

(1980) 09 MAD CK 0013
In the Madras High Court
Case No : Writ Petition No. 4563 of 1976

Lucas T.V.S. Ltd.

APPELLANT

Vs

Assistant Collector of Central Excise, Madras and Others

RESPONDENT

Date of Decision : 19-09-1980

Acts Referred:

Central Excise Rules, 1944 — Rule 173C, 9B
Central Excises and Salt Act, 1944 — Section 2, 4

Citation : (1981) 8 ELT 657

Hon'ble Judges : Padmanabhan, J

Bench : Single Bench

Advocate : V.K. Thiruvengkatachari, for A.R. Ramanathan, for the Appellant;
V.N.R. Rao, G.N. Udaykumar and P. Sukumar, for the Respondent

Judgement

1. Messrs Lucas T.V.S. Ltd., the petitioners herein, are the manufacturers, among other products, of starter motors, wipermotors and parts

thereof viz., starter armatures and wiper armatures. These items fall under item 30(3) and 30(4) of the Central Excise Tariff. They became

assessable to duty at 20% ad valorem with effect from 1st March, 1973. The said goods are sold as original equipment to the manufacturers of

internal combustion engines and motor vehicles. They are also sold as spares to serve and replacement market through the distributors of the

petitioners. In accordance with the usual business practice, the sale of the goods manufactured as original equipment differs in price from customer

to customer depending upon various circumstances and the prices are agreed after negotiation from time to time. The prices of the very same

goods sold as spares for service and replacement differ from the prices charged to original equipment manufacturers and in fact the prices are

much higher. With effect from 1st March, 1973 the petitioners have been paying excise duty based on the prices declared by them pending

determination of the true assessable value in terms of S. 4 of the Central Excises and Salt Act. The petitioners' distributors in the service market

are (1) M/s. Lucas Indian Service Ltd., Madras - 2; (2) M/s. India Motor Parts and Accessories, Madras-2; and (3) M/s. T.V.S. and Sons Ltd.,

Madurai-1. On 7th January, 1974, the first respondent, the Assistant Collector of Central Excise, Madras-34, decided that with effect from 1st

March, 1973, the petitioners should pay excess duty in respect of the goods sold even as original equipment to manufacturers on the wholesale

cash price at which their distributors sell the goods to dealers. Accordingly, the first respondent called upon the petitioners to file a revised price list

and pay the difference in duty on all past clearance of goods from 1st March, 1973, till the date of finalisation of the prices. Admittedly, the

petitioners have been paying duty on the goods sold to original equipment manufacturers on the price at which it was sold to the distributors to their

view by mistake on an erroneous view of the law. Thereafter, on 27th November, 1975, the petitioners filed a petition before the Collector of

Central Excise, that in the light of the various decisions of the Supreme Court and other High Courts, the petitioners were bound to pay duty in

respect of these goods only on the wholesale cash price sold by them to the original equipment manufacturers and not on the price at which the

distributors sold the goods to their customers. The petitioners further stated that by mistake of law they have been paying the duty far in excess of

the duty payable in law and consequently the first respondent was liable to refund the duty paid by mistake of law. On 18th March, 1976 the

second respondent replied stating that there was no case for reopening the issue already decided. The petitioners preferred an appeal before the

Central Board of Customs and Excise, New Delhi, the third respondent herein, which was dismissed on 23rd February, 1977. A further appeal

preferred to the Government of India, the fourth respondent herein, was also dismissed on 24th October, 1978. In these circumstances, the

petitioners have filed this writ petition for the issue of a writ of certiorified Mandamus to quash the order passed by the second respondent on 18th

March, 1976 as confirmed by respondents 3 and 4 and refund the excess duty paid by the petitioners by mistake of law.

2. In the counter affidavit filed on behalf of respondents 1 and 2, it is stated that the petitioners were filing price lists for their products from 1st

March, 1975, onwards under Rule 173C of the Central Excise Rules, 1944. They were approved provisionally under rule 9(b) of the Central

Excise Rules pending final determination of the duty payable. On a scrutiny of the petitioners marketing pattern it was found that the prices charged

for the goods sold as original equipments were lower than the prices charged for the said goods sold as spare parts in the replacement market. It

was further found that the goods were generally marketed by the petitioners through their distributors, viz., M/s. Lucas Indian Services Ltd.,

Madras-2; M/s. India Motor Parts and Accessories Ltd., Madras and M/s. T.V.S. and Sons Ltd., Madurai. The transaction between the

petitioners and their distributors were not at arm's length in view of the fact that some of the Directors are common to both the petitioners"

manufacturing firm and that of their distributors. In these circumstances, it was decided that the wholesale cash price charged by the distributors to

their dealers would constitute assessable value for the assessment of the goods. On this basis, the liability of the petitioner product to excise duty

was finalised. It is further stated in the counter affidavit that no excess collection of duty had been made from the petitioners warranting any refund

of the same to them. It is further stated that the petition for the issue of a writ of Mandamus is not maintainable in law.

3. According to the petitioners, the price at which they were selling their products as original equipment to manufacturers like Ashok Leylands

Ltd., represented the correct wholesale price. The price at which they were selling their products to their distributors could not represent the

wholesale price. To take an illustration one of the articles manufactured by the petitioners is started (Ashok Leyland Ltd.) GBS 524P.96.222C.

The price exclusive of excise duty at which the said product was sold to Messrs Ashok Leyland Ltd. was Rs. 581. The price exclusive of excise

duty at which the said product was sold to their distributors was Rs. 660/-. The same product was sold by the distributors to the trade at Rs. 1100

exclusive of excise duty. Deducting 25% for discount out of Rs. 1100 the assessable value was fixed at Rs. 825. While excise duty on the

assessable value calculated at Rs. 581 came to Rs. 116, excise duty on the basis of the price charged to the distributors came to Rs. 132, and the

excise duty on the basis of price sold by the distributors came to Rs. 165. According to the petitioners, in the case of these starters designed for Ashok Leyland Ltd., they are liable to pay duty only on the assessable value of Rs. 581, while by mistake they were paying duty on the assessable value of Rs. 825, which was the price charged by their distributors after allowing for a discount of 25%. The situation with regard to the order products manufactured by the petitioners is similar i.e. they had paid the excise duty on these products also at the price at which they were sold by their distributors to the trade.

4. The question that arises for consideration is as to the basis on which the assessable value for the purpose of excise duty can be arrived at S. 4 of

the Central Excises and Salt Act, 1944, as stood before 1-10-1975 reads as follows :-

4. Determination of value for the purpose of duty. - Where under this Act, any article is chargeable with duty at a rate dependent on the value of

the article, such value shall be deemed to be - (a) the wholesale cash price for which an article of the like kind and quality is sold or is capable or

being sold at the time of the removal of the article chargeable with duty from the factory or any other premises of manufacture or production for

delivery at the place of manufacture or production, or if a wholesale market does not exist exist for such article at such place, at the nearest place

where such market exists; or (b) where such price is not ascertainable the price at which an article of the like kind and quality is sold or is capable

of being sold by the manufacturer or producer, or his agent, at the time of the removal of the article chargeable with duty from such factory or other

premises for delivery at the place of manufacture or production, or if such article is not sold or is not capable of being sold at such place, any other

place nearest thereto.

Explanation. - In determining the price of any article under this section, no abatement or deduction shall be allowed except in respect of trade

discount and the amount of duty payable at the time of the removal of the article chargeable with duty from the factory or other premises

aforesaid.

5. The question on what basis the assessable value for the purpose of levying excise duty under S. 4(a) of the Central Excises and Salt Act should

be determined came up for consideration before the Supreme Court in A.K. Roy and Another Vs. Voltas Limited, M/s. Voltas Ltd. carried on,

inter alia, business of manufacturing air-conditioners, water coolers and their component parts. It effected direct sales to consumers at list prices

and the sales so effected came to about 90% to 95% of its production during the relevant period. It also sold its articles amounting to 5 to 10% of

its production to wholesale dealers from different parts of the country in pursuance of agreements entered into with them. The manufacturer had

agreed to grant 22% discount to the dealers. M/s. Voltas Ltd. claimed that in accordance with S. 4(a), the best price, after deducting the discount

of 22% allowed to the wholesale dealers, should be taken to be "the wholesale cash price" for ascertaining the real value of the articles. The excise

authorities contended that the agreements with the wholesale dealers conferred certain extra commercial advantages upon them and so the sales to

them were not sales to independent purchasers but to favoured ones, and, therefore, the price charged would not represent the "wholesale cash

price" as mentioned in S. 4(a). They urged that S. 4(a) visualises a wholesale market at the place of manufacture where articles of like kind and

quality were sold or could be sold and that it also postulated a market where any wholesalers purchaser could purchase the articles and as no

articles of a like kind and quality were sold, at or near the place of manufacture, and as the wholesale sales were confined to the favoured buyers,

there was no wholesale market at the place of manufacture. The High Court of Gujarat held that the articles which were sold to wholesale dealers

after deduction of 22% discount allowed to them would represent the wholesale cash price and that excise duty would be chargeable under S. 4(a)

on that basis. Against the judgment of the Gujarat High Court, the excise authorities took the matter in appeal before the Supreme Court. After

referring to certain decisions of the various High Courts, Mathew J. observed as follows :-

We do not think that for a wholesale market to exist, it is necessary that there should be a market in the physical sense of the term where articles

of a like kind or quality are or could be sold or that the articles should be sold to so-called independent buyers. Even if it is assumed that the latter

part of S. 4(a) proceeds on the assumption that the former part will apply only if there is a wholesale market at the place of manufacture for articles

of a like kind and quality, the question is what exactly is the concept of wholesale market in the context. A wholesale market does not always mean that there should be an actual price where articles are sold and bought on a wholesale basis. These words can also mean the potentiality of the articles being sold on a wholesale basis. So, even if there was no market in the physical sense of the term at or near the place of manufacture where the articles of a like kind and quality are or could be sold, that would not in any way affect existence of market in the proper sense of the term provided the articles themselves could be sold wholesale to traders, even though the articles are sold to them on the basis of agreements which confer certain commercial advantages upon them. We also think that the application of clause (a) of S. 4 of the Act does not depend upon any hypothesis to the effect that at the time and place of sale, any further articles of like kind and quality should have been sold. If there is an actual price for the goods themselves at the time and place of sale and if that is a wholesale cash price, the clause is not inapplicable for want of sale of other goods of a like kind and quality.

Then with reference to the decision of the various High Courts, which had taken a different view, the learned Judge observed :-

We do not think that these decisions, in so far as they hold that the price of sales to wholesale dealers would not represent the wholesale cash

price for the purpose of S. 4(a) of the Act merely because the manufacturers had entered into agreement with them stipulating for commercial

advantages, are correct. If a manufacturer were to enter into agreement with dealers for wholesale sales of the articles manufactured on certain

terms and, conditions, it would not follow from that alone that the price for these sales would not be the wholesale cash price for the purpose of S.

4(a) of the Act if the agreements were made at arms length and in the usual course of business. There can be no doubt that the wholesale price has

to be ascertained only on the basis of transactions at arms length. If there is a special or favoured buyer to whom a specially low price is charged

because of extra-commercial considerations, e.g., because he is a relative of the manufacturer, the price charged for these sales would not be the

wholesale cash price for levying excise under S. 4(a) of the Act. A sole distributor might or might not be a favoured buyer according as terms of

the agreement with him are fair and reasonable and were arrived at on purely commercial basis. Once the wholesale dealings at arms length are established, the determination of the wholesale cash price for the purpose of S. 4(a) of the Act may not depend upon the number of such wholesale dealings. The fact that the respondent sold 90 to 95% of the articles manufactured to consumers direct would not make the price of the wholesale sales of the rest of the articles any the less the wholesale cash price for the purpose of S. 4(a), even if these sales were made pursuant to agreements stipulating for certain commercial advantages, provided the agreements were entered into at arms length and in the ordinary course of business. It is not necessary for attracting the operation of S. 4(a), that there should be a large number of wholesale sales. The quantum of goods sold by a manufacturer on wholesale basis is entirely irrelevant. The mere fact that such sales may be few or scanty does not alter the true position.

6. The same question arose for consideration in *Atic Industries v. Asst. Collector, Central Excise*, AIR1975 SC970 = 1978E.L.T.(J.444). The Atic Industries carry on business of manufacturing dye-stuffs in a factory situate in a small township called Atul in Bulsar Distt. in the State of Gujarat. The dyestuffs manufactured by the Atic Industries were sold by them in wholesale units to two wholesale buyers, viz., I.C.I. (India) Ltd. and Atul Products Ltd., under respective agreements entered into by them with ICI and Atul Products. The price charged by the Atic Industries to ICI and Atul was uniform price described as the basic selling price less trade discount of 18%. ICI and Atul, in their turn, resold the dye-stuffs purchased by them from the Atic Industries to two categories of buyers. One was the category of textile mills and other was the category of distributors. The sales by ICI and Atul to the textile mills and other large consumers were at the basic selling price without any discount, but so far as the distributors were concerned, the sales to them by ICI and Atul were at a higher price, though with trade discount. ICI charged a higher price but allowed 10% trade discount, while Atul charged a slightly lower price and allowed two and a half per cent trade discount. The prices were, however, so adjusted that the net selling prices charged by ICI and Atul to the distributors were almost the same. The distributors, in their turn,

resold the dye-stuffs purchased by them from ICI and Atul to the small consumers at a slightly higher price referred to as small consumers price.

No discount was given by the distributors to the small consumers. The Atic Industries contended before the Excise authorities that for the purpose

of assessing the excise duty, the value of the dye-stuff manufactured by them should be taken to be the price at which they sold the same in

wholesale units to ICI and Atul, less a uniform trade discount of 18% which they at the relevant time gave to these two wholesale buyers. The

excise authorities took the view that the value of the dye-stuffs for the purpose of assessment of excise duty should be taken to be the price at

which ICI and Atul sold the dye stuffs to the distributors and no deduction should be allowed in respect of the discount given by them to the

distributors since it was not uniform, being 10% in case of ICI and 2-1/2% in case of Atul. The Supreme Court observed as follows :-

In fact, the present case is such stronger than the Voltas case. In the Voltas case, 90 to 95% of the production was sold by the manufacturer in

retail and only a small percentage namely 5 to 10% was sold in wholesale and yet the price charged by the manufacturer to the wholesale dealers

less trade discount of 22% was taken as the wholesale cash price for assessment of value under S. 4(a). Here, on the contrary, no retail price at all

were effected by Atic Industries and the entire production was sold in wholesale to ICI and Atul under agreements entered into with them.

Moreover, it was not in dispute between the parties that the agreements entered into by the Atic Industries with ICI and Atul were made at arms

length and in the usual course of business. It was not the case of the excise authorities at any time that specially low prices were charged by Atic

Industries to ICI and Atul because of extra commercial considerations or that the agreement were anything but fair and reasonable or arrived at on

purely commercial basis. The wholesale dealings between the appellants and ICI and Atul were purely commercial dealings at arms length and the

price charged by the appellants for sales in wholesale made to ICI and Atul less trade discount of 18% was therefore clearly wholesale cash price

within the meaning of S. 4(a) and it did not make any difference that the wholesale dealings of the appellants were confined exclusively to ICI and

Atul and apart from these two, no independent buyers could purchase the dye-stuffs in wholesale from the appellants.

It can therefore be taken as settled law that where a manufacturer sells his goods manufactured by him in wholesale to a wholesale dealer at arms length and in the usual course of business, the wholesale cash price charged to the wholesale dealer less than trade discount would represent the value of the goods for the purpose of assessment of excise duty. Further, the application of clause (a) of S. 4 does not depend upon any hypothesis to the effect that at the time and place of sale, any further articles of like kind and quality should have been sold. If there is an actual price for the goods themselves at the time and place of sale and of that is a wholesale cash price, the clause is not inapplicable for want of sale of other goods of a like kind and quality. It is also clearly established that wholesale price has to be ascertained only on the basis of transactions at arms length. If there is a special or favoured buyer to whom a specially low price is charged because of extra-commercial considerations, because he is a relative of the manufacturer the price charged for these sales would not be the wholesale cash price for levying excise duty under S. 4(a) of the Act.

7. In this case, a further complication has arisen by virtue of the fact that the petitioners sell their products as original equipments to manufacturers like Ashok Leylands Ltd. and Kirloskar Ltd. and the rent of the products in wholesale to their three distributors. While A.R. Ramanathan, would contend that it is the price at which the products are sold to manufacturers as original equipment should be taken to be the wholesale price, Mr. U. N. R. Rao, the learned counsel for the respondents would argue that the price at which the products are sold to different manufacturers as original equipment would not be the wholesale price as contemplated in S. 4(a) of the Act. In the submission of Mr. Rao, the wholesale sale of the petitioners' product takes place only when the products are sold to their three distributors and normally the price at which they are sold to the distributors would be the assessable value of the products under S. 4(a) of the Act. However, in this case, the petitioners' distributors must be taken to be favoured buyers and that consequently the price at which the products are sold the distributors could not be taken to be the correct wholesale price, but the price at which the said distributors sell the products to the trade should be taken to be the assessable value.

8. A similar situation arose for consideration before a Full Bench of the Kerala High Court in *T.E.C. Industries v. Asst. Collector, C.E., 1980 Tax.*

L.R. 2280; 1981 E.L.T. 221. The *T.E.C. Industries Ltd. (the Travancore Electro Chemical Industries Ltd., Chingavanam)* are manufacturers of

calcium carbide. According to the normal practice the manufacturers effect sales of calcium carbide even of the same size at different prices to

different classes of buyers. *M/s Indian Oxygen Ltd.* is one of the bulk purchasers of calcium carbide from *T.E.C. Industries*. In view of this fact,

the manufacturers have been selling calcium carbide to *M/s. Indian Oxygen Ltd.* at a price lower than the price realised from most of the other

buyers of calcium carbide, of the same size. The excise authorities had no case that the price to *M/s. Indian Oxygen Ltd.* was under-stated in the

invoices or that the sales were effected to them at a lower price on account of any extra commercial considerations. Nearly 60% of calcium

carbide produced by the manufacturers were sold at a lower price of *M/s. Indian Oxygen Ltd.* While according to the manufacturers the price at

which the goods were sold to *M/s. Indian Oxygen Ltd.* should be the basis for determination of the duty leviable on such goods, the excise

authorities contended that the higher price at which the goods were sold in the wholesale market to others should be taken to be the criterion for

determination of the excise duty. In other word, it was contended by the excise authorities before the Full Bench that the wholesale cash prices

were not merely cash prices realised when goods were sold even in bulk to consumers but prices realised when sales were effected to wholesale

dealers. The Full Bench raised the following points for determination - (1) When goods which are the subject of levy to excise duty are sold

wholesale and there is no extra commercial element in fixing the sale price in such sales should be assessment to duty be made on the basis of such

sales or whether they should be made only on the basis sale price of goods of like kind and quality. (2) When evidence establishes that goods of

the same quality and kind are sold at different wholesale cash price in the usual course of business should the highest of these be adopted for

assessing duty on the price at which the goods are capable of being sold ? If not, how is the wholesale cash price to be determined in such a case ?

(3) Whether the sales to *Indian Oxygen* are sales the price realised whereunder represent wholesale cash price within the meaning of that term as

used in S. 4 of the Act as it stood prior to amendment by Act 22 of 1973 ?"" As regards the first point the Bench observed as follows :-

The contention that wholesale cash price shall not be determined on the basis of the price at which the goods subjected to duty are sold or are

capable of being sold and that must necessarily depend only upon the price of other goods of like kind and quality does not therefore appeal to

us.

As regards the second point the Bench observed as follows :-

Since we propose to dispose of the petition before us on the last of the points urged by the learned Central Government Pleader by way of

answer to the petitioner's case, we are leaving this difficult question open.

As regards the third point the Bench observed as follows :

Wholesale cash price envisages a deduction in respect of trade discount for the purpose of assessment of value of the article under S. 4 of the

Act. Such trade discount is an incident normal in all sales to dealers. The term wholesale dealer is defined in the Act in section 2(k) and that refers

to a person who buys or sells excisable goods wholesale for the purpose of trade or manufacture. What was contemplated by S. 4(a) of the Act as

it stood at the relevant time was not sale to consumers in bulk but sale to the trading community in wholesale. We are therefore unable to hold on

the facts that the price at which goods were sold to M/s. Indian Oxygen was a wholesale cash price.

I am in agreement with the dictum laid down by the Kerala High Court viz., what S. 4(a) contemplated as it stood at the relevant time was not sale

to the consumers in bulk but sale to the trading community in wholesale. Considering the facts of this case on the basis it will be seen that the

manufacturers like Ashok Leyland and Kirloskar Ltd. are only industrial consumers and therefore the price at which the petitioners sell their

products to Ashok Leyland Ltd. and Kirloskar Ltd. cannot constitute wholesale price.

9. Then the question arises whether the price at which the petitioners sold their products to their distributors is the wholesales price or the price at

which the distributors sold the products to the trade is the wholesale price. If the sale by the petitioners to the distributors is at arms length and in

the course of usual business, then the price at which the petitioners sold their

products to their distributors can be said to be the wholesale price, as laid down in Voltas case. But in this case, the Assistant Collector of Central Excise has come to the conclusion that the transaction between the petitioners and the distributors cannot be considered to be at arms length. The Assistant Collector in his order dated 7th January, 1974 has observed as follows :-

Inasmuch the first sale of goods from the manufacturer to their distributors, some of whose directors are common with those of the manufacturer's own company, is on a principal to principal basis, it cannot be considered as a transaction at arm's length as interpreted by the Supreme Court in its judgment in the case of M/s. Voltas Ltd. v. A. K. Roy. Hence the wholesale price which the assessable goods are sold to their distributors cannot be accepted as a wholesale cash price for assessment under S. 4(a) of the Central Excises and Salt Act, 1944. The nearest approach to the goods wholesale market is at the stage at which the distributors sell the goods in wholesale lots to dealers or traders. Hence the price at which the distributors of M/s. Lucas T.V.S. Ltd. Padi, sell their goods to dealers will be considered as wholesale cash price under S. 4(a) of the Central Excises and Salt Act, 1944 and this price would be the true assessable value of their goods.

This finding is a question of fact. If really the petitioners were aggrieved by the finding given by the Asst. Collector of Central Excise, as early as on 7-1-1974, that the transaction between the petitioners and the distributors was not at arms length, then the petitioners should have filed an appeal under the provisions of the Act and canvassed the correctness of the finding of fact entered into by the Asst. Collector of Central Excise. This, the petitioners have admittedly not done.

10. Mr. A. R. Ramanathan, however, contended that both in the Voltas case as in the Atic Industries case, the Supreme Court held that the value of the goods for the purpose of excise must take into account only the manufacturing costs and manufacturing profit and it must not be loaded with post-manufacturing profit arising from the post-manufacturing operations. In view of this, the learned counsel would contend that the price charged by the distributors to the trade was loaded with post-manufacturing profit such as expenses incurred by the distributors and therefore, could not be

taken to be the correct assessable value of the goods for the purpose of determination of excise duty under S. 4(a) of the Act. As is evident from

the reported decisions, the principle that the value of the goods for the purpose of determination of excise duty must take into account only the

manufacturing cost and the manufacturing profit and it must not be loaded with post-manufacturing profit arising from the post-manufacturing

operation was laid down by the Supreme Court even in Voltas case. This principle was not laid down by the Supreme Court for the first time in

Atic Industries case. Bhagwati J. in Atic Industries case has extracted the relevant passage from the judgment of Mathew J. in Voltas case in

paragraph 12 of his judgment. The order dated 7-1-1974 was passed by the Assistant Collector of Central Excise after the Supreme Court had

decided the Voltas case. As a matter of fact, the Asst. Collector of Central Excise had relied upon the decision in Voltas case for holding that the

transaction between the petitioners and the distribution was not at arms length. Consequently, it cannot be said that the Asst. Collector of Central

Excise passed the order dated 7-1-1974, on any mistake of law. The Asst. Collector as well as the petitioners were clearly aware of the true

position of law as on 7-1-1974. Even accepting that the entire contentions of the petitioners are correct viz., that the value of the goods for the

purpose of excise duty must take into account only the manufacturing cost and not post-manufacturing profit, the Asst. Collector of Central Excise

must be deemed to have committed an error in the application of the law to the facts of the case. It cannot be said that the order dated 7-1-1974,

was vitiated by any mistake of law. Nor can it be said that the petitioners paid the duty as per the order dated 7-1-1974, under any mistake of

law. At the most, it can be said that the Asst. Collector of Central Excise misapplied the principle of law laid down by the Supreme Court in Voltas

case to the facts of the petitioners' case. If that be the true position, the petitioners' remedy would have been to file an appeal against the order of

the Asst. Collector of Central Excise dated 7-1-1974, and not to file a claim for refund as if the duty had been paid under a mistake of law, or

mistake of fact. When the Asst. Collector of Central Excise had held that the transaction between the petitioners and their distributors was not at

arms length and therefore for the purpose of excise duty the price at which the distributors sold the goods to the trade must be taken to be the

wholesale value for the purpose of assessment to duty and the petitioners did not prefer an appeal as provided for under the Act, the petitioners

must be deemed to have acquiesced in the order passed by the Asst. Collector of Central Excise. I am therefore of the opinion that it is too late for

the petitioners to claim refund of the excise duty paid by virtue of the order dated 7-1-1974.

11. I am further of the firm opinion that the order passed by the Asst. Collector of Central Excise on 7-1-1974, that the price at which the

petitioners sell their product to manufacturers of combustion engine and motor vehicles for the purpose of being used in their manufacture cannot

be taken to be the assessable value for the purpose of levy of excise duty under S. 4(a) cannot be said to be the result of any mistake of law which

would vitiate the said order. As already stated, the order was passed after the pronouncement of the Supreme Court in Voltas case that where a

manufacturer sells his goods manufactured by him in wholesale to a wholesale dealer at arms length and in the usual course of business, the

wholesale cash price charged to the wholesale dealer less the trade for the purpose of assessment of excise duty. Therefore, at the most even if it is

assumed for the sake of argument that the petitioner's contention was correct the Asst. Collector of Central Excise must be deemed to have

committed only an error in the application of the principle of law as enunciated by the Supreme Court to the case on hand. In such circumstances,

the petitioners remedy would have been to prefer an appeal. They cannot now say that the Asst. Collector passed the order under any mistake of

law.

12. In view of the conclusions reached by me, I am of the view that the impugned orders of respondents 2 to 4 refusing to grant refund to the

petitioners or holding that the petitioners are not entitled to refund are correct. No question of refund therefore arises in this case. It is therefore

unnecessary for me to consider the other contentions advanced by Mr. V. K. T. Chari on the question of refund.

13. In the result, the writ petition fails and is dismissed, but without costs.