

(2017) 03 RAJ CK 0164
In the Rajasthan High Court
Case No : 9433 of 2016

JK Tyre & Industries Limited

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 09-03-2017

Acts Referred:

[Central Excise Act, 1944](#), [Section 35](#), [Section 4\(1\)\(b\)](#) - Appeals to Commissioner (Appeals)]. - Valuation of excisable goods for purposes of charging of duty of excise
[Central E](#)

Citation : (2017) 03 RAJ CK 0164

Hon'ble Judges : Govind Mathur, Vinit Kumar Mathur

Bench : DIVISION BENCH

Advocate : M.S. Singhvi, Sharad Kothari, Deepak Chandak, Vipul Singhvi

Final Decision : Dismissed

Judgement

1. The present writ petition has been filed against the order dated 30.06.2016, passed by the Assistant Commissioner, Central Excise & Customs. The petitioner is aggrieved by this order whereby the permission to clear the goods on provisional assessment basis under Rule 7 of the Central Excise Rules, 2002 has been denied. 2. At the threshold, the counsel for the respondents has raised a preliminary objection with regard to the maintainability of the writ petition, in view the efficacious alternative remedy available to the petitioner under the Central Excise Act. 3. In order to appreciate the controversy, briefly the facts giving rise to the present writ petition are that the petitioner company is having its registered office at Kankroli and is engaged in the business of manufacture and sale of tyre, tubes & flaps falling under Central Excise Tariff Act, 1985. 4. It has been contended by Mr. M.S. Singhvi, learned senior counsel that the petitioners are engaged in this trade for a number of years and are selling excisable goods partly by way of direct sale to the customers from the factory and partly through their outside depots/C & F agents spread throughout the country. For this purpose, the goods are cleared from the factory to the depots/C

& F agents as stock transfer on payment of duty but the goods are actually sold to the customers from the depots/C & F agents. He submits that in case of sales through depots/C & F agents, the clearances of tyres, tube and flaps from the factory are made on provisional basis under rule 7 of Central Excise Rules, 2002 since March, 1997 on the request of the company. Learned senior counsel submits that it is a trade practise in tyre industry to adopt provisional assessment on clearances from the factory to the depot/C & F agent due to uniform trade practise of allowing various types of discounts to the customers/dealers from the depots subsequent to the sales there from by way of credit notes. The company is having a large number of depots and C & F agents throughout the country and during the process of sending the tyres a number of discounts are allowed by the petitioner at the depot level as turnover discount, prompt payment discount, taxes & octroi absorbed, slab discount, growth discount/special incentive discount, exclusive discount, fleet discount, product discount, test discount etc. Learned senior counsel submits that petitioner has been clearing the goods on provisional assessment basis for last about 20 years and the petitioner's company for permitting the clearance on provisional assessment basis had always been acceded to by the respondents. He further submits that even for the Assessment Year 2015-16, the respondent no.2 has allowed the petitioner to clear the goods on provisional basis. The learned senior counsel submits that after the final assessment is made by the respondents whatever the final duty is payable by the petitioner is always paid in accordance with the act and rules and there is no breach or violation of the same at any point of time. 5. The petitioner company made a request vide its letter dated 4.3.2016 seeking the permission to clear goods on provisional assessment basis in accordance with Rule 7 of the Central Excise Rules, 2002 for the period 2016-17. 6. In pursuance of the letter dated 4.3.2016, the respondent No.2 Assistant Commissioner, Central Excise Division, Udaipur has issued a show cause notice dated 10.05.2016 proposing to refuse the request of the petitioner for clearing of goods on provisional assessment basis. In pursuance of the said show cause notice, the petitioner filed a detailed reply on 10.06.2016 clarifying the facts and legal position of the matter, more particularly relying upon a decision of Calcutta High Court. The learned Assistant Commissioner after hearing the parties rejected the petitioner's request for clearing the goods on provisional basis and therefore, the petitioner has approached this Court by way of filing this present writ petition. 7. Learned counsel for the respondents Mr. Vipul Singhvi has raised a preliminary objection with respect to the maintainability of the writ petition and has submitted that the present writ petition is against the order of Assistant Commissioner and as per Section 35 of the Central Excise Act, 1944, there is an equally efficacious alternative remedy of appeal to the Commissioner and therefore, the writ petition is liable to be dismissed on the ground of alternative remedy. Section 35 of the Central Excise Act, 1944 which reads as under :- (1) Any person aggrieved by any decision or order passed under this Act by a Central Excise Officer lower in rank than a 2[Commissioner of Central Excise] may appeal to the 3[Commissioner of Central

Excise (Appeals)] [hereafter in this Chapter referred to as the 1[Commissioner (Appeals)]] 4[within sixty days] from the date of the communication to him of such decision or order : 5[Provided that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of thirty days.] 6[(1A) The Commissioner (Appeals) may, if sufficient cause is shown, at any stage of hearing of an appeal, grant time, from time to time, to the parties or any of them and adjourn the hearing of the appeal for reasons to be recorded in writing : Provided that no such adjournment shall be granted more than three times to a party during hearing of the appeal.] (2) Every appeal under this section shall be in the prescribed form and shall be verified in the prescribed manner. 8. We have heard learned counsel for the parties at length. In order to appreciate the controversy, we deem it appropriate to reproduce Rule 7 of the Central Excise Rule 2002 as under :- "Rule 7. Where the excisable goods are not sold by the assessee at the time and place of removal but are transferred to a depot, premises of a consignment agent or any other place of premises (hereinafter referred to as "such other place") from where the excisable goods are to be sold after their clearance from the place of removal and where the assessee and the buyer of the said goods are not related and the price is the sole consideration for the sale, the value shall be the normal transaction value of such goods sold from such other place at or about the same time and, where such goods are not sold at or about the same time, at the time nearest to the time of removal of goods under assessment." 9. The above said rule has been considered by the learned Assistant Commissioner and while dealing the issue it has been held that the petitioner is under an obligation to pay Central Excise of the invoice on the basis of value of similar excisable goods sold from the depot at the time of clearance from their factory as provided under law and therefore, the application of the petitioner for provisional assessment for the years 2016-17 was rejected. It will be worth to reproduce the findings arrived at by the learned Assistant Commissioner in the order dated 30.06.2016 which reads as under :- "10. I observe that the revenue has raised an issue that the assessee should pay duty in terms of provisions of section 4 of the Central Excise Act, 1944 read with Rule 7 of the valuation Rules, i.e. the assessee should pay duty on the transaction value shown on the invoice where they may allow the abatement of upfront discounts given in the invoices as clarified vide CBEC circular No. 354/81/2000-TRU dated 30.06.2000 while the contention of the assessee is that while sending the goods to the depot the actual price/transaction value on which the duty has to be paid is not known hence the clearances made from the depots have to be assessed for duty as per section 4(1)(b) of CEA 1994. The moot point comes to my mind is as to whether the deduction of discounts would be admissible if there is no evidence showing that the same has actually been passed on to the customer. In this case the entire sale of the assessee taken place through depots where the goods are first stock transferred, that in such a situation, as per the provision of Rules 7 of Central Excise valuation Rules, 2000, the assessable value of the goods would be the sale price

of the goods prevailing at the depot at the time of removal. Since discounts are not given at the time of sale, but are determined at a later date, their deduction is not permissible for determining the assessable value when the assessee is not in a position to show that the discounts whose deduction had been claimed by them on average basis has actually been passed on to the buyers. Hence, in any case they are not eligible for their deduction for the reason that the buyers are not meeting the purchase targets; such discounts are not eligible for deductions." As per Section 4(3)(d), "Transaction Value" means the actual amounts paid or payable for the goods sold and duty is supposed to be paid on this value. The provisions of Section 4(1)(b) of CEA 1944 read with Rule 7 of Central Excise Rules, 2002 are applicable to determine the normal transaction value, in respect of the goods to the depots and sold subsequently there from. The relevant portion of Section 4(1) of Central Excise Act, 1944 is as under : (I) Where under this act the duty of excise is chargeable on any excisable goods with reference to their value, then on each removal of the goods, such value shall (a) In a case where the goods are sold by the assessee for delivery at the time and place of removal, the assessee and the buyer of the goods are not related and the price is the sole consideration for the sale, be the transaction value; (b) In any other case, including the case where the goods are not sold, be the value determined in such manner as may be prescribed; Section 4(3) (d) of CEA 1944 defines transaction value "means the price actually paid or payable for the goods when sold and includes any amount that the buyer is liable to pay in connection with the sale whether payable at the time of sale or at any other time...." 12. I find that the assessee claims discounts which are partly given at the time of sale of goods from their depots to the buyers which are mentioned in the invoices issued and the remaining discounts are given subsequently on quarterly basis by issue of credit notes. I observe that the assessee has wrongly submitted that at the time of removal of goods from their factory to their various depot/consignment agents, the actual prices prevailing on the date of clearance are not known. Since the value of goods sold from their depots is known at the time of clearance of similar goods from their factory, the assessee is liable to clear the excisable goods from their factory at the price prevailing and available at their depots. 13. I also find that the value of goods sold from the depots of the assessee is known at the time of clearance of similar excisable goods from their factory, therefore, the assessee is required to clear the same on such value and has to pay duty accordingly. Any further discounts given after the end of particular quarter viz turn over discount, slab discount, growth discount, exclusive dealer discount, special incentive discount, trade discount etc, the quantum of which are not known at the time of billing by the assessee from their depots, are not deductible from the assessable value of goods cleared from their factory. The said discounts though are admissible, calculated and allowed in future to their dealers and quantum of such discounts are not known at the time of clearance of goods from their factory, should have to be quantified at the time of finalization of Provisional Assessment, but the duty on the similar goods cleared from their factory should have to be paid on the assessable value equal

to sale value of similar goods available at their depots. Thus the amount deducted on the account of the said discounts from the assessable value at the time of clearance of goods from their factory, is against the spirit and provisions of Section 4(1)(b) of the said Act read with Rule 7 of the Central Excise Rule, 2002. 14. Thus at the time of clearance of the said goods from their factory, the duty is to be initially assessed at the sale value of similar goods available at their depots and the subsequent discounts passed on by the assessee to the buyers should be includable in the value of goods cleared from their factory. Thus the assessee wrongly reduces the assessable value by claiming the maximum amount of discounts allowed, which are not known at the time of clearance and even at the time of sale from their Depots, which are dependent on the performance of the dealers in future, whereas, as per the definition of the Transaction Value given in Section 4 of Central Excise Act, 1944 the same means the price actually paid or payable for the goods when sold and in this case when the goods are sold the price payable is higher than the value on which the assessee is paying the duty after deducting various discounts, the fate of which is decided later on. 15. I also observe that the assessee has referred various judgments of the Apex Court and Tribunals wherein the courts have held that such after sale discounts is permissible. In this regard I find that the case laws cited by the assessee are not helpful to them as they are differentiated on the grounds that the assessee is well known to the discounts and may claim on the basis of the value of similar excisable goods sold from the depots at the time of clearance from their factory, therefore, the assessee is required to clear the same on such value and has to pay duty accordingly. 16. I also find that the assessee has submitted that SAP system can only view the transactions that have taken place at different locations but the system cannot forecast the behaviour of the customer in purchasing the quantity of the goods from the depot during a particular period so the entitlement of the customer in availing discount cannot be predicted by SAP system. In this regard I do find myself compatible with the contention of the assessee that the SAP system is merely an accounting system from where all the transactions may be viewed by the assessee but the system cannot predict the behaviour of the customer hence it is inapplicable on availability of quantity of discounts. 17. In this regard the assessee vide this office letter C.No. V(26)PA/JKTyre/UDR/48/2015/8555 dated 10.12.2015 and 3319 dated 04.05.2016 was made acquainted that they are paying duty on the value finally realized from the buyers whereas, in terms of provisions of section 4 of the Central Excise Act, 1944 read with Rule 7 of the valuation Rules, they have to pay duty on the transaction value shown on the invoice where they may allow the abatement of upfront discounts given in the invoice as clarified vide CBEC circular No. 354/81/2000- TRU dated 30.06.2000. But the assessee vide their letter dated 10.05.2016 has expressed inability to follow the procedure as advised vide the above letter and submitted that they are unable to determine the correct transaction value at the time of removal of goods from the factory gate to depots. 18. The Commissioner of Central Excise, Udaipur has reviewed order in original No. 23/2015-16 (Prov.Ass) dated

26.02.2016 and order in original No.24/2015-16 (Prov.Ass) dated 31.03.2016 vide Order-In-Review No. 08/2016 dated 26.05.2016 and Order-In-Review No.09/2016 dated 01.06.2016 respectively on the grounds discussed here-in-above. Both the above Orders-In-Original have been appealed against with the Commissioner (Appeals) Central Excise, Jaipur and are still sub-judice. 10. Learned senior counsel relying upon the judgment of the Calcutta High Court has submitted that in identical situation, the Calcutta High Court in Shyam Steel Industries v. Dy. Commr. Of C.Ex. & S.T., Durgapur DIV-I reported in 2015 (323) E.L.T. 508 (Cal.) has allowed the writ petition giving the benefit of provisional assessment to the petitioner. Learned senior counsel relying upon the paras 7, 14 and 24-27 has submitted that the benefit of provisional assessment should also be extended to the petitioner company in the present case. The paras 7, 14 and 24-27 are reproduced as under : "7. The petitioner company by its letter dated July 31, 2014 applied to the respondent No.1 for permission to clear the manufactured goods on the basis of provisional assessment for the period of August 1, 2014 to November 30, 2014. A similar application was made by the petitioner company by its letter dated December 2, 2014 for the period of December 1, 2014 to March 31, 2015. These applications of the petitioner company have not been responded to by the respondent No.1. As a result, the petitioner company is being forced to clear the goods manufactured by it on final assessment basis without taking into account the trade discounts made available by it to its customers, thereby ending up paying excess central excise duty than what is actually payable under the 1944 Act. 14. Appearing on behalf of the department, Ld. Counsel submitted that the requirements of Rule 7 of the 2002 Rules are not satisfied in the instant case and, as such, the petitioners cannot claim clearance of the goods on the basis of provisional assessment. He further submitted that the writ petitioners have approached this court one year after the department filed appeal against the order of the Commissioner and, such delay disentitles the writ petitioners to any relief. Ld. Counsel finally submitted that if the writ application is allowed, the department's appeal against the Commissioner's order permitting clearance of goods on the basis of provisional assessment, would be rendered infructuous. 24. I am also impelled to observe that the ground on which the Deputy Commissioner of Central Excise turned down the petitioner's request for provisional assessment is not acceptable in law. The ground for refusal was as follows : "In the instance case resorting to provisional assessment may lead to a lot of paper work and impose various statutory obligations on the assessee/department. In practice, it is seen that, it is very difficult for the assessee to comply with them leading to protracted litigations. 25. The aforesaid ground is misconceived. The deputy Commissioner did not address the proper issues. As such, in my opinion the Commissioner rightly allowed the appeal against the order of the Deputy Commissioner. 26. In view of the aforesaid this writ petition succeeds. There will be an order in terms of prayer (a) of the writ petition. 27. The writ petition is accordingly disposed of without, however, any order as to costs." 11. The judgment of the Calcutta High Court was challenged before the Division Bench and vide judgment reported in

2016 (331) E.L.T. 73 (Cal.) , the learned Division Bench has relegated the matter to the Deputy Commissioner by holding as under :- 8. Accordingly, Deputy Commissioner of Central Excise and Service Tax, Durgapur, the proforma respondent No. 3 is directed to dispose of the application for provisional assessment filed in terms of Rule 7 of the Rules within four weeks from the date of presentation of a copy of the certified copy of this order by passing a reasoned order in accordance with law, to be communicated to the parties after giving an opportunity of hearing. At the time of hearing, the parties are at liberty to rely on judgments and orders in support of their contentions and the Deputy Commissioner in his reasoned order shall deal with the same. 9. it is made clear that pendency of the applications for provisional assessment shall not prevent the CESTAT to proceed with the appeal and the appeal may be disposed of preferably within a period of eight week from the date of presentation of the copy of the certified copy of this order without being influenced by any of the observations made in this order or passed by the learned Single Judge. 12. The learned senior counsel has relied upon the judgment reported in Union of India & Ors. v. Bombay Tyres International (P) LTD.; (2005) 3 SCC 787 which reads as under :- "3. As a result of further arguments in regard to certain specific matters on which our judgment dated 7.10.1983 was not specific we pass the following : (1) Trade discounts.- Discounts allowed in the trade (by whatever name such discount is described) should be allowed to be deducted from the sale price having regard to the nature of the goods, if established under agreements or under terms of sale or by established practise, the allowance and the nature of the discount being known at or prior to the removal of the goods. Such trade discounts shall not be disallowed only because they are not payable at the time of each invoice or deducted from the invoice price. (2) Taxes.- Additional sales tax, surcharge on sales tax and turnover tax should be allowed to be deducted from the sale price in order to arrive at the assessable value, and also octroi where payable/paid by the manufacturer. These taxes if proved to have been paid, should be allowed even if they are paid periodically to the relevant taxing authorities in accordance with the relevant provisions of taxing statutes/rules. (3) It is clarified that the cost of insurance mentioned in the judgment as part of the cost of transportation which is to be included as a deduction is the transit transport insurance covering transportation of the goods from the factory gate to the place or places of delivery. (4) Where a company has more than one factory located at different places and the prices at the depots is the same irrespective of the lack of identification of the goods from a particular factory of production, the deductions as set out in this judgment and as explained in this order shall be computed and allowed on the basis of such price." (5) This order shall be by way of clarification of the judgment delivered on 7.10.1983. (6) The matters shall also be listed on 18.11.1983 and shall be heard in the Court at 2 p.m." He has further relied upon the judgment delivered in Government of India and Others v. Madras Rubber Factory LTD. & Ors; (1995) 4 SCC 349 which reads as under : 48. The assessee's case in this behalf is this : this is a discount granted to all dealers operating under Recurring Credit Scheme (RCS) with effect from April 1, 1980.

The discount is being given on a halfyearly basis depending upon the volume of purchases made by each such dealer. Out of the total Madras Rubber Factory dealers, about eighty percent are said to be RCS dealers and out of the total sales effected by the Madras Rubber Factory, over sixty percent sales are made by these RCS dealers (as per the figures relating to the year 1981-82). The discount is being granted by issuing credit notes to dealers and though the said discount is not shown on the face of each invoice, it is known to all the Madras Rubber Factory dealers. The discount cannot indeed be shown in the invoice for the simple reason that the discount is known only at the end of the half year. 49. The Assistant Collector allowed the said claim on the finding that this discount is given with a view to encourage the turn over of the sales and that having regard to the objects underlying the Recurring Credit Scheme, this deduction is liable to be allowed. He found that in the ultimate analysis the dealer pays one percent less than the catalogue price and that the said claim is also consistent with the clarificatory order of this court in *Bombay Tyre International*. 50. The learned Additional Solicitor General, however, contended that this discount, not being known or paid at the time of removal/sale, cannot be allowed. 51. In the light of the findings recorded by the Assistant Collector, it must be held that this is a discount which is known and understood at the time of removal of the goods though it is quantified later. The Assistant Collector has also recorded a finding, "I also find that such system of grant of discount is not uncommon in the trade". Keeping in view the clarificatory Order of this Court in *Bombay Tyre International*, this claim must be held to have been rightly allowed by the Assistant Collector.

Year Ending Discount and Prompt Payment Discount : 52. What is called "Year-ending discount" is really a bonus given by Madras Rubber Factory to its dealers @ Rupees fifty per tyre in respect of a particular type of tyres. This discount is payable only where the payments are actually received within forty five days from the date of the invoice. Under this scheme, it appears that a declaration is to be received dealer-wise and thereafter provision is to be made at the head office of MRF for the bonus. The Assistant Collector has found that this discount was allowed by the assessee not out of any extracommercial considerations but that they were meant only to boost the sales particularly in the year 1981-82 in respect of Leader Tyre in order to achieve the target of sales for that year. He has recorded a finding that "such a system of grant of discount is prevalent in normal trade practise and the only difference may be that MRF limited have granted the discount only at the end of the year and not at the time of actual sales". The learned Additional Solicitor General disputed the correctness of the basis on which the Assistant Collector has allowed this deduction. He commended for our acceptance the reasoning in Para 13(ii) of the judgment dated December 20, 1986 (*Assistant Collector of Central Excise v. Madras Rubber Factory*.) The reasoning in the said order runs thus : "The allowance of the discount is not known at or prior to the removal of the goods. The calculations are made at the end of the year and the Bonus at the said rate is granted only to a particular class of Dealers. This is computed after taking stock of the accounts between MRF and its dealers. It is not in the nature of a discount but is in the

nature of a Bonus or an incentive much after the invoice is raised and the removal of the goods is complete. In the circumstances, we are of the opinion that MRF is not entitled to deduction under this head." 53. We are, however, of the respectful opinion that the said reasoning cannot be accepted in view of the clear finding recorded by the Assistant Collector that this system of discount is prevalent in the industry and is known and understood at the time of removal of particular goods, though the amount is quantified later. In view of the said finding and in the light of the clarificatory Order in *Bombay Tyre International*, we hold that this claim has been rightly allowed by the Assistant Collector. 54. So far as the prompt payment discount is concerned, it is payable under a scheme called "prompt payment discount scheme" which is applicable only to up-country non-RCS dealers (except, of course, the government and DGS&D accounts). The discount is @ 0.75% on the total value of the invoice including sales tax, surcharge etc. provided the bill is cleared/paid within 26 days from the date of invoice. The case of the *Union of India* is that this discount is limited only to certain varieties of products as explained in the scheme document and is valid only for a limited period. The Assistant Collector, however, dealt with this discount along with the year ending discount and allowed it on the same reasoning as is applicable to the year ending discount." He further relied upon the judgment delivered in *Purolator India Limited v. Commissioner of Central Excise, Delhi-III*; (2015) 10 SCC 715 which reads as under :- "15. Post-1973, this Court has in two of its decisions, namely, in *Union of India v. Bombay Tyres International (P) Ltd.* clearly held as follows : (SCC p. 788, para 3) "(1) Trade discounts-Discounts allowed in the Trade (by whatever name such discount is described) should be allowed to be deducted from the sale price having regard to the nature of the goods, if established under agreements or under terms of sale or by established practise, the allowance and the nature of the discount being known at or prior to the removal of the goods. Such trade discounts shall not be disallowed only because they are not payable at the time of each invoice or deducted from the invoice price." 16. In the second judgment in *Union of India v. Madras Rubber Factory Ltd.* what has been held is as follows : (SCC pp. 385-86, paras 52-55) "Year ending discount and prompt payment discounts 52. what is called "Year ending discount" is really a bonus given by Madras Rubber Factory to its dealers @ Rupees fifty per tyre in respect of a particular type of tyre. This discount is payable only where the payments are actually received within forty-five days from the date of the invoice. Under this scheme, it appears that a declaration is to be received dealer-wise and thereafter provision is to be made at the head office of MRF for the bonus. The Assistant Collector has found that this discount was allowed by the assessee not out of any extracommercial considerations but that they were meant only to boost the sales particularly in the year 1981- 1982 in respect of Leader Tyre in order to achieve the target of sales for that year. He has recorded a finding that "such a system of grant of discount is prevalent in normal trade practise and the only difference may be that MRF Ltd. have granted the discount only at the end of the year and not at the time of actual sales". The learned Additional Solicitor General disputed the

correctness of the basis on which the Assistant Collector has allowed this deduction. He commended for our acceptance the reasoning in para 13(ii) of the judgment dated 20-12-1986 (CCE v. Madras Rubber Factory Ltd.) The reasoning in the said order runs thus : (SCC pp. 761- 62) 13. (ii)...The allowance of the discount is not known at or prior to the removal of the goods. The calculations are made at the end of the year and the bonus at the said rate is granted only to a particular class of dealers. This is computed after taking stock of the accounts between MRF and its dealers. It is not in the nature of a discount but is in the nature of a bonus or an incentive much after the invoice is raised and the removal of the goods is complete. In the circumstances, we are of the opinion that MRF is not entitled to deduction under this head." 53. We are, however, of the respectful opinion that the said reasoning cannot be accepted in view of the clear finding recorded by the Assistant Collector that this system of discount is prevalent in the industry and is known and understood at the time of removal of particular goods, though the amount is quantified later. In view of the said finding and in the light of the clarificatory order in Bombay Tyres International, we hold that this claim has been rightly allowed by the Assistant Collector. 54. So far as the prompt payment discount is concerned, it is payable under a scheme called "prompt payment discount scheme" which is applicable only to up-country non-RCS dealers (except, of course, the Government and DGS & D accounts). The discount is @ 0.75% on the total value of the invoice including sales tax, surcharge, etc. provided the bill is cleared/paid within 26 days from the date of invoice. The case of the Union of India is that this discount is limited only to certain varieties of products as explained in the scheme document and is valid only for a limited period. The Assistant Collector, however, dealt with this discount along with the year ending discount and allowed it on the same reasoning as is applicable to the year ending discount. 55. In view of the findings recorded by the Assistant Collector and the clarificatory order in Bombay Tyres International this claim too must be held to have been rightly allowed by the Assistant Collector." 17. The only question that falls for our determination is whether Section 4 as amended in the year 2000 makes no change to the aforesaid position? 13. On the strength of these judgments, the learned senior counsel submits that the position of law is clear and the petitioners are entitled to get the provisional assessment done by the respondents in pursuance of the application submitted by them. It is further contended that the respondents vide notification No. F.No. 354/81/2000-TRU dated 30.6.2010 has also allowed to undertake the provisional assessment. Learned counsel has also relied upon the aforesaid notification which reads as under :- "9. As regards discounts, the definition of transaction value does not make any direct reference. In fact, it is not needed by virtue of the fact that the duty is chargeable on the net price paid or payable. Thus if in any transaction a discount is allowed on declared price of any goods and actually passed on the buyer of goods as per common practise, the question of including the amount of discount in the transaction value does not arise. Discount of any type or description given on any normal price payable for any transaction will, therefore, not form part of the transaction value for the

goods, eg.. quantity discount for goods purchased or cash discount for the prompt payment etc., will therefore not form part of the transaction value. What is important is that it must be established that the discount of a given transaction has actually been passed on to the buyer of the goods. The differential discounts extended as per commercial considerations on different transactions to unrelated buyers if extended can not be objected to and different actual prices paid or payable on various transactions are to be accepted for working assessable value. Where the assessee claims that the discount of any description for transaction is not readily known but would be known only subsequently-as for example, year end discount-the assessment for such transactions may be made on a provisional basis. However, the assessee has to disclose the intention of allowing such discount to the department and make a request for provisional assessment." 14. Learned counsel further submits that the circular of the department is binding on the respondent authorities. To buttress his arguments he has also relied upon the judgment delivered in CIT Kochi v. Trans Asian Shipping Services Private Ltd. delivered in (2016) 8 SCC 604. 15. In view of the judgments and notification, the learned senior counsel submits that the petitioner company is entitled for provisional assessment to be permitted by the respondent department and whatever be final outcome of the final assessment, they are ready and willing to deposit the differential duty along with interest as demanded by the respondent department. He submits that in case the duty is paid in excess, the same will be refunded to the petitioner company or adjusted in the future demands and therefore, there will be no loss of revenue or the revenue will not be at any disadvantageous position. In this view of the matter, the rejection of the demand for the provisional assessment by totally non-speaking and unreasoned order is absolutely arbitrary and illegal. 16. The learned counsel further submits that since the facts are admitted by the revenue and only a pure question of law is involved, therefore, alternative remedy should not come in his way and the matter should be decided on merit. He further submits that it is a settled position of law that alternative remedy is not a bar to entertain the writ petition where a pure question of law is involved and the facts are admitted. For the purpose, he relies upon the judgment delivered in Executive Engineer, Southern Electricity Supply Company of Orissa Limited (Southco) & Anr. v. Sri Seetaram Rice Mill : (2012) 2 SCC 108 which reads as under :- 79. It may be noticed that admittedly the present respondent has not preferred any appeal against the provisional order of assessment dated 25.7.2009 and, in fact, had preferred a writ petition against the very issuance of a notice issued in terms of subsections (2) and (3) of Section 126 of the 2003 Act. This brings us to the question as to what is the scope of jurisdiction under Article 226 of the Constitution of India in the face of the provisions of Section 127 of the 2003 Act. 80. It is a settled canon of law that the High Court would not normally interfere in exercise of its jurisdiction under Article 226 of the Constitution of India where statutory alternative remedy is available. It is equally settled that this canon of law is not free of exceptions. The courts, including this Court, have taken the view that the statutory remedy, if provided under a

specific law, would impliedly oust the jurisdiction of the civil courts. The High Court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India can entertain writ or appropriate proceedings despite availability of an alternative remedy. This jurisdiction, the High Court would exercise with some circumspection in exceptional cases, particularly, where the cases involve a pure question of law or vires of an Act are challenged. This class of cases we are mentioning by way of illustration and should not be understood to be an exhaustive exposition of law which, in our opinion, is neither practical nor possible to state with precision. The availability of alternative statutory or other remedy by itself may not operate as an absolute bar for exercise of jurisdiction by the courts. It will normally depend upon the facts and circumstances of a given case. The further question that would inevitably come up for consideration before the Court even in such cases would be as to what extent the jurisdiction has to be exercised. 81. Should the courts determine on merits of the case or should they preferably answer the preliminary issue or jurisdictional issue arising in the facts of the case and remit the matter for consideration on merits by the competent authority? Again, it is somewhat difficult to state with absolute clarity any principle governing such exercise of jurisdiction. It always will depend upon the facts of a given case. We are of the considered view that interest of administration of justice shall be better subserved if the cases of the present kind are heard by the courts only where they involve primary questions of jurisdiction or the matters which go to the very root of jurisdiction and where the authorities have acted beyond the provisions of the Act. However, it should only be for the specialised tribunal or the appellate authorities to examine the merits of assessment or even the factual matrix of the case. 82. It is argued and to some extent correctly that the High Court should not decline to exercise its jurisdiction merely for the reason that there is a statutory alternative remedy available even when the case falls in the above-stated class of cases. It is a settled principle that the courts/tribunal will not exercise jurisdiction in futility. The law will not itself attempt to do an act which would be vain, *lex nil frustra facit*, nor to enforce one which would be frivolous - *lex neminem cogit ad vana seu inutilia* - the law will not force anyone to do a thing vain and fruitless. In other words, if exercise of jurisdiction by the tribunal *ex facie* appears to be an exercise of jurisdiction in futility for any of the stated reasons, then it will be permissible for the High Court to interfere in exercise of its jurisdiction. This issue is no longer *res integra* and has been settled by a catena of judgments of this court, which we find entirely unnecessary to refer to in detail. Suffice it to make a reference to the judgment of this Court in *Whirlpool Corpn. v. Registrar of Trade Marks* where this Court was concerned with the powers of the Registrar of Trade Marks and the Tribunal under Trade and Merchandise Marks Act, 1958 and exercise of jurisdiction by the High Court in the face of availability of a remedy under the Act." 17. He further relied upon the judgment delivered in *Union of India & Anr. v. State of Haryana & Anr.*; (2000) 10 SCC 482 which reads as under :- "3. Having heard learned counsel for the parties at length, we are of the view that these are the matter which should not

have been dismissed by the respective High Courts in suggesting an alternative remedy. The question raised was pristinely legal which required determination as to whether provision of telephone connections and instruments amounted to sale and even so why was the Union of India not exempt from payment of sales tax under the respective statutes. The respondents counter such stance. We think the question raised was fundamental in character and need not have been put through the mill of statutory appeals in the hierarchy. For this reason alone, we set aside the respective impugned orders of the High Courts and remit the writ petitions back to them for decision in accordance with law. The recovery of tax would stand stayed till the disposal of the writ petitions. Ordered accordingly. 18. It is true that for maintainability of a writ petition alternative remedy is not a bar but when to invoke the extra ordinary jurisdiction under Article 226 of the Constitution will depend on the facts of each case. The fundamental principles which have been pronounced by the Hon"ble Supreme Court from time to time and taking into consideration the facts and circumstances of this particular case, we are not inclined to invoke the discretion more particularly when the order impugned is a well reasoned order dealing with the entire aspects argued before it by the petitioner company. 19. That on the same subject the appeals before the commissioner (Appeals) arising out of the order of review are pending consideration for the assessment year 2015-2016 and the petitioner company is also contesting the same. Therefore, any decision on merits by this court will render the appeals pending before the Commissioner Appeals otiose and of no consequence. 20. In some what similar situation, the Hon"ble Supreme Court in the case reported in AIR 2016 SC 4995 Satya Pal Anand v. State of M.P. & Ors. has held as under; "In exercise of writ jurisdiction, the High Court cannot be oblivious to the conduct of the party invoking that remedy. The fact that the party may have several remedies for the same cause of action, he must elect his remedy and cannot be permitted to indulge in multiplicity of actions. The Page 26 exercise of discretion to issue a writ is a matter of granting equitable relief. It is a remedy in equity. In the present case, the High Court declined to interfere at the instance of the appellant having noticed the above clinching facts. No fault can be found with the approach of the High Court in refusing to exercise its writ jurisdiction because of the conduct of the appellant in pursuing multiple proceedings for the same relief and also because the appellant had an alternative and efficacious statutory remedy to which he has already resorted to. This view of the High Court has found favour with Justice Dipak Misra. We respectfully agree with that view." 21. In RLW 2016 (1) Raj. 671 (Balotra Water Pollution Control & Research Foundation Trust (BWPCRT) v. State of Rajasthan & Ors.) a Division Bench held as under :- "On enforcement of the Constitution on January 26, 1950, the citizens of our country received a strong shield of fundamental and constitutional rights - the rights personal as well as collective. Part-III of the Constitution, that covers the fundamental rights, ensures right to equality, right to freedom, right against exportation, right to freedom of religion and cultural and educational rights. Some of the rights given are attached to each and every "person" irrespective of their citizenship. The other parts of the Constitution

confers several constitutional rights to the citizens of India. All these rights would have been of no meaning, if adequate safeguard would have not been given to enforce and protect such rights. Under Article 32 of the Constitution of India, remedy to ensure and protect fundamental rights is given as a fundamental right, but a very broad discretion is given to High Courts under Article 226 of the Constitution of India to issue prerogative writs, orders and directions within their territorial jurisdiction to ensure enforcement, extension and protection of the fundamental, constitutional and other legal rights of the subjects. The remedy given under Article 226 being discretionary is subject to several checks. The checks mostly are self-imposed and as a rule of policy with a view that extraordinary remedy should always be exercised in extraordinary circumstances only. The remedy given must not be treated at par or alike other statutory remedies. A prominent self-imposed restriction in exercise the discretion given under Article 226 of the Constitution is the principle of exhausting all other statutory remedies before approaching writ court. It is a rule of convenience and discretion and does not oust the jurisdiction of a writ court, but indicates a caution in exercising extraordinary constitutional authority. The deviation from this principle is permissible if the relief is sought with well founded allegation of violation of fundamental rights, if the right has been or being threatened to be infringed by a law which itself is ultra-vires, if there is a complete lack of jurisdiction in the officer or the authority issuing impugned order or action, if there is flagrant violation of principles of natural justice, if the 08-03- 2017 prevention of public injury and vindication of public justice requires the extraordinary recourse and if the court is satisfied that the remedy available is not efficacious enough to protect the injury caused or may be caused. This principle applies with more vigour, if a party is seeking a writ in the nature of certiorari to get an order passed by judicial or quasi judicial authority set aside. Hon"ble Supreme Court while dealing with this aspect of the doctrine of exhausting all other remedies before approaching writ court in the case of State of U.P. v. Mohammad Nooh, reported in AIR 1958 SC 86, held as under :- "11. On the authorities referred to above it appears to us that there may conceivably be cases-and the instant case is in point-where the error, irregularity or illegality touching jurisdiction or procedure committed by an inferior court or tribunal of first instance is so patent and loudly obtrusive that it leaves on its decision an indelible stamp of infirmity or vice which cannot be obliterated or cured on appeal or revision. If an inferior court or tribunal of first instance acts wholly without jurisdiction or patently in excess of jurisdiction or manifestly conducts the proceedings before it in a manner which is contrary to the rules of natural justice and all accepted rules of procedure and which offends the superior court's sense of fair play the superior court may, we think, quite properly exercise its power to issue the prerogative writ of certiorari to correct the error of the court or tribunal of first instance, even if an appeal to another inferior court or tribunal was available and recourse was not had to it or if recourse was had to it confirmed what ex facie was a nullity for reasons aforementioned. This would be so all the more if the tribunals holding the original trial and the tribunals

hearing the appeal or revision were merely departmental tribunals composed of persons belonging to the departmental hierarchy without adequate legal training and background and whose glaring lapses occasionally come to our notice. The superior court will ordinarily decline to interfere by issuing certiorari and all we say is that in a proper case of the kind mentioned above it has the power to do so and may and should exercise it." The law laid down by Hon"ble the Apex Court in *State of U.P. v. Mohammad Nooh* (supra) still holds the field and in view of the law laid down a writ in the nature of certiorari can be issued even if a remedy of appeal/revision is available on arriving at a conclusion that an inferior court or Tribunal of first instance has committed an error so patent that may not be cured or obliterated by adopting the other statutory remedy. The doctrine of availability of alternative remedy may also be ignored, if the inferior court or Tribunal of first instance acts wholly without jurisdiction or patently in excess of jurisdiction or manifestly conducts the proceedings of a writ in the manner that is contrary to the rules of natural justice." 22. Therefore, we are of the view that rule of exhausting the statutory remedy is a self imposed limitation, a rule of policy and the discretion rather than a rule of law. A writ court in exceptional cases can issue a writ notwithstanding the fact that the statutory remedy has not been exhausted. However, the rule of policy relating to availability of alternative remedy can be ignored in the exceptional case only. The exceptional circumstances differ from case to case and facts to facts. In general, it can be said that if there is a complete lack of jurisdiction in the officer or the authority to pass the impugned order, if the order impugned is passed in flagrant violation of principle of natural justice, if the order under challenge is absolutely non-speaking and unreasoned and not effective challenge to that can be given by availing remedy of appeal, the violation of fundamental rights is apparent and availing of alternative remedy, statutory remedy shall be nothing but an empty formality. A writ court can issue a writ, order or direction by ignoring the statutory remedy. Since none of the conditions mentioned above exist in the present case and there is an equally efficacious alternative and statutory remedy of appeal under Section 35 of the Central Excise Act available to the petitioner, we are not persuaded to exercise the jurisdiction under Article 226 of the Constitution of India in this case. Hence, the same is dismissed. No order as to costs. Writ petition dismissed - No order as to costs.