Before K. S. Tiwana and M. M. Punchhi, JJ.

FOOD SPECIALITIES LIMITED,—*Petitioner.*

versus

APPELLATE COLLECTOR and others,—*Respondents.*

Civil Writ No. 468 *of* 1981.

May 18, 1981.

Central Excises and Salt Act (1 *of* 1944)—*Section* 4 *and First Schedule Items No.* 1-*B and* 46—*Central Excise Rules*, 1944—*Rules* 9, 47 *and* 49—*Company engaged in the manufacture of prepared or preserved foods in unit containers—Metallic containers so used also manufactured in the factory premises under different licence—Such containers carried from the place of manufacture and storage to the filling room through a conveyor belt to be filled with preserved foods which are separately liable to excise duty—Such carriage of the tins—Whether a 'removal' within the meaning of rules* 9 *and* 49—*Excise duty on metallic tins—Whether leviable.*

Held, that the mechanical automatic process in a single continuous line, connected with the conveyor belts, would not by itself make a plant composite one. However, it is the entire conspectus of things which has to be viewed. If the tins are removed from the place of their manufacture to be sold outside the factory, they would attract duty but if they are used within the factory after removal from their place of manufacture, may be by a conveyor belt, to the place of manufacture of the other excisable goods of prepared or preserved foods, this would attract the levy. In such processes the product goes out of one stream of production into another stream of production. It goes out from one place of production to become another product in another place of production. Plainly, no further process of that product is to be done and it is to be used in another stream of production. This would neither be a case of issuing out or taking out of the product for its consumption. The consumption pre-supposes the using up or exhausting the product or otherwise spending it out. No such process is involved for what happens to the metal containers in being transferred to the filling room as receptacles. (Para 16).

Held, that the duty is attracted on removal from the place where the excisable goods are produced, cured or manufactured or they are removed from the store room or other place of approved storage. It is the manufacturer who is required to provide store room or other place for storage at his place of business for depositing the goods made on the same premises without payment of duty

as required under rule 47 of the Central Excise Rules, 1944. The place of manufacture, production or cure is required to be specified by the Collector in this behalf. Reading both the rules 9 and 49 together, the intention is clearly discernible that the removal of goods from the place of production, manufacture or cure or from an approved store room or place of storage can alone attract levy of duty. (Para 18).

Petition under Article 226 of the Constitution of India praying that this Hon'ble Court may be pleased to issue a writ of Certiorari *or any other appropriate writ or order to—*

(a) *quash the assessment orders of the appropriate authorities with respect to the financial years 1975, 1977, 1978 and 1979 on the basis of which the Department is seeking to recover the excuse duty on metal containers manufactured by the petitioner;*

(b) *issue a Writ of Mandamus directing the respondents to refund the excess excise duty paid to them by the petitioner, and*

(c) *pass such other order or orders as this Hon'ble Court may deem fit and proper to serve the ends of justice,*

(d) *issuance of advance notice be exempted,*

(e) *filing of certified copies of annexure be dispensed with.*

It is further prayed that any other suitable writ, direction or order may be issued by this Hon'ble Court as it may deem fit in the circumstances of the case.

It is further prayed that the costs of this litigation be allowed to the petitioner.

Kapil Sibal, Advocate, *for the petitioner.*

Gopi Chand, Advocate, *for the Respondent.*

JUDGMENT

M. M. Punchhi, J.

(1) These are two writ petitions (C.W.P. No. 456 of 1981 and No. 1109 of 1980) filed by Messrs Food Specialities Limited, Moga, to challenge the validity and levy of excise duty in respect of metal

containers, which are employed in the manufacture of prepared or preserved foods in unit containers ordinarily intended for sale.

(2) The petitioner-Company manufactures various articles of food, *inter* alia, condensed milk as well. That condensed milk is put into tin containers of unit size for the purposes of marketing. The goods thus prepared fell under tariff item No. 1-B of the First Schedule of the Central Excise and Salt Act, 1944 (hereinafter called the Act) which attracts *ad valorem* duty. To be precise, it is termed as "Prepared or preserved foods put up in unit containers and ordinarily intended for sale". On the other hand, tariff item No. 45 in the aforesaid Schedule provides imposing *ad valorem* excise duty on "Metal containers not elsewhere specified". The explanation added thereto with regard to containers has its accrued meaning assigned to it in Explanation to item No. 27. That explanation provides that "Containers" means "Containers ordinarily intended for packaging of goods for sale, including corks, drums, cane, boxes, gas cylinders and pressure containers, whether in assembled or unassembled condition and containers known commercially as flattened or folded containers. The petitioner-Company manufactures tin containers and employs them for the purpose of filling in them condensed milk so as to produce the net product of prepared and preserved food put up in unit containers (hereinafter shortly referred as P. P. Foods). Both the tariff items having attracted imposition of excise duty, the petitioner obtained licence under the Act to manufacture or to produce the said items. The fabricating process of the tin containers as described by the petitioner-Company is through a mechanical automatic process which is given below:

(a) Full tinplate sheets are cut on two machines (slitters) into strips having the exact dimensions of the developed body of a DCM tin. These strips are then known as "body blanks".

(b) These body blanks are fed to a "Body maker" where they are shaped and seamed (side locked) in order to form the clinderical part of the tins.

(c) Through conveyors, the bodies are sent to a 'flanger" where flanges are made to prepare the tin to receive the ends.

(d) The flanged bodies then travel, on conveyors, to a seamer where one end is seamed on the body leaving the other and open.

(e) The bodies without bottom and travel towards the filling room through a sterilizer.

(f) The sterilized bodies are than filled with condensed milk and seamed with the second end which is embossed with the manufacturing code.

(g) The filled tins are then labelled and packed.

Note—

On one line, full tinplate sheets are cut in strips which are then sent to a Press for manufacture of ends. One part of these ends is fed on the seamer at Point (d) above and the second part is fed after sterilisation, to the seamer at Point (f) above.

The operations (b) to (g) are made in a single continuous line at a speed of 185 tins/minute. It takes about 8 minutes to complete the operations from the body blanks to the packing of the filled/labelled tins."

(3) The P. P. Foods as manufactured are claimed to be removed under the Self Removal Procedure of the Central Excise Rules. In accordance with Rule 173-C of the said Rules, the price-list of goods assessable to *ad valorem* duty was submitted for the first time by the petitioner-Company to the Superintendent, Central Excise, Ludhiana, when the duty of metal containers under tariff item No. 45 had come to be levied with effect from 1st March, 1970. Incidentally, the jurisdiction at a later time came to be vested in the Superintendent, Central Excise, Moga, At the time when the jurisdiction vested in the concerned authority at Ludhiana, the Superintendent is said to have approved the list on 14th March, 1970. Whereas the copy of the approval with the petitioner-Company is claimed to have the endorsement that it was approved without pre-conditions, the Excise Department, on the other hand, on the strength of the office copy retained by them, claimed that it was approved provisionally. It was claimed that for a period of three months from

March, 1970 to May, 1970, the monthly returns filed by the petitioner-Company, were just signed by the Superintendent, but with effect from 1st June, 1970 onwards when the Self Removal Procedure had come to be operative, the Superintendent in all the monthly returns from June, 1970 to May, 1972, signed the requisite form RT-12 without writing the word "provisionally". On the strength of that conduct, the petitioner claimed that the price-list submitted by it for the year ending on 31st December, 1970, had been finally approved, and in consequence thereof, in all the monthly returns, the basis of the said price list, which is Annexure P-1 to C.W.P. 1109 of 1980, the petitioner-Company maintained that the net assessable value was 22 paise per container. This was qualified by a note that these containers are not sold in the market, but are meant for inside use of the factory, which is based on factory cost, which may be considered inclusive of profit. Some correspondence ensued between the petitioner-Company and the Department as the latter was of the view that suitable addition of profit should be made to the manufacturing cost of the container, but the former expressed its inability to mention any profit since the tin containers were not sold in the market, rather the Company insisted that the cost be treated as inclusive of profit.

(4) The petitioner-Company further claims that in 1972, on audit objection, the matter was raked up. Show-cause notice, dated 2nd June, 1972 copy of which is Annexure P-2 to C.W.P. 1109 of 1980, purporting to be under Rule 10 and 10-A of the Rules, was issued to the petitioner, on the premises that the excise duty on metal containers for the period 1st March, 1970 to 31st May, 1972, had been short levied. The petitioner-Company challenged the notice asserting that it was void *ab initio* having been issued beyond the period of one year limitation as provided in Rule 173-J, read with Rule 10 of the Rules. On merits, it pleaded that there was no short levy and the addition of profit margin was not warranted. The Assistant Collector on 12th December, 1973,—*vide* Annexure P-5 to C.W.P. No. 1109 of 1980, negatived the contentions of the petitioner-Company, holding that the levy of duty was within limitation and that the profit margin had to be added to the cost of metal containers. He added the profit margin at the rate of 10 per cent of the cost of the metal containers. The petitioner-Company unsuccessfully appealed before the Appellate Collector, who dismissed the same,—*vide* his order dated 20th

July, 1974 of which Annexure P-7, is the copy of C.W.P. 1109 of 1980. The order of the Appellate Collector was left uninterfered within revision by the Government of India,—*vide* order, dated 7th January, 1980, a copy of which is Annexure P-5 to that petition. The final determination of the price done by the authorities pertained to the accounting years 1970, 1971, 1972 since the petitioner, on the asking of the Department, did not supply the price list subsequent to the year 1970. C.W.P. 1109 of 1980 has been filed to challenge not only the orders of the Union of India and the departmental officers below, but also to dispel the claim of the respondents that the excise duty was leviable on metal containers separately when concededly excise duty has been levied on the finished products known as P.P. Foods in unit containers.

(5) Subsequently, the petitioner-Company supplied the price list (though claimed to be under protest) for the year 1975. Here the net assessable value was disclosed as 45 paise for each tin. Incidentally in the immediately preceding year, the Assistant Collector had accepted the price as calculated by the petitioner, which was based on the calculation of actual cost of the container plus *pro rata* profit deemed to have been earned by the petitioner in the petitioner's overall operations. The figure was arrived at by taking the average profit earned during that year. In the year 1975, however, the petitioner claimed an overall loss but instead thereof, the Assistant Collector added a profit of 10 per cent to the cost of metal containers determining its assessable value at Rs. 25 paise per tin. Similar was the situation qua the year 1972 in increasing the assessable value by adding 10 per cent profit margin to the cost of tins. The matter was stated to be pending in appeal before the Appellant Collector. Likewise, was the case for the financial year 1978. However, for the financial year 1979, the petitioner-Company disclosed *pro rata* notional profit, deemingly earned, in the overall operations of the petitioner to the extent of 12.02 per cent. This time, the Assistant Collector accepted the average profit margin of 12.02 per cent and did not employ the method of adding 10 per cent to the cost of tins as in the yester years.

(6) C.W.P. No. 400 of 1980 has been filed not only to question the orders of the Assistant Collector, but also to challenge the validity of the levy of duty. It is claimed by the petitioner-Company that as the Department has already applied its mind to the

matters embodied in the said writ petition in earlier years which are subject-matter of C.W.P. No. 1109 of 1980, it is futile to exhaust its remedies before the departmental authorities.

(7) The material averments in both the petitions have been denied by the respondents. Besides raising the preliminary objection that the petitioner should exhaust its alternate statutory remedy of appeal for the financial years covered in C.W.P. 456 of 1981, it is claimed that the assessment of the Central Excise Duty and levy of excise duty has validly been done. Similar is the case with regard to the financial years covered by C.W.P. No. 1109 of 1980. It is maintained that the metal containers produced by the petitioner-Company are used for captive consumption and the assessable value thereof can be determined under Section 4 of the Act. Rule 5 was specifically pleaded to contend that the removal of goods from the place of their production, cure or manufacture, *per se* attracted levy of the excise duty and it was immaterial that the removal was meant for consumption of manufacture of another commodity in or outside such place of production, cure or manufacture. In other words, it was claimed that an excisable good, if it comes to be used or consumed in the manufacture of another excisable good, the levy of the excise duty would remain attracted all the same.

(8) Since some of the points are common to both the petitions and arguments have been addressed to us jointly, this judgment will dispose of both these petitions.

(9) Mr. Kapil Sibal, learned counsel for the petitioners, preluded his arguments by inviting our attention to the fact that Section 4 of the Act, as it stood before its amendment on 1st October, 1971 would govern a part of the period in C.W.P. No. 455 of 1981, and the whole period covered by C.W.P. No. 1109 of 1980. For the remaining period covered by C.W.P. 455 of 1981, the amended Section would come to operate, but all the same to both the periods Rules 7 and 49, which have remained unamended, would come to apply. Section 4 of the Act provides how valuation of excisable goods for purposes of charging the excise duty, could be made. Rule 9 provides for the time and manner of payment of duty, and Rule 49 provides that such duty is chargeable only on the removal of the goods from the factory premises or from an approved place of storage.

(10) The principal contention of Mr. Kapil Sibal, learned counsel for the petitioner, was that the tin containers manufactured by the Company though under a separate licence, was manufacturing of goods in process leading to the end product of P.P. Foods in unit containers. According to him, his case is squarely covered by two decisions of the Delhi High Court in *Modi Carpets Limited and another* v. *Union of India and others,* (1) *and J. K. Cotton Spinning & Weaving Mills Co. Ltd. and another* v. *Union of India and others,* (2) and by a judgment of the Bombay High Court in *Oudh Sugar Mills Ltd.* v. *Union of India and another,* (3). He claimed that on the parity and reasoning given in the aforesaid precedents, no excise duty is leviable at all on the tin containers which come to be employed to make up the end products.

(11) In *Oudh Sugar Mill's case* (supra), of the Bombay High Court, the manufacturing process for hydrogenated vegetable oil was carried out in a composite hydrogenation plant which consisted of two sections, namely, the crushing section and the hydrogenation section. The graphical sketch of the vegetable oil defining and hydrogenation process plant submitted by the petitioner to the Court as also the process of the manufacture, which began with the feeding of ground nut into the elevator and ending up in the manufacture of Vanaspati, appealed to the Court, and it was held as follows :—

> "The provision of rule 9, in our view, contemplates that an item of excisable goods must be independently manufactured as such and removed from the plant and where the process of manufacture is for the purpose of manufacture of any other commodity whether in or outside the place of their manufacture. Where the plant of production is treated as composite plant and where the process of manufacture is an integrated continuous un-interrupted process, a transfer of produce which is a component of the final produce from one part of the plant to another does not, in our view, amount to removal as contemplated in rule 9, When the vegetable oil is transferred from the

(1) 1980 Excise Law Times, 320.

(2) 1980 Central Excise & Custom Journal 6381.

(3) 1980 Excise Law Times, 327.

storage tank to other part of the plant it is nearly transferred from one part of the plant to another."

In a later part of the judgment, the Court also observed as follows :

"Rule 1, which we have read earlier, in terms, lays down that no excisable goods shall be removed from any place where they are produced or any specified promises appurtenant thereto, whether for consumption, export or manufacture of any other commodity in or outside such place until the excise duty leviable has been paid. The Rules thus contemplates the site of manufacture as the place from where removal has to take place whether for consumption, export or manufacture of any other commodity. It obviously makes no reference to the Plant or equipment. But, where there are two distinct plants within the same factory premises, removal can take place either outside the factory premises or within the factory premises if the product obtained by working of one plant is sent to another plant for obtaining another product. There can be no removal of a product within the plant itself so long as the product is in the process of manufacture.

There can be removal only if the product goes out of one stream of production into another stream of production or if the product is issued out or taken out or consumed if no further processing of that product is to be done." (emphasis supplied).

It is significant that in the manufacturing process, the ground nut had to shed off its oil cake and the residue ground nut oil only remained in the composite plant so as to receive hydrogenation in process as a part of one continuous integrated process.

(12) In *Modi Carpets's case* (supra), the Delhi High Court while considering the scope of Rules 9 and 49 held that no excise duty could be levied and recovered on oliver obtained by the petitioners if it was consumed within the very premises in which it was manufactured for the purposes of making woollen yarn, and as such held that there was no removal from the place of manufacture as envisaged by Rule 9, read with Rule 49, of the Excise Rules. It was also

held that in the absence of any place having been specified by the Collector under Rule 9, the place of manufacture had to be deemed to be the entire factory in which the manufacturing process takes place. It was held that the raw wool had to pass through various stages in order to become woollen yarn, and one of those stages was the stage of being oliver. It is significant that the substantum of the material which was put to the process of manufacture till the time it became the end product remained the same and the oliver, the intermediate product, remained an in-process material.

(13) In *J. K. Cotton Spinning & Weaving Mill's* case (supra), the Delhi High Court held that if there is single process of manufacture and at some stage during the process the excisable commodity emerges, it will not be liable to duty unless it is removed or consumed or sold. That was the case in which a Company was running a composite mill and manufactured blended non-cellulcaic spun yarn for which excise duty was payable, but utilised the yarn within its own factory for the purpose of making man-made fabric. The Bench took the view that so long as the yarn was not cleared or removed from the factory, no duty was payable. It was observed as follows :

> "It is a case where there is a single end product and the various processes are all towards the emergency of that end product. No doubt, if the yarn, that is wound up on the cones is removed by the assessee for the purpose of sale or for the purpose of consumption otherwise the goods so removed would attract duty and that is not denied by the petitioner itself. But so long as the cones are not removed from the pipalins and they continue to be wound on the cones transferred to the warp beams and thereafter sent in for the process of weaving it is difficult to see how there can be said to be a removal of the goods within the meaning of the Act and the Rules. The contention of the petitioners is well founded and that no duty is payable on the yarn produced by the assessee in its spinning and weaving mill and which is utilised for the purpose of weaving the fabric manufactured by the petitioner-company."

It is significant that for the purposes of the Act, the entire factory of the company was found to be the licensed premises and no part

of the premises was found to be specified within the meaning of Rule 49.

(14) Mr. Sibal strenuously urged that in the instant case the premises licensed for the purposes of manufacturing metal containers and P. P. Foods were just the same. To facilitate understanding, the parties produced before us the respective applications made by the petitioner-Company to obtain licences for the manufacture of metal containers as also P. P. Foods. These applications were made in the statutory forms, known as Form AW-4. In both the applications, the column meant for brief description with boundaries of the premises intended to be used as factory, filling has been made. "As per ground plan attached". Perhaps, the same filling is made to cover the columns meant for "Description of each main division or sub-division of the factory" and "Store room or other place or storage". Besides that, against these columns, it is mentioned that towards North, there is G. T. Road, towards South—Railway Line, towards East—residences/ green fields and towards West—Kingwah Canal. For the columns meant for "Distinguishing letter or number or letter and number of each", "Detailed description of each" and "Purpose of each", no relevant filling seems to have been made. This is the position in both the applications. The entries totally tally. Both the licences are stated to have been granted on 28th August, 1970 and renewed from time to time. Two plans countersigned by the Assistant Collector, Central Excise & Customs, Chandigarh, signifying his approval, dated 25th May, 1970, were placed before us. These two plans on the general lay-out of the factory tally totally. However, for the plan meant for prepared or preserved foods, a portion has been encircled in red pencil and cross sectioned. This has been termed as "Warehouse"—Prepared or Preserved Foods. It carries added certification by the Superintendent and Inspector, Central Excise, that the premises was found to be safe and secure. Similarly in the other plan, meant for metal containers, approved on the same day, a portion has been encircled in red pencil and cross sectioned, ear-marked as 'Tin shop'—metal containers. Incidentally, the portion ear-marked as "Tin shop—Metal containers' is contiguous to the portion ear marked as 'Warehouse—Prepared or Preserved Food'. Significantly, in both these plans the spaces meant for 'Filling' and 'Hatmaker' have been left out of the red crossed section. According to the averments made in both the writ petitions with regard

to the process of manufacture of P. P. Foods, the empty tin after its manufacture and sterilization, comes out to the Filling room on a conveyor belt. Thereafter, the condensed milk is poured in it and seamed with second and which is embossed with the manufacturing code. This part of the operation has been ear-marked as "e" and "f" in the mechanical automatic process given dashir. The petitioner-Company claims that the operations inclusive of operations "e" and "f" are made in a single continuous line at a speed of 151 tins/minute, and this fact has not been specifically denied by the respondents.

(15) Now the question arises whether when the tin containers travel towards the Filling-room, sterlized or, in other words, they travel from the premises cross sections to the premises which is shown uncrossed, is it removal for the purposes of Rules 9 and 49 of the Excise Rules ? If it is so, then it would attract the levy of excise duty. While the petitioner-claims that the licensed premises for preparation of both the excisable goods was the entire factory as shown in the general lay-out in both the plans, the respondents, on the other hand, maintained that the portion earmarked in red in one plan is meant as the place of production or manufacture of the metal containers and in the other as warehouse for prepared or preserved foods. We have already noticed that the former is termed as Tin shop and the other as "Warehouse". The warehouse is conceived to be ear-marked by a manufacturer as a place of storage on his premises for depositing goods made on the same premises without payment of duty. That is the mandate of Rule 47. The removal of goods from such warehouse would obviously attract the mischief of Rule 9. *Ex facie* the area cross-sectioned in red in the plan meant for prepared or preserved foods, does not appear to be the factory itself but a warehouse, the premises of which were found safe and secure by the authorities to be used as a warehouse in terms of Rule 47. It is no body's case that any manufacturing process was being conducted in this portion of the factory. The dispute relates to the Tin shop which has been cross-sectioned in the plan meant for the mental containers. Now, here the parties are at variance. The petitioner-Company contended that the area so ear-marked only signified that this was the place where the tins were manufactured and not for the purpose of ear-marking it as a separate plant, or for the purpose of

mentioning it as a separate factory, for manufacturing metal containers. The respondents, on the other hand, vehemently contend that the area as ear-marked is the only place where the tin containers were being produced or manufactured and those being independently excise goods, the said area had to be treated as a separate factory or a distinct plant. Concededly as stated before, the tins are filled with condensed milk outside the area so earmarked. In the presence of the suggested demarcation, is the plant yet composite or are they two different plants, one of which sends tin containers and the other receives and uses them, though they are situated in the same factory area in the larger sense.

(16) The mechanical automatic process in a single continuous line, connected with the conveyor belts, would not by itself make a plant a composite one. However, it is the entire conspectus of things which has to be viewed. Here the end product of the petitioner-Company was 'P.P. Foods in unit containers'. It would have made no difference if they were termed as "Unit containers filled with P.P. Foods. The unit containers are to contain food, or the food has to be contained in the unit containers in order to be an excisable goods. How the process of wedding them, together at a place which is outside the red cross-sectioned area could all the same be factory area but only for the purpose of manufacturing P. P. Foods. The licence required the place of their manufacture to be mentioned and it was so mentioned as otherwise the permission to manufacture such goods would not have been granted. But on the same logic, it cannot be said that the factory premises for manufacture of metal containers was also the area outside the red cross-sectioned area marked for the purposes. Concededly, if the tins as such had been removed from the tin shop to be sold outside the factory, they would attract duty. But if they are used within the factory after removal from their place of manufacture, may be by a conveyor belt, to the place of manufacture of the other excisable goods of prepared and preserved food, it would, in our view, attract the levy. It seems to us that in such process, the product gone out of one stream of production into another stream of production. It goes out from one place of production, to become another product, to another place of production. Plainly, no further process of that product is to be done and it is to be used in another stream of production. This would

neither be a case of issuing out or taking out of the product for its consumption. The consumption pre-supposes the using up, for exhausting the product, or otherwise spending it out. No such process is involved for what happens to the metal containers in being transferred to the Filling-room as receptacles.

(17) To revert again to the columns in the applications for obtaining licences, it would be interesting to note that against column No. 12 meant for "Particulars of such kind of raw material to be used in such manufactures" Tinplate has been mentioned for manufacture of metal containers and "Tins and Cartons" have been mentioned as one of the raw materials to be used for the manufacture of P. P. Foods. Thus, two different kinds of raw materials were conceived by the petitioner-Company to manufacture two excisable goods covered by the two respective licenses. Had it been one integrated process, the raw material in the manufacture of P. P. Foods should have been mentioned as Tinplate and not "Tins and Cartons." It seems to us that there was no doubt entertained ever on that behalf by the petitioner-Company.

(18) Adverting to Rules 9 and 49 of the Rules, it is the removal of the goods which attracts payment of duty. Primarily it is the removal of the goods from any place where they are produced, cured or manufactured or any premises appurtenant thereto. That place is required to be specified by the Collector in this behalf. The removal can either be for consumption, export, or manufacture of any other commodity in or outside the specified place. The removal is prohibited until the excise duty leviable thereon has been paid at such place and in such manner as is prescribed in the rules or as the Collector may require and except on presentation of an application in the proper form and on obtaining the permission of the proper officer on the prescribed form. Proviso to Rule 9 takes care for the deposit of goods without payment of duty in places of storage enumerated therein. In Rule 49, payment of duty required to be made at the time when the excisable goods are about to be issued out of the place or premises specified under Rule 9 by the Collector or are about to be removed from the store-room or other place of storage approved by the Collector under Rule 47. So the duty is attracted on removal from the place where the excisable goods are produced, cured or manufactured, or when

they are removed from the store-room or other place of approved storage. It is the manufacturer who is required to provide store-room or other place for storage at his place of business for depositing the goods made on the same premises without payment of duty as required under Rule 47. The place of manufacture, production cure as said before is required to be specified by the Collector in this behalf. Reading both the rules 9 and 49 together, the intention is clearly discernible that the removal of goods from the place of production, manufacture or cure or from an approved store-room or place of storage can alone attract levy of duty.

The heading in Rule 49 indicating that the duty was chargeable only on the removal of the goods from the factory premises, is no guide to the body of the rule. The expression "factory premises" used in the heading has thus a limited scope to mean the place or premises as specified under Rule 9, that is the place of manufacture, production or cure or any premises appurtenant thereto and in no case the factory premises, as largely understood and canvassed by the petitioner. Thus, we are of the considered view that the activity of the petitioner, as has been explained by us, would not attract the ratio of decisions in *Modi Carpets' case* (supra), *J. K. Cottons Spinning & Weaving Mills'* case (supra) and *Oudh Sugar Mills's* case (supra) and we can find no fault with the respondents levying evcise duty on the petitioner on the removal of metal containers from their specified place of production or manufacture, to be used for manufacturing the commodity known, as P. P. Foods outside the place meant for the production and manufacture of the first commodity.

(19) This brings us to the second question, with regard to the method adopted by the respondents in determining the value for the purposes of charging the excise duty. Under the unamended section 4 of the Act, the value of the article chargeable with duty was deemed either to be the wholesale cash price for such an article and where such price was not ascertainable, the price at which the article of the like kind or quality was capable of being sold at the time of removal of the article as detailed in that section. Under amended section 4, the valuation of the excisable goods for the purposes of charging the excise duty is deemingly to be 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

subject to the conditions as mentioned in the said section. Proviso (iii) (b) to the said section provides that where the normal price of such goods is not 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. Here the petitioner Company's case positively is that the metal containers are not sold by it in the market. In the price lists given by the petitioner-Company in the year 1970 and then again in 1978, it only mentioned the cost of containers and did not include therein the notional profit or exclude therefrom the notional loss. Whether it is a case under the unamended or amended section 4, the price of the goods at which they are ordinarily sold by the assessee to a buyer in the course of wholesale trade, would include elemental profit and loss. There is a provision in the rules for provisional assessment of duty under Rule 9-B. Under Chapter VII-A of the Rules, rules are prescribed for removal of the excisable goods on determination of the duty by the producers, manufacturer and private warehouse licensees. Undoubtedly, tariff items 1-B and 45 are covered under these Rules. Under Rule 173-C, the assessee is required to file the price list of the goods assessable to *ad valorem* duty with the proper officer. Under sub-rule (2) (ii), thereof, prior approval of the proper officer of the price list, filed by the assessee under sub-rule (1), would be necessary if the assessee was to use such goods for the manufacture or production of other goods in his factory. After such a price-list is submitted, the rule enjoins, the proper officer to approve the price-list after making such modifications as he may consider necessary so as to bring the value shown in the said price-list to the correct value for the purpose of assessment as provided in section 4 of the Act. Elaborate procedure has been provided therein in case of dispute with regard to the price to be settled by the proper officer in the manner prescribed. The domain of the proper officer under the said rule is to hold an inquiry into the price-list submitted to him by the assessee. It is after following such procedure that the price-list submitted by the assessee can be varied, but at the same time, the assessee is entitled to file a fresh list or an amendment of the list filed or approved as the case may be. A certain element of discretion in the nature of the rule does come to be employed. Here the assessee did not submit the price-list after the year 1970. The respondents chose to add a notional profit of 10 per cent for

the years in question involved in C.W.P. No. 1109 of 1980. The Assistant Collector finalised the price-list in terms of section 173-C in view of the well settled position of law that the real value of the goods include the cost of manufacture and profit margin. He added the margin of profit at the rate of 10 per cent because the petitioner-Company did not furnish the exact *pro-rata* profit, margin or loss on the final product. This was by no means difficult. The overall profit derived from P. P. Foods could have been split on the ratio of the cost of manufacturing of tin containers and the cost of preparing/preserving the condensed milk. At least a workable hypothesis could have been given to the Assistant Collector for finalising the price-list of the metal containers. The element of discretion having been made to enter the conduct of the petitioner-Company and having attracted the orders of the Assistant Collector, the authority in Appeal, and the Revisional Authority, we cannot and will not upset that view, merely because we could be persuaded on facts to settle the controversy at a different percentage or different apportioning in a particular year. The final assessments of the years involved in C.W.P. No. 456 of 1981 except for the year 1979 followed the same pattern and we can find no fault with that view. For the year 1979, the final assessment was made on the basis of the price list disclosed by the petitioner-Company. Having led the authorities in that direction, the petitioner cannot have any grouse with regard to the method adopted for the assessment.

(20) The next question was whether Rule 10 or Rule 10-A could be attracted in the circumstances. In the notice issued to the petitioner-Company, the title mentioned both the rules. Rule 10 provides for the recovery of duties not levied or not paid, or short-levied or not paid in full or erroneously refunded. A period has been prescribed from the date within which the service of notice on the person chargeable with duty can be effected requiring him to show cause why he should not pay the amounts specified in the notice. Rule 10-A is in the nature of residuary rule, providing that where the rules do not make any specific provision for the collection of any duty, or of any deficiency in duty if the duty has for any reason been short levied, the proper officer is entitled to serve notice on the person from whom such duty, deficiency in duty or sum is recoverable requiring him to show cause to the Assistant Collector of Central Excise why he should not pay the

amount specified in the notice. There is no period of limitation provided in Rule 10-A. The Assistant Collector held that the demand did not suffer from the mischief of Rule 10. The appellate Collector observed that the provisions of Rule 10-A would be applicable notwithstanding the fact that they were working under the provisions of Self Removal Procedure. He took that view holding that since the appellants themselves did not declare the margin of profit while declaring the price list, subsequent demand of duty from them on the margin of profit under the provisions of Rule 10-A, was correct in law. The Revisional Authority took the view that since the petitioner-Company did not declare their margin of profit nor filed any revised price list despite being asked to do so, there was justification to invoke the provisions of Rule 10-A. It is significant that under Rule 10 (3), the relevant date from which the period of limitation is to be computed in the case of excisable goods, on which the value or the rate of duty has been provisionally determined under the Rules, is to be the date on which the duty is to be adjusted after final determination of the value of the rate of duty, as the case may be. Here the parties are at dispute as to whether the assessment was provisional. All the departmental authorities, on the strength of the office copy, have maintained that the assessment was not final but was provisional. We cannot go into this disputed question of fact and have to treat the fact as determined by the authortiies below final for our purpose, and if that is so, the relevant date "would be the date on which the final determination of the value was made". That was made simultaneous with the confirming of the provisional demand. Final determination of the value of goods had not been made in accordance with the rules and hence the period prescribed in Rule 10 for the service of the notice would not come to bar the proceedings. Every thing being in the fluid stage, Rule 10-A of the Rules could definitely come to be employed for the purpose. We find no legal infirmity in the impugned orders on that score in both the writ petitions.

(21) Lastly, in C.W.P. No. 1109 of 1980, the vires of Rule 10-A of the Rules were questioned on the plea that it gave arbitrary and unbridled powers to the authorities without the provisions of any guide lines regarding its application. The point was hereby touched and not elaborated.

(22) For the foregoing reasons, we find no merit in both the petitions, and dismiss the same without any order as to costs.

N. K. S.

Before S. S. Sandhawalia, C. J. and G. C. Mital, J.

SARDAR SINGH,—*Appellant.*

versus

Smt. DALIP KAUR and others,—*Respondents.*

Regular Second Appeal No. 242 *of* 1980.

May, 19, 1981

Limitation Act (XXXVI of 1963)—*Article* 97—*Indian Registration Act (XVI of* 1908)—*Section* 47—*Sale deed executed—Possession of the sold land delivered to the vendee earlier on the same day—Instrument of sale registered few days later—Such possession—Wheher delivered under the sale—Suit to pre-empt such sale—Period of limitation—Whether commences from the date of execution of the sale deed—First part of Article* 97—*Interpretation of—Sale—When complete.*

Held, that a reading of the third column of Article 97 of the Limitation Act, 1963 shows that wherever the subject matter of sale admits of physical possession of whole or part of the property sold then the starting point of limitation under the first part is from the date of taking of possession of whole or part thereof and wherever either whole or part of the property sold does not admit of physical possession, then the limitation starts from the date of registration of the instrument of sale. The object to provide two different limitations for two different sets of facts is the same, namely, the notice of the sale to the pre-emptor. If whole of the sold property is already in possession of a tenant, mortgagee or a person other than the owner under some title and that person continues in possession, in spite of the sale by the owner, the only way to provide knowledge to a pre-emptor would be by a registered document because under the law the moment a document is entered in the register of the Registrar, the sale is notice to the general public and the registration of such a sale