A M/S. PUROLATOR INDIA LTD.

v.

COMMISSIONER OF CENTRAL EXCISE DELHI-III

(Civil Appeal No. 1959 of 2006)

B AUGUST 25, 2015

[A.K. SIKRI AND R. F. NARIMAN, JJ.]

Central Excise Act, 1944: s.4 (as amended in 2000) – Sales Tax, Cash Discount, Volume Discount – Whether C *deductible for arriving at assessable value – Held: Cash discount is deductible from the sale price in order to arrive at the value of excisable goods at the time of removal of goods – However, issue as to Volume Discount and Sales Tax,* D *matter was rightly remitted back by the Tribunal.*

Disposing of the appeal, the Court

HELD: 1. It can be seen that the common thread running through Section 4, whether it is prior to 1973, after E **the amendment in 1973, or after the amendment of 2000, is that excisable goods have to have a determination of "price" only "at the time of removal". This basic feature of Section 4 has never changed even after two amendments. The "place of removal" has been amended from** F **time to time so that it could be expanded from a factory or any other premises of manufacture or production, to warehouses or depots wherein the excisable goods have been permitted to be deposited either with payment of duty, or from which such excisable goods are to be sold** G **after clearance from a factory. In fact, Section 4(2) pre-2000 made it clear that where the price of excisable goods for delivery at the place of removal is not known, and the value thereof is determined with reference to the**

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price for delivery at a place other than the place of removal, the cost of transportation from the place of removal to the place of delivery is to be excluded from such price. This is because the value of excisable goods under the Section is to be determined only at the time and place of removal. Even after the amendment of Section 4 in 2000, the same scheme continues. Only, Section 4(2) is in terms replaced by Rule 5 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. [Para 14] [829-B-F]

2. It can be seen that Section 4 as amended introduces the concept of "transaction value" so that on each removal of excisable goods, the "transaction value" of such goods becomes determinable. Whereas previously, the value of such excisable goods was the price at which such goods were ordinarily sold in the course of wholesale trade, post amendment each transaction is looked at by itself. However, "transaction value" as defined in sub-clause (3)(d) of Section 4 has to be read along with the expression "for delivery at the time and place of removal". It is clear, therefore, that what is paramount is that the value of the excisable goods even on the basis of "transaction value" has only to be at the time of removal, that is, the time of clearance of the goods from the appellant's factory or depot as the case may be. The expression "actually paid or payable for the goods, when sold" only means that whatever is agreed to as the price for the goods forms the basis of value, whether such price has been paid, has been paid in part, or has not been paid at all. The basis of "transaction value" is therefore the agreed contractual price. Further, the expression "when sold" is not meant to indicate the time at which such goods are sold, but is meant to indicate that goods are the subject matter of an agreement of sale.

A **Cash discount is something which is "known" at or prior to the clearance of the goods, being contained in the agreement of sale between the assessee and its buyers, and must therefore be deducted from the sale price in order to arrive at the** value of excisable goods "at the time
B of removal". **[Para 18] [832-D-H; 833-A-B]**

Union of India v. Bombay Tyre International Limited 1984 (17) ELT 329 (SC); *Government of India v. Madras Rubber Factory Ltd.* **1995 (77) ELT 433 (SC) – relied on.**

C

Commissioner of Central Excise, Jaipur-II v. Super Synotex (India) Ltd. and Ors. **2014 (301) ELT 273 (SC) – distinguished.**

D *Deputy Commissioner of Sales Tax (Law) Board of Revenue (Taxes), Ernakulam v. Advani Oorlikon (P) Ltd.*, **1981 (8) ELT 801 (S.C.) – referred to.**

Case Law Reference

E **1984 (17) ELT 329 (SC) relied on. Paras 7, 15, 25**

1995 (77) ELT 433 (SC) relied on. Paras 7, 16, 25

2014 (301) ELT 273 (SC) distinguished. Paras 9, 23

F **1981 (8) ELT 801 (S.C.) referred to. Para 21**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1959 of 2006.

G From the Judgment and Order No. 1241/04-NB-A dated 11.11.2004 of the Customs, Excise & Service Tax Appellate Tribunal, New Delhi in Appeal No. E/1670/04-NB-A.

V. Lakshmikumaran, M.P. Devanath, Vivek Sharma, L. Charanaya, R. Ramachandran, Aditya Bhattacharya, Hemant
H Bajaj, Anandh K., Rajesh Kumar for the Appellant.

Pinki Anand, ASG, Ashok Kumar Panda, Nisha Bagchi, Aruna Gupta, B. Krishna Prasad for the Respondent. A

The Judgment of the Court was delivered by

R.F. NARIMAN, J. 1. M/s Purolator India Limited (hereinafter referred to as the appellant) is engaged in the manufacture of excisable goods, namely Filter Elements, Inserts, and Cartridges and Components. These goods are either cleared by the appellant to various vehicle manufacturers or stock transferred to depots from where they are further stock transferred to clearing and forwarding agents. B C

2. For effecting stock transfers, the appellant filed declarations under Rule 173C with the excise department. In these declarations, the appellant claimed deduction towards Sales Tax, Cash Discount and Volume Discount on excise duty payable to arrive at the assessable value under Section 4 of the Central Excise and Salt Act, 1944. D

3. Apart from undertaking manufacturing activities, the appellant at times also receives goods from customers for repair in case of defects noticed by the customers. The customers either reject the entire lot or a particular box etc. if they notice any defect, so that their time is not wasted in checking each and every item and thus, goods are sent back to the appellant. On receipt of such consignments, the appellant checks the same for defects indicated and undertakes necessary repairs. Thereafter, the finished products are returned to customers. The appellant was filing the necessary D-3 declarations for receipt of such returned goods and was maintaining the register required in Form V for the said purposes and was thereafter returning such repaired items under the provisions of Rule 173H without payment of duty thereon. E F G

4. A Show Cause Notice dated 2.4.2002 was issued H

A wherein it was alleged that the appellant is not eligible for the various deductions claimed on account of volume discount, sales tax and cash discount. Besides this it was also alleged that the appellant has removed new finished excisable goods instead of old/repaired goods.

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5. The appellant filed a detailed reply to the show cause notice countering each and every allegation. The Commissioner of Central Excise, Delhi-III passed an Order dated 31.12.2003 dropping the duty demands on all the issues for C the period April 1996 to February 1997, being more than five years old. Further, he dropped the duty demand on the issue of cash discount for the period prior to July 2000. However, on the remaining issues, the Commissioner has confirmed duty demand of Rs. 44,66,247/- and also imposed penalty of Rs. D 49,66,247/- on the appellant as follows:-

"ORDER

With a view to the discussion and findings recorded E above

(i) invoke extended period of limitation provided in first proviso to Section 11A(1) of the Central Excise Act, 1944, and determine the following amounts in terms of F provisions of Section 11A and direct the assessee to pay the same forthwith.

(a) Rs. 13,43,046/- towards duty involved on replaced goods cleared between March 1997 to March 2001.

G (b) Rs. 14,27,483/- towards duty computed for the period of March 1997 to March, 2001 on volume discount.

(c) Rs, 11,96,601/- towards duty computed for the H period of March 97 to March, 2001 on Sales Tax

deduction and

(d) Rs. 4,99,117/- towards duty on cash discount for the period of July 2000 to March, 2001

(ii) confirm that the interest in terms of provisions of Section 11AB ibid is payable by the assessee on the amounts of (i) (a) to (i) (d) above;

(iii) impose a penalty of Rs. 44,66,247/- on assessee under the provisions of Section 11AC ibid;

(iv) impose a penalty of Rs. 5 lakhs on assessee in terms of provisions of Rule 173Q of the Central Excise Rules, 1944 and Rule 25 of the Central Excise Rules, 2001 both read with section 38A of the Central Excise Act, and

(v) appropriate the amounts of Rs. 29,140/-, Rs. 38,896/-, Rs. 42,728/- and Rs. 19,443/- which were voluntarily paid by the assessee on account of duty on handling charges and differential duty.

It is clarified that the amount of penalty in (iii) above shall be reduced to 25% thereof if the assessee deposits the amounts of the duty, interest and penalty, determined vide this order within 30 days from the date of communication of this order; and that if the assessee has already deposited /paid some amount in relation to the dues determined above, then such payment shall be adjusted against the dues."

6. When it came to cash discount, the Tribunal upheld the finding of the Commissioner on the following basis:-

"10. Regarding cash discount, it is not in dispute that the duty has been demanded in respect of cash discount

A which was not actually passed on to the customers. The learned Advocate has relied upon the decision in Pace Marketing Specialities Ltd, supra, wherein it has been held by the Tribunal that cash discount is a discount allowed for prompt payment for the goods and when this B discount is reduced from the invoice price, transaction value at the time of delivery of goods is obtained, otherwise, the invoice price is a future price and as the assessable value is to be determined with regard to time of removal financing and other cost cannot form part of C the assessable value. With due regard, we find ourselves unable to agree with this view. The measure for valuation under New Section 4 of the Central Excise Act (with effect from 1.7.2000) is the "transaction value" and not the "deemed value" which was the case under the Old D Section 4 of the Act. Under Old Section 4 the value shall be deemed to be the normal price, that is to say, the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade or E delivery at the time and place of removal. In view of this clear language of the Section itself, the Bombay High Court in the case of Jenson & Nicholson (India) Ltd. Vs. Union of India, 1984 (17) ELT 4 (Bom.) has filed that the wholesale cash price on which the excisable duty is F assessable will naturally be the price minus the cash discount allowed in the invoice. The Hon'ble High Court has proceeded on the basis that the sales are effected on the basis of the price basis which themselves mention the various terms subject to which the sales are effected. G The Tribunal followed the said Judgment in CCE, Meerut Vs. Station Shox Ltd. 1996 (85) ELT 139 (T). The provision of Section 4 of the Central Excise Act have since then completely changed. As per new Section 4. Value shall "in a case where the goods are sold by the H assessee, for delivery at the time and place of the

removal, the assessee and the buyers of the goods are not related and the price is the sole consideration for the sale, be the transaction value." Thus in the present matter, the value for the purpose of Section 4 shall be the transaction value which has been defined in clause (d) of sub-section(3) of Section 4 of the Act as under:-

> "transaction value" means the price actually paid or payable for the goods, when sold, and includes in addition to amount charged as priced, any amount that they buyer is liable to pay to, or on behalf of, the assessee, by reason of, or in connection with the sale, whether payable at the time of sale or at any other time, including , but not limited to, any amount charged for, or to make provision for, advertising or publicity marketing and selling organization expenses, storage, outward handling, servicing ,warranty, commission or any other matter, but does not include the amount of duty of excise, sales tax and other taxes, if any actually paid or actually payable on such goods."

11. Thus the value has under gone a complete change. The question to be asked for determination of the assessable value under new Section 4 is what is the "transaction value" of the goods that is "the price actually paid or payable for the goods when sold." Contrary to these provisions, under the old Section 4 the value was a deemed one, that is to say, the price at which goods a ordinarily sold in the course of wholesale trade. Now under New Section 4, one has not to look as to what is the price at which goods are ordinarily sold in the course of wholesale trade. The price actually paid or payable is to be taken up as the assessable value. In the present matter, the transaction value has to be taken for the purpose of assessment of duty under Section 4 of the Central Excise Act and as admittedly no cash discount

A has been given to the customers, the actual price paid by them shall be the assessable value.

12. Accordingly, we reject the appeal as far as it relates to the allowance of deduction on account of cash
B discount. In respect of volume discount and sales tax and duty liability in respect of returned goods, the matter is remanded to the jurisdictional Adjudicating Authority for re-adjudication in terms of our direction. We leave the issue regarding imposition of penalty open to be decided
C by the Adjudicating Authority."

7. Shri Lakshmikumaran, learned counsel for the appellant, has argued that Section 4 of the Central Excise and Salt Act, 1944 as amended in 2000, has made no change in the
D situation qua cash discount as it obtained under the old Section 4. According to him, what has to be seen in order to arrive at the correct value of excisable goods under Section 4 is such value at the time of removal, and this being so under both the old Section and the new Section, cash discount has to be al-
E lowed as has been held in **Union of India v. Bombay Tyre International Limited**, 1984 (17) ELT 329 (SC), and **Government of India v. Madras Rubber Factory Ltd.**, 1995 (77) ELT 433 (SC).

F 8. Further, according to the learned counsel, "transaction value" which was introduced for the first time into the amended Section 4 does not make any change with regard to the fact that such transaction value is only at the time of removal from the factory or depot, being the time of clearance of excisable
G goods from the factory premises or depot as the case may be. According to him, every agreement of sale entered into by the assessee with its buyers makes it known before the goods are cleared that there is to be a cash discount insofar as the appellant's goods are concerned. Therefore, this being the
H case, it is clear that at the time of clearance of the excisable

goods from the appellant's factory, such discounted price alone has to be the value of the goods cleared from the appellant's factory even under the amended Section 4.

9. Ms. Pinky Anand, learned Additional Solicitor General, has, on the other hand, stated that the introduction of "transaction value" into the amended Section 4 makes a world of difference and that therefore only what is actually paid ultimately is to be looked at for the purpose of valuation of the appellant's goods. If it is found that what is "actually paid" is not the discounted price, then the transaction value cannot possibly include cash discount. For this purpose, she relied upon the decision in **Commissioner of Central Excise, Jaipur-II v. Super Synotex (India) Ltd. and Ors.**, 2014 (301) ELT 273 (SC).

10. We have heard learned counsel for the parties. In order to better appreciate the arguments on both the sides, it is necessary to set out Section 4 of the Central Excise and Salt Act as it obtained prior to the amendment made in 1973, the amendment made in 1973; and finally the amendment made in 2000.

11. Section 4, prior to its amendment in 1973, read as follows:-

> "4. 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 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, or if a whole 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

A 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,
B 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 place at any other place nearest thereto.

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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
D chargeable with duty from the factory or other premises aforesaid."

12. After the amendment of 1973, Section 4 reads as follows:-

E "4. Valuation of excisable goods for purposes of charging of duty of excise.- (1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to value, such value, shall, subject to the other
F provisions of this section, be deemed to be –

(a) the normal price thereof, that is to say, the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal, where the buyer is not a
G related person and the price is the sole consideration for the sale:

Provided that -

H (i) where, in accordance with the normal practice of the

wholesale trade in such goods, such goods are sold by the assessee at different prices to different classes of buyers (not being related persons) each such price shall, subject to the existence of the other circumstances specified in clause (a), be deemed to be the normal price of such goods in relation to each such class of buyers;

(ia) where the price at which such goods are ordinarily sold by the assessee is different for different places of removal, each such price shall, subject to the existence of other circumstances specified in clause (a), be deemed to be the normal price of such goods in relation to each such place of removal;

(ii) where such goods are sold by the assessee in the course of wholesale trade for delivery at the time and place of removal at a price fixed under any law for the time being in force or at a price, being the maximum, fixed under any such law, then, notwithstanding anything contained in clause (iii) of this proviso, the price or the maximum price, as the case may be, so fixed, shall, in relation to the goods so sold, be deemed to be the normal price thereof;

(iii) where the assessee so arranges that the goods are generally not sold by him in the course of wholesale trade except to or through a related person, the normal price of the goods sold by the assessee to or through such related person shall be deemed to be the price at which they are ordinarily sold by the related person in the course of wholesale trade at the time of removal, to dealers (not being related persons) or where such goods are not sold to such dealers, to dealers (being related persons), who sell such goods in retail;

(b) where the normal price of such goods is not

A ascertainable for the reason, that such goods are not sold or for any other reason, the nearest ascertainable equivalent thereof determined in such manner as may be prescribed.

B (2) Where, in relation to any excisable goods the price thereof for delivery at the place of removal is not known and the value thereof is determined with reference to the price for delivery at a place other than the place of removal, the cost of transportation from the place of C removal to the place of delivery shall be excluded from such price.

(3) The provisions of this section shall not apply in respect of any excisable goods for which a tariff value has been D fixed under sub-section (2) of section 3.

(4) For the purposes of this section, -

(a) "assessee" means the person who is liable to pay the duty of excise under this Act and includes his agent;

E

(b) "place of removal" means-

(i) a factory or any other place or premises of production or manufacture of the excisable goods;

F

(ii) a warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty;

(iii) a depot, premises of a consignment agent or any G other place or premises from where the excisable goods are to be sold after their clearance from the factory and,

from where such goods are removed;

H (ba) "time of removal", in respect of goods removed from

the place of removal referred to in sub-clause (iii) of clause (b), shall be deemed to be the time at which such goods are cleared from the factory;

(c) "related person" means a person who is so associated with the assessee that they have interest, directly or indirectly, in the business of each other and includes a holding company, a subsidiary company, a relative and a distributor of the assessee, and any sub-distributor of such distributor.

Explanation. - In this clause "holding company", "subsidiary company" and "relative" have the same meanings as in the Companies Act, 1956 (1 of 1956);

(d) "value", in relation to any excisable goods,-

(i) where the goods are delivered at the time of removal in a packed condition, includes the cost of such packing except the cost of the packing which is of a durable nature and is returnable by the buyer to the assessee.

Explanation. – In this sub-clause, " packing" means the wrapper, container, bobbin, pirn, spool, reel or warp beam or any other thing in which or on which the excisable goods are wrapped, contained or wound;

(ii) does not include the amount of the duty of excise, sales tax and other taxes, if any, payable on such goods and, subject to such rules as may be made, the trade discount (such discount not being refundable on any account whatsoever) allowed in accordance with the normal practice of the wholesale trade at the time of removal in respect of such goods sold or contracted for

A sale.

Explanation. - For the purposes of this sub-clause, the amount of the duty of excise payable on any excisable goods shall be the sum total of –

B

(a) the effective duty of excise payable on such goods under this Act; and

(b) the aggregate of the effective duties of excise payable
C under other Central Acts, if any, providing for the levy of duties of excise on such goods,

and the effective duty of excise on such goods under each Act referred to in clause (a) or clause (b) shall be,-

D

(i) in a case where a notification or order providing for any exemption (not being an exemption for giving credit with respect to, or reduction of duty of excise under such Act on such goods equal to, any duty of excise under
E such Act, or the additional duty under section 3 of the Customs Tariff Act, 1975 (51 of 1975), already paid on the raw material or component parts used in the production or manufacture of such goods) from the duty of excise under such Act is for the time being in force,
F the duty of excise computed with reference to the rate specified in such Act, in respect of such goods as reduced so as to give full and complete effect to such exemption; and

G (ii) in any other case, the duty of excise computed with reference to the rate specified in such Act in respect of such goods.

(e) "wholesale trade" means sales to dealers, industrial
H consumers, Government, local authorities and other

buyers, who or which purchase their requirements otherwise than in retail." A

13. Section 4, as it reads after the amendment of 2000, is as follows:-

"4. Valuation of excisable goods for purposes of charging of duty of excise.- B

(1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to their value, then on each removal of the goods, such value shall – C

(a) in a case where the goods are sold by the assessee, for delivery at the time and place of the removal, the assessee and the buyer of the goods are not related and the price is the sole consideration for the sale, be the D transaction value;

(b) in any other case, including the case where the goods are not sold, be the value determined in such manner as may be prescribed. E

(2) The provisions of this section shall not apply in respect of any excisable goods for which a tariff value has been fixed under sub-section (2) of section 3.

(3) For the purpose of this Section,- F

(a) "assessee" means the person who is liable to pay the duty of excise under this Act and includes his agent;

(b) persons shall be deemed to be "related" if- G

(i) they are inter-connected undertakings;

(ii) they are relatives;

(iii) amongst them the buyer is a relative and a distributor H

A of the assessee, or a sub-distributor of such distributor; or

(iv) they are so associated that they have interest, directly or indirectly, in the business of each other.

B *Explanation.* – In this clause –

(i) "inter-connected undertakings" shall have the meaning assigned to it in clause (g) of section 2 of the Monopolies and Restrictive Trade Practices Act, 1969 (64 of 1969); C and

(ii) "relative" shall have the meaning assigned to it in clause (41) of section 2 of the Companies Act, 1956 (1 of 1956);

D (c) "place of removal" means -

(i) a factory or any other place or premises of production or manufacture of the excisable goods;

E (ii) a warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty,

from where such goods are removed;

F (d) "transaction value" means the price actually paid or payable for the goods, when sold, and includes in addition to the amount charged as price, any amount that the buyer is liable to pay to, or on behalf of the assessee, G by reason of, or in connection with the sale, whether payable at the time of the sale or at any other time, including, but not limited to, any amount charged for, or to make provision for, advertising or publicity, marketing and selling, organization expenses, storage, outward H handling, servicing, warranty, commission or any other

matter; but does not include the amount of duty of excise, sales tax and other taxes, if any, actually paid or actually payable on such goods." A

14. It can be seen that the common thread running through Section 4, whether it is prior to 1973, after the amendment in 1973, or after the amendment of 2000, is that excisable goods have to have a determination of "price" only "at the time of removal". This basic feature of Section 4 has never changed even after two amendments. The "place of removal" has been amended from time to time so that it could be expanded from a factory or any other premises of manufacture or production, to warehouses or depots wherein the excisable goods have been permitted to be deposited either with payment of duty, or from which such excisable goods are to be sold after clearance from a factory. In fact, Section 4(2) pre- 2000 made it clear that where the price of excisable goods for delivery at the place of removal is not known, and the value thereof is determined with reference to the price for delivery at a place other than the place of removal, the cost of transportation from the place of removal to the place of delivery is to be excluded from such price. This is because the value of excisable goods under the Section is to be determined only at the time and place of removal. Even after the amendment of Section 4 in 2000, the same scheme continues. Only, Section 4(2) is in terms replaced by Rule 5 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. B C D E F

15. Post 1973, this Court has in two of its decisions, namely, in **Union of India v. Bombay Tyre International Limited**, 1984 (17) ELT 329 (SC), clearly held as follows:- G

"*Trade Discounts*. – Discounts allowed in the Trade (by whatever name such discount is described) should be allowed to be deducted from the sale price having regard to the nature of the goods, if established under H

A agreements or under terms of sale or by established practice, the allowance and the nature of the discount being known at or prior to the removal of the goods. Such Trade Discounts shall not be disallowed only because they are not payable at the time of each invoice or deducted from
B the invoice price." (at para 1)

16. In the second judgment in **Government of India v. Madras Rubber Factory Ltd.**, 1995 (77) ELT 433 (SC), what has been held is as follows:-

C

"Year Ending Discount and Prompt Payment Discount:

What is called 'Year-ending discount' is really a bonus given by Madras Rubber Factory to its dealers @ Rupees
D fifty per tyre in respect of a particular type of tyres. This discount is payable only where the payments are actually received within forty five days from the date of the invoice. Under this scheme, it appears that a declaration is to be
E received dealer-wise and thereafter provision is to be made at the head office of MRF for the bonus. The Assistant Collector has found that this discount was allowed by the assessee not out of any extra-commercial considerations but that they were meant only to boost
F the sales particularly in the year 1981-82 in respect of Leader Tyre in order to achieve the target of sales for that year. He has recorded a finding that "such a system of grant of discount is prevalent in normal trade practice and the only difference may be that MRF limited have
G granted the discount only at the end of the year and not at the time of actual sales". The learned Additional Solicitor General disputed the correctness of the basis on which the Assistant Collector has allowed this deduction. He commended for our acceptance the
H reasoning in Para 13(ii) of the judgment dated

December 20,1986 (Assistant Collector of Central Excise v. Madras Rubber Factory.) The reasoning in the said order runs thus:

> "The allowance of the discount is not known at or prior to the removal of the goods. The calculations are made at the end of the year and the Bonus at the said rate is granted only to a particular class of Dealers. This is computed after taking stock of the accounts between MRF and its dealers. It is not in the nature of a discount but is in the nature of a Bonus or an incentive much after the invoice is raised and the removal of the goods is complete. In the circumstances, we are of the opinion that MRF is not entitled to deduction under this head."

We are, however, of the respectful opinion that the said reasoning cannot be accepted in view of the clear finding recorded by the Assistant Collector that this system of discount is prevalent in the industry and is known and understood at the time of removal of particular goods, though the amount is quantified later. In view of the said finding and in the light of the clarificatory Order in *Bombay Tyre International*, we hold that this claim has been rightly allowed by the Assistant Collector.

So far as the prompt payment discount is concerned, it is payable under a scheme called 'prompt payment discount scheme' which is applicable only to up-country non-RCS dealers (except, of course, the Government and DGS&D accounts). The discount is @ 0.75% on the total value of the invoice including sales tax, surcharge etc. provided the bill is cleared/paid within 26 days from the date of invoice. The case of the Union of India is that this discount is limited only to certain varieties of products as explained in the scheme document and is valid only

A for a limited period. The Assistant Collector, however, dealt with this discount along with the year ending discount and allowed it on the same reasoning as is applicable to the year ending discount.

B In view of the findings recorded by the Assistant Collector and the clarificatory order in *Bombay Tyre International* this claim too must be held to have been rightly allowed by the Assistant Collector." (at paras 59 to 62)

C 17. The only question that falls for our determination is whether Section 4 as amended in the year 2000 makes no change to the aforesaid position.

18. It can be seen that Section 4 as amended introduces the concept of "transaction value" so that on each removal of D excisable goods, the "transaction value" of such goods becomes determinable. Whereas previously, the value of such excisable goods was the price at which such goods were ordinarily sold in the course of wholesale trade, post amendment each transaction is looked at by itself. However, "transaction value" as defined in sub-clause (3)(d) of Section 4 has to be read along with the expression "for delivery at the time and place of removal". It is clear, therefore, that what is paramount is that the value of the excisable goods even on the F basis of "transaction value" has only to be at the time of removal, that is, the time of clearance of the goods from the appellant's factory or depot as the case may be. The expression "actually paid or payable for the goods, when sold" only means that whatever is agreed to as the price for the goods G forms the basis of value, whether such price has been paid, has been paid in part, of has not been paid at all. The basis of "transaction value" is therefore the agreed contractual price. Further, the expression "when sold" is not meant to indicate the time at which such goods are sold, but is meant to indicate H that goods are the subject matter of an agreement of sale.

Once this becomes clear, what the learned counsel for the assessee has argued must necessarily be accepted inasmuch as cash discount is something which is "known" at or prior to the clearance of the goods, being contained in the agreement of sale between the assessee and its buyers, and must therefore be deducted from the sale price in order to arrive at the value of excisable goods "at the time of removal".

19. We were referred to the Central Board of Excise and Customs Bulletin for the period January-March, 1975 in which the Board laid down:-

"Cash Discounts

That is, discounts for prompt payment of price of goods on delivery, are admissible in arriving at the assessable value if they are available to all buyers. This aspect has been dealt with in detail under the heading "price".

"...Some assessee may give to all his buyers cash discount, that is a discount for prompt payment. In other words, they charge a somewhat lesser price where there is cash payment, but charge a higher price (i.e. without deduction of the cash discount) if the payment is not made in cash. In such cases, the cash discount, if allowed, will be admissible on the principle that only the net price obtained after deduction of the cash discount is the price of the goods."

"Illustrations.

(iv) Assessee A sells the goods at Rs. 100 per unit but given a cash discount of 2% if payment is made at the time of delivery or within a specified period. Such cash discount will be admissible and the price will be Rs. 100 per unit minus 2%."

A 20. This understanding of the Board would necessarily continue in view of what is said above as regards cash discounts even after the amendment of Section 4 in the year 2000.

B 21. We were referred to the judgment of this Court in **Deputy Commissioner of Sales Tax (Law) Board of Revenue (Taxes), Ernakulam v. Advani Oorlikon (P) Ltd.**, 1981 (8) ELT 801 (S.C.), in which it was stated:-

C "... Cash discount is allowed when the purchaser makes payment promptly or within the period of credit allowed. It is a discount granted in consideration of expeditious payment. *A trade discount is a deduction from the catalogue price of goods allowed by wholesalers to* D *retailers engaged in the trade.* The allowance enables the retailer to sell the goods at the catalogue price and yet make a reasonable margin of profit after taking into account his business expense. The outward invoice sent by a wholesale dealer to a retailer shows the catalogue E price and against that a deduction of the trade discount is shown. The net amount is the sale price, and it is that net amount which is entered in the books of the respective parties as the amount realisable." (at para 5)

F 22. This judgment arose in the context of the Central Sales Tax Act, but it is instructive only in that it makes it clear that a cash discount is the discount granted in consideration of expeditious payment, and is therefore directly related to price.

G 23. It only remains to discuss the sheet anchor of revenue's case, namely, the judgment of this Court in **Commissioner of Central Excise, Jaipur-II v. Super Synotex (India) Ltd. and Ors.** (supra). The said judgment was concerned with sales tax incentives that were given under the Rajasthan Sales Tax In- H centives Scheme. On the facts of that case, 25% of the sales

tax was paid to the Government, and 75% of the said amount of sales tax was retained by the assessee and became the assessee's profit. Under the earlier Board's circulars that were issued by the Central Board of Excise and Customs, the amount of 75% of sales tax that was never paid to the Government but retained by the assessee was also liable to be deducted from "price" under the old Section 4, that is, Section 4 before its amendment in the year 2000. This Court held that the amended Section 4 would require that such amount of 75% is not deductible as sales tax because, according to this Court, only sales tax that is "actually paid" could be deducted post Section 4 as amended in 2000. This Court said:-

> "It is evincible from the language employed in the aforesaid circular that set off is to be taken into account for calculating the amount of sales tax permissible for arriving at the "transaction value" under Section 4 of the Act because the set off does not change the rate of sales tax payable/chargeable, but a lower amount is in fact paid due to set off of the sales tax paid on the input. Thus, if sales tax was not paid on the input, full amount is payable and has to be excluded for arriving at the "transaction value". That is not the factual matrix in the present case. The assessee in the present case has paid only 25% and retained 75% of the amount which was collected as sales tax. 75% of the amount collected was retained and became the profit or the effective cost paid to the assessee by the purchaser. The amount payable as sales tax was only 25% of the normal sales tax. Purpose and objective in defining "transaction value" or value in relation to excisable goods is obvious. The price or cost paid to the manufacturer constitutes the assessable value on which excise duty is payable. It is also obvious that the excise duty payable has to be excluded while calculating transaction value for levy of excise duty. Sales tax or VAT

A or turnover tax is payable or paid to the State Government on the transaction, which is regarded as sale, i.e., for transfer of title in the manufactured goods. The amount paid or payable to the State Government towards sales tax, VAT, etc. is excluded because it is not an amount
B paid to the manufacturer towards the price, but an amount paid or payable to the State Government for the sale transaction, i.e., transfer of title from the manufacturer to a third party. Accordingly, the amount paid to the State Government is only excludible from the transaction value.
C What is not payable or to be paid as sales tax/VAT, should not be charged from the third party/customer, but if it charged and is not payable or paid, it is a part and should not be excluded from the transaction value. This is the
D position after the amendment, for as per the amended provision the words "transaction value" mean payment made on actual basis or actually paid by the assessee. The words that gain signification are "actually paid". The situation after 1.7.2000 does not cover a situation which
E was covered under the circular dated 12.3.1998. Be that as it may, the clear legislative intent, as it seems to us, is on "actually paid". The question of "actually payable" does not arise in this case." (at para 22)

F 24. It will be noticed that this Court did not deal with Section 4(1)(a) as amended in the year 2000 insofar as it speaks of delivery of goods at the time and place of removal. This Court was only concerned with whether sales tax is to be deducted from "transaction value" as newly defined. We have
G already seen that "transaction value" specifically states that it will not include sales tax "actually paid or actually payable on such goods". On the facts of that case, this Court was not concerned with the expression "actually payable" as it did not arise in that case. This Court was only concerned with sales
H tax not "actually paid" to the Rajasthan Government, and there-

fore held that since 75% of sales tax was retained by the assessee, the said amount could not be deducted as only amounts payable to the State Government as sales tax can be deducted. This was so held on an interpretation of the last part of the definition of "transaction value". The facts of the present case are concerned with the first part of the definition of "transaction value" which has to be read with Section 4(1)(a) as has been stated above.

25. This judgment does not in any manner deviate from the settled legal position so far as cash discounts are concerned as has been laid down in **Union of India v. Bombay Tyre International** (supra) and **Government of India v. MRF** (supra). In fact, as has been pointed out earlier, this judgment did not concern itself with the "price" of excisable goods that must be ascertained only at the time of removal from the factory gate. Since this Court was only concerned with whether or not certain amounts by way of sales tax were or were not to be deducted from "price", the said judgment has little application to the facts of the present case.

26. In view of what has been said above, it is clear that "cash discount" has therefore to be taken into account in arriving at "price" even under Section 4 as amended in 2000.

27. Insofar as the other point of defective goods and volume discount on sales tax is concerned, the Tribunal has stated:-

> "8. We have considered the submissions of both the sides. Regarding defective goods, we observe from the statement dated 9.10.2000 of Shri R.K. Gulati that he has clearly deposed therein that "the goods so received from various customers under the said D3s,have not actually been rectified and entire new finished products have been sent to the buyer taking it as the goods

A rectified." This is clear admission on the part of the authorized signatory for Excise matters that new excisable goods were cleared in place of defective goods received back. This statement has not been retracted by Shri Gulati at all. The certificate given by the B Chartered Engineer is dated 5.7.2002 which is much after the period involved in the present matter before us and cannot overcome the clear admission by the authorized signatory of the Appellant company. We also do not find any force in the submission that Shri Gulati's C statement can be relied upon only in respect of Khandsa factory not in respect of factory at Mehrauli Road since no such qualification has been attached by Shri Gulati in his statement. Further, if the defective goods were D substituted by new goods at one factory, it is reasonable to include that the same practice would be prevalent at the other factory of the same manufacturer. We, therefore, hold that the Appellants were removing the new excisable goods to their customers in lieu of defective goods E received back by them. We, however, find force in the contention of the learned Advocate that duty cannot be demanded in respect of the defective goods against which no excisable goods were cleared by the Appellants. This aspect is being remanded to the jurisdictional F Adjudicating Authority for reconsideration of the material/ evidence that may be produced by the Appellants within two months of receipt of this Order.

9. Regarding volume discount and sales tax, the dispute G is not with regard to their deduction but the actual amount of volume discount passed or sales tax paid. In our view the actual amount of volume discount passed on by the Appellant and actual amount of sale tax paid/payable have to be deducted from for the purpose of determining H the assessable value of the goods. This is a factual matter

which has to be looked into again by the jurisdictional Adjudicating Authority after considering the material adduced by the Appellants within two months of receipt of this Order." A

28. Both parties have requested us that since the matter is going to be remanded in terms of the Tribunal's order on these issues, the remand should be an open-ended one, namely, that both parties should be free to argue afresh on all points that arise insofar as these issues are concerned. We therefore, while affirming the Tribunal's order of remand, allow both parties to argue all points that may arise insofar as these issues are concerned. So far as the cash discount issue is concerned, we set aside the Tribunal's order. B C

29. Appeal is disposed of accordingly. D

Devika Gujral Appeal disposed of.

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