

**(1974) 09 CAL CK 0007**  
**In the Calcutta High Court**  
**Case No : Matter No. 247/73**

|                                                   |            |
|---------------------------------------------------|------------|
| Krishna Lal, Thirani and Company Ltd. and Another | APPELLANT  |
| Vs                                                |            |
| Collector of Central Excise and Others            | RESPONDENT |

---

**Date of Decision :** 27-09-1974

**Acts Referred:**

Central Excise Rules, 1944 — Rule 11, 173B, 173B(2), 173C, 173C(2)  
Companies Act, 1956 — Section 294(2)  
Contract Act, 1872 — Section 72  
Finance Act, 1971 — Section 4, 4(a)  
Sea Customs Act, 1878 — Section 30

**Citation :** (1978) 2 ELT 568

**Hon'ble Judges :** S. A. Masud, J

**Bench :** Single Bench

**Final Decision :** Dismissed

---

## Judgement

S. A. Masud, J.—In this writ petition the petitioner company has challenged the validity of orders of assessment for each year commencing from 1971 till March 1973 purported to have been made under the Central Excises and Salt Act 1944. The petitioner has also prayed for an appropriate writ directing the respondents to refund a sum of Rs. 5,90,362/- which according to the petitioner is the Excise duty demanded and received by the respondents for the period between May 29, 1971 to March 15, 1973. The facts of the case according to the petitioner may briefly be stated as follows : ?

\* \* \* \*

2. The petitioner company manufactures and sells coated abrasives and grinding wheels. It organises sale and its articles from its Head Office at Calcutta as also from its branch offices at Delhi and Madras. The petitioners products are sold to distributors and/or dealers to whom a trade discount of 41.24% and 22.5% were allowed in respect of the said coated abrasives and grinding wheels respectively. The petitioner also sells its products directly to consumers and such sales

comprise 68% of its products. It also stated in the petition that approximately 38% of such manufactured goods were sold to the wholesale dealers of distributors. For the first time the said coated abrasives and grinding wheels were made excisable goods by adding as Item No. 51 by Notification issued on May 29, 1971 within the purview of Central Excises and Salt Act, 1944. By the said Notification 10% ad valorem excise duty on the said two categories of goods was levied under the Finance Act of 1971 in as much as the said goods were manufactured with the aid of power. Since the introduction of the levy of excise duty the excise department has been levying and collecting the said duty on the gross price of the manufactured goods pending final assessment. On December 16, 1971 the Assistant Collector of Excise assessed the petitioner's products for the levy of the excise duty in the following way :?

(a) abrasive sheets item gross price less 12% trade discount less 3% cash discount u/s 4(a) of the said Excise Act.

(b) grinding wheels and other bonded products gross price list less 12% trade discount under the said Section 4(a).

The aforesaid order of the Assistant Collector was varied by the Superintendent of Central Excise who made his own assessment on the value of the said goods as under :

(a) Abrasive sheet Item gross price less 12% trade discount with no provision for cash discount.

(b) Grinding wheels and other bonded products gross price list less 5% trade discount only.

3. Since October 1971 the petitioner under the Self Removal Scheme has been submitting to the Excise Officers for their approval a list of articles in the approved form under Rule 173B of the Central Excise Rules, 1944 and also has been filing such forms for the approval of the price lists in accordance with Rule 173C of the said Rules. The assessment under the Self Removal Procedure is made on the basis of the petitioners statement in form R.T. 12 which represents the monthly assessment memorandum in respect of clearance of the manufactured goods. According to the petitioner from 29th May, 1971 till now the respondents have been levying and determining the excise duty on the basis of the manufacturing costs, manufacturing profits and also costs of post-manufacturing operations and selling profits after allowing the rate of trade discount. According to the petitioners they discovered the mistake that the excise duty cannot be leviable on costs of post manufacturing operations and selling profits. This error of law came to the petitioner's knowledge in December 1972 when the Supreme Court delivered the judgment in A.K. Roy and Another Vs. Voltas Limited, hereinafter described as the Voltas case. On March 23, 1973 the petitioner asked the respondents to exclude the costs of post-manufacturing operations and selling profits from the assessable value of the petitioner's goods for the purpose of levying of excise duty u/s 4 of the said Excise Act. In this

letter the petitioner also demanded justice for the determination of the wholesale cash price u/s 4 of the said Excise Act. The petitioner filed this application on April 3, 1973.

4. On the question of applicability of the principles laid down in the said Supreme Court decision in *A. K. Roy v Voltas Limited* (Supra) to the facts of the petitioners case in three other matters that is *Messrs Electric Lamp Manufacturers (India) Ltd. v Collector of Central Excise, Calcutta and Orissa and Ors.* 1978 ELT (84) and also *Dunlop (India) Ltd. v Collector of Central Excise, West Bengal and Ors.* (Matter No. 117 of 1973) and *East Anglia Plastics Ltd.. v. Collector of Central Excise* (Matter No. 158 of 1973) I have delivered three judgments to day where after discussing the legal affects of Section 4 of the said Excise Act and Rules framed thereunder in the light of the Principles of law laid down in the said Supreme Court decision and other decisions of the Judicial Committee and the High Court I discharged the Rules subject to some directions. The counsel for the petitioner in the instant case has adopted the argument made on behalf of the petitioner manufacturer in these cases but have added that the facts of this case are distinguishable from the facts in the other three matters. He has also made some additional submissions on the impugned orders of assessment. It is not necessary to reiterate the views which I have already expressed by me in the said three judgments.

5. Mr. Saraf counsel for the petitioner has submitted that similar to the facts in the Voltas case the petitioner company was selling to wholesale dealers and also directly to retail customers but by mistake in the price list which had to be submitted by his client under the statutory Rules his client included the cost of post-manufacturing operations and selling profits. The respondents have levied duty u/s 4(a) of the said Excises Act on the value of the manufactured goods which should exclude those post-manufacturing costs and profits. Accordingly his client paid an excess duty of the said sum of Rs. 5,90,362/-. As there is error on the face of the records of the said orders of assessment the orders of assessment should be quashed and the respondents should be directed to pay the refund. Further he has also argued that although the Assistant Collector of Excise allowed him higher rate of discount to be deducted from the wholesale cash price the subordinate officer being the said Superintendent of Excise reduced the rate of discount arbitrarily. Further as the Excise duty was levied on the selling costs and selling profits the Central Government is demanding the Excise duty on sales and as such the statutory Rules 173B and 173C are ultra vires of the legislative lists in the Constitution.

6. Lastly Mr. Saraf has claimed a refund of Rs. 5,90,362/- as excess Excise duty paid for the period between May 29, 1971 and March 1973. According to him the excise duty was levied from his client with effect from May 19, 1971 on the basis of the statements made by the petitioner under the directions of the Excise Officers. Although the Self Removal Scheme was effective the petitioner for the first time submitted their statements according to the statutory form on

September 30, 1972. He has referred me to the Annexure to the Counter Affidavit filed in his proceeding where the figures under column 3 and 5 include post-manufacturing costs and profits. The petitioner company both prior to and after the introduction of the self Removal Scheme has been filing statements regarding the wholesale cash price which include the manufacturing costs, manufacturing profits, selling cost and selling profits under the common mistaken belief that the wholesale cash price includes selling costs and selling profits. The mistake has been discovered for the first time in December 1972 and the petitioner has therefore filed this application for claiming refund u/s 72 of the Indian Contract Act. Relying upon Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf, he had submitted that the excess amount paid under common mistake of law should be refunded by the respondents inasmuch as the determination of the wholesale cash price for the relevant period has been made contrary to and in violation of Section 4 of the said Excises Act as construed by the Supreme Court in the Voltas case.

7. Mr. T.K. Bose with the learned Advocate General for the respondents has submitted that the principles laid down in the Voltas case have no application to the facts of the present case. According to him in this case the petitioner has already made an application for refund of the alleged excess duty paid by the petitioner. He has suggested that this Rule can be disposed of with a direction that the Excise Officers will decide the petitioner's application for refund in accordance with law.

8. As stated earlier in my judgments delivered in three matters set out earlier I have made the following inter alia decisions :?

(1) The Excise Officers have jurisdiction to levy duty on the wholesale cash price of the products of the manufacturing company and as such the said officers right to assess the excise duty u/s 4(a) of the said Excise Act cannot be on the ground that the orders are vitiated by lack of inherent jurisdiction. Thus the impugned orders of assessment cannot be held to be nullities.

(2) The assessee have submitted statements showing correct value of its manufactured goods in accordance with the statutory forms and also forms prescribed by the Collector, Central Excise under the Central Excise Rules, 1944; but assessee have not shown the break up of the value of the assessable goods by including manufacturing costs and manufacturing profits and by excluding costs and profits of post manufacturing operations such as selling cost and selling profits. The Excise Officers have allowed the clearance of goods on the basis of the assessee's own representation on payment of excise duty under the Physical Control Scheme or the adjustment of the excise duty against its current account under Chapter VII-A under the Self Removal Scheme. The Excise Officers passed their final orders of assessment and collected the excise duty in exercise of their jurisdiction to assess the excise duty u/s 4 of the said Excise Act. The statements on the value of the manufactured products had been declared by the assessee to be correct on which the duty was to be assessed. The assessee had

special knowledge about the manufacturing costs and manufacturing profits in respect of its own products. The assessee company had in fact also determined the leviable duty under Rule 173B(2) and Rule 173F. The assessee was allowed to remove their products from the place of manufacture on payment of the duty determined by the assessee itself. Thus it cannot be said that the Excise Officers did not approve the price list submitted by the assessee in accordance with the Rule 173C(2). Assuming the petitioners case for payment of excess duty is correct the excise officers in exercise of their jurisdiction have only made errors of facts and not errors of law. Thus the excise officers cannot be said to have committed a perverse conclusion of facts against the assessee. The assessee's contention to the effect that the excise officers acted in excess of their jurisdiction cannot be sustained in law.

(3) The assessee's submission that the Excise Officers have committed an error of law in assessing duty by including in the wholesale cash price the selling profits is not also warranted in law. The principles of law laid down in the *Voltas* case are only the confirmations of the principles of law laid down as early as 1932 when the Judicial Committee held that u/s 30 A of the Sea Customs Act 1878 which are substantially analogous to Section 4(a) of the said Excises Act post-importation expenses should not be included in determination of customs duty. Further, there is no question of any error of law inasmuch as Section 4 of the said Excises Act was enforced since 1944 and it was the assessee's duty to make out a case before the Excise Officers that the Excise duty should only be leviable on manufacturing cost and manufacturing profits. It was not unnatural or unreasonable for the Excise Officers to accept the Value of the manufactured goods and the leviable duty suggested by the assessee on the belief that such price did not include post-manufacturing costs and profits of the manufacturing company. The Excise Officers, in these circumstances cannot be said to have committed any error of law also. The petitioners contention that the value shown in their statements and the leviable excise duty suggested by them were made under a mistake of law on the part of the assessee should first be examined by the Excise Officers before the calculations are accepted by this court.

(4) The writ court exercises discretionary jurisdiction and it would only exercise its judicial discretion in favour of or against the assessee according to the facts and circumstances of each case. The Excise duty being an indirect tax leviable on the manufactured goods and to be collected from the manufacturers the assessee ordinarily is entitled to get a refund of any excise duty collected by the respondents in excess of their jurisdiction. But admittedly under Explanation to Section 4, the assessee in determining the wholesale cash price on which the impugned orders of assessment were made always excluded the rate of discount and the payment of duty payable at the time of the removal of the manufactured products from the place of manufacture. Thus the refund of the alleged excess duty has been already collected from the assessee's wholesale purchases or retailers. As the assessee company having already realised such excess duty from their purchasers such amount cannot be reimbursed by the Excise

department on the simple reasons that the assessee has not suffered any loss and the assessee cannot be allowed to be doubly reimbursed. This unjust enrichment by allowing refund cannot be justified in the discretionary writ jurisdiction of this Court.

(5) Section 40(2) of the said Excises Act debars the petitioner to challenge the impugned orders of assessment made by the Excise Officers in good faith.

9. Mr. Saraf however has submitted that in any event the petitioners Claim for refund as prayed for in the present petition cannot be barred in the facts of his clients case. It appears from the petition that the petitioner has challenged the orders of assessment dated 16-12-71, 28-4-72 and 27-6-72. For the reasons stated in my said three judgments I have held that the impugned orders of assessment cannot be said to be nullities. It is also the common case that no appeal or revision has been made against the said impugned orders before the statutory form under the said Excises Act but at the same time it appears that every assessee is entitled to apply for refund of any excess sum paid under Rule 11 read with Rule 173 J. Mr. Bose has made a statement that an application for refund has been made by the petitioner in June, 1972. It also appears that in the letter dated December 27, 1972 the petitioner also has claimed for refund of the total sum paid by the petitioner since May 29, 1971 when for the first time the Excise duty is to be levied upon the product of the petitioner company. Further according to him Rule 11 read with Rule 173J on a proper construction means that application for refund should have to be made within one year from the date of payment or adjustment against the current account or the personal ledger Account of the petitioner under the Self Removal Scheme. This adjustment according to Mr, Bose has been made every month and as the petitioner has not made any application for refund within one month from such adjustment for the purpose of clearance of petitioners goods the petitioners application for refund is barred by the special period of limitation under the said Excise Rules. In my view this contention of Mr. Bose cannot be accepted. It appears from the record that the petitioner has submitted statement regarding price list in accordance with the statutory form for the period from 29-5-71 to 16-12-71. But the orders of assessment previously made were only provisional assessments. The first order of assessment was made by the Assistant Collector on December 16, 1971 in connection with the determination of wholesale cash price u/s 4. The second order of assessment for the same period was made by the Superintendent of Excise on April 28, 1972. But all the said orders have been merged by order of assessment passed by the Superintend on June 27, 1972, The petitioner has not only made an application for refund in June 1972 but also has claimed refund by the letter demanding justice on March 23, 1973 on the basis of a statement for 1972-72 (Annexure A to the petition). Thus the application for refund of excess duty can only be made after the final order of assessment Is made. The payment or the adjustment that was earlier made was done not under any final order of assessment and thus Mr. Sarafs contention must be accepted inasmuch as the petitioners claim for refund has been duly made within the special period of

limitation. The Rule Nisi was issued on April 3, 1973 when as interim injunction also was issued restraining the respondents from proceeding with the petitioner's case. I therefore hold that the respondents are directed to treat the two applications for refund on June 1972 and also the letter dated December 27, 1972 as application for refund which should be disposed in accordance with law.

10. There are some new facts in the instant case which distinguish the facts in the Voltas case. Admittedly the petitioner is selling about 68% of their total sale directly to the consumers and 38% to purchasers through the distributors. Mr. Saraf has submitted that the wholesale cash price excluding selling costs and selling profits should be the wholesale cash price on which the excise duty could only be levied u/s 4 of the said Excises Act. The Voltas case presupposes the sale between the principal independent manufacturer, seller and a principal independent purchaser. It appears from Annexure A to the petition that the agreements with said distributors do not show they are outright sales on the basis of the wholesale cash price. Mr. Saraf has submitted that the trade discount to the company's various distributors substantially vary on grounds of commercial expediency. Some of the material of the agreement read as follows :?

"This is further subject to ratification by shareholders of this company in their General meeting You are forbidden to canvass business from any other area controlled by our other agents....Prices will be charged as ruling at the time of the despatches....In case of price revision, debit or credit rates as the case may be will be issued on only stocks held by you as on the date of price revision trade price different...on supplies made to your Delhi office we shall draw our Bills through Bank of 75 days D/A basis for supplies made to your Branch Office. Bills will be drawn on the respective offices of 60 days D/A basis : our present delivery time if 12/14 weeks and orders should be placed well in advance for arranging timely deliveries."

"Direct supplies made by us to the Government department under the D.G.S.A.D. rate Contract will be outside the purview of this agreement."

11. The agreement of distributorship with Messrs. Crystal Company at New Delhi in July 1 (year not mentioned) and also similar agreement with Messrs. S.G. Trivedi of Bombay dated July 16, 1971 (Annexure A to the petition show clearly that the distributors are not buyers of the petitioner company but are only firms or companies which are controlled by the petitioner as their agents. Section 4(a) contemplates a sale where the ownership of the seller in the manufactured goods vest in the buyer. In this connection reference may be made to Section 294(2) of the Indian Companies Act where a contract between a company in connection with a sole selling agency agreement must be sanctioned by the General Body of the shareholders. The petitioner company has decided to enter into the sole selling agency agreement in different zones to their agents. No resolution has been placed before me or before the Excise Officers as to the decision of the Board of Directors or the meeting of the shareholders. Further the trade discount allowed under the said distribution agreement widely vary from distributor to

distributor and naturally the excise Department has on investigation of facts allowed only 12 $\frac{1}{2}$ % as the trade discount while deducting the same in determination of the wholesale cash price Assuming that 75% trade discount is allowed by a manufacturer the Excise department has got the power to modify or vary the genuineness of such transaction under Rule 173C(2). This allowance would be all findings of facts. Even assuming that the Excise Officers have acted arbitrarily in allowing trade discount to different distributors of the petitioner company, such errors are only errors of fact and the writ court should not interfere with such decision. The petitioner has legal remedy to prefer an appeal against such disallowance of stipulated trade discount but the petitioner did not choose to prefer an appeal which is provided under the Central Excises Act.

12. Further if the assessee's contention is correct that the Excise Officers have committed errors of law in not treating the distribution agreement as a normal sale transaction or in disallowing the stipulated trade discount petitioner has got the statutory remedy to prefer an appeal or revision against the orders of the Excise Officers. If the petitioner disables itself by not following the statutory remedy this writ court cannot grant it the relief inasmuch as such errors of law had not been made under any lack of jurisdiction. Reliance may be placed upon *A.V. Venkateswaran, Collector of Customs, Bombay Vs. Ramchand Sobhraj Wadhvani and Another*, .

13. The Excise department has also found that the petitioner company also manufactures artificial and synthetic resin falling under Item No. 15A of the First Schedule to the said Excise Act in its said factory on which the excise duty is leviable @ 40% ad valorem during the relevant period (para 5 of the counter Affidavit of Mr. Sen). In para 8 of the said counter Affidavit it is also stated that the petitioner company during the period from May, 1971 to July 1972 was under the charge of the Superintendent of Central Excise, Calcutta, V Division and from August 1972 under the charge of Central Excise, Calcutta, XI Division. In paragraphs 13B and 13C of the said Affidavit it is stated that the petitioner company submitted the price list to the Excise Department and they also assessed ad valorem in the said list for approval of the same. In fact they also submitted amended price list from time to time under Rule 173C(3) of the said Excise Rules. This approved price list do not show any manufacturing or post-manufacturing expenses. As stated earlier the petitioner also determined the leviable duty under Rule 173B(2) read with Rule 173C. The said price list has been declared and certified as correct by the petitioner . itself on January 21, 1973 (Annexure A). Further the periodical return of excisable goods has been submitted by the petitioner in form R.T. 12 of the said Excise Rules. The petitioner has also submitted various other prescribed forms and mentioned real value of its excisable goods u/s 4 of the said Excise Act. The Excise Officers on the basis of those figures have come to the findings of facts which cannot be disturbed by this writ court without a clear break up acceptable amount of manufacturing cost and manufacturing profits. Relying upon *Sri Hriday Narain v. Income Tax Officer*, AIR 1974 SC 33, Mr. Somnath Chatterjee learned counsel on

behalf of the petitioner has argued that a provision for an alternative remedy is no bar to move an application under article 226 of the Constitution. The facts of the said case are distinguishable from the facts of the present case. That was an application for rectification under the Income tax Act before a particular officer and as the said application was heard on merit by the High Court, the High Court did not think that the aggrieved party should be referred back to the same officer before whom the rectification should be made. In this particular case, under the Central Excise Act there is a provision for an appeal and also for revision to the Union Government. In the said Supreme Court decision the impugned order was not appealable at all. Reliance may also be placed upon *Sheo Nath Singh Vs. Appellate Assistant Commissioner of Income Tax, Calcutta*, where the Supreme Court has indicated that an application under Article 226 should not be heard on merit if at the time when the application is made there is alternative remedy available for the aggrieved party. Further as stated earlier the petitioners grievances if any can be redressed on the application for refund which is made under Rule 11 read with Rule 173J. Thus the present application of the petitioner is held to be premature and speculative. Reliance may be placed upon *Mahaluxmi Rice Mill Vs. Additional Commissioner of Commercial Taxes, West Bengal and Others*. Reliance may also be placed on the reasoning set out in three other judgments delivered by me today in matter No. 153 of 1973, Matter No. 111 of 1973 and Matter No. 158 of 1973 where Rules Nisi obtained by the petitioners on the interpretation of Section 4 of the Central Excises Act have been discharged by me.

14. For all the reasons stated above the Rule is discharged subject to the following directions that the respondents will deal with the applications for refund pending before the Excise Officers in accordance with law. The petitioners application for assessment of duty on which final order has not yet been passed is directed to be determined by the Excise Officers on the basis of the assessment of wholesale cash price as set out in Section 4 of the said Act comprising manufacturing costs and manufacturing profits only and excluding post-manufacturing profits, if any. All interim orders stand vacated. There will be no order as to costs. The petitioner will be at liberty to take recourse to any other remedy permissible in law.