding post-manufacturing costs and profits. All interim orders stand vacated. There will be no orders as to costs. The petitioner company will be at liberty to take recourse to any other remedy, permissible in law.