Corner Stone Brands Ltd. vs Collector Of C. Ex. on 26 March, 1996

Equivalent citations: 1996(86)ELT257(TRI-DEL)

ORDER

U.L. Bhat, J. (President)

1. The common appellant is a company engaged in the manufacture of television sets in 3 models, 209], Perfect and Plus E. The period in dispute in these appeals is l-7-1987 to 28-2-1989. As per two agreements during the relevant period, the T.V. sets were sold by the appellant to M/s. Arvind Mills Ltd. which owned the brand name "Pyramid". The T.V. sets were manufactured and sold to M/s. Arvind Mills in this brand name. Notification No. 68/86, dated 10-2-1986 as amended, exempted T.V. sets of screen size 36 cms. and value not exceeding Rs. 5,000/-per set which attracted Basic Excise at the rate of Rs. 1,500/- per set and those exceeding the value of Rs. 5,000/- per set attracted Basic Excise at the rate of Rs. 1,750/- per set. With effect from 1988 the rate of duty for sets of value exceeding Rs. 5,000/- was increased from Rs. 1,750/- to Rs. 2,000/- per set. Appellant had paid during the period at the rate of Rs. 1,500/- per set on the footing that the value did not exceed Rs. 5,000/- per set based on the prices shown in the classification list which were Rs. 14,900/- for model Plus E and 209J and for model perfect Rs.14,650/-. Show cause notice dated 8-5-1991 was issued to the appellant invoking the enlarged period of limitation under proviso to Section 11A of the Central Excises and Salt Act, 1944 (for short, the Act) stating that the assessable value under Section 4(1) of the Act of these sets exceeded Rs. 5,000/-per set and demanding differential duty of Rs. 250/- per set sold till 28-2-1988 and of Rs. 525/- (Basic Excise plus Special Excise duty) for sets sold from 1-3-1988 to 28-3-1989. The show cause notice was resisted by the appellant but confirmed by the Collector who also imposed penalty of Rs. 25 lakhs on the assessee and Rs. 5 lakhs on the Director incharge. The Company and the Director have filed these appeals. We have heard Shri V. Sridharan appearing for the appellants and Shri A.K. Singhal, JDR.

2. The contracted sale prices for the 3 models during the period in question were Rs. 4,900/- per set, Rs. 4,650/- per set and Rs. 4,900/- per set respectively. The prices were inclusive of excise duty. The Collector concluded that the declared prices were not the sole consideration for the sale of the sets, that in order to arrive at the assessable values, the cost of packing materials supplied by the buyer, the cost of advertisement incurred by the buyer, the excise duty paid on the picture tube (which is not included in the assessable value of the appellant), the cost incurred by the buyer towards service to customers during the warranty period of the appellant, the difference between the normal interest and interest stipulated if any for security amount deposited by the buyer with the appellant and the discount and charges of the bank should be added to the assessable values and if so added, the assessable values regarding each of the models would exceed Rs. 5,000/-. It was thus held that the higher of the excise duty rates would be attracted. The Collector held that the larger period of limitation under proviso to Section 11A of the Act was available. Penalty was imposed under Rule 209A of the Rules.

3. It is noticed the terms of the agreement are between the appellant's predecessor and M/s. Arvind Mills (for short, Arvind). There are two agreements which operated during the period concerned in this appeal. The agreement dated 1-12.1986 require the manufacturer to sell and M/s. Arvind Mills to purchase on principal to principal basis T.V. sets complying with the standards and specifications given by Arvind. The quantities and items to be sold and the prices to be paid from time to time shall be mutually agreed upon. The manufacturer can reduce or increase the prices by giving not less than thirty days notice. All taxes and duties shall be borne by Arvind. Arvind shall have right to inspect the T.V. sets and reject the items which are not in accordance with their standards and specifications. Title to the goods shall on delivery. Price shall paid (sic) by Arvind within thirty days of the date of relevant invoice for each consignment. But against delivery, Arvind shall deliver to the manufacturer a 90 days advance bill of exchange for the full amount set out in the invoice. If Arvind fails to pay the price as agreed, interest at 18% shall be paid on the moneys due from the date or invoice till the date of payment. As security for payment of the prices for goods sold from time to time, Arvind shall deposit Rs. 30 lakhs within one year from the date of the agreement and the deposit shall not carry any interest. The deposit shall be maintained always. The manufacturer shall be entitled to deduct from the deposit all money due from Arvind. All the products shall be resold by Arvind in their original packing. The agreement shall be in force till 31-12-1988. The agreement relates to T.V. sets and components.

4. The terms and conditions of the agreement dated 1-9-1988 as substantially similar to the above terms. Additionally the agreement obliges the manufacturer to supply free of charges components/parts for replacement in fulfilment of warranty given by Arvind and security deposit amount shall carry interest at 15%. All the products to be purchased by Arvind shall be packed by the manufacturer in a manner specified by Arvind. Arvind's Trade mark 'PYRAMID' or any other trade mark will be affixed to the products by the manufacturer as instructed by Arvind.

5. According to the impugned order, there was flow of additional consideration for the sales by the manufacturer to Arvind which should be added to agreed sale price to arrive at the assessable value and the value so arrived at per T.V. set in respect of three models of T.V. sets would exceed Rs. 5,000/- and hence the higher rate of duty was required to be paid. We will deal with each of these items of additional consideration.

6. Cost of packing materials supplied to the manufacturer by Arvind :

> There is no dispute that primary packing materials, namely polythene covers, thermocol and cardboard cartons for packing the T.V. sets were supplied free of cost to the manufacturer by Arvind. The T.V. sets were in such condition at the time of clearance at the factory gate. Admittedly the packing was not of a durable nature. The packing was not returnable by Arvind to the manufacturer, for the simple reason that the packing belonged to Arvind and not to the manufacturer. Ordinarily, since the packing was not of a durable nature and was not returnable, the cost of such packing would be included in the assessable value of the T.V. sets by virtue of the provision in Section 4(4)(d)(i) of the Act. It is the contention of the appellant the cost of the packing is not to be so included since packing materials were supplied free of cost by

Arvind and the cost was not met by the manufacturer. This contention is rebutted on behalf of department. Both sides have relied on some decisions.

7. Following the decision of the High Court of Gujarat in Alembic Glass Industries Ltd. 1979 (4) E.L.T. (J 444) and of the High Court of Karnataka in Alembic Glass Industries Ltd. -1986 (24) E.L.T. 23, the Tribunal, in CCE v. United Glass and Ors. - 1987 (31) E.L.T. 786, held that the cost of packing materials supplied by buyer to the manufacturer is not to be included in the assessable value of the goods. This decision was followed in Hindustan Tin Works Pvt. Ltd. v. CCE -1988 (35) E.L.T. 497 (Tribunal) and Gujarat State Fertilizers Co. Ltd. v. CCE - 1988 (19) ECR 400 (Tribunal). We also noticed that the appeals C.A. Nos. 105/88 and 106/88 filed before the Supreme Court against the decision in United Glass and Ors. case 1987 (31) E.L.T. 786 was dismissed as noticed at page A165 of 1995 (76) E.L.T.

8. In Hindustan Polymers v. CCE - 1989 (43) E.L.T. 165 (S.C.), fusel oil manufactured by the appellant was being sold in bulk and delivered to customers in tankers or packed in drums brought by the buyers and sold to them. The drums were durable in nature but not returnable by the buyers since they belonged to the buyers themselves. The Tribunal held that the value of these drums should be included in the assessable value of the goods packed in the goods. Sabyasachi Mukerjee J (as he then was) agreeing with the decision of the High Court of Bombay in Govind Pay Oxygen Ltd. v. Assistant Collector, Central Excise - 1986 (23) E.L.T. 394 and of the Karnataka High Court in Alembic Glass Industries Ltd. case 1986 (24) E.L.T. 23, held that expression "cost" in relation to packing in Section 4(4)(d)(i) of the Act has a definite connotation and has been used in contradistinction of the expression "value" and the clear implication of the expression "cost" is that only packing cost of which is incurred by the assessee i.e. the seller is to be included. Ranganathan J in the concurring judgment held that cost of packing referred to Section 4(4)(d)(i) of the Act is the cost of packing incurred by manufacturer and recovered by him from the purchaser whether as part of the sale price or separately and cost of packing supplied free of cost by the buyer cannot notionally be added to or substracted from the price at which the goods have been sold by the manufacturer. Verma (J) held that the "cost of packing" referred in Section 4(4)(d)(i) of the Act does not include within its ambit the cost of packing not incurred by the manufacturer when the packing is supplied by the buyer and not the manufacturer. The decision in M.R.F. Ltd. case 1995 (77) E.L.T. 433 (S.C.) noticed Hindustan Polymers case and did not express any dissent. Thus it is the settled law that where package or packing material is supplied by the buyer free of cost, the cost of such package is not part of the assessable value of the goods which are sold in such packages.

9. Advertisement cost incurred by the buyer : The T.V. sets, though manufactured by the appellants are sold in the Brand name "PYRAMID" belonging to Arvind. Arvind was advertising these T.V. sets and meeting the cost thereof. The Collector held that such cost was incurred by the buyer for the benefit of the manufacturer and must be part of the assessable value of T.V. sets. Conclusion is challenged by the appellant and supported by the department.

10. The goods advertised were PYRAMID T.V. sets of Arvind. Appellant has no control of any sort over the advertisement. It is not suggested that the advertisements promote the cause of the appellant, except in a indirect manner that if Arvind's sales increase, more T.V. sets will be

purchased by Aravind from the appellant. The agreements between them did not require Arvind to advertise the T.V. sets. The cost of advertisement has not directly promoted the interests of the appellant. We will examine the decisions cited in this factual backdrop. In Kerala Electric Lamp Works Ltd. and Anr. v. CCE -1988 (33) E.L.T. 771 (Tribunal), Crompton, the principal distributor of the appellant lifted 80% of the production and such goods were Crompton branded. The principal distributor was held to be not a related person. Marketing, publicity and sales promotion expenses were borne by the principal distributor. It was held that this did not amount to any extra consideration accruing from the principal distributor to the assessee. In Eddy Current Controls (India) Ltd. v. CCE -1989 (39) E.L.T. 147 (Tribunal) the manufacturer appointed a big company having wide marketing net work as sole distributor under an agreement. It was held that the parties were not related persons, the manufacturer agreed before the Tribunal that the charges for advertisement and after sales service during the warranty period incurred by the sole distributor on behalf of the manufacturer may be treated as additional consideration and money value thereof may be added to the assessable value. It may thus be seen that the Tribunal did not have occasion to consider the question of rendering its decision, the decision was a concession by the appellant. In CCE v. M.G.Shahani & Co. - 1995 (80) E.L.T. 905 (Tribunal), the respondent was manufacturing shampoos with the brand name belonging to the buyer and selling the same to the brand name owner. There was no relationship between them other than as seller and buyer and the transactions between them were not influenced by any special relationship. Under the agreement, the buyer was not obliged to incur any expenditure on advertisement at the instance of the seller. Manufacture' was to be done as per specifications of the buyer who had right to reject goods not upto the specifications. The transactions were on principal to principal basis. It was held that agreed sale price could be accepted as basis of valuation and the price at which the buyer sold the. goods could not be the basis of valuation.

11. As we have indicated, the goods advertised were T.V. sets having brand name of Arvind. There was nothing to indicate that the advertisements in any way prompted the cause of the appellant, except in an indirect manner. The agreement did not require Arvind to incur such expenses. The decision about advertisement and incurring the cost thereof was entirely of Arvind. It was not done on behalf of the appellant. The parties are not related persons. There was nothing to indicate that the transactions were not at arm's length. In these circumstances the Collector was in error in holding that the cost of advertisement form additional consideration and requires to be added to the assessable value.

12. Excise duty paid on input picture tube : Appellant was taking Modvat credit in respect of excise duty paid on picture tubes purchased and used in the manufacture of T.V. sets. The dispute is while computing the cost of raw materials, whether the excise duty paid on picture tubes is to be included or not. The two decisions of the Tribunal in this regard, namely Atic Industries Ltd. - 1992 (62) E.L.T. 321 and Incab Industries - 1990 (45) E.L.T. 342 have been explained in Dai Ichi Karkaria Ltd. - 1996 (81) E.L.T. 676 by a larger Bench of the Tribunal. The last mentioned decision lays down that excise duty paid on input in regard to which Modvat credit was availed of by a manufacturer is not to be included in the assessable value of the final product under Section 4(1)(b) of the Act and Rule 6(b)(ii) of the Central Excise Valuation Rules. The two earlier decisions dealt with cases of valuation under Section 4(1) (a) of the Act.

13. The Collector concluded that there was under valuation of the picture tubes and enhanced the price element of the picture tubes by Rs. 463 per piece. This amount included the excise duty on such differential price of picture tubes. According to the appellants as Modvat credit had been taken on the duty paid on picture tube, the duty element should have been deducted from the differential price. The Collector having invoked Section 4(1)(b) of the Act read with Rule 6 of the Rules, should have deducted the duty element on the differential price of picture tubes.

14. Under the terms of the agreement dated 1-9-1988 the appellant is to supply free of charge components/parts of T.V. sets for replacement in fulfilment of warranty given by Arvind. Inevitably Arvind was meeting the service cost of replacing parts during the warranty period. According to the Collector the transactions were not on principal to principal basis and the price declared did not include the service cost of replacing parts and therefore the declared price was not the normal price. Both sides rely on certain decisions. In A.K. Roy and Anr. v. Voltas Limited -1977 (1) E.L.T. (J177) the Supreme Court held that if a manufacturer enters into an agreement with dealers for wholesale sales of the manufactured articles on certain terms and conditions, it would not follow from that alone that the price for those sales would not be the wholesale cash price for the purpose of Section 4(a) of the Act. If the agreements are made at arm's length and in the usual course of business. A sole distributor might or might not be a favoured buyer according as terms of the agreement with him are fair and reasonable and were arrived at on purely commercial basis. The decision in Bombay Tyre International Ltd. case 1983 (14) E.L.T. 1896 (S.C) discusses the general principles underlining valuation. In Mahindra and Mahindra Ltd. v. Union of India and Anr. - 1984 (16) E.L.T. 76 (Bom.), there was an agreement between the manufacturer and Voltas. Voltas were appointed sole distributors of tractors. It was the duty of the Voltas as distributor to assess the market conditions, place orders in advance, promote sales and purchase tractors as per advance orders and pay for the same within 18 days of delivery. It was the responsibility of the distributor to store the tractors until sale and transport the same and maintain sales organisation to carry out pre-sale training activities provide after sales service in respect of tractors, share the advertisement expenses and to carry large stocks. High Court of Bombay repelled the contention that the agreed price was far less than the market price in view of several responsibilities undertaken by the distributor, including the responsibility to carry out after sales service and meet 50% of the advertisement charges, taking the view that requirement of sales organisation and to provide after sales service are the usual conditions provided in the agreement with the wholesale buyers and such a condition was in existence in the agreement dealt with in A.R. Roy and Anr. v. Voltas Ltd. -1977 (1) E.L.T. (J 177). In Moped India Ltd. v. Assistant Collector of Central Excise - 1986 (23) E.L.T. 8 (S.C.), the dealer under agreement with the manufacturer was required to deposit security amount and to have its own show room, service station, repair shop, parts store room and salesmen and to give three free services to every vehicle -sold by him and was to obtain fixed commission on each Moped sold and Rs. 4/- for each free service. It was held that the dealer cannot be treated as related person and the relationship between them was on principal to principal basis. In Standard Electric Appliances v. Superintendent of Central Excise and Ors. -1986 (23) E.L.T. 302 (Madras), under the agreement between the manufacturer and the wholesale dealer, the dealer was required to render after sales service to the consumer, and the wholesaler was attending to the advertisement, sales and service and warranty claims and was charged price lower than that charged to retailers. It was observed that since it was a commercial price, it must be regarded as wholesale cash price for the purpose of

Section 4 of the Act. Viewed from the commercial perspective, the manufacturer, instead of finding out a large number of wholesale dealers, found one wholesaler who was prepared to lift 90% of the production and if under these circumstances, a lower price was charged to the wholesaler, it would not be correct to hold that the price was not a commercial price. The fact that the wholesaler was advertising the product and giving after sales service and complying with the normal warranties would not render the wholesaler a favoured buyer. When a consumer purchases an article from the dealer, in the case of service facilities, he looks to the dealer but not to the manufacturer. It was also observed that in the case of defective parts also he will look to the dealer from whom he has purchased and notwithstanding the fact that the wholesaler may ultimately have the parts replaced by them reimbursed from the manufacturer, the service facilities would be provided by the wholesaler with a view to earn goodwill and attract customers. Advertising a product by wholesaler is one of the well-known methods by which the wholesaler attracts a customer and, as a result of increase of business, the demand for the product of the manufacturer also increases, advertising by the wholesaler cannot be said for and on behalf of the manufacturer. In these circumstances, the fact that the wholesaler charged the lower price would not make it a favoured buyer. In Diamond Clock Manufacturing Co. Ltd. v. CCE - 1988 (34) E.L.T 662 (Tribunal), the Tribunal, without examining the matter in depth merely observed that passing on the warranty charges is also not legal and the manufacturer would be responsible for the warranty and the expenses for the same should be included. This observation has to be confined to the facts of the case in view of the decisions referred to above. Further so far as the consumer is concerned, the manufacturer was Arvind and not the appellant, for the product was being sold as a prodtict of Arvind on the facts of the case since the consumer would be looking to Arvind for warranty, replacement of parts during warranty period and service, cost of replacement parts, the service cost element cannot be included in the assessable value.

15. In Metal Box India Ltd. v. CCE - 1995 (75) E.L.T. 449 (S.C.) the appellant was manufacturing goods as per customers requirements and was supplying against negotiated prices printed in the contract. One of the customers, Ponds (India) Ltd., not related person was engaged in marketing cosmetic products. There is an agreement between them under which the manufacturer was to supply containers as per specifications of Ponds (India) Ltd. and maintain a steady and regular supply of containers and Ponds (India) Ltd. agreed to pay as advance certain amounts and Ponds (India) was to get certain discounts to be deducted from the gross price. The Assistant Collector added ad hoc interest on the advances received by the appellant to the assessable value. First appellate authority set aside the ad hoc interest on advances. The Tribunal restored the decision of the Assistant Collector. The Supreme Court noticed that Ponds (India) Ltd. was almost a wholesale buyer, lifting 90% of the total production of the appellant. Huge amounts were advanced free of interest by Ponds (India) Ltd. which was given 50% discount on the normal price. The Supreme Court took the view that Ponds (India) Ltd. had advanced large amounts free of interest had necessarily entered into the agreement regarding discount of 50%. The Supreme Court held that the Tribunal was right in holding that notional rate of interest given by the wholesale buyer should be reloaded in the price so as to reflect the correct price of the goods since a favoured treatment was given to the wholesaler who had advanced large amounts free of interest. Since the notional interest was added to the price, that aspect according to Supreme Court had to be kept out of the picture in considering the claim for discount of 50%. The Supreme Court held that the net picture which

emerges is that here was a wholesale buyer claiming discount because it avoided the botheration of appellant by way of advertisement cost for marketing as 90% of the products were lifted by the wholesaler and for such buyer if a concession by way of trade discount is given, may be to the extent of 50% though in fact it will be much less as reloading of contract price by the notional value of interest has been permitted, such a trade discount cannot be said to be in any way uncalled for or a special treatment contrary to trade practice. A substantial amount of Rs. 60 lakhs was deposited with the appellant as security and the deposit was maintained through out the period. Under one agreement no interest was payable and in another agreement 50% interest was payable. Bank rate at the relevant time was between 18 to 20% per annum. The security amount was fully at the disposal of the appellant for the purpose of carrying out its manufacturing activity. If for this purpose any bank can be approached for loan, appellant would have to pay at least 18% interest per annum. The fact that interest on deposits with the companies will be limited to 15% would not be a relevant circumstance. We are therefore of the opinion that notional interest at the rate of 18% on the security amount for the period covered by 1-12-1986 and differential interest at the rate of 3% from 1-3-1988 has to be loaded to the price to be arrived at the assessable value.

16. As per the terms of the two agreements, Arvind deposited Rs. 30 lakhs with the appellant as security. Under the agreement, dated 1-12-1986, no interest was payable on the security amount by the appellant. Under the later agreement, the appellant was liable to pay interest on the security amount at 15% per annum/The Collector took the view that non-provision of interest in the earlier agreement and provision for what he regarded as low interest of 15% per annum was deliberately made as against Bank rate of 18 to 24% per annum and the differential interest represented additional consideration for the sale transactions and the same must be added to the price to arrive at the assessable value. The Collector did not quantify the amount to be added to this count. Learned counsel for the appellant did "not address any arguments in regard to the period for which no interest was payable on the security amount. He contended that for the period covered by the agreement dated 1-9-1988, the interest stipulated at 15% per annum was a reasonable rate as per normal commercial practice and the conclusion that there was flow of additional consideration is unsustainable. He also pointed out that 15% per annum is the maximum interest payable by any company on deposits.

17. Under the terms of the agreements, price of T.V. sets shall be paid by Arvind within thirty days of the date of relevant invoice for each consignment but against delivery Arvind shall deliver to appellant a 90 days advance bill of exchange for the full amount set out in the invoice. After obtaining the bills of exchange duly signed by Arvind's representative, appellant would discount the same with the Bank and receive the invoice price less discounting charges and the Bank, in due course, would collect the full invoice price. Though the show catise notice refers to this aspect, there is no conclusion in this regard in the impugned order. There is nothing stated in the appeal memorandum in this regard. Hence we are not required to consider if the Bank discount charges should be added to arrive at the assessable value.

18 Learned counsel has commented on the method adopted by the Collector to arrive at the assessable value for the purpose of verifying whether it exceeds Rs. 5,000/~ so as to attract the higher rate of duty. According to him, since the duty fixed on T.V. sets of value not exceeding Rs.

5,000/- is Rs. 1500/-, the cum-duty price for the lower slab should not exceed Rs. 6,500/- (i.e. Rs. 5,000/- plus Rs. 1500/-) and only if the cum-duty price exceeds Rs. 6,750/-(Rs. 5,000/- plus Rs. 1750/-), the higher duty of Rs. 1750/- is attracted. It is contended that in case of cum-duty value ranging from Rs. 6,500/- to Rs. 6,750/-, duty element of Rs. 1,750/- has to be deducted to see if assessable value exceeds Rs. 5,000/- or not and if the value is below Rs. 5,000/- duty can be levied only at Rs. 1,500/- though Rs. 1,750/- is deducted from the cum-duty price. According to Shri Singhal, JDR, this is a strange argument deserving of no consideration at all. Our attention has been invited by learned counsel for the appellant to a few decisions.

19. In Hindustan Sugar Mills Ltd. v. State of Rajasthan and Ors. -1979 (43) STC 13, the Supreme Court dealt with the scope of definition of "sale price" under the Rajasthan Sales Tax Act, 1954 and Central Sales Tax Act, 1956. In considering the same the Supreme Court observed as follows :

> "Take for example, excise duty payable by a dealer who is a manufacturer. When he sells goods manufactured by him, he always passes on the excise duty to the purchaser. Ordinarily, it is not shown as a separate item in the bill, but it is included in the price charged by him. The "sale price" in such a case could be the entire price inclusive of excise duty because that would be the consideration payable by the purchaser for the sale of the goods. True, the excise duty component of the price would not be an addition to the coffers of the dealer, as it would go to reimburse him in respect of the excise duty already paid by him on the manufacture of the goods. But, even so, it would be part of the "sale price" because it forms a component of the consideration payable by the purchaser to the dealer. It is only as part of the consideration for the sale of the goods that the amount representing excise duty would be payable by the purchaser...And, on this reasoning, it would make no difference whether the amount of excise duty is included in the price charged by the dealer or is shown as a separate item in the bill. In either case, it would be part of the "sale price".

20. In Bata Shoe Company (P) Ltd. and Anr. v. Collector of Central Excise and Ors. - 1985 (21) E.L.T 9 (S.C.) the Supreme Court considered a case of liability to duty in regard to footwear depending upon its value. Footwear was completely exempt from duty where the value did not exceed Rs. 5 per pair. If it exceeded Rs. 5, duty was 10% ad valorem. For 1967 and 1968 the wholesale price of footwear was Rs. 6.25 per pair. According to the manufacturer, the assessable value was only Rs. 4.94 though the wholesale price was Rs. 6.25 and therefore claimed exemption. The department did not agree with this view. The question turned on the method of determining the assessable value. The assessable value would not include the duty element as is clear from Section 4(4)(d)(ii) of the Act. The Supreme Court observed as follows :

> "On a careful reading of the Notification dated July 24, 1967, it also becomes clear that the effect of the Notification is to render the chargeability or otherwise to duty of excise of footwear falling under Item 36 of the First Schedule is made wholly dependent upon the 'value' of the article of footwear; in case such value exceeds Rs. 5 per pair. ... It is precisely to such a situation that the provision of Section 4 gets

attracted because as expressly stated in the opening part of the said section the mode of determination of Value' specified in the section will be applicable to all cases where any article is chargeable with duty at a rate dependent upon the value of the article. In she case of total exemption, the rate will be 'nil'. Thus, Entry 36 read along with the Notification dated July 24,1967 clearly shows that the chargeability to duty in respect of any article of footwear is made dependent upon its value in the sense that the chargeability to duty of excise will arise only if the 'value' of the article does not exceed Rs. 5 per pair...the first essential step is to determine the 'value' of the article in the manner prescribed in Section 4 of the Act. The fact that on such a computation the article may ultimately be found to be exempted from excise duty does not have any bearing on the question of applicability of Section 4 of the Act for determining the 'value' for the purposes of duty. The expression 'for the purposes of duty' occuring in Section 4 has a wide import. For all purposes connected with the determination of chargeability and levy of duty the provisions of the section are to be applied for computation of the 'value' of the article. Under the Explanation to Section 4, it is mandatory that in determining the price of the article both trade discount as well as the amount of duty calculated as payable on the wholesale cash price payable at the time of removal of the article based on the wholesale cash price referred to in clause

(a) are to be deducted from such wholesale price."

The Court held that in as much as value of the articles of footwear in question calculated in accordance with Section 4 of the Act did not exceed Rs. 5 per pair, they were exempt from charge of duty under the Notification.

21. In view of the above decision, we agree with the contention of appellant that to determine whether such value exceeds Rs. 5,000 /-, the higher rate of duty must be deducted and if the net value is less than Rs. 5,000/-, the lesser rate of duty has to be actually imposed. This will certainly have an impact on the quantum of differential duty.

Limitation

22. The period in dispute in these appeals is 1-7-1987 to 28-2-1989. The show cause notice was issued on 8-5-1981, within the extended period of five years contemplated by the proviso to Section 11A of the Act. Appellant contend that the extended period was really not available in this case. The show cause notice dealt with various counts on account of which the goods were deliberately under-valued and if these factors had been taken into account, the value exceeds Rs. 5,000/- and the higher rate of duty would be attracted and thus there was contravention of the provisions of Section 4 of the Act read with Rules 9, 173B, 173F, 173G and 173Q as also Notification No. 77/87, dated 1-3-1987 on account of deliberate undervaluation in order to avoid higher incidence of duty as also Notification No, 122/88, that the appellant filed wrong classification lists of the products and cleared goods involving differential duty. The fraudulent misdeclaration of the real value was stated to be the reason for invoking enlarged period of limitation. On the various factors we have discussed already, it is clear that there was wilful suppression of material facts affecting certain aspects of

valuation and, therefore, enlarged period of limitation was available.

Imposition of penalty on the assessee and the Director

23. The imposition of penalty of Rs. 5,00,000.00 on one of the Directors of the company under Rules 209A of the Rules is also challenged. We do not think we need express any opinion on this aspect, since in the light of our findings on various aspects in controversy, the Collector has to re-assess the value for the purpose of finding whether any differential duty is to be demanded or not. It may be that no differential duty requires to be paid on such re-assessment. If that be so, the question of imposition of penalty does not arise. Even if differential duty is to be demanded, the question of imposition of penalty on the company as well as the Director may be considered afresh.

24. In the result, we set aside the impugned order and remand the case to the jurisdictional Commissioner who will pass a fresh order in accordance with law and in the light of various findings recorded and observations made in this order. Appeals are allowed accordingly.