A COMMISSIONER OF CENTRAL EXCISE, LUCKNOW, U.P.

v.

M/S. CHHATA SUGAR CO. LTD.

FEBRUARY 27, 2004

B [V.N. KHARE CJ., S.B. SINHA AND S.H. KAPADIA, JJ.]

Central Excise Act, 1944—Section 4, 4(1)(a), 4(4)(d)(ii)—U.P. Sheera Niyantran Adhiniyam, 1964—Section 8(4), (5) and section 10—Assessable value of molasses for purposes of levy of excise duty—Determination of— C *Whether administrative charges collected by sugar factory from buyers on behalf of State Government for molasses sold, duty or impost in the nature of tax and as such includible or not includible in the value of molasses—Held: Administrative charges levied is in addition to and separate from the statutory price of molasses fixed under section 10 of U.P. Act, which is the normal price* D *under section 4(1)(a) of 1944 Act—It never formed part of normal price as such cannot come within the ambit of assessable value—Further applying various tests levy of administrative charge is in nature of tax and not fee—Hence, not includible in the assessable value in terms of section 4(1)(a).*

Respondent-assessee is engaged in the manufacture and clearance of E **molasses falling under tariff item No. 1703.10. It collected administrative charges in terms of section 8(5) of U.P. Sheera Niyantran Adhiniyam, 1964 on behalf of the State Government from the buyers/alottees, on the molasses sold. Respondent did not include administrative charges collected from the buyer in the assessable value of molasses for purpose of levy of excise duty and was issued notices. Assistant Commissioner held that the administrative** F **charges were in nature of fees and as such includible in the value of molasses in terms of section 4(4)(d)(ii) of Central Excise Act, 1944. Commissioner (Appeals) set aside the order. However, tribunal dismissed the appeal filed holding that the administrative charge was a tax and was not includible in the value of molasses. Hence the present appeal.**

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Division Bench of this Court doubted the correctness of two-judge Bench decision of this Court in the case of *Commissioner of Central Excise, Meerut* **v.** *Kisan Sahkari Chinni Mills Ltd.,* **that administrative charges collected by the sugar factory for molasses sold from the buyers constituted an impost in the nature of tax and as such was not includible in the value of molasses in terms**

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of section 4(4)(d)(ii) of the Act, and referred the matter to the present Bench. A

Appellant-Revenue contended that the words 'other taxes' in section 4(4)(d)(ii) of the Act cannot be interpreted in the light of the words "taxation" as defined in Article 366(28) of the Constitution; that the U.P. Act is a regulatory legislation and the administrative charges levied thereunder are in the nature of regulatory fees; that regulatory regime for molasses was B required in the public interest in view of the potential danger to public health and environment if the industry and the product are not properly regulated; that the mere fact that the charges may be recovered under section 8(5) of the U.P. Act by the sugar factory (producer) from the buyer of molasses does not militate against the administrative charges being in the nature of C regulatory fees, nor lead to the conclusion that it is a tax, since the benefit of the regulation of molasses goes to the buyer, the administrative charges may be recovered from him; that the levy under the U.P. Act is a regulatory fee and not a tax and therefore, is includible in the assessable value for the purpose of imposition of excise duty; and that *Kiran Sahkari Chinni Mills Ltd.* case is erroneous. D

Dismissing the appeals, the Court

HELD: *Per Kapadia, J. (For himself and Khare, CJI) :*

1.1. In the instant case, one is concerned with the provisions of the E Central Excise Act, 1944 as it stood at the relevant time. Taxes are one of the items of deduction from the normal price, which is the price at which excisable goods are ordinarily sold by the assessee to the buyer in course of wholesale trade, to arrive at the assessable value. A normal price under section 4(1)(a) of the Act includes numerous cost factors including taxes and therefore, under section 4(4)(d)(ii) the legislature has provided for express deduction of taxes F from the normal price to arrive at the assessable value. However, the normal price may vary. Under the second proviso to section 4(1)(a), the normal price is the statutory price fixed under any law for the time being in force or at a price, being the maximum, fixed under such law, which in the instant case is the U.P. Sheera Niyantran Adhiniyam, 1964. [807-F-H; 808-A] G

1.2. Under Section 10 of the U.P. Act the sugar factory has to sell molasses at the prescribed price which is the maximum price fixed by the Controller under section 8 of the U.P. Act. Under Section 8(5) of the U.P. Act, however, administrative charges are levied in addition to the price of molasses which the buyer has to pay to the sugar factory (producer). H

A Therefore, these administrative charges are distinct, separate and in addition to the price of the molasses, which price is the statutory price fixed under section 10 of the U.P. Act and which consequently is the normal price under section 4(1)(a) of the Act. Under the second proviso to section 4(1)(a) of the Act the normal price which is the assessable value is the statutory price which under the U.P. Act does not include administrative charges. Hence the B administrative charges payable by the assessee under Section 8(4) of the U.P. Act are not includible while determining "value" of goods for the purposes of assessment under the Act. [808-A-D]

**Commissioner of Central Excise, Meerut* v. *Kisan Sahkari Chinni Mills* C *Ltd.,* (2001) 132 E.L.T. 523 SC, affirmed.

1.3. An assessee under the Act incurs expenses in the course of manufacture of goods, which includes taxes. The concept of price covers cost plus profit plus taxes. Therefore, under section 4(1)(a) if the normal price includes taxes, they have to be deducted. But if an item of expenditure or D cost does not fall in the normal price, there is no question of deduction of that item from such a price as such a component never formed part of the normal price in the first instance and, therefore, it cannot come within the ambit of assessable value under section 4(1)(a). [808-E-F]

Hindustan Sugar Mills v. *State of Rajasthan,* [1978] 4 SCC 271, relied E on.

1.4. The levy of excise duty under the Act has the status of a constitutional concept. The point of collection is located where the Act declares it will be. Further, an article becomes an object of assessment when it is sold by the manufacturer but that circumstance does not detract from its true F nature that it is a levy on the fact of manufacture. Hence, this gives an insight into the connotation of the words "other taxes" in section 4(4)(d)(ii) of the Act. Therefore, it cannot be said that administrative charges levied on the sugar factory under the U.P. Act do not fall within the words 'other taxes' and that the definition of the word "taxation" in Article 366(28) cannot be G read into the words "other taxes" under section 4(4)(d)(ii) of the Act.

[807-C-E]

Union of India and Ors. etc. v. *Bombay Tyre International Ltd. and etc.,* AIR (1984) SC 420, relied on.

H 2.1. A tax is capable of being passed on to the consumer or the buyer

whereas a fee is a counter payment by the buyer who receives the benefit of the services for which he is charged and such fees are not capable of being passed on as fees to the consumer or the buyer. In the instant case, levy of administrative charges under section 8(4) of the U.P. Act is imposed on production of molasses for sale and under section 8(5) the same is passed on to the buyer-distillery. In the circumstances, levy of administrative charges under the U.P. Act is a tax. [809-F-G]

M/s. Chotabhai Jethabhai Patel & Co. etc. v. *Union of India and Anr. etc.*, AIR (1962) SC 1006, held applicable.

2.2. Customs and excise duties are indirect taxes as they are additions of definite amounts to the prices at which the goods upon which they are imposed are, in the ordinary course of business, sold by person who have paid the duties. Under Section 8(5) of the U.P. Act, administrative charges is in addition to the prices at which goods are sold in the ordinary course of business by the sugar factory-producer of molasses. Moreover, the predominant object of the U.P. Act is to maximize the revenue by way of tax while regulating storage and supply of molasses. The beneficiary under the said Act is the distillery which provides important source of revenue to the State. Therefore, the said levy of administrative charges is in nature of tax. [810-A-C]

Mathews v. *The Chicory Marketing Board (Victoria)*, (1938) 60 Commonwealth Law Reports 263, referred to.

2.3. Another test to decide whether a levy is a tax or fee is that while tax is a compulsory exaction, fee relates to the principle of *quid pro quo*. In the instant case, the administrative charges is not a component of the consideration received by the sugar factory. It does not form part of the revenue of the sugar factory and cannot be appropriated to the revenue account of the sugar factory. Therefore, there is no element of *quid pro quo* with regard to administrative charges in the hands of the sugar factory. On the other hand, under section 8(4) of the U.P. Act read with Rule 23 of the U.P. Rules, every sugar factory is required to deposit administrative charges on the molasses sold/supplied before actual delivery to the distillery (buyer), which brings in the principle of compulsory exaction. Hence, administrative charges under the U.P. Act is a tax and not a fee. [810-C-F]

D.G. Gose & Co. (Agents) (P) Ltd. v. *State of Kerela*, [1980] 2 SCC 410; *Raitlal Panachand Gandhi* v. *State of Bombay*, [1954] SCR 1055; *Sreenivasa General Traders* v. *State of A.P.*, [1983] 4 SCC 353; *BSE Brokers' Forum* v.

A *Securities and Exchange Board of India,* **[2001] 3 SCC 482;** *City Corporation of Calicut* **v.** *Thachambalath Sadavisan and Ors.,* **[1985] 2 SCC 112;** *Commissioner and Secretary to Government, Commercial Taxes and Religious Endowments Department and Ors.,* **[1992] 3 SCC 488;** *Krishi Upaj Mandi Samiti and Ors.* **v.** *Orient Paper & Industries Ltd.,* **[1995] 1 SCC 655;** *Secretary to Government of* B *Madras and Ors.* **v.** *P.R. Sriramulu and Anr.,* **[1996] 1 SCC 345 and** *Vam Organic Chemicals Ltd. and Anr.* **v.** *State of U.P. and Ors.,* **[1997] 2 SCC 715, referred to.**

Per Sinha, J (Concurring) :

C **1. When a statute deals with an essential commodity in terms whereof the price of a commodity is fixed thereunder, the sale price must be determined having regard to the price fixed under the statute and any other sum. The administrative charges payable by the buyer under the U.P. Act, thus, being in addition to the sale price, the same cannot be a fee. Furthermore, one of the tests for determining as to whether the impost is a 'tax' or 'fee' would,** D **be whether the burden can be passed to the end user. Under the State Act, the same is permissible. A 'fee' in a situation of this nature cannot be passed on to the end user, a 'tax' can be. [815-H; 816-A-B]**

Neyveli Lignite Corporation Ltd. **v.** *Commercial Tax Officer, Cuddalors and Anr.,* **[2001] 9 SCC 648 and** *Commissioner of Central Excise, Delhi* **v.** *Maruti* E *Udyog Ltd.,* **[2002] 3 SCC 547, relied on.**

1.2. In any event regulatory fee imposed for the purpose of regulating the industry producing molasses, it cannot be passed on to the buyers as they are not subjected to any regulation under the Act. The nature of impost is such that burden thereof is to be borne by the buyers and the respondents F **herein are merely the agents for collecting the same on behalf of the State. Therefore, the impost cannot be termed as a 'fee' so as to deprive the respondents of the benefit of deduction of the tax for the purpose of Section 4(4)(d)(ii) of the Central Excise Act, 1944. [816-C-D]**

G **1.3. In terms of Rule 23 of the UP Sheera Niyantaran Niyamawali, 1974, the occupier of a sugar factory is obligated to deposit the administrative charges even prior to delivery of molasses and recovery thereof from the buyers. The impost levied in terms of the said Act must, thus, be held to be a special tax applicable to a section of the people, namely, buyers of molasses. [816-D-E]**

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C.C.E. **v.** *Kisan Sahakari Chinni Mills Ltd.,* **[2001] 6 SCC 697, affirmed.**

The Corporation of Calcutta and Anr. **v.** *Liberty Cinema,* **AIR (1965) SC 1107, relied on.**

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Gasket Radiators Pvt. Ltd. **v.** *Employees' State Insurance Corporation and Anr.,* **[1985] 2 SCC 68;** *Tata Iron and Steel Co. Ltd.* **v.** *Collector of Central Excise, Jamshedpur,* **[2002] 8 SCC 338;** *Municipal Corporation, Amritsar* **v.** *The Senior Superintendent of Post Offices, Amrtisar Division and Anr.,* **JT (2004) 1 SC 561;** *Synthetics and Chemicals Ltd. and Ors.* **v.** *State of U.P. and Ors.,* **[1990] 1 SCC 109;** *The State of West Bengal* **v.** *Kesoram Industries Ltd. and Ors.,* **(2004) 1 SCALE 425 and** *M/s. Shriram Industrial Enterprises Ltd.* **v.** *The Union of India and Ors.,* **AIR (1996) Allahabad 135, referred to.**

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Hylton, Plaintiff in Error **v.** *The United States.,* **US SCR 1 Law, Ed. Dallas 169, referred to.**

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CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 7488-7492 of 2001.

From the Final Judgment and Order dated 27.7.99 of the Central Excise Customs and Gold (Control) Appellate Tribunal, New Delhi in F.O. Nos. 1043-47/99-A in E/A. Nos. 2418-2420/98-A and E/2422-2423 OF 1998-A.

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WITH

C.A. Nos. 7494-7499/2001, 999, 1974/2000, 7493/2001, 6807/99 and 7500-7514 of 2001.

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Soli J. Sorabjee, Attorney General, Jaideep Gupta, Ms. Nisha Bagchi, Prateek Jalan, K.C. Kaushik and B.K. Prasad for the Appellant.

Vinay Garg, Arvind Minocha (NP), Vishwajit Singh (NP), Praveen Kumar and Alok Yadav for V. Balachandran for the Respondent.

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The Judgments of the Court were delivered by

KAPADIA, J.

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1. Doubting the correctness of a two-Judge Bench decision of this Court in the case of *Commissioner of Central Excise, Meerut* v. *Kisan Sahkari Chinni Mills Ltd.* reported in (2001)132 E.L.T. 523 SC, a Division Bench of

A this Court has referred the matter to a three-Judge Bench.

2. Since common question of law and fact arises in these appeals before us, the same are disposed of by this common judgment. However, for the sake of convenience we quote hereinbelow the facts in Civil Appeal Nos. 7488-7492 of 2001.

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POINTS FOR DETERMINATION

3. It is convenient to set out, at the outset, the question involved in these appeals. That question is: whether administrative charges collected by the sugar factory for molasses sold from the buyers/allottees on behalf of the C State Government in terms of section 8(5) of the U.P. Sheera Niyantran Adhiniyam, 1964 (hereinafter referred to as "the U.P. Act") constituted a duty or impost in the nature of a tax and consequently not includible in the value as defined in terms of Section 4(4)(d)(ii) of Central Excise Act, 1944 (hereinafter referred to as "the Act").

D **BACKGROUND FACTS**

4. M/s.Chhata Sugar Company Ltd., Tehsil - Chhata, District - Mathura, U.P. (hereinafter referred to as 'the assessee') is engaged in the manufacture and clearance of molasses falling under tariff item No. 1703.10. The assessee E is registered with the Department under Rule 174 of Central Excise Rules, 1944. While determining the assessable value of molasses for computing central excise duty, the assessee did not include administrative charges collected from the buyer at Rs.10 per quintal on behalf of the State Government under the provisions of the U.P. Act. Accordingly, demands show cause notices were issued under the Central Excise Act for alleged contravention F of section 4 of the Act read with Rules 9 and 173G of the Central Excise Rules, 1944. The Assistant Commissioner, Central Excise, Aligarh confirmed the demands holding that the administrative charges are includible in the value on the ground that these administrative charges are not a tax but they are in the nature of fees .The order of the Assistant Commissioner however G was set aside by the Commissioner (Appeals), Central Excise, Allahabad vide order dated 14th May, 1998. Being aggrieved, the Department preferred an appeal before the Customs, Excise and Gold Control (Appellate) Tribunal (CEGAT), New Delhi. However, CEGAT vide impugned judgment and order dated 27th July, 1999, rejected the appeal holding that the said administrative charge was a tax and it was not includable in the assessable value in terms H of section 4(4)(d)(ii) of the Act by placing reliance on the judgment of this

Court in the case of *D.G. Gose and Co. (Agents) (P.) Ltd.* v. *State of Kerala* reported in [1980] 2 SCC 410. Against the impugned judgment, the revenue has come by way of appeal to this Court under Section 35 L of the Central Excise and Salt Act, 1944.

ANALYSIS OF THE CENTRAL EXCISE ACT, 1944 AND U.P. ADHINIYAM, 1964

5. In order to answer the point at issue one has to analyse the relevant provisions of Central Excise Act, 1944 (as it stood at the relevant time). We quote hereinbelow section 4 of the said Act:-

> "**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 provisions of this section, be deemed to be-
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> (a) the normal price there of, 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 related person and the price is the sole consideration for the sale:
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> Provided that—
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> (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;
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> (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;
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> (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

A 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 person), who sell such goods in retail;

(b) 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.

(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 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 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;

(b) "place of removal" means—

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

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

(iii) a depot, premises of a consignment agent or any 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;

(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 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—

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

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

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

(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 C equal to, any duty of excise under 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, the D 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

(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 (e) "wholesale trade" means sales to dealers, industrial consumers, Government, local authorities and other buyers, who or which purchase their requirements otherwise then in retail."

6. Section 3(1) of the Central Excise Act, 1944 is a charging section, F which creates the liability to pay the excise duty on the goods produced or manufactured in India and the said sub-section clearly indicates the nature and character of the duty, namely, that it is a tax on production and manufacture of goods, while Section 4 is in the nature of machinery provision and, therefore, any thing said therein must be read so as to carry out the basic concept of excise duty. Section 4 of the said Act provides for determination of value G for the purposes of charging the duty of excise under the Act. Further, the valuation is to be based ordinarily on the price thereof, that is to say, the price at which the excisable goods are ordinarily sold by the manufacturer to a buyer. According to section 4(1)(a) normal price is the price at which excisable goods are ordinarily sold by the assessee to a buyer in the course H of wholesale trade for delivery at the time and place of removal provided the

buyer is not a related person and the price is the sole consideration for sale. A However, there are three provisos to section 4(1)(a) to clarify what would be the normal price in the circumstances mentioned in the three provisos. For the purposes of this case we are concerned with proviso (ii) which *inter alia* states that if excisable goods are sold in course of wholesale trade for delivery at the time and place of removal at a price fixed under any law for the time B being in force or at the maximum price fixed under any such law, the price or the maximum price as the case may be, so fixed, shall be deemed to be the normal price. Therefore, section 4(1)(a) indicates what is normal price whereas the three provisos to section 4(1)(a) indicate three different normal prices in the circumstances mentioned under the three provisos. Consequently, under proviso (ii) to section 4(1)(a), if the excisable goods are sold by a C manufacturer 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 the price or the maximum price as the case may be so fixed shall be the normal price.

7. The U.P. Act has been enacted to save and preserve the total D production of molasses in the State and for development of industrial growth and equitable distribution to distilleries and other industrial establishments. It deals with storage, gradation and price of molasses produced by sugar factories in the State of Uttar Pradesh and for regulation of supply and distribution thereof. Under Section 2 (a), Controller has been defined to mean Controller E of Molasses appointed under section 4. Under section 4 the State Government may by notification in the gazette appoint the person to be the Controller of molasses for the purposes of exercising the powers under the Act. Under section 5 of the U.P. Act, every occupier of sugar factory is required to take steps enumerated in the section to preserve the molasses. Under section 7 of the U.P. Act, the Controller is required to take steps to remove adulterated F molasses. Section 8 and 10 of the U.P. Act are relevant for the purposes of deciding these appeals and accordingly they are quoted hereinbelow:—

> "8. **Sale and supply of molasses.** - (1) The Controller may by order require the occupier of any sugar factory to sell or supply in the prescribed manner such quantity of molasses to such person, as may G be specified in the order, and the occupier shall, not withstanding any contract, comply with the order.
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> (2) The order under sub-section (1)—
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> (a) shall require supply to be made only to a person who requires H

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it for his distillery or for any purpose of industrial development;

(aa) may require the person referred to in clause

(a) to utilise the molasses supplied to him under an order made under this section for the purpose specified in the application made by him under sub-section (1) of Section 7-A and to observe all such restrictions and conditions as may be prescribed.

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(b) may be for the entire quantity of molasses in stock or to be produced during the year or for any portion thereof, but the proportion of molasses to be supplied from each sugar factory to its estimated total produce of molasses during the year shall be same throughout the State, save where, in the opinion of the Controller, a variation is necessitated by any of the following factors:

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(i) The requirements of distilleries within the area in which molasses may be transported from the sugar factory at a reasonable cost:

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(ii) The requirement for other purposes of industrial development within such area; and

(iii) The availability of transport facilities in the area.

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(3) The Controller may make such modifications in the order under sub-section (1) as may be necessary to correct any error or omission or to meet a subsequent change in any of the factors mentioned in clause (b) of sub-section (2).

(4) The occupier of a sugar factory shall be liable to pay to the State Government, in the manner prescribed, administrative charges at such rate, not exceeding five rupees per quintal as the State Government may from time to time notify, on the molasses sold or supplied by him.

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(5) The occupier shall be entitled to recover from the person to whom the molasses is sold or supplied an amount equivalent to the amount of such administrative charges, in addition to the price of molasses.

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10. Maximum prices of molasses.—(1) The occupier of a sugar factory shall sell molasses in respect of which an order under Section 8 has been made at a price not exceeding that prescribed in the schedule.

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(2) The State Government may, by notification in the Gazette amend the Schedule if such amendment is necessitated by reason of any variation in the cost of storage of molasses or loading or shunting charges of molasses in tank wagons or in order to bring the prices of molasses in conformity with the prices, if any, fixed by the Government of India.

Explanation - "Prices shall include all costs incidental to the loading of molasses into railway tank wagons, tank lorries or other containers and shunting charges of railway tank wagons."

8. A bare reading of section 8 *inter alia* indicates that the Controller may by order require a sugar factory to sell or supply such quantity of molasses to such person(s) as may be specified in his order and the sugar factory shall comply with the order notwithstanding any contract to the contrary. However, section 8(2) makes it clear that such supply of molasses shall be made only to a person who requires it for his distillery or for industrial development. Under section 8(4), the sugar factory shall be liable to pay the State Government and in the manner prescribed, administrative charges at specified rates on the molasses sold or supplied by the sugar factory. Under section 8(5), the sugar factory shall be entitled to recover from the person to whom the molasses is sold or supplied, an amount equivalent to such administrative charges, *in addition to the price of the molasses* (underline supplied by us). A perusal of 8(5) shows that the said administrative charges do not form part of the consideration for which the molasses are sold or supplied. Under section 8(5) of the U.P. Act administrative charges are recoverable by the sugar factory from the buyers in addition to the price of the molasses. It shows that liability to pay administrative charges is on the buyer and that it has no co-relation with the price of the molasses. The sugar factory recovers these administrative charges from the buyers and passes it on to the government. These administrative charges are not appropriated to the revenue of the assesssee. Under section 10 of the U.P. Act, the sugar factory has to sell the molasses at the price not exceeding the price prescribed in the schedule thereto. Further, under the explanation to the said section, prices shall include all costs incidental to loading of molasses in to railway tank wagons, lorries or other containers. It is important to note that administrative charges contemplated by section 8(4) of the U.P. Act are not included in the explanation to section 10. This is because there is a dichotomy under section 8(4) of the U.P. Act between the prices of molasses on one hand and the administrative charges. It is for this reason that it is expressly

A provided under section 8(5) that the sugar factory shall recover the administrative charges or the amount equivalent thereto from the buyer in addition to the price of molasses. Under section 22, the State Government is empowered to make rules in order to carry out the purposes of the U.P. Act.

9. At this stage it would be necessary to quote Rule 2(b) and rule 23 B of U.P. Sheera Niyantaran Niyamawali, 1974 (hereinafter referred to as "U.P. Rules") which run as under:—

> "*Rule 2. Definitions.*—In these Rules, unless there is anything repugnant in the subject or context thereof—
>
> C (a) .....
>
> (b) "Allottee" means a person in whose favour an order under Section 8 of the Act has been made for purpose of purchase of molasses from the occupier of a sugar factory.
>
> D Rule 23. Administrative charges.— Every occupier of a sugar factory shall deposit the amount of administrative charges payable on molasses sold or supplied by him in the treasury or sub-treasury of the district in which the sugar factory is situate and produce the treasury challan as evidence of such payment to the excise officer in charge of the sugar factory before making actual delivery of the molasses to the E purchaser."

Rule 23 shows that every sugar factory shall deposit the administrative charges payable on molasses sold or supplied by it in the Government treasury before making actual delivery of the molasses to the buyer/allottee. This rule further shows that in the first instance, administrative charges shall be paid F by the sugar factory in advance before actual delivery of the molasses with a right of reimbursement at a later date from the buyer/allottee. It also indicates that the sugar factory is only a collecting agent for the State Government. It is for this reason that section 8(5) of the U.P. Act requires the sugar factory to recover from the buyer or the allottee an amount equivalent to the administrative charges in addition to the price of the molasses. Reading G section 8(5) of the U.P. Act with rule 23 it is clear that the liability to pay administrative charges under the U.P. Act is on the buyer/allottee and not on the factory.

ARGUMENTS

H 10. At the outset, learned Attorney General submitted that the main

question which arises for consideration is: whether the administrative charges levied under the U.P. Act are "other taxes" within the meaning of section 4(4)(d)(ii) of the Act. It was *inter alia* urged the above judgment of the Division Bench in the case of *Commissioner of Central Excise* v. *Kisan Sahkari Chinni Mills Ltd.* (supra) is erroneous for interpreting the words "other taxes'' in section 4(4)(d)(ii) of the Act in the light of the words "taxation" as defined in Article 366 (28) of the Constitution of India, that there is no warrant for interpreting the words "other taxes" in the Act with similar amplitude, that it was clear from the scheme of the Act that the exclusion under section 4(4)(d)(ii) was intended for duties of excise, sales tax and other similar levies and not for every levy or duty or charge under a statute, that Parliament has deliberately not incorporated the wide definition of taxation in Article 366(28) of the Constitution in section 4(4)(d)(ii) of the Act, and the Division Bench failed to notice that the wide definition in Article 366(28) is for interpretation of the expression "taxation" appearing in the Constitution and not for other statutes and that the Division Bench had erred in holding that administrative charges would be covered by the words "other taxes" as it is compulsory exaction made under an enactment and, therefore, a duty or impost must be held to be in the nature of a tax. In this connection, it was also submitted that a levy being under a statute is not decisive of its character as a tax, and a fee can also be a compulsory levy under a statute and reliance was placed on the judgment of this Court in the case of *Ratilal Panachand Gandhi* v. *State of Bombay,* reported in [1954] SCR 1055; *Sreenivasa General Traders* v. *State of A.P.,* reported in [1983] 4 SCC 353; *BSE Brokers' Forum* v. *Securities and Exchange Board of India,* reported in [2001] 3 SCC 482 . Learned Attorney General further contended that the U.P. Act is a regulatory legislation and the administrative charges levied there under are in the nature of regulatory fees. In this connection he invited our attention to the preamble of the U. P. Act which declares that the Act is intended to provide in public interest for the control of storage, gradation and price of molasses produced by sugar factories in U.P. and the regulation of supply and distribution thereof. Our attention was also invited to sections 3 and 4 of the U.P. Act which deal with establishment of Advisory Committee to advise the State Government on matters relating to storage, preservation, gradation, price, supply, disposal of molasses and for a Controller of molasses. Our attention was also invited to Sections 5, 6, 7, 7A and 8 of the U.P. Act which provide for preservation and prevention of adulteration and which also provide for distribution and supply of the product. Thus a person who requires molasses for his distillery or for industrial establishment has to apply to the Controller and the Controller is entitled under section 8(1) of the U.P. Act to

A order any sugar factory to sell or supply the given quantity of molasses to an intending buyer. These provisions also found place in the U.P. Rules which provide *inter alia* for analysis and testing of samples and maintenance of account. It was submitted that regulatory regime for molasses was required in the public interest in view of the potential danger to public health and B environment if the industry and the product are not properly regulated. In this connection it was submitted that this Court has held that regulatory fees do not require an element of *quid pro quo* in the strict sense and that a reasonable relationship between the levy and the service rendered is sufficient. That if the activities for which a license is given requires regulation, the fee charged for this purpose is correctly classifiable as a fee and not as a tax. In support C of this contention, reliance was placed on the judgments of this Court in the case of *City Corporation of Calicut* v. *Thachambalath Sadasivan and Ors.*, [1985] 2 SCC 112; *Commissioner and Secretary to Government Commercial Taxes and Religious Endowments Department and Ors.* v. *Sree Murugan Financing Corporation, Coimbatore and Ors.*, [1992] 3 SCC 488; *Krishi Upaj Mandi Samiti and Ors.* v. *Orient Paper and Industries Ltd.*, [1995] 1 D SCC 655; *Secretary to Government of Madras and Ors.* v. *P.R. Sriramulu and Anr.* [1996] 1 SCC 345; *Vam Organic Chemicals Ltd. and Anr.* v. *State of U.P. and Ors.*, [1997] 2 SCC 715 and *B.S.E. Brokers' Forum Bombay and Ors.* v. *Securities and Exchange Board of India and Ors.*, [2001] 3 SCC 482. Placing reliance on the above judgment it was contended that so far as E the regulatory fee is concerned, the service to be rendered is not a condition precedent and the same does not loose the character of a fee provided it is not excessive. The mere fact that the charges may be recovered under section 8 (5) of the U.P. Act by the sugar factory (producer) from the buyer of molasses does not militate against the administrative charges being in the nature of regulatory fees, nor lead to the conclusion that it is a tax. The F reason being, since the benefit of the regulation of molasses goes to the buyer, the administrative charges may be recovered from him. It was accordingly submitted that the levy under the U.P. Act is a regulatory fee and not a tax and is, therefore, includible in the assessable value for the purpose of imposition of excise duty. It was submitted that the impugned judgment G of the tribunal and the decision of the Division Bench of this Court in *Commissioner of Central Excise* v. *Kisan Sahkari Chinni Mills Ltd.* (supra) have overlooked the abovestated legal position and, therefore, was erroneous.

FINDINGS:

H 11. The basic issue in this batch of cases is whether the administrative

charges payable by the assessee under section 8 (4) of the U.P. Act are to be included while determining "value" of goods for the purposes of assessment under the Act. We have analysed both the Acts earlier. Briefly it may be mentioned that section 3(1) of the Act is a charging section which creates the liability to pay the excise duty on the goods produced as manufactured in India and the said sub-section indicates the nature and character of the duty, *viz.* that it is a tax on production and manufacture of goods, while section 4 of the Act is a machinery provision and therefore meant to worry out the basic concept of excise duty. Section 4 of the Act provides for determination of value for the purpose of charging the excise duty under the Act. However, the valuation is based on the price thereof, that is to say, the price at which the excisable goods are ordinarily sold by the manufacturer to a buyer. In the case of *Union of India and Ors. etc.* v. *Bombay Tyre International Ltd. and etc.,* reported in AIR [1984] SC 420, it was *inter alia* held that under the Act while the levy is on the manufacture or production of goods, the stage of collection need not in point of time tally with the completion of the manufacturing process, that while the levy has the status of a constitutional concept, the point of collection is located where the Act declares it will be and that where the excise duty is levied on *advoloram* basis the value on which such duty is levied is a "conceptual value". This judgement of the Apex Court is relevant for two reasons. Firstly, it lays down that levy under the Act has the status of a constitutional concept. Therefore, we do not find merit in the argument of the learned Attorney General that the definition of the word "taxation" in Article 366(28) cannot be read into the words "other taxes" under section 4(4)(d)(ii) of the Act. Secondly, it lays down that an article becomes an object of assessment when it is sold by the manufacturer but that circumstance does not detract from its true nature that it is a levy on the fact of manufacture. Hence, the judgment of this Court in the case of *Union of India* v. *Bombay Tyer International* (supra) gives us an insight into the connotation of the words "other taxes" in section 4(4)(d)(ii) of the Act. Further, Section 4(1)(a) of the Act shows that the assessable value of an article is based on the normal price, which is the price at which excisable goods are ordinarily sold by the assessee to the buyer in the course of wholesale trade. In this case, we are concerned with the provisions of the Act as it stood at the relevant time. It is to be noted that taxes are one of the items of deduction from the normal price to arrive at the assessable value. A normal price under section 4(1)(a) of the Act includes numerous cost factors including taxes and therefore, under section 4(4)(d)(ii) the legislature has provided for express deduction of taxes from the normal price to arrive at the assessable

A value. However, the normal price may vary under the three situations mentioned in the three provisos to section 4(1)(a) of the Act. Under the second proviso to section 4(1)(a), which applies to facts of this case, the normal price is the statutory price fixed under any law for the time being in force or at a price, being the maximum, fixed under such law, which in the B present case is the U.P. Act. Under section 10 of the U.P. Act the sugar factory has to sell molasses at the prescribed price. The said price is the maximum price fixed by the Controller under section 8 of the U.P. Act. Under section 8(5) of the U.P. Act, however, administrative charges are levied in addition to the price of molasses which the buyer has to pay to the sugar factory (producer). Therefore, these administrative charges are distinct, C separate and in addition to the price of the molasses, which price is the statutory price fixed under section 10 of the U.P. Act and which consequently is the normal price under section 4(1)(a) of the Act. Under the second proviso to section 4(1)(a) of the Act the normal price which is the assessable value is the statutory price and since the statutory price under the U.P. Act does not D include administrative charges there is no question of deducting these administrative charges from the normal price to arrive at the assessable value in terms of section 4(4)(d)(ii) of the Act. Hence, there is no merit in the contention advanced on behalf of the revenue that administrative charges payable by the assessee under section 8(4) of the U.P. Act are includible while determining "value" of goods for the purposes of assessment under the E Act. The matter can also be looked at from a conceptual angle. An assessee under the Act incurs expenses in the course of manufacture of goods, which includes taxes. The concept of price covers cost plus profit plus taxes. Therefore, under section 4(1)(a) if the normal price includes taxes, See [1978] 4 SCC 271, they have to be deducted. But if an item of expenditure or cost F does not fall in the normal price, there is no question of deduction of that item from such a price as such a component never formed part of the normal price in the first instance and, therefore, it cannot come within the ambit of assessable value under section 4(1)(a) of the Act. On this very point, this matter stands concluded.

G 12. However, as stated above, in these civil appeals, we are required to decide the true purport of the words "other taxes" in section 4(4)(d)(ii) of the Act. It is argued on behalf of the Department that administrative charges levied on the sugar factory under the U.P. Act do not fall within the words "other taxes", that while construing the said expression under section H 4(4)(d)(ii) of the Act, one cannot take the assistance of the word "taxation"

as defined in Article 366(28) of the Constitution and consequently, the judgment of the Division Bench of this Court in the case of *Commissioner of Central excise* v. *Kisan Sahkari Chinni Mills Ltd.* (supra) needs reconsideration. We may repeat that in our view, administrative charges under the U.P. Act do not enter assessable value under section 4(1)(a) of the Act. However, even assuming for the sake of argument that administrative charges form part of the assessable value, even then such charges are in the nature of tax and, therefore, excludible in terms of section 4(4)(d)(ii) of the Act for reasons mentioned hereinafter.

13. Before dealing with the foregoing issue, it may be noted that in this case we are concerned with identification of the nature of levy of administrative charges under section 8(4) and section 8(5) of the U.P. Act. As stated above, the U.P. Act has been enacted with the object of regulating supply and equal distribution of molasses to distilleries and other industrial establishment. Under section 8(4) of the U.P. Act, every sugar factory is made liable to pay to the Government administrative charges at the specified rate on sale or supply of molasses to the distillery. Under section 8(5), every sugar factory is entitled to recover from the buyer administrative charges in addition to the prices of molasses. Under section 10(1) of the U.P. Act, the sugar factory has to sell molasses at a price not exceeding that prescribed in the Schedule. Therefore, the levy of administrative charges is on production for sale of molasses. In the case of *M/s. Chotabhai Jethabhai Patel and Co. etc.* v. *Union of India and Anr. etc.* reported in AIR (1962) SC 1006, the question before this Court was the nature and character of the duty of excise. It was held that the duty of excise was a tax or duty not intended by the taxing authority to be borne by the person on whom it is imposed and from whom it is collected but it is intended to be passed on to those who purchased the goods on which the duty was collected. That excise duty is a tax as it is imposed in respect of some dealing with the commodities, such as their import or sale, or production for sale. It has been further held that going by the general tendency of a tax, it is capable of being passed on to the consumer or the buyer. In our view, the above test is important because a tax is capable of being passed on to the consumer or the buyer whereas a fee is a counterpayment by the buyer who receives the benefit of the services for which he is charged and such fees are not capable of being passed on as fees to the consumer or the buyer. The above point of distinction is applicable to the facts of this case. In the present matter, as stated above levy of administrative charges under section 8(4) of the U.P. Act is on the producer of molasses; it is imposed on production of molasses for sale and under section 8(5) the same is passed on to the buyer-

A distillery. In the circumstances, levy of administrative charges under the U.P. Act is a tax. There is one more circumstances which indicates that the levy of administrative charges under the U.P. Act is a tax. In the case of *Mathews v. The Chicory Marketing Board (Victoria),* reported in [1938] 60 Commonwealth Law Reports 263, it has been held that customs and excise duties are indirect taxes as they are additions of definite amounts to the prices B at which the goods upon which they are imposed are, in the ordinary course of business, sold by persons who have paid the duties. This test is also applicable to the present case. Under Section 8(5) of the U.P. Act, administrative charges is in addition to the price at which goods are sold in the ordinary course of business by the sugar factory (producer of molasses). C Moreover, the predominant object of the U.P. Act is to maximize the revenue by way of tax while regulating storage and supply of molasses. The beneficiary under the said Act is the distillery. It is the distillery which provides important source of revenue to the State. In our view, the said levy of administrative charges is in nature of tax.

D 14. We can look at the problem from another viewpoint. One of the test to decide whether a levy is a tax or fee is that while tax is a compulsory exaction, fee relates to the principle of *quid pro quo.* This test can usefully be applied to the facts of the present case. As stated above, the beneficiary of the U.P. Act is the distillery (buyer). All regulatory measures are for the E benefit of the buyer. The sugar factory is merely a collecting agent of administrative charges for the State Government. The administrative charge is not a component of the consideration received by the sugar factory. This is clear from the provisions of Section 8(5) which state that the administrative charges shall be collected in addition to the price of the molasses from the buyer-distillery. The said administrative charges do not form part of the F revenue of the sugar factory. The said administrative charges cannot be appropriated to the revenue account of the sugar factory. Therefore, there is no element of *quid pro quo* as far as the administrative charges in the hands of the sugar factory are concerned. On the other hand, under section 8(4) of the U.P. Act read with Rule 23 of the said U.P. Rules, every sugar factory is required to deposit administrative charges on the molasses sold/supplied G before actual delivery to the distillery (buyer), which brings in the principle of compulsory exaction. Hence, administrative charge under the U.P. Act is a tax and not a fee.

15. We have decided this case in the light of the scheme of the U.P. H Act and the Rules framed thereunder and, therefore, it is not necessary to

examine numerous judgments cited at the bar on the question of difference between the tax and fee. Ultimately, each matter will have to be decided in the light of the provisions of the statute in question. We are, therefore, in agreement with the view expressed in the case of *Commissioner of Central Excise, Meerut* v. *Kisan Sahkari Chinni Mills Ltd.* (supra) A

For the above reasons, all the civil appeals herein stand dismisses with no order with no order as to costs. B

S.B. SINHA, J. 'Taxation' is defined in clause (28) of Article 366 of the Constitution of India to mean :

> "taxation" includes the imposition of any tax or impost, whether general or local or special, and "tax" shall be construed accordingly;" C

The Constitution of India postulates either a tax or a fee. However, the use of expression 'tax' or 'fee' in a statute is not decisive; as on a proper construction thereof and having regard to its scope and purport, 'fee' may also be held to be a tax. D

The definition of 'tax' in terms of Clause (28) of Article 366 of the Constitution is wide in nature. The said definition may be for the purpose of the Constitution; but it must be borne in mind that the legislative competence conferred upon the State Legislature or the Parliament to impose 'tax' or 'fee' having been enumerated in different entries in the three lists contained in the Seventh Schedule of the Constitution of India, the same meaning of the expression "tax" unless the context otherwise requires, should be assigned. E

Having regard to the fact that different legislative entries have been made providing for imposition of 'tax' and 'fee' separately, indisputably the said expressions do not carry the same meaning. Thus, a distinction between a tax and fee exists and the same while interpreting a statute has to be borne in mind. F

A distinction must furthermore be borne in mind as regard the sovereign power of the State as understood in India and the doctrine of Police Power as prevailing in the United States of America. In some jurisdictions a distinction may exist between a police power and a power to tax but as in the Constitution of India, the word 'tax' is defined, it has to be interpreted accordingly. G

The expression 'regulatory fee' is not defined. Fee, therefore, may be held to be a tax if no service is rendered. While imposing a regulatory fee, H

A although the element of *quid pro quo,* as understood in common parlance, may not exist but it is trite that regulatory fee may be in effect and substance a tax. [See *The Corporation of Calcutta and Anr.* v. *Liberty Cinema,* AIR (1965) SC 1107.

B In *Municipal Corporation, Amritsar* v. *The Senior Superintendent of Post Offices, Amritsar Division and Anr.,* JT (2004) 1 SC 561, it was held:

> "The question, whether the demand so made was by way of 'service charge' or 'tax' need not detain us any longer. The demand so made was with regard to the services rendered to the respondents' department, like water supply, street lighting, drainage and approach roads to the land and buildings. In the counter, the respondents averred that they are paying for the services rendered by the appellant-Corporation by way of water and sewerage charges and power charges separately. It is also categorically averred that no other specific services are being provided to the respondents for which the tax in the shape of service charges can be levied and realized from the respondents. There is no provision in the Municipal Corporation Act for levying services charges. The only provision is by way of tax. Undisputedly, the appellant-Corporation is collecting the tax from general public for water supply, street lighting and approach roads etc. Thus, the 'tax' was sought to be imposed in the garb of 'service charges..."

C

D

E

We may furthermore notice that a seven-Judge Bench of this Court in *Synthetics and Chemicals Ltd. and Ors.* v. *State of U.P. and Ors.,* [1990] 1 SCC 109, while considering the question as to whether the levy on industrial alcohol by the State is justifiable, *inter alia,* held that when revenue earned out of the impost is substantial, the same would not be justifiable as fee.

F

In *Liberty Cinema* (supra), this Court, while interpreting Section 548 of the Calcutta Municipal Act providing for grant of a licence, observed :

> "...The reference to the heading of Part V can at most indicate that the provisions in it were for conferring benefit on the public at large. The cinema house owners paying the levy would not as such owners be getting that benefit. We are not concerned with the benefit, if any, received by them as members of the public for that is not special benefit meant for them. We are clear in our mind that if looking at the terms of the provision authorising the levy, it appears that it is not for special services rendered to the person on whom the levy is

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H

> imposed, it cannot be a fee wherever it may be placed in the statute. A consideration of where Ss. 443 and 548 are placed in the Act is irrelevant for determining whether the levy imposed by them is a fee or a tax."

It was further observed :

> "19. The last argument in this connection which we have to notice was based on Ss. 126 and 127 of the Act. Section 126 deals with the preparation by the Chief Executive Officer of the Corporation called Commissioner, of the annual budget. The budget has to include an estimate of receipts from all sources. These receipts would obviously include taxes, fees, licence fees and rents. Under S. 127(3) the Corporation has to pass this budget and to determine, subject to Part IV of the Act, the levy of consolidated rates and taxes at such rates as are necessary to provide for the purposes mentioned in sub-section (4). Sub-section (4) requires the Corporation to make adequate and suitable provision for such services as may be required for the fulfillment of the several duties imposed by the Act and for certain other things to which it is not necessary to refer. The first point made was that these sections showed that the Act made a distinction between fees and taxes. It does not seem to us that anything turns on this as the only question now is whether the levy under S. 548 is a fee. The other point was that clauses (3) and (4) of Section 127 showed that the Corporation could fix the consolidated rates and taxes and that the determination of rates for these had to be in accordance with the needs for carrying out the Corporation's duties under the Act. It was said that as the licence fee leviable under Section 548 did not relate to any duty of the Corporation under the Act, it being optional for the Corporation to impose terms for grant of licences for cinema houses, the rate for that fee was not to be fixed in reference to anything except rendering of services. We are unable to accept this argument and it is enough to say in regard to it that it is not right that Section 443 does not impose a duty on the Corporation. We think it does so, though in what manner and when it will be exercised it is for the Corporation to decide. It is impossible to call it a power, as the respondent wants to do, for it is not given to the Corporation for its own benefit. The Corporation has been set up only to perform municipal duties and its powers are for enabling it to perform those duties. Furthermore there is no doubt that an estimate of the licence

A

> fee has to be included in the budget and therefore the word 'tax' in Section 127(3) must be deemed to include the levy under Section 548. The words "subject to the provisions of Part IV" in Section 127(3) must be read with the addition of the words "where applicable"..
>
> 20. The conclusion to which we then arrive is that the levy under S. 548 is not a fee as the Act does not provide for any services of special kind being rendered resulting in benefits to the person on whom it is imposed. The work of inspection done by the Corporation which is only to see that the terms of the licence are observed by the licencee is not a service to him. No question here arises of correlating the amount of the levy to the costs of any service. The levy is a tax. It is not disputed, it may be stated, that if the levy is not a fee, it must be a tax."

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C

A regulatory statute may also contain taxing provisions.

D

The decisions of this Court point out towards the need of existence of the element of *quid pro quo* for imposition of fee; be it to the person concerned or be it to a group to which he belongs; irrespective of the fact as to whether the benefit of such service is received directly or indirectly.

The point at issue is required to be considered keeping in view the aforementioned legal position.

E

By reason of the provisions of the U.P. Sheera Niyantran Adhiniyam, 1964 (hereinafter referred to as 'the UP Act'), the trade carried out by the respondents is sought to be regulated.

F

Some service, therefore, was required to be rendered by the State or the statutory authority to the owners of the factory producing molasses or the molasses industries generally if an impost by way of 'fee' was to be levied.

A Constitution Bench of this Court in *The State of West Bengal* v. *Kesoram Indusries Ltd. and Ors.*, (2004) 1 SCALE 425 referring to *Synthetics and Chemicals* (supra), observed :

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> "It may be seen that the power to levy sales tax on industrial alcohol was available to the State but for the provisions of the Ethyl Alcohol (Price Control) Orders on account of which the State could not charge sales tax on industrial alcohol. *The State could* levy any fee based on *quid pro quo...*"

H

[Emphasis supplied]

In the aforementioned case, it was observed by one of us : A

> "In ascertaining the subject matter, or the scope or purpose of the legislation, the Court is entitled to give due regard to its economic effect. (See *The King* v. *Barger,* (1908) 6 CLR 41 and *Attorney-General for Alberta* v. *Attorney General for Canada,* (1939) AC at pp. 130-132). The aforementioned decisions have been referred to in B *The State of South Australia and Anr.* v. *The Commonwealth and Anr.,* (1942) 65 C.L.R. 373.

Excise duty is considered to be an indirect tax. The Supreme Court of *United States in Hylton, Plaintiff in Error* v. *The United States,* US SCR 1 Law. Ed. Dallas 169, observed : C

> "The term taxes, is generical, and was made use of to vest in Congress plenary authority in all cases of taxation. The general division of taxes is into direct and indirect. Although the latter term is not to be found in the constitution, yet the former necessarily implies it. Indirect D stands opposed to direct. There may, perhaps, be an indirect tax on a particular article, that cannot be comprehended within the description of duties, or imposts, or excises, in such case it will be comprised under the general denomination of taxes. For the term tax is the genus, and includes,
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> E
>
> 1. Direct taxes.
> 2. Duties, imposts, and excises.
> 3. All other classes of an indirect kind, and not within any of the classifications enumerated under the preceding heads."

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We may notice that the validity of U.P. Act came to be considered by a Full Bench of the Allahabad High Court in *M/s. Shriram Industrial Enterprises Ltd.* v. *The Union of India and Ors.,* AIR (1996) (Allahabad) 135, wherein one of us V.N. Khare, J (as the Hon'ble Chief Justice of India then was) speaking for the Bench upheld the vires thereof, *inter alia,* on the ground that the same has been enacted in terms of Entry 33, List III of the G Constitution of India. The said Act is, therefore, held to be regulatory in nature.

When a statute deals with an essential commodity in terms whereof the price of a commodity is fixed thereunder, the sale price must be determined H

A having regard to the price fixed under the statute and any other sum. [*See Neyvelilignite Corporation Ltd.* v. *Commercial Tax Officer, Cuddalore and Anr.*, [2001] 9 SCC 648 and *Commissioner of Central Excise, Delhi* v. *Maruti Udyog Ltd.,* [2002] 3 SCC 547. The administrative charges payable by the buyer under the U.P. Act, thus, being in addition to the sale price, the same cannot be a fee.

B

Furthermore, one of the tests for determining as to whether the impost is a 'tax' or 'fee' would, in my opinion, be whether the burden can be passed to the end user. Under the State Act, the same is permissible. A 'fee' in a situation of this nature cannot be passed on to the end user, a 'tax' can be.

C In any event regulatory fee imposed for the purpose of regulating the industry producing molasses, in my opinion, cannot be passed on to the buyers as they are not subjected to any regulation under the Act. The nature of impost is such that burden thereof is to be borne by the buyers and the respondents herein are merely the agents for collecting the same on behalf of D the State. The impost, therefore, cannot be termed as a 'fee' so as to deprive the respondents of the benefit of deduction of the tax for the purpose of Section 4(4)(d)(ii) of the Central Excise Act, 1944.

We may also notice that in terms of rule Rule 23 of the UP Sheera Niyantaran Niyamawali, 1974, the occupier of a sugar factory is obligated to E deposit the administrative charges even prior to delivery of molasses and recovery thereof from the buyers.

The impost levied in terms of the said Act must, thus, be held to be a special tax applicable to a section of the people, namely, buyers of molasses.

F In this Case, this Court is not concerned with the validity or otherwise of the impost, in which event only the question as to whether the same has sufficient constitutional protection or not whether viewed as a tax or fee or either; was required to be considered as was the case in *Gasket Radiators Pvt. Ltd.* v. *Employees' State Insurance Corporation and Anr.,* [1985] 2 SCC 68.

G We may also notice a decision of this Court in *Tata Iron and Steel Co. Ltd.* v. *Collector of Central Excise, Jamshedpur.,* [2002] 8 SCC 338, wherein a Bench of this Court distinguished *C.C.E.* v. *Kisan Sahakari Chinni Mills Ltd.,* [2001] 6 SCC 697 holding that the impost impugned therein did not have a backing of a statutory provision and, thus, would not be a tax. But it H was clearly held that the same would be so if the levy is imposed by any

central or State legislature or any statutory authority. The principles enunciated in *Kisan Sahakari Chinni Mills Ltd.* (supra) was, therefore, not deviated from. A

Therefore, in agreement with the judgment and order proposed to be delivered by Brother Kapadia, J., I am also of the opinion that *Kisan Sahakari Chinni Mills Ltd.* (supra) lays down the correct law. B

N.J. Appeals dismissed.