

Voltas Limited Vs. A.K. Roy

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Court : Mumbai

Decided On : Aug-10-1970

Reported in : (1971)73BOMLR229

Judge : K.K. Desai and ;Nain, JJ.

Appeal No. : O.C.J. Miscellaneous Petition No. 324 of 1967

Appellant : Voltas Limited

Respondent : A.K. Roy

Disposition : Appeal allowed

Judgement :

K.K. Desai, J.

1. In this petition under Article 226 of the Constitution, the petitioner Company (hereinafter called the petitioners) has challenged the legality of the appellate order of respondent No. 1 dated May 2, 1967, in respect of the petitioners' liability to pay excise duty for the year 1963 and the orders of the Assistant Collector of Customs relating to the petitioners' liability to pay excise duty for the years 1962, 1964, 1965, and 1966 and the diverse notices of demand calling upon the petitioners to pay for the above years the different assessed amounts aggregating to Bs. 27,57,477.19. The facts leading to the institution of the petition may be

shortly summarised as follows:-

2. The petitioner Company carries on business of manufacturing and selling air-conditioners, water coolers and component parts thereof. The petitioners organise sales of the goods of their manufacture from their head office at Bombay and from branches at Calcutta, Delhi, Madras, Bangalore, Cochin and Lucknow. From these offices the petitioners effect direct sales to consumers at 'list prices'. Further, the petitioners have made agreements with certain dealers inter alia agreeing to sell to these dealers for each different area all the different goods manufactured by the petitioners on the terms and conditions which appear in a specimen copy of the agreement annexed as exh. A to the petition. The exh. A to the petition contains particulars of the dealers with whom agreements were made on the conditions appearing in the specimen copy exh. A and of the dates of their appointments as also the dates of termination of some of such appointments. It appears that between 1962 and 1966, which is the relevant period, the petitioners had made agreements on the above terms with dealers at Surat, Poona, Rajkot, Nagpur, Dibrugarh, Allahabad, Banaras, Agra, Amritsar, Jaipur, Trichy, Coimbatore, Vijayawada, Mangalore and Calicut. Apparently, these agreements relate to very large areas of local districts roundabout the places mentioned above. The appointed dealers agreed, inter alia, to render servicing to the air-conditioners and water coolers sold. Paragraph 11 of the agreement contains descriptions of the goods and includes the 'list prices' fixed by the petitioners for sale of their goods to consumers. Details of the discounts given to the consumers when price was paid in cash or larger quantities were purchased are contained in these particulars. The agreements provide that the dealers should not sell the goods sold by the petitioners to them except strictly in accordance with the list prices fixed by the petitioners. The relevant provision in this connection is:

These prices are to be taken for supply of the mills on the basis of F.O.R. client's nearest railway station, i. e. you are not to charge the clients for freight, insurance and packing charges. Further, freight, insurance, packing charges and sales tax paid by you on the purchase of unit from us are to be borne by you and not to be charged to the customers.

As regards the terms for sale of the petitioners' goods to the dealers, the provision is :

We agree to sell to you the 'Crystal ' Room Air-conditioners, 'Tushar' Water Coolers and Dehumidifying units at our list prices, less 22% discount. These prices are, at your option, either F.O.R. Bombay (i. e. packed free) or unpacked ex our godown in Nets Delhi. The Central or State Sales/General/Purchase Tax or any other local taxes such as octroi, etc., any further statutory levies, transit insurance, freight charges and packing charges (wherever involved) will be to your account. You will not be entitled to any discount on the prices of the accessories mentioned in the price schedule on pages 8 and 4 of this letter.

Similar provision is made for sale of spare parts of the air-conditioners and the water coolers and dehumidifying units and provides for sale at list prices less 20 per cent discount. Apparently, these agreements are made in the ordinary course of business and the prices for sale of the goods of the manufacture of the petitioners to the dealers are fixed in a commercial manner and are not arbitrary. The para. 12 in the agreements provides for forwarding by the petitioners of all inquiries in respect of the territory mentioned in the agreements to the dealers with an option to the petitioners to quote and sell the articles required directly even in the dealers' territory. In that connection, the provision is that in respect of direct sales commission as calculated in that paragraph would always be payable by the petitioners to the dealers.

3. The petitioners' case is that diverse terms mentioned in the agreements with dealers are all for ensuring that the public get the goods of the manufacture of the petitioners at uniform and standard price and the units are properly serviced and preserved in good condition after sale. All the units and component parts (i. e, goods of each kind) manufactured by the petitioners were at some time or another sold by the petitioners to the dealers in accordance with the terms in the agreements. This was not the case in respect of the unit described as low temperature unit Model B-I-BL which came to be sold directly by the petitioners to consumers because of the nature of this model.

4. Excise duty on the basis of ad valorem value was imposed on air-conditioners, water coolers and parts of water coolers from March 1, 1961. The petitioners' case that the list prices less 22 and 20 per cent discount which the petitioners agreed to charge to their dealers was 'wholesale cash price' in respect of all the articles of the manufacture of the petitioners was accepted by the Excise authorities for assessments made up to the end of 1962. Upon special excise duty being imposed from March 1, 1963, the petitioners revised their 'list price' and a copy of the revised 'list price' was furnished to the Excise authorities. In January 1964, the Superintendent of Central Excise made provisional assessment orders on the footing that the price agreed to be charged by the petitioners to their dealers was not applicable for assessment of duty. In April 1964, the Superintendent of Central Excise intimated to the petitioners that as regards the articles sales whereof were not substantial to the dealers, the duty would be assessed not on the footing of 'whole sale cash prices' but on the footing of the prices charged to the consumers, i.e. retail prices. The Superintendent of Excise by his orders passed in September 1964 assessed the petitioners to tax in respect of all sales on the footing of the list prices for sale to consumers in respect of the period January 1, 1963, to December 31, 1963. The petitioners were on the above footing liable to pay additional amount of Rs. 7,31,869.13. A notice of demand dated October 8, 1964, was served on the petitioners calling upon them to pay the above sum. The petitioners' representation in that connection was disposed of by the order dated November 1, 1965, made by the Assistant Collector of Central Excise. By this order the assessment made on the above footing was confirmed. The petitioners' appeal against the assessment made on the above footing was dismissed by respondent No. 1 by his appellate order dated May 2, 1967, which is the appellate order that is challenged in this petition. In the appellate order the following findings of the Assistant Collector were first recited:-

5. The air-conditioners Model No. B-I-BL, Condenser Coil for room air-conditioner Model No. W-I-X and Condenser Coil for room air-conditioner Model No. B-L-0 were not sold during the year 1963 through dealers. In respect of other models and parts some sales were made through dealers, but they were scant when compared to sales effected direct to consumers. Respondent No. 1 observed that in respect of some of the products manufactured by the Company no sales were

effected through the media of wholesale and that in respect of a few products sale by wholesale was negligible, say, to the extent of 5 to 10 per cent. He held that the discount of 22 per cent over the list prices was not available except to authorised dealers. Discount not generally available to all independent wholesale purchasers was not admissible for the purpose of Section 4(a) (of the Central Excises and Salt Act). He accordingly held that prices agreed to be charged by the Company to their authorised wholesale dealers could not be accepted as 'wholesale cash price' (within the meaning of that phrase) under Section 4(a). The discount allowed to these dealers could not be held to be 'trade discount'. He held that Section 4(a) contemplated existence of wholesale transactions in the ordinary course of business in an open market. The price charged must be one at which an independent buyer of a normal wholesale lot for cash would pay and the price must not be dependent on any special relationship between the seller and the buyer. He then went on to examine the question if a wholesale market on a reasonable basis existed in the case of the sales of the products of the Company. In that connection, he held that the price list furnished to the authorised dealers was not open to others. The sales made by the Company through these authorised dealers did not represent transactions in wholesale in an open market condition. He, inter alia, stated : 'These agents are not their wholesale stockists who buy goods from them in a whole-sale lot and store them and supply to the consumers'. He, therefore, held that the sales made to these authorised dealers could not be deemed to be wholesale transactions in an open market condition. He, therefore, confirmed the assessment made by the lower authorities and rejected the appeal of the petitioners.

6. On the very same basis, the assessment which was completed for 1962 was revised. The petitioners were assessed to excise duty on the footing that the provisions in Clause (b) of Section 4 were applicable. The petitioners were assessed to tax in respect of the years 1964, 1965 and 1966 also on similar footing. Pursuant to the revised assessment for 1962 and assessments made for the above three years, notices of demand, three dated February 4, 1966, and two dated August 80, 1966, were served on the petitioners. Against the revised assessment for the year 1962 and assessments for the years 1964-1966 made originally by the Superintendent of Excise, the petitioners had appealed to the

Assistant Collector who made his appellate order dated November 21, 1966, confirming the assessments made. Against those orders, the petitioners filed appeals on January 19, 1967. These appeals have not been disposed of up-to-date. After the impugned first appellate order dated May 2, 1967, was made, respondent No. 1 by his letter dated May 24, 1967, intimated to the petitioners that they should make deposits of the amounts assessed in the matters of their appeals. On June 6, 1967, the petitioners were called upon to pay amounts assessed to tax in respect of all the above years which aggregate to Rs. 27,57,477.19. This petition is mainly for the purpose of challenging the reasoning contained in the above impugned appellate order dated May 2, 1967. This also is the reasoning for assessments of tax not only for the year 1963 but also for years 1962 and 1964 to 1966. This petition is to prevent the enforcement of the demands for deposit made in respect of the appeals filed and not disposed of and for payment of the above aggregate amount of tax,

7. In support of the petition, Mr. Palkhivala for the petitioner Company has challenged the correctness of the findings made by respondent No. 1 in connection with the true construction and effect of the provisions in Clause (a) of Section 4 of the Central Excises and Salt Act. His submission was that in arriving at his findings respondent No. 1 did not pay any attention to the true nature of the excise duty levied under Section 3 of the Act. He submitted that there was no warrant for the finding that the wholesale cash price mentioned in Clause (a) was the price which was the ruling price in open market conditions. The submission was that the price which could be the basis of levy of excise duty both under Clauses (a) and (b) of Section 4 was always intended to be the price that the manufacturer charges on sale of goods of his manufacture. The submission was that the ruling price in the open market charged by third party dealers to their purchasers had no relevance to the purpose of the excise duty levied under the Act. For arriving at the true construction and effect of the provisions in Section 4 it was necessary to remember that excise duty was levied on manufacturers of goods on the basis of the cost of manufacture and in certain events on the profits made by the manufacturers. It was impossible that excise duty could be charged on prices prevailing in markets other than the market that was made by the manufacturer himself. This basis was altogether forgotten by respondent No. 1 in

arriving at his findings. All the findings are accordingly without any warrant in law and liable to be set aside. The submissions made by Mr, Bhabha on behalf of the respondents were all made on the basis of the observations of Sinha, J., in the case of National Tobacco Co. v. Collector, Central Excise : AIR1961 Cal477 . The submissions made were in consonance with the observations in this authority and were as follows:-To attract the provisions in Clause (a) of Section 4, existence of a wholesale market was a condition precedent. The wholesale market involved dealings on a substantial scale made in the ordinary course of business regularly and continuously. Dealings of a sporadic nature not made in the ordinary course of business could not be described as dealings in a wholesale market. Whether the transactions on which reliance could be placed were made in the ordinary course of business should be ascertained by looking at the volume of the business transacted. This volume would indicate whether the transaction was wholesale or retail. The submission was that unless the transactions involved bulk sales at the price fixed on a wholesale unit, the transactions could not be held to have been effected for 'wholesale cash price'. He relied upon the fact that the dealers' agreements on which reliance was placed by the petitioner Company had certain restrictive covenants obliging these dealers to render service to the purchasers in respect of the articles sold by the dealers. He relied upon the fact that the sales through the dealers were only 5 per cent of the total extent of sales of the petitioner Company. On the basis of these facts, his submission was that the dealers' agreements were not made in the ordinary course of business. The transactions effected between the petitioner Company and the dealers were not transactions in an open market but on restrictive conditions agreed by the dealers. The discount given by the petitioner Company was for special purposes and was not 'trade discount'. The transactions between the petitioner Company and these dealers could never be held to be effected in ordinary course of business or in an open market at an open market rate. The price indicated in these transactions was, therefore, not the wholesale cash price as mentioned in Clause (a) of Section 4. He relied upon the fact that the above judgment of the High Court of Calcutta was followed by that High Court in the case of Collector, Central Excise v. Shankarlal A.I.R. [1908] Cal. 154, and the High Court of Mysore in the case of Amco Batteries (P) Ltd. v. Asst. Collector, Central Excise A.I.R [1968] Mys. 216,

and the High Court of Andhra Pradesh in the case of Union of India v. Suryaprakasa Rao : AIR 1967 AP281 .

8. As regards the reliance that had been placed by Mr. Palkhivala on the findings of the Privy Council in the case of Vacuum Oil Company v. Secretary of State : (1932)34BOMLR1057 ., and Ford Motor Company of India, Limited v. Secretary of State (1937) 40 Bom. L.R. 209., Mr. Bhablia's submission was that these observations were irrelevant because they were made in connection with the construction and effect of the provisions in Section 30 of the Sea Customs Act, whilst the present case was governed by the provisions of the Central Excises and Salt Act. His further submission was that even as regards the provisions in Section 30 of the Sea Customs Act which were in pari materia with the provisions in Clause (a) of Section 4 of the Central Excises and Salt Act, the fact was that the Clause (a) had been amended materially by Act XV of 1955. The amendment was extremely important and altered the provisions in the section in such a way that the observations of the Privy Council in the above two decisions had, in any event, ceased to be applicable. In connection with this submission, we will have to look into the provisions in the section as previously existing and subsequently amended.

9. In reply, Mr. Palkhivala strongly relied upon the observations of the Privy Council in these two authorities and submitted that the findings made by the Calcutta High Court in the case of National Tobacco Co. v. Collector, Central Excise were per incuriam and in ignorance of the relevant observations of the Privy Council in the above two decisions. These observations were the 'law' which was binding on the learned Judges who decided the four cases on which reliance was placed on behalf of the respondents. The findings made by these Judges were so contrary to the observations of the Privy Council that these findings could not be held to be pronouncement of the correct law as regards the true construction and effect of the provisions in Clause (a) of Section 4. He also levelled criticism in a large way on the findings made in the judgment in the case of National Tobacco Co. v. Collector, Central Excise, which criticism will have to be borne in mind whilst deciding the submissions made on behalf of the parties in this petition.

10. Now, in connection with the submissions made on behalf of the parties, it is first necessary to recite the provisions in Section 4 which provides :

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

(a) the wholesale cash price for which an article of the like kind and quality is sold or is capable of being sold, at the time of the removal of the article chargeable - with duty from the factory or any other premises of manufacture or production for delivery at the place of Manufacture or production, or if a wholesale market does not exist for such article at such place, at the nearest place where such market exists, or

(b) where such price is not as certainable, the price at which an article of the like kind and quality is sold or is capable of being sold by the manufacturer or producer, or his agent, at the time of the removal of the article chargeable with duty from such factory or other premises for delivery at the place of manufacture or production or if such article is not sold or is not capable of being sold at such place, at any other place, nearest thereto.

Explanation,-In determining the price of any article under this section no abatement or deduction shall be allowed except in respect of trade discount and the amount of duty payable at the time of the removal of the article chargeable with duty from the factory or other premises aforesaid.

In both the Clauses (a) and (b) of the section the following relevant phrases appear:- .priceat the time of the removal of the article chargeable with duty from the factory ...for delivery at the place of manufacture or...

The relevant provision applicable to both the above clauses which appears in the Explanation to the section is 'In determining the price...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 ...from the factory...'. The above language in the two clauses and, the Explanation is indicative of the true nature of

the duty of excise levied under the Act, As can be found from the observations in several decisions including the pronouncement of the Privy Council in the above referred two authorities, the intent and purpose of entirely similar provisions in the Sea Customs Act was that the loading on price after importation of the goods was not permitted in charging the customs duty. For the same reasons and having regard to the above contents of the Section 4 it is abundantly clear that the price that is relevant and can be the basis for calculating duty of excise must be the price charged by the concerned manufacturer. Apparently, duty of excise cannot be calculated on the basis of fates and/or prices with which the manufacturer has no concern whatsoever. Duty of excise cannot be charged to the manufacturer on the basis of the value of larger profits which dealers in the market can make by resale of the manufactured articles come into their possession. It is with this intent and purpose that in the above quoted parts of Section 4 including the Explanation thereto specific mention is made of the fact that the price ascertained under both the Clauses (a) and (6) must be the price at the time of the removal of the articles from the factory and the price for delivery at the place of manufacture with the further statement in the Explanation that from that price no abatement or deduction shall be allowed except in respect of trade discount and amount of duty payable at the time of the removal. The price charged by an ordinary wholesale or retail dealer in the market who resells the goods manufactured by another will have no relevance to the amount of duty payable and the trade discount allowed by the manufacturer which are referred to in the Explanation. The true construction and effect of Section 4 can only be arrived at if what is discussed above is borne in mind. It is apparent that under Clause (a) the basis for calculation of excise duty is the wholesale cash price whilst under Clause (b) the basis is the retail price. Apparently, under Clause (b), retail price charged by outsider dealers can never be the relevant basis for charging the manufacturer with excise duty. So far as one can imagine, the price charged by outside wholesale or retail dealer would not be fixed with reference to the time of the removal of the articles from the factory or on the basis of delivery at the place of manufacture. These outside dealers would fix price for the resales of the manufactured goods obtained by them in accordance with the ruling conditions in the market, wholesale or retail. They would take advantage of scarcity. Conversely, in the event of glut in the market, they would

have to suffer losses. This would be so in the case of retail dealers as also wholesale dealers and more so in respect of wholesale dealers. It is for this reason that we have come to the conclusion that for assessing the value of the manufactured goods to excise duty under Clause (a), the as ascertainable wholesale cash price must only be the price charged by a manufacturer. If his transactions do not disclose any such wholesale cash price, the alternative way of assessing duty would be in accordance with the provisions in Clause (b) i.e. the retail price that he charges or the whole cash price of the articles of like kind and quality. Now, in this connection, it is important to notice that the provisions in Section 4(a) prior to its amendment by Act XV of 1955 did not make reference to any market. Though the language in the first part of the section was amended to some extent, that amendment has not made any change in the effect of that part of the section. The main amendment which must be considered is in the following lines of the present Clause (), viz. : 'if a wholesale market does not exist for such article at such price, at the nearest place where such market exists'. Clause (b) was also added by the amending Act XV of 1955. For ascertainment of the effect of the above amendment in Clause (a), it may be first noticed that in Clause (b) also, in connection with the retail price to be ascertained for assessment of duty of excise, the alternative place for delivery other than the place of manufacture mentioned is 'if such article is not sold or is not capable of being sold at such place, at any other place nearest thereto'. It will at once be noticed that in connection with retail price which is the basis for assessing excise duty, all sorts of retail transactions cannot be relied upon. Even these retail transactions to be basis for calculation of duty of excise must be for delivery at the place of manufacture and only in cases in which sales are not effected at that place for delivery, at other place nearest to the place of manufacture. As already discussed, these retail sales must ordinarily be of the manufacturer and not of a third party. For the same reasons, the above amended provisions in Clause (a) clearly indicate that the alternative to the price for delivery at the place of manufacture can only be considered in the event that transactions for delivery at the place of manufacture do not exist. If wholesale cash price for delivery at the place of manufacture can be ascertained, nothing that appears in this newly amended provision will become relevant. One would always have to bear in mind that the price to be ascertained

must be the price at the time of the removal of the articles from the factory for delivery at the nearest place simply for the reason that there are no transactions at ex-factory delivery price. Having regard to the context in which the phrase 'wholesale market' appears, it is abundantly clear that it refers only to the deals and transactions of the concerned manufacturer and the market place is the place nearest to the factory where the manufacturer insists that he would give delivery. Any other alternative construction would be extraneous and irrelevant to the very object and purpose of the duty which is called excise duty that is levied by the above Act. Duty charged on any other basis would not be fixed and calculated on the basis of cost of manufacture and the profits earned by the manufacturer and would thus involve levy of kind other than excise duty. Under the above circumstances, in our view, the true construction and effect of the provisions in Clause (i) is that wherever manufacturer makes contracts fixing wholesale cash price, duty will have to be levied on the basis of such price. This price will be the price for contracts for delivery at the place of manufacture and in the absence of such contracts the price fixed by the manufacturer for delivery at the place which is nearest to the factory.

11. Now, as has been held with reference to in pari materia provisions in Section 30 of the Sea Customs Act by the Privy Council in the above two authorities, the phrase 'wholesale price' mentioned in Clause (a) is in contradistinction to the retail price which is the basis fixed under Clause (b).

12. In the case of Vacuum Oil Company v. Secretary of State, questions arose under Section 30 of the Sea Customs Act which provided :

For the purposes of this Act the real value shall be deemed to be-

(a) the wholesale cash price, less trade discount, for which goods of the like kind and quality were sold, or are capable of being sold, at the time and place of importation... except... of the amount of the duties payable on the importation thereof: or

(b) where such price is not as certainable, the cost at which goods of the like kind and quality could be delivered at the place, without any abatement or deduction

except as aforesaid.

The Vacuum Oil Company imported from the United States of America lubricating oil known by the trade name 'Gargoyle'. The oil was imported in barrels, drums and cases. The oil was disposed of direct to consumers and never to dealers. The Company discharged all the functions of retailers of their oil as sold in large bulk as well as small quantities. The selling price was the same irrespective of the quantity sold. If a consumer entered into contract to take all his requirements for a year, he was entitled to discount which varied between 2 1/2 to 5 per cent according to the quantity purchased in the year. The Company succeeded in the trial before Blackwell, J., in its contention that customs duty could not be calculated against the Company under Clause (a) of Section 30. In the appeal before a Division Bench consisting of Beaumont, C.J., and Baker, J., it was held that the preferable meaning to be attached to the term 'wholesale price' as found in Clause (a) was that of a price paid on a sale of a substantial quantity of goods rather than of a price in contrast with a retail price and when regard was had to the enormous quantities of oil represented by the Company's sales and the substantial amount involved in even the smallest of them, these sales might properly be regarded as wholesale. Now, this finding of the Division Bench did not commend itself to the Privy Council. In connection with this finding, the observation was (p. 1068) : "He (Chief Justice) has not availed himself, as an aid to construction, of the light thrown upon each of its expressions by the presence within it of the others. Further in his construction of the words he has, they think, hardly had sufficient regard to the setting in which they are found."

13. In connection with the real value to be ascertained for levy of customs duty, the observation was (p. 1068) : "sections of a taxing Act not to be pressed against the taxpayer beyond their plain intendment, and taken as a whole, as their Lordships read them, they seem to disclose on the part of the legislature when describing the price which is to represent the 'real value' of the goods to be taxed a definite purpose to define a price-conservative in its every aspect and free in particular from any loading for any post importation charges incurred in relation to the goods. The 'price' is to be a price for goods, as they are both at the 'time' and 'place' of importation. It is to be a 'cash price' that is to say a price free from any

augmentation for credit or other advantage allowed to a buyer; it is to be a net price, that is to say it is price 'less trade discount'. And this last expression, supplemented by these other indications confirms in their Lordships' view the conclusion that the words 'wholesale... price' are used in the section in contradistinction to a 'retail price' and that not only on the ground that such is a well-recognised meaning of the words but because their association with the words 'trade discount' indicates that sales to the trade are those in contemplation, and also because only by attaching that meaning to the word is the 'wholesale' price relieved of the loading representing post importation expenses, which, as a matter of business, must always be charged to the consumer, and which, in the other words of the section already alluded to, are so carefully eliminated.

Their Lordships accordingly reach the conclusion that in no sense can the price charged to consumers for the machinery oils imported by the appellants be regarded as such 'a wholesale cash price' as is described in the Act, nor is it in their judgment possible by further inquiry to extract any such price from any other available material. Indeed the Act, as their Lordships read it, does not invite any such further inquiry.

14. It further requires to be stated that in their Lordships' opinion where value could be ascertained from actual sales of importer, the phrase 'like kind and quality' did not oblige the authorities to look into values of other goods of like kind and quality.

15. Now, in connection with the true construction of the phrase 'wholesale cash price' as appearing in the present Section 4(a) of the Central Excises and Salt Act, every single observation of their Lordships of the Privy Council is relevant and applicable. That the provision appeared in the Sea Customs Act does not make difference, because both the Acts deal with similar aspects. In the Sea Customs Act the wholesale cash price was required to be ascertained in such manner that the importer was not charged to duty on loading of price by post importation expenses. For that reason, reference was made to the time and place of importation as also to the fact that abatement of deduction could not be granted except of the amount of import duty payable on importation. As already discussed,

for similar relevant reasons, duty of excise was never intended to be charged on the footing of price charged by third party dealers. It was for that reason that in the present section the phrase 'at the time of the removal' and price being ex-factory and/or the nearest place of market were fixed. Reference was for the same reason made in the Explanation to the fact that abatement or deduction cannot be allowed except in respect of trade discount and the amount of duty payable. These provisions were made to provide for calculating duty on the basis of cost of manufacture plus manufacturer's profit. All the circumstances mentioned in Clause (a) of Section 4 existed in relation to customs duty in Section 30 (a) and (b) of the Sea Customs Act which came to be construed by the Privy Council. Following the reasoning contained in the observations of the Privy Council, it must be held that the phrase 'whole sale cash price' contained in Clause (a) of Section 4 is used in the section in contradistinction to the retail price and that price is relieved of the loading represented by post manufacture expenses unless they form part of the profits of the manufacturer himself. The word 'wholesale' in the phrase 'wholesale cash price' in Clause (a) has not the meaning of price for bulk sales and quantitative sales. When the sales of the manufacturers are to consumers even if in large quantities and at prices which might be in common parlance described as whole sale prices, the transactions cannot be held to involve 'wholesale cash price'.

15. In the case of Ford Motor Company of India, Limited v. Secretary of State, the question related to ascertainment of customs duty upon import of a consignment of 236 Ford motor cars. The Company had the monopoly of importing Ford motor cars. The Company resold the imported Ford motor cars only to authorised dealers or distributors. Each distributor had a particular district within which he was the sole agent for retail sale of Ford vehicles. The Company issued from time to time a price list and the terms of business were that the retail price to be charged by the distributor to the public was that stated in the price list current at the time of arrival of the vehicles in India and the price payable by the distributor to the Company was the same price, less a discount of 20 per cent. The distributor had to pay this price before obtaining delivery. Delivery was given free on rail except in Bombay where delivery was given from the warehouse of the Company. The Company's case was that they were not liable pay any duty on the basis that there

was a wholesale cash price for sale of the Ford motor cars within the meaning of Clause (a) of Section 80, Their case was that the duty was payable by them on the C.I.F. price which was the import price under Clause (b) of Section 80. Diverse arguments were advanced in connection with this case made by the Company. In connection with these arguments, their Lordships of the Privy Council referred to the agreements made by the Company for sale of all the imported cars through their distributors. It was held that the Company's price to their distributors was a wholesale price within the meaning of the section as declared in *Vacuum Oil Company v. Secretary of State*, The price charged to the distributor was cash price. Payment was made before delivery and delivery was within a few days of the arrival of the goods. Only discount had been deducted. In that connection, the observation was (p. 275) :.That the legislature intended to exclude post importation expenses need not be doubted, but it had to do this In a practicable manner without undue refinement, and it must be taken to have regarded the phrase which it employed as sufficient for the purpose if taken in a reasonable sense.

The facts in that case were in several respects similar to the facts in the present case. The total quantity involved was 256. In cases of some of the distributors the number of vehicles sold was very small. The volume of business was small in most cases.

16. The phrase 'article of the like kind and quality' in relation to wholesale cash price and retail price appears in both the clauses of Section 4 of the Central Excises and Salt Act and Section 80 of the Sea Customs Act. Even so, in the case of *Vacuum Oil Company v. Secretary of State*, their Lordships of the Privy Council held that in respect of oil that was known by the trade name of Gargoyle there could be no article of like kind and quality and also that when actual sales of the manufactured articles existed the price charged for them would be the basis for calculation of duty. In the case of *Ford Motor Company of India, Limited v. Secretary of State* also the duty was calculated on the basis of price of actual sales of the vehicles to distributors. The ratio of the two decisions is that in cases in which price of the article itself is available, the same would be the only correct norm for calculation of duty. As in the present case the price of the articles of

manufacture of the petitioner Company is available and the 'Voltas' is the trade name by which the goods of the petitioner Company are sold, there is no difficulty and the question of consideration of the price of article of like kind and quality does not arise. Probably, in cases in which manufacturers' prices are found to be unreal or improper or bogus the prices of articles of like kind and quality were intended to be the basis for calculation of duty. Serious difficulties of calculations would arise in such calculations, but in this case we are not called upon to consider the question of these difficulties.

17. It has been rightly emphasised by Mr. Palkhivala that applying the tests laid down by their Lordships of the Privy Council in the above two judgments, it should be held that when a manufacturer proves that he sells the goods of his manufacture and/or makes agreements offering for sale goods of his manufacture to authorised dealers, the list prices quoted by him in the contracts made and/or offered to be made by him to his authorised dealers should be considered wholesale cash price of the goods of his manufacture within the meaning of Clause (a) of Section 4. He is right in his submission that in the first decision the Privy Council definitely rejected the findings made by Beaumont, C. J., that whenever there were bulk sales for the price fixed on wholesale units, the price charged should be held to be wholesale cash price. The test laid down in the first case was that the sale by the importer to a consumer would not involve sale at wholesale cash price. The quantitative test was thus altogether rejected. It was further definitely held that the sales effected by an importer through dealers who effected resales would involve wholesale price for the reason that the wholesale price was mentioned in the section in contradistinction to retail price. There is no reason why these tests laid down by the Privy Council should be held to be inapplicable to ascertainment of duty of excise under the provisions in the present Section 4 of the Central Excises and Salt Act. Following the observations of the Privy Council in the above two cases, the facts in the present case will have to be scrutinised to find out if for any reasons it can be held that the list price on the basis whereof the petitioner Company agreed to sell goods of its manufacture to the authorised dealers was not wholesale cash price and the correct basis for calculating duty payable by the petitioner Company. Before referring to the facts, it is necessary to deal with the authorities on which reliance has been placed on

behalf of the respondents.

18. The first case is National Tobacco Co, v Collector, Central Excise. The facts in that case were similar to the facts in the present case, because the Company which manufactured cigarettes made special agreements for sale of goods of its manufacture through agents. The agents were from time to time given, price list on the basis whereof they were bound to sell the Company's goods to third parties. Though upto a time duty of excise was assessed against the Company on the basis of the prices charged by the Company to the distributors under Clause (a) of Section 4, at a subsequent stage, that price was not accepted as the correct basis for calculating excise duty. The case of the department was that the duty was liable to be calculated on the basis of wholesale cash price, that is to say, the price at which the goods were capable of being sold in a wholesale market to an independent buyer. In connection with this question, Sinha, J. (sitting singly), referred to the provisions in Section 4 and analysed the section and ascertained its true effect by mentioning in the first instance that 'the 'wholesale price', means the price which a wholesale dealer and not a retail dealer charges for his goods, when he sells them in wholesale units'. On the above basis which, with respect, appears to us to be not correct in relation to the construction of the Section 4, he further held (p. 479) :.The words 'wholesale market' must mean a place where the article in question is habitually sold to anybody who wishes to make a purchase or sale. It is equally obvious that just because a factory manufactures the articles at a particular place, and sells them there to its stockists or dealers, will not by itself convert it to a wholesale market.

He observed (p. 480) :.If a manufacturer sells to a restricted number of stockists at the location, subject to special conditions, it does not follow that there exists a wholesale market at such a location.

The basis of all the further findings made by the learned Judge is what we have just quoted above. The result of this basis was that the learned Judge was prepared to consider the prices charged by third party wholesale dealers to their purchasers as relevant for ascertaining the wholesale cash price as mentioned in Clause (a) of Section 4. Now, it appears to us that for the reasons we have already

discussed above, the prices charged by third parties being' wholesale and/or retail dealers were never intended to be the basis for and must be irrelevant for calculation of duty of excise levied under the Act. It is true that prices charged by a manufacturer to his dealer may be bogus and/or stated for ulterior purposes of favouring a particular dealer. Such prices may be mentioned so that a manufacturer himself receives undisclosed profits in an indirect and unjustified manner. In such and similar circumstances, the prices charged by a manufacturer to a dealer can be rejected as improper prices on the basis whereof duty cannot be calculated. It appears to us, with great respect, that in discussing the phrase 'wholesale market' in the manner in which he did, the learned Judge failed to give sufficient importance to the nature and character of duty of excise and the relevant provision is Section 4 which indicated that nature, the provision being that the relevant price was the price 'at the time of the removal of the articles from the factory' and for delivery at the factory or at the nearest market. The meaning that he gave to the phrase 'wholesale market' and the opinion he expressed that the price charged by a third party wholesale dealer could be the basis for ascertaining wholesale cash price led the learned Judge into great difficulties. He had accordingly to make allowances in that connection and he observed as follows (p. 481) :.If a wholesale market exists at the site of the factory, ... then the determination of the time-element is very simple. But where there is no wholesale market at the site of the factory, ... a calculation has to be made, as to the location of the nearest wholesale market. In that event, the calculation must be made at a point of time when the goods were removed from the factory or premises of manufacture etc., which means a determination of the wholesale cash price that the goods would have fetched at the nearest wholesale market at the time of such removal etc. ... if at the time of removal no actual transaction can be discovered at the nearest wholesale market, then the excise authorities must investigate and discover the nearest transaction in point of time. This however will be permissible only when the next transaction takes place at a short distance of time, otherwise a notional calculation will have to be made as to what the wholesale cash price would have been in such a wholesale market, at the requisite point of time, ...In other words, what will have to be determined, is as to what would be the wholesale cash price that such goods would have fetched in such a wholesale market, at or

about the time when the goods were removed from the factory...

It would be improper to discuss the above observations in details here. It is sufficient to state that it appears to us that the above method of calculation of wholesale cash price suggested by the learned Judge only points to the fact that the conclusions arrived at by the learned Judge were not correct. In our view the price which can be considered under the Central Excises and Salt Act must be the price charged by a manufacturer. The prices charged by third parties can never be relevant.

19. Now, it is true that in the case of *National Tobacco Co. v. Collector, Central Excise*, the learned Judge was not referred to the above two decisions of the Privy Council. It is also true that the observations made by the learned Judge in that case are contrary to his own findings in the previous decision in the case of *Asoke Exporters and Importers v. Collector of Customs* [1955] 2 Cal. 470, In that case, the learned Judge was concerned with the provisions in Section 80 of the Sea Customs Act. Decisions of the Privy Council were pointed out to the learned Judge. The learned Judge in that case discussed the submission made on the basis of the provisions in Section 30 (a) to the effect that there must exist a substantial market for wholesale sales and secondly there must be reasonable continuous sales in such a market. That contention was rejected by referring to the first decision of the Privy Council in the case of *Vacuum Oil Company v. Secretary of State*. The learned Judge observed (p. 478): .It will be observed that the goods that were imported were very substantial but nevertheless as they were sold retail and not wholesale, it was not possible to ascertain the wholesale cash price at the place of importation and accordingly it was held that Section 30 (6) applied.

The learned Judge also referred to the case of *Ford Motor Company of India, Limited v. Secretary of State* and observed (p. 478) :

It, therefore, seems to be clear that what is to be ascertained is not whether there is a market for the goods at the place of importation but whether the particular goods under enquiry can be sold in the market at a wholesale cash price, that is to say, the particular goods or goods of the like kind and quality.

We apprehend that if the two Privy Council cases and his own above judgment were cited to the learned Judge, his conclusions might have been different.

20. In connection with the findings made by the learned Judge regarding the meaning of the phrase 'wholesale market', it may at once be noticed that the market referred to in both the sections must be the place mentioned by a manufacturer in his contracts for delivery of goods, the place being, in the first instance, the factory itself. If price is not fixed by a manufacturer for delivery at the factory, the only alternative place can be the place nearest the factory fixed by him for delivery of his goods. This being the true construction of the phrase 'wholesale market', we cannot accept the submission made by Mr. Bhabha that the phrase means an open market where everyone can reach for making transactions with a third party wholesale dealer.

21. In the case of Amco Batteries (P) Ltd. v. Asst. Collector, Central Excise, the test laid down in the case of National Tobacco Co. v. Collector, Central Excise, was accepted as correct test. That fact led the Court into difficulties which appear from the following (p. 219) :.I may add that in the instant case in determining the 'wholesale cash price' of the batteries in question, the Authorities will have to deduct the expenses that were likely to have been incurred by Messrs. Addison and Co. (P) Ltd., and George Oakes (P) Ltd., and the discounts to which they are ordinarily entitled to.

As that decision is arrived at merely by following the observations of Sinha, J., in the case of National Tobacco Co. v. Collector, Central Excise, which we are not following, we do not propose to discuss the details of that case.

22. In the case of Union of India v. Suryaprakasa Rao, the High Court of Andhra Pradesh accepted the observations and findings of Sinha, J., in National Tobacco Co. v. Collector, Central Excise, and made a remand order without making any substantial findings. As we are not following the decision of Sinha, J., it is not necessary to discuss this decision in any details. Sinha, J., sitting in Division Bench as Chief Justice, followed his own decision in National Tobacco Co. v. Collector, Central Excise, in the case of Collector, Central Excise v. Shankarlal. In that case, counsel for the appellants did not dispute the correctness of the findings

made in the case of National Tobacco Co. v. Collector, Central Excise. It was further found that the dealers' agreements on which reliance was placed on behalf of the assessee Company did not mention a proper price and was not an agreement which could be basis for making any calculations. The matter of construction of Section 4 was not further discussed in that case.

23. The word 'market' as contained in the list in the Seventh Schedule to the Constitution arose for construction before the Supreme Court in the case of Waverly Jute Mills v. Raymon & Co. : [1963]3SCR209 , and the relevant observation was (p. 94) : .Market no doubt ordinarily means a place where business is being transacted. That was probably all that it meant at a time when trade was not developed and when transactions took place at specified places. But with the development of commerce, bargains came to be concluded more often than not through correspondence and the connotation of the word 'market' underwent a corresponding expansion. In modern parlance the word 'market' has come to mean business as well as tile place where business is carried on ... the question in what sense it is used in a particular statute must be decided on a consideration of the context of that statute.

24. Now, from what is discussed above, it is clear that the basis of the decision in the impugned appellate order dated May 2, 1967, is entirely incorrect. To the extent that respondent No. 1 held that the wholesale cash price acceptable for assessment must represent sales in an open market to an independent buyer, he was entirely incorrect. He was not entitled to reject consideration of the price quoted by the petitioner Company to its dealers merely on the ground that this price was not offered for wholesale sales to other traders in an open market condition. In rejecting the submission made on behalf of the petitioner Company that the quantum of sales to consumers howsoever large would have to be ignored if wholesale cash price was ascertainable, he failed to follow the law that was pronounced by the Privy Council in the decisions cited above and was wrong.

25. Mr. Bhabha has argued that in 1963, 3165 room air-conditioners Model B-I were sold by the petitioner Company directly as against their sales of 323 such air-conditioners through dealers in different parts of India. 856 room air-conditioners

Model B-125 were sold by the petitioners themselves. None of this model was sold in the dealers' territories and/or through dealers. 43 dehumidifiers Model X-I were sold by the petitioner Company. Two only were sold all over India through dealers. 196 'Tushar' Water Coolers Model R-40 were sold by the petitioner Company. Five only were sold throughout India through dealers. There were similar figures in connection with the sales of 'Tushar' Water Coolers Model R-10 and 'Tushar' Water Coolers Model SC-40/40. Mr. Bhabha referred to these facts and further referred to the fact that for clearance of the goods manufactured from time to time the petitioner Company submitted duly completed forms AR-1. He referred to Rule 9-B of the Central Excise Rules which provided for provisional assessment to duty on submission of filled forms by a manufacturer and the fact that on such submission of forms an opportunity may be given for removal of goods from the factory. The burden of his contention was that levy of excise duty was always made under the Rules and to the knowledge of the petitioner Company, every time and from time to time when removal of the manufactured articles was sought by submission of A-I forms; and that to get the benefit of calculation of duty on the footing that there was a wholesale cash price in respect of their goods, the petitioner Company was bound to prove in respect of quantities removed from time to time that at the time of removal it had made a contract for wholesale sale of the goods removed. Having regard to very small quantities sold through the dealers, evidently, in his submission, the petitioner Company had failed to prove that when it removed from time to time the goods manufactured during the year 1963, a wholesale cash price transaction existed in respect of the articles removed. His submission, therefore, was that even if the agreements produced by the petitioner Company were held to be for wholesale cash price, the duty levied could not be held to be invalid. The reason was that only very few articles removed were delivered under the agreements to the distributors. For the balance of the goods it was impossible to hold that at the time of removal any wholesale cash price was fixed by the manufacturer in respect of the goods removed. As regards the goods sold by the petitioner Company itself, a finding should be made that in respect of those goods wholesale cash price was not available and the duty levied was proper.

26. Mr. Palkhivala contended that the above submissions do not take into account the phrase 'is capable of being sold' as contained in Clause (a) of Section 4. The submission was that the agreements with the dealers were not held to be non-commercial or not made in the ordinary course of business. These agreements provided for sale of each and all the articles of manufacture of the petitioner Company to and through the dealers on the terms of price mentioned in the agreements. The list prices for each and all of the articles current at the date of the removal of the articles fixed the price at which the petitioner Company agreed to deliver these articles to the dealers. The actual sale and delivery of the goods was irrelevant, because, under the agreements as read with the current list prices, the wholesale cash price for these goods was always ascertainable.

27. In connection with these submissions, it requires to be emphasised that even in his appellate order dated May 2, 1967, respondent No. 1 has referred to the dealers with whom the petitioner Company had agreements as wholesale dealers. It has not been the attempt of respondent No. 1 and it is not the case of the respondents that the agreements made by the petitioner Company with their dealers were bogus and/or the prices mentioned therein were not the current prices at which the petitioner Company was not willing to sell its goods to the dealers. It is abundantly clear that it is not the case of the respondents that the prices mentioned in the agreements were arbitrary or only quoted with the purpose of screening profits of the petitioner Company as manufacturers. Admittedly, as regards some of the manufactured articles removed from the factory, there were completed sales at the prices mentioned in the agreements. We do not see how the quantity of sales can be relevant factor in considering the applicability of the provisions in Clause (a) of Section 4. It is quite clear that the price of retail sales and/or sales to consumers of these goods can become basis for calculation of duty of excise only when the wholesale cash price as mentioned in Clause (a) is not ascertainable. That is the effect of the phrase 'where such price is not ascertainable' contained in Clause (b) of Section 4 as also the phrase 'is capable of being sold' contained in Clause (a) of Section 4. It has not been the case of the respondents, and there is no finding to the effect, that the goods removed from time to time were not capable of being sold through these dealers at the prices mentioned in the agreements if the dealers desired the delivery of such goods.

That there was no demand for such goods in the territories assigned to different dealers and that for that reason the dealers did not place orders for and take delivery of these goods cannot have the effect of proving that these goods were not capable of being sold through the dealers at the prices mentioned in the agreements. The fact that the sales did not take place must be, under the circumstances, irrelevant. On such facts, it would be impossible to make a finding that the price for sale of such goods, at the time of removal thereof, to the dealers as agreed under the agreements was not capable of being ascertained. As appears from the contents of exhs. Z and Z-I in respect of what is described as 'Tushar' Water Coolers Model BR-10, not a single sale and delivery had been effected either by the petitioner Company or the dealers. Though 856 room air-conditioners Model B-125 were sold in 1963 by the petitioner Company, not a single article of this model was sold to the dealers and/or in the territories of dealers. These facts only go to show that certain kinds of articles of manufacture of the petitioner Company were not in demand in the territories of dealers. Certain kinds of articles were for that reason during certain periods of time not sold in the territories of dealers and/or to the dealers; but these facts do not destroy the position which arises by reason of the provision in the agreements with dealers that the petitioner Company was at every relevant time, i.e., every time that the articles of the manufacture of the petitioner Company were removed from the factory, willing to sell to the dealers these very articles at the current list prices less discounts agreed. The price for these articles as and when sold through the dealers was always ascertainable. It is clear, therefore, that there is no substance in the contention made by Mr. Bhabha that for the reason that these articles were during certain periods of time not sold to the dealers and were not at all sold in the territories of dealers by the dealers it should be held that wholesale cash price for goods not sold to dealer was not ascertainable. This contention made by Mr. Bhabha is accordingly rejected. We cannot accept his contention that in connection with this question it is necessary to look into the facts of volume of sales of the articles by the petitioner Company to the dealers. We cannot accept his submission that the wholesale cash price for these articles could not be held to be as ascertainable unless every time a quantity of articles was removed from the petitioners' factory, one or more sales must be shown to have been effected to the

dealers.

18. But Mr. Bhabha submits that these agreements have restrictive provisions and the prices mentioned therein are accordingly not wholesale cash prices as necessary for application of the provisions in Clause (a) of Section 4. He particularly relies upon the fact that contents of the clauses 1 to 11 in each of the agreements with the dealers restrict the rights of the dealers in the matter of trading in the goods of the manufacture of the petitioner Company. Under Clause 3, the dealers are prevented from selling the articles sold to them outside the areas of the districts mentioned in their agreements. Under Clause 8, the dealers have given undertakings to give service to the Crystal Room air-conditioners and 'Tushar' Water Coolers and de-humidifying units sold by them in their territory free of charge during the guarantee period of twelve months. Under Clause 9, the dealers have agreed to employ at least one serviceman for giving adequate service and to depute servicemen for training to the petitioners' workshops at Delhi or Bombay. Under Clause 11, the dealers are prevented from reselling the articles sold to them except strictly in accordance with the selling prices fixed by the petitioner Company. There is further provision whereby the dealers agreed to look after the installation of the air-conditioners, though they were at liberty to charge the customers in that connection. In so far as reliance is placed on these and similar provisions for the contention that the price charged to the dealers is not open market price, the same must be rejected.

29. It first requires to be noticed that as is mentioned in the affidavit of Virendra Punj, the President of All India Airconditioning and Refrigeration Association, dated April 25, 1969, the air-conditioning and refrigeration units and machineries and components manufactured by the manufacturers of these goods are highly specialised engineering items and they are of such a nature that they require regular after-sale service by competent well trained engineers and technicians. Under the circumstances, the agreements made between such manufacturers and their dealers provide for the proper upkeep of the units. Having regard to these facts, even in respect of sales effected by the petitioner Company itself to consumers, the petitioner Company itself gives guarantee for twelve months and undertakes during the guarantee period to render services of the kinds mentioned

in the different clauses of the dealers' agreements. As these clauses which are described as restrictive have been agreed between the petitioner Company and the dealers only with a view to promote the sales of the articles of manufacture of the petitioner Company, it is not possible to hold that these so-called restrictive conditions in the agreements are not genuine wholesale cash prices. The petitioner Company agreed to give to the dealers discount of 22 per cent, on the air-conditioners, water coolers and de humidifying units and 20 per cent, on the component parts. The petitioners organised business of the sales of the articles of their manufacture through dealers of different areas on the same terms and conditions. In a sense there was no 'free wholesale market' in respect of the petitioners' goods throughout India. It is, however, difficult to hold that these facts make any difference to ascertainment of the wholesale cash price that the petitioner Company charged to these dealers at the time of the removal of the articles from the factory for delivery at the place nearest the factory and/or at the factory. Thus, price could easily be ascertained by reading the contents of the agreements made by the petitioner Company with each of its dealers. The so-called restrictive conditions have not made any difference in the matter of the wholesale cash price which can be ascertained in accordance with the provisions in Clause (a) of Section 4. We are unable to accept Mr. Bhabha's contention that these agreements are special agreements and the terms quoted therein for sale are not in the ordinary course of business and that the agreements must be held to be not relevant for the purposes of finding 'wholesale cash price'.

30. The price agreed between the petitioner Company and its dealers is for delivery FOR Bombay; or ex-Company's godown at New Delhi. As the factory of the petitioner Company is situate at Bombay, the basis for calculation of excise duty would be the agreed price for delivery FOR Bombay.

31. Mr. Bhabha next contends that in any event we should not deal in this petition with the revised assessments of excise duty made for 1962 and assessments of excise duty made for the years 1964 to 1966. He has pointed out that in connection with these assessments, the petitioner Company filed appeals on January 19, 1967. The only reason why the appeals have not been disposed of was that the petitioner Company had failed to make deposits of the assessed

amounts. Respondent No. 1 is now not insisting on these deposits because of a certain judgment of the Supreme Court and is willing to dispose of these appeals. Mr. Palkhivala, however, submits that respondent No. 1 made up his mind on all the contentions which could be raised before him in these appeals when he disposed of the appeal in respect of the assessment for 1963. He thereafter made demands for deposits. The department thereafter issued notices of demand for payment of diverse amounts assessed in respect of all the years in question. But for the prayers in the present petition challenging the validity of these assessments, respondent No. 1 would have by this time disposed of the appeals on the same footing as contained in the impugned order dated May 2, 1967. As questions of merits are all questions of law and as the opinion expressed by this Court on these questions must be binding on respondent No. 1, no useful purpose can be served by asking the petitioners to have their appeals in respect of these years heard by respondent No. 1. We find it extremely difficult to negative the submissions made by Mr. Palkhivala. The basis on which the assessments for the above years are made against the petitioner Company was the same as the basis in the impugned appellate order dated May 2, 1967. Since the reasoning of that order has been held by us to be entirely incorrect, the petitioner Company is entitled to relief in respect of the assessment orders for the years 1962 and 1964 to 1966. The setting aside of these assessments will not injuriously affect the right of the department because assessments will have to be made afresh in respect of all the years mentioned in the petition in accordance with the principles declared in this judgment. We see no reason for not giving relief to the petitioner Company in respect of all the orders which are challenged in this petition and in respect of all the notices of demand mentioned in the petition.

32. Under the circumstances, the rule in this petition will be made absolute. The impugned order dated May 2, 1967, and the various notices of demand which are all mentioned in the letter of the Inspector of Central Excise dated June 6, 1967, exh. Y to the petition, and the orders of assessments leading to these notices of demand are declared to be invalid and are set aside. The respondents will not enforce the claims made in the above impugned order and assessments and notices of demand. The respondents will pay costs fixed at Rs. 3,000.

