COMMISSIONER OF CENTRAL EXCISE, INDORE

v.

M/S GRASIM INDUSTRIES LTD.THROUGH ITS SECRETARY

(Civil Appeal No. 3159 of 2004)

MAY 11, 2018

**[RANJAN GOGOI, N. V. RAMANA, R. BANUMATHI, MOHAN M. SHANTANAGOUDAR AND S. ABDUL NAZEER, JJ.]**

*Central Excise Act, 1944 – ss.3 and 4 – Whether s.4 of the Central Excise Act, 1944 (as substituted with effect from 1-7-2000) and the definition of "transaction value" in clause (d) of sub-section (3) of s.4 are subject to s.3 of the Act – Held: The observations made in* ***Acer India Ltd.*** *to the effect that 'transaction value' defined would be subject to the charging provisions contained in s.3 of the Act will have viewed in the context of a situation where an addition of the value of a non-dutiable item was sought to be made to the value of a dutiable item for the purpose of determination of the transaction value of the composite item – This is the limited context in which the subservience of s.4(3)(d) to s.3 was expressed and has to be understood – If so understood, the views expressed in that paragraph of* ***Acer India Ltd.*** *case cannot be read to be in conflict with the decision of* ***Bombay Tyre International Ltd.****.*

*Central Excise Act, 1944 – ss.3 and 4 – Whether ss. 3 and 4 of the Act despite being interlinked, operate in different fields – Held: The measure of the levy contemplated in s.4 of the Act is not controlled by the nature of the levy – So long a reasonable nexus is discernible between the measure and the nature of the levy both ss. 3 and 4 would operate in their respective fields – The view expressed in* ***Bombay Tyre International Ltd.*** *is the correct exposition of the law in this regard.*

*Central Excise Act, 1944 – ss.3 and 4 – Whether the concept of "transaction value" makes any material departure from the deemed normal price concept of the erstwhile s.4(1)(a) of the Act – Held: "Transaction value" as defined in s.4(3)(d) brought into force by the Amendment Act, 2000, statutorily engrafts the additions to the 'normal price' under old s.4 as held to be permissible in* ***Bombay***

A ***Tyre International Ltd.*** *besides giving effect to the changed description of the levy of excise introduced in s.3 of the Act by the Amendment of 2000 – There is no discernible difference in the statutory concept of 'transaction value' and judicially evolved meaning of 'normal price'.*

B **Answering the referred issues, the Court**

**HELD: 1. The amendment to Section 3 of Central Excise Act, 1944 by substitution of the words "a duty of excise on all excisable goods" by the words "a duty of excise to be called the Central Value Added Tax (CENVAT) on all excisable goods" is**
C **conspicuous. The amendment of Section 3 to the Act not only incorporates the essentials of a changed concept of charging of tax on additions to the value of goods and services at each stage of production but also engrafts in the statute what was judicially held to be permissible additions to the manufacturing cost and manufacturing profit in *Bombay Tyre International Ltd.*. This**
D **fundamental change by introduction of the concept underlying value-added taxation in the provisions of Section 3 really find reflection in the definition of 'transaction value' as defined by Section 4(3)(d) of the Act besides incorporating what was explicitly held to be permissible in *Bombay Tyre International Ltd.*. Section**
E **4(3)(d), thus, defines 'transaction value' by specifically including all value additions made to the manufactured article prior to its clearance, as permissible additions to be price charged for purpose of the levy. [Para 21][1119-B-F]**

**2. Considering the decision in *Acer India Ltd.* in the said**
F **case, softwares which were duty free items and could be transacted as softwares came to be combined with the computer hardware which was a dutiable item for purposes of clearance. The Revenue sought to take into account the value of the computer software for the purposes of determination of 'transaction value' with regard to the computer. This Court**
G **negatived the stand of the Revenue taking the view that when software as a separate item was not dutiable its inclusion in the hard-disk of the computer cannot alter the duty liability of the software so as to permit the addition of the price/value of the software for the purpose of levy of duty. It is in the above context**

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**that the decision of this Court in *Acer India Ltd*. has to be understood. The observations made in paragraph 84 thereof to the effect that 'transaction value' defined in Section 4(3)(d) of the Act would be subject to the charging provisions contained in Section 3 of the Act will have to be viewed in the context of a situation where an addition of the value of a non-dutiable item was sought to be made to the value of a dutiable item for the purpose of determination of the transaction value of the composite item. This is the limited context in which the subservience of Section 4(3)(d) to Section 3 of the Act was expressed and has to be understood. If so understood, the views expressed in *Acer India Ltd*. can be read to be in conflict with the decision of *Bombay Tyre International Ltd.* [Para 22][1119-F-H; 1120-A-C]**

**3. The measure of the levy contemplated in Section 4 of the Act will not be controlled by the nature of the levy. So long a reasonable nexus is discernible between the measure and the nature of the levy both Section 3 and 4 would operate in their respective fields. The view expressed in Bombay Tyre International Ltd. is the correct exposition of the law in this regard. Further, "transaction value" as defined in Section 4(3)(d) brought into force by the Amendment Act,2000, statutorily engrafts the additions to the 'normal price' under the old Section 4 as held to be permissible in Bombay Tyre International Ltd. besides giving effect to the changed description of the levy of excise introduced in Section 3 of the Act by the Amendment of 2000. In fact, there is no discernible difference in the statutory concept of 'transaction value' and the judicially evolved meaning of 'normal price'. [Para 23][1120-C-F]**

*Union of India and Ors. v. Bombay Tyre International Ltd. and Ors.* **[1984] 1 SCR 347 : (1984) 1 SCC 467 – affirmed**

*Commissioner of Central Excise, Pondicherry v. Acer India Ltd.*[2004] 4 Suppl. SCR 676 : (2004) 8 SCC 173; *C.C.E. Indore v. Grasim Industries Ltd.* **[2009] 12 SCR 204 : (2009) 14 SCC 596;** *C.C.E. Indore v. Grasim Industries Ltd.* **(2016) 6 SCC 391;** *The Province of Madras v. Messrs. Boddu Paidanna & Sons* **A.I.R. (29)**

A **1942 Federal Court 33 (from Madras);** *Governor-General in Council v. Province of Madras* **[A.I.R. (32) 1945 Privy Council 98];** *R.C. Jall Parsi v. Union of India and anr.* **1962 AIR 1281 : [1962] Suppl. SCR 436;** *A.K. Roy and Another v. Voltas Limited* **[1973] 2 SCR 1089 : (1973) 3 SCC 503;** *Atic Industries Limited v. H.H. Dewa, Asstt. Collector of Central Excise and ors.* **[1975] 3 SCR 563 : (1975) 1 SCC 499 – referred to.**

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**Case Law Reference**

| | | |
|---|---|---|
| C **[1984] 1 SCR 347** | **affirmed** | **Para 3** |
| **[2004] 4 Suppl. SCR 676** | **referred to** | **Para 3** |
| **[2009] 12 SCR 204** | **referred to** | **Para 3** |
| **(2016) 6 SCC 391** | **referred to** | **Para 4** |
| **A.I.R. (29) 1942 Federal Court 33** | **referred to** | **Para 10** |
| D **(from Madras)** | | |
| **A.I.R. (32) 1945 Privy Council 98** | **referred to** | **Para 11** |
| **[1962] Suppl. SCR 436** | **referred to** | **Para 12** |
| **[1973] 2 SCR 1089** | **referred to** | **Para 14** |
| **[1975] 3 SCR 563** | **referred to** | **Para 20** |

E CIVIL APPELLATE JURISDICTION: Civil Appeal No. 3159 of 2004.

From the final Order No.672/2003-NB(A) dated 10.12.2003 of the Customs, Excise & Service Tax Appellate Tribunal, New Delhi in Appeal No.E/1370/2003-NB(A).

F WITH

C.A. Nos. 3455/2004, 7272/2005, 2982-2985/2005, 2986/2005, 7143/2005, 2261/2006, 2246-2247/2008, 2934-2935/2008, 3528/2008, 4820/2008, 6695/2008, 2534/2009, 253/2010, 8541/2009, 445/2010, 1382/2010, 2003-2004/2010, 2430/2010, 2363/2010, 7174-7175/2010, 4696/2011, G 6984/2011 and 2705/2012.

Ms. Pinky Anand, ASG, K. Radhakrishnan, S.K. Bagaria, V. Sridharan, Sr. Advs., Rupesh Kumar, Arijit Prasad, Ritesh Kumar, Mrs. Rashmi Malhotra, B. Krishna Prasad, Balendu Shekhar, Sumit Teterwal, Ms. Saudamini Sharma, Hemant Arya, Ms. Snidha Mehra, H Ms. Kirti Dua, Mukesh Kumar Maroria, Ramesh Singh, Nikhil Goel,

Ms. Naveen Goel (for Mrs. Sheela Goel), S. Sukumaran, Anand Sukumar, Bhupesh Kumar Pathak, K. Rajeev, Mrs. Meera Mathur, Kumar Ajit Singh, L. Badri Narayanan, Aditya Bhattacharya, Victor Das, Ms. Apeksha Mehta, M.P. Devanath, Joseph Pookkatt, Prashant Kumari, Dinesh Kumar (for M/s Ap & J Chambers), Ravinder Narain, Ajay Aggarwal, Ms. Mallika Joshi, Ms. Ruchika Singh, Rajat Gava, Rajan Narain, Rajesh Kumar, Ms. Chandani Patel, S. Nandakumar, M.S. Sarankumar, Ms. Deepika Nandakumar, Suba Somu, V. N. Raghupathy, Nikhil Nayyar, N. Sai Vinod, Dhananjay Baijal, Ms. Smriti Shah, Divyanshu Rai, S. Jaikumar, B. Venugopal, Kartik Jindal, Ajinkya Tiwari, Rajendra Singhvi, K.K.L. Gautam, Ms. Arundhati Chakraborty, Brij Bhushan, Advs. for the appearing parties.

The Judgment of the Court was delivered by

**RANJAN GOGOI, J.** 1. First, the facts:

The respondent – Assessees are manufacturers of dissolved and compressed industrial gases, liquid chlorine and other allied products. Cotton yarn and Post Mix Concentrate manufactured by two other individualassessees are also in issue. These articles are supplied to the customers in tonners, cylinders, carboys, paper cones and HDPE bags, BIBs, pipeline and canisters, which may be more conveniently referred to as "containers". In some cases the containers are provided by the Assesseesto the customers on rent whereas in others the customers bring their own containers. For making available or for filling up the containers provided by the customers the Assessees charge the customers certain amounts under different heads viz. packing charges, wear and tear charges, facility charges, service charges, delivery and collection charges, rental charges, repair and testing charges. The Assessees treat the said amounts as their income from ancillary or allied ventures.

2. The issue arising is whether the aforesaid charges realised by the Assessees are liable to be taken into account for determination of value for the purpose of levy of duty in terms of Section 4 of the Central Excise Act, 1944 (hereinafter referred to as "the Act") as amended with effect from 1st July, 2000.

3. Perceiving a conflict between the two decisions of this court in ***Union of India and Ors.*** *v.* ***Bombay Tyre International Ltd. and Ors.***[1] and ***Commissioner of Central Excise, Pondicherry*** *v.* ***Acer India***

[1] *(1984) 1 SCC 467*

A ***Ltd.***[2]**,**a two judge Bench of this Court by order dated 30th July, 2009[3] referred the following questions for an answer by a larger bench:

> "*1*. Whether Section 4 of the Central Excise Act, 1944 (as substituted with effect from 1-7-2000) and the definition of "transaction value" in clause (*d*) of sub-section (3) of Section 4
B are subject to Section 3 of the Act?
>
> *2*. Whether Sections 3 and 4 of the Central Excise Act, despite being interlinked, operate in different fields and what is their real scope and ambit?
>
> *3*. Whether the concept of "transaction value" makes any material
C departure from the deemed normal price concept of the erstwhile Section 4(1)(*a*) of the Act?"

4. As the decisions in ***Bombay Tyre International Ltd.*** (supra) and ***Acer India Ltd.***(supra) were rendered by Benches of Three Hon'ble Judges of this Court, the above questions were referred by order dated
D 30th March, 2016[4] to an even larger Bench. This is how we are in seisin of the matter.

5. What is excise duty and what is the relationship between the nature of the duty and the measure of the levy are the two precise questions that would arise for determination in the present reference.

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6. On first principles, there can be no dispute. Excise is a levy on manufactureand upon the manufacturer who is entitled under law to pass on the burden to the first purchaser of the manufactured goods. The levy of excise flows from a constitutional authorisationunder Entry 84 of List I of the Seventh Schedule to the Constitution of India. The
F stage of collection of the levy and the measure thereof is, however, a statutory function.So long the statutory exercise in this regard is a competent exercise of legislative power,the legislative wisdom both with regard to the stage of collection and the measure of the levy must be allowed to prevail. The measure of the levy must not be confused with
G the nature thereof though there must be some nexus between the two. But the measure cannot be controlled by the rigors of the nature. These are some of the settled principles of laws emanating from a long line of decisions of this Court which we will take note of shortly. Do these

[2] (2004) 8 SCC 173
[3] (2009) 14 SCC 596
H [4] (2016) 6 SCC 391

principles that have withstood the test of time require a rethink is the question that poses for an answer in the present reference. A

7. At this stage, it may be necessary to specifically take note of the provisions of Sections 3 and 4 as originally enacted and as amended from time to time.

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**Section 3**

| **Section 3 of the Act in force prior to amendment by Finance Act 2000 (Act 10 of 2000)** | **Relevant portion of Section 3 as substituted/amended (with effect from 12th May, 2000) by Section 92 of the Finance Act, 2000 (No.10 of 2000)** |
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| **3. Duties specified in the First Schedule to be levied.** –<br><br>(1) There shall be levied and collected in such manner as may be prescribed,-<br><br>(a) a duty of excise on all excisable goods which are produced or manufactured in India as, and at the rates, set forth in the First Schedule to the Central Excise Tariff Act, 1985;<br><br>(b)…… | ***3. Duties specified in [the First Schedule and the Second Schedule] to the Central Excise Tariff Act, 1985] to be levied.-***<br><br>There shall be levied and collected in such manner as may be prescribed,-<br><br>*(a) a duty of excise to be called the Central Value Added Tax (CENVAT) on all excisable goods which are produced or manufactured in India as, and at the rates, set forth in the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986);*<br><br>(b)…… |

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**Section 4**

| Section 4 as originally enacted **(in the Central Excise and Salt Act, 1944),** | Section 4 as amended by Amendment Act No.22 of 1973 | Section 4 as amended by Finance Act, 2000 with effect from 1.7.2000 |
|---|---|---|
| **Determination of value for the purposes of duty** – Where under this Act any article is chargeable with duty at a rate dependent on the value of the article, such value shall be deemed to be the wholesale cash price for which an article of the like kind and quality is sold or is capable of being sold | **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- | **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 their value, then, on each removal of the goods, such value shall - |

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| for delivery at the place of manufacture and at the time of its removal therefrom, without any abatement of deduction whatever except trade discount and the amount of duty then payable. | (a) the normal price thereof, that is to say, the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal, where the buyer is not a related person and the price is the sole consideration for the sale:<br><br>Provided that-<br><br>(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;<br><br>(ii) where such goods are sold by the assessee in the course of wholesale trade for delivery at the time and place of removal at a price fixed under any law for the time being in force or at a price, being the maximum, fixed under any such law, then, notwithstanding anything contained in clause (iii) of this proviso, the price or the maximum price, as the case may be, so fixed, shall, in relation to the goods so sold, be deemed to be the normal price thereof; | (a) in a case where the goods are sold by the assessee, for delivery at the time and place of the removal, the assessee and the buyer of goods are not related and the price is the sole consideration for the sale, be the transaction value;<br><br>(b) in any other case, including the case where the goods are not sold, be the value determined in such manner as may be prescribed.<br><br>(2) The provisions of this section shall not apply in respect of any excisable goods for which a tariff value has been fixed under sub-section (2) of section 3.<br><br>(3) For the purpose of this section,-<br><br>(a) "assessee" means the person who is liable to pay the duty of excise under this Act and includes his agent;<br><br>(b) persons shall be deemed to be "related" if -<br><br>(i) they are inter-connected undertakings;<br><br>(ii) they are relatives;<br><br>(iii) amongst them the buyer is a relative and distributor of the assessee, or a sub-distributor of such distributor; or |

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| | (iii) where the assessee so arranges that the goods are generally not sold by him in the course of wholesale trade except to or through a related person, the normal price of the goods sold by the assessee to or through such related person shall be deemed to be the price at which they are ordinarily sold by the related person in the course of wholesale trade at the time of removal, to dealers (not being related persons) or where such goods are not sold to such dealers, to dealers (being related persons) who sell such goods in retail;<br><br>(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.<br><br>(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. | (iv) they are so associated that they have interest, directly or indirectly, in the business of each other.<br>***Explanation.*** - In this clause-<br><br>(i) "inter-connected undertakings" shall have the meaning assigned to it in clause (g) of section 2 of the Monopolies and Restrictive Trade Practices Act, 1969 (64 of 1969); and<br><br>(ii) "relative" shall have the meaning assigned to it in clause (41) of section 2 of the Companies Act, 1956 (1 of 1956);<br><br>(c) "place of removal" means –<br><br>(i) a factory or any other place or premises of production or manufacture of the excisable goods;<br><br>(ii) a warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty, from where such goods are removed; |

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| | (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.<br><br>(4) For the purposes of this section,-<br><br>(a) " assessee" means the person who is liable to pay the duty of excise under this Act and includes his agent;<br><br>(b) " place of removal" means-<br><br>(i) a factory or any other place or premises of production or manufacture of the excisable goods; or<br><br>(ii) a warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty,<br><br>from where such goods are removed;<br><br>(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. | (d) "transaction value" means the price actually paid or payable for the goods, when sold, and includes in addition to the amount charged as price, any amount that the buyer is liable to pay to, or on behalf of, the assessee, by reason of, or in connection with the sale, whether payable at the time of the sale or at any other time, including, but not limited to, any amount charged for, or to make provision for, advertising or publicity, marketing and selling organization expenses, storage, outward handling, servicing, warranty, commission or any other matter; but does not include the amount of duty of excise, sales tax and other taxes, if any, actually paid or actually payable on such goods. |

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| | Explanation.- In this clause" holding company"," subsidiary company and" relative" have the same meanings as in the Companies Act, 1956 ; (1 of 1956 ) | | A |
| | (d) "value", in relation to any excisable goods,- | | B |
| | (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. | | C |
| | 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; | | D |
| | (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. | | E<br>F |
| | (e) "wholesale trade" means sales to dealers, industrial consumers, Government, local authorities and other buyers, who or which purchase their requirements / otherwise than in retail. | | G<br>H |

A 8. It may be appropriate, at this stage, to make a brief narration of the developments in the particular branch of fiscal jurisprudence which is in issue in the present cases. The ***Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938, (Central Provinces and Berar Act No.XIV of 1938)*** authorised the levy and collection from every retail dealer, as defined by the Act, a tax on the retail sales of motor spirits and lubricants at the rate of five per cent on the value of such sales. The levy was challenged and what arose for decision before the Federal Court on a reference, made by the Governor General under Section 213 of the Government of India Act, 1935 (often referred to as "the Constitution Act") is the question whether the said levy was a duty of excise under Entry 45 of List-I in the Seventh Schedule to the Constitution Act or a tax on sale of goods under Entry 48 of List II of the said Schedule. While the eventual answer in the reference holding the levy to be a tax on sale of goods and therefore within the competence of the Provincial Legislature is of no consequence to the present issue, what may require a specific notice is that Entry 45 which empowered the Federal Legislature to make laws with respect to "duties of excise on tobacco and other goods manufactured or produced in India; except…" corresponds to Entry 84 of List-I of the Seventh Schedule to the Constitution of India.

E 9**.** Some extracts from the opinion rendered by Chief JusticeGwyer(all the Judges on the Bench gave their own opinions while agreeing to the eventual conclusion) would throw light on the nature of the levy of excise and is therefore being recollected below:-

> "The federal legislative power extends to making laws with respect to duties of excise on goods manufactured or produced in India. "Excise" is stated in the Oxford Dictionary to have been originally accise", a word derived through the Dutch from the late Latin accensare, to tax; the modern form, which ousted accise" at an early date, being apparently due to a mistaken derivation from the Latin excidere, to cut out. It was at first a general word for a toll or tax, but since the 17th century it has acquired in the United Kingdom a particular, though not always precise, signification. The primary meaning of "excise duty" or "duty of excise" has come to be that of a tax on certain articles of luxury (such as spirits, beer or tobacco) produced or manufactured in the United Kingdom, and it is used in contradistinction to customs duties on

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articles imported into the country from elsewhere. At a later date the licence fees payable by persons who produced or sold excisable articles also became known as duties of excise; and the expression was still later extended to licence fees imposed for revenue, administrative, or regulative purposes on persons engaged in a number of other trades or callings. Even the duty payable on payments for admission to places of entertainment in the United Kingdom is called a duty of excise; and, generally speaking, the expression is used to cover all duties and taxes which, together with customs duties, are collected and administered by the Commissioners of Customs and Excise. But its primary and fundamental meaning in English is still that of a tax on articles produced or manufactured in the taxing country and intended for home consumption. I am satisfied that that is also its primary and fundamental meaning in India; and no one has suggested that it has any other meaning in Entry (45).

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…There can be no reason in theory why an excise duty should not be imposed even on the retail sale of an article, if the taxing Act so provides. **Subject always to the legislative competence of the taxing authority, a duty on home produced goods will obviously be imposed at the stage which the authority find to be the most convenient and the most lucrative, wherever it may be; but that is a matter of the machinery of collection, and does not affect the essential nature of the tax.** The ultimate incidence of an excise duty, a typical indirect tax, must always be on the consumer, who pays as he consumes or expends; and it continues to be an excise duty, that is, a duty on home-produced or home-manufactured goods, no matter at what stage it is collected. The definition of excise duties is therefore of little assistance in determining the extent of the legislative power to impose them; for the duty imposed by a restricted legislative power does not differ in essence from the duty imposed by an extended one.

**It was argued on behalf of the Provincial Government that an excise duty was a tax on production or manufacture only**

**and that it could not therefore be levied at any later stage. Whether or not there be any difference between a tax on production and a tax on the thing produced, this contention, no less than that of the Government of India, confuses the nature of the duty with the extent of the legislative power to impose it. Nor, for the reasons already given, is it possible to agree that in no circumstances could an excise duty be levied at a stage subsequent to production or manufacture**."

**(Underlining and bold is ours)**

10. The issue was considered further in ***The Province of Madras*** vs. **Messrs. BodduPaidanna& Sons**[5]. The following observation would be relevant.

"In 1939 F.C.R. 18 the opinions expressed were advisory opinions only, but we do not think that we ought to regard them as any less binding upon us on that account. We accept, therefore, the general division between the Central and Provincial spheres of taxation which commended itself to the majority of the Court in that case…….. They recognized that the expression 'duty of excise' is wide enough to include a tax on sales ; but where power is expressly given to another authority to levy a tax on sales, it is clear that "duty of excise" must be given a more restricted meaning than it might otherwise bear. On the other hand the fact that "duty of excise" is itself an expression of very general import is no reason at all for refusing to give to the expression "tax on sales" the meaning which it would ordinarily and naturally convey. In these circumstances the question at issue in the present appeal appears to us to lie within a very small compass.

The duties of excise which the Constitution Act assigns exclusively to the Central Legislature are,- according to the 1939 F.C.R 18, duties levied upon the manufacturer or producer in respect of the manufacture or production of the commodity taxed. The tax on the sale of goods, which the Act assigns exclusively to the Provincial Legislatures, is a tax levied on the occasion of the sale of the goods. Plainly a tax levied on the first sale must in the nature of things be a tax on the sale by the manufacturer or producer ; but

[5] A.I.R. (29) 1942 Federal Court 33 (from Madras)

it is levied upon him qua seller and not qua manufacturer or producer.

……If the taxpayer who pays a sales tax is also a manufacturer or producer of commodities subject to a central duty of excise, there may no doubt be an overlapping in one sense ; but there is no overlapping in law. The two taxes which he is called on to pay are economically two separate and distinct imposts.**There is in theory nothing to prevent the Central Legislature from imposing a duty of excise on a commodity as soon as it comes into existence, no matter what happens to it afterwards, whether it be sold, consumed, destroyed, or given away. A taxing authority will not ordinarily impose such a duty, because it is much more convenient administratively to collect the duty (as in the case of most of the Excise Acts) when the commodity leaves the factory for the first time, and also because the duty is intended to be an indirect duty which the manufacturer or producer is to pass on to the ultimate consumer, which he could not do if the commodity had, for example, been destroyed in the factory itself.It is the fact of manufacture which attracts the duty, even though it may be collected later ; and we may draw attention to the Sugar Excise Act in which it is specially provided that the duty is payable not only in respect of sugar which is issued from the factory but also in respect of sugar which is consumed within the factory.In the case of a sales tax, the liability to tax arises on the occasion of a sale, and a sale has no necessary connexion with manufacture or production. The manufacturer or producer cannot of course sell his commodity unless he has first manufactured or produced it; but he is liable, if at all, to a sales tax because he sells and not because he manufactures or produces; and he would be free from liability if he chose to give away everything which came from his factory.**"

11. The early views on the nature of excise duty as a levy and the stage of collection thereof would make it clear that though the impost is on the manufacture of an article the point of collection of the same need not necessarily coincide with the time of manufacture. The stage of collection can and usually is a matter of administrative convenience and

such stage, normally, is the stage of clearance of article when it, for the first time, enters the trade for sale. The above position was affirmed by the Privy Council in **Governor-General in Council** v. **Province of Madras**[6] wherein it was, *inter alia*, held as follows:

> "The term " duty of excise " is a somewhat flexible one: it may, no doubt, cover a tax on first and, perhaps, on other sales: it may in a proper context have an even wider meaning. An exhaustive discussion of this subject, from which their Lordships have obtained valuable assistance, is to be found in the judgment of the Federal Court in 1939 F. C. R. 18. Consistently with this decision, their Lordships are of opinion that a duty of excise is primarily a duty levied upon a manufacturer or producer in respect of the commodity manufactured or produced. It is a tax upon goods not upon sales or the proceeds of sale of goods. Here again, their Lordships find themselves in complete accord with the reasoning and conclusions of the Federal Court in the BodduPaidanna case. The two taxes, the one levied upon a manufacturer in respect of his goods, the other upon a vendor in respect of his sales, may, as is there pointed out, in one sense overlap. But in law there is no overlapping. The taxes are separate and distinct imposts. If in fact they overlap, that may be because the taxing authority, imposing a duty of excise, finds it convenient to impose that duty at the moment when the exciseable article leaves the factory or workshop for the first time on the occasion of its sale. But that method of collecting the tax is an accident of administration; it is not of the essence of the duty of excise, which is attracted by the manufacture itself."

12. The above views received the consideration of this Court in **R.C. Jall Parsi** v. ***Union of India and anr***[7]**.** wherein this Court held that while excise duty is essentially a duty on manufacture which is passed on to the consumer, the stage of collection, subject to legislative competence of the taxing authority, could be at any stage convenient so long the character of the levy i.e. duty on manufacture is not altogether lost. The further view expressed was to the effect that "the method of collection does not affect the essence of the duty, but only relates to the machinery of collection for administrative convenience."

13. It will hardly be necessary to reiterate the long lines of pronouncements that have consistently followed the above view,except

[6] [A.I.R. (32) 1945 Privy Council 98]

[7] AIR 1962 SC 1281

to make a little detailed reference to ***Bombay Tyre International Ltd.***(supra), not only because the true ratio of the decision in the said case has to be understood for the purpose of this reference so as to deal with the perceived conflict with **Acer India Ltd.** (supra) but also on account of the fact that the subject in issue had received a full and detailed consideration of this Court.

14. In ***Bombay Tyre International Ltd.*** (supra) the issue, shortly put, waswhether determination of assessable value for thelevy of excise duty can be only on the manufacturing cost and the manufacturing profit. It was contended before this Court, by relying on the decision of this Court in ***A.K. Roy and Another*** **vs.** ***Voltas Limited***[8], that having regard to the character of the levy the measure must be restrictedthereto. The contention was rejected by referring to a long line of precedents including those referred to herein above to hold that "**the levy of a tax is defined by its nature, while the measure of the tax may be assessed by its own standard. It is true that the standard adopted as the measure of the levy may indicate the nature of the tax but it does not necessarily determine it**.". The further view expressed in ***Bombay Tyre International Ltd.*** (supra)is that merely because excise is a levy on manufactured goods the value of the excisable article for the purpose of levy cannot be limited to only the manufacturing cost plus manufacturing profit. This Court went on to hold that "**a broader based standard of reference may be adopted for the purpose of determining the measure of the levy. Any standard which maintains a nexus with the essential character of the levy can be regarded as a valid basis for assessing the measure of the levy**."

15. A reading of Section 4 of the Act, as originally enacted; as amended by 1973 Amendment; and as further amended by 2000 Amendment would clearly show that the value of the article for the purposes of levy of ad valorem duty was with reference to the price i.e. 'normal price' prior to the 2000 Amendment and thereafter with reference to the 'transaction value' which has been defined (already extracted) to mean "the price actually paid or payable for the goods, when sold, and includes in addition to the amount charged as price……"

16. The measure for the purpose of the levy is, therefore, essentially the price charged in respect of a transaction which must necessarily be at arm's length. Inclusions and additions that enrich the value of the

[8] (1973) 3 SCC 503

A Article till its clearance are permissible additions to the price that can be taken into account to determine 'value' under the old Section 4 (prior to 2000) as well as the 'transaction value' under the amended section effective from 1.7.2000. While such additions have been judicially held to be permissible under the old Act in ***Bombay Tyre International Ltd.*** B (supra) the very same heads have been statutorily engrafted by the amendment made in 2000.

17. The price charged for a manufactured article at the stage when the article enters into the stream of trade in order to determine the value/transaction value for computation of the quantum of excise duty payable does not come into conflict with the essential character or nature C of the levy. The measure is the value and value isrelated to price. The price charged at the stage of clearance, in addition to manufacturing cost and manufacturing profit, can include certain value additions and inclusions which enrich the value of the product to make it suitable for sale or to facilitate such sale. At this stage, imposthas nothing to do with D the sale. The impost is on manufacture. But it is the value upto the stage of the first sale that is taken as the measure. Doing so does not introduce any inconsistency between the nature and character of the levy and the measure adopted.

18. The above aspect had been considered in ***Bombay Tyre*** E ***International Ltd.***(supra) on a specific contention advanced on behalf of the Assessees that the deductions under the following heads should be made from the sale price in the following terms:

> **"48.** We now proceed to the question whether any post-manufacturing expenses are deductible from the price when F determining the "value" of the excisable article. The old Section 4 provided by the Explanation thereto that in determining the price of any article under that section no abatement or deduction would be allowed except in respect of trade discount and the amount of duty payable at the time of the removal of the article chargeable with duty from the factory or other premises aforesaid. The new G Section 4 provides by sub-section (2) that where the price of excisable goods for delivery at the place of removal is not known and the value 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 has to be

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excluded from such price. The new Section 4 also contains sub-section (4)(*d*)(*ii*) which declares that the expression "value" in relation to any excisable goods, 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. Now these are clear provisions expressly providing for deduction, from the price, of certain items of expenditure. But learned counsel for the assessees contend that besides the heads so specified a proper construction of the section does not prohibit the deduction of other categories of post-manufacturing expenses. It is also urged that although the new Section 4(4)(*d*)(*i*) declares that in computing the "value" of an excisable article, the cost of packing shall be included, the provision should be construed as confined to primary packing and as not extending to secondary packing. The heads under which the claim to deduction is made are detailed below:

(*1*) Storage charges.

(*2*) Freight or other transport charges, whether specific or equalised.

(*3*) Outward handling charges, whether specific or equalised.

(*4*) Interest on inventories (stocks carried by the manufacturer after clearance).

(*5*) Charges for other services after delivery to the buyer.

(*6*) Insurance after the goods have left the factory gate.

(*7*) *Packing charges*.

(*8*) Marketing and Selling Organisation expenses, including advertisement and publicity expenses.

***(Underlining is ours)***

19**.** The above issue was answeredby saying -

**"50**. We shall now examine the claim. It is apparent that for the purpose of determining the "value", broadly speaking both the old

A Section 4 (*a*) and the new Section 4(1)(*a*) speak of the price for sale in the course of wholesale trade of an article for delivery at the time and place of removal, namely, the factory gate. Where the price contemplated under the old Section 4 (*a*) or under the new Section 4(1)(*a*) is not ascertainable, the price is determined under the old Section 4(*b*) or the new Section 4(1)(*b*). Now, the price of an article is related to its value (using this term in a general sense), and into that value have poured several components, including those which have enriched its value and given to the article its marketability in the trade. Therefore, the expenses incurred on account of the several factors which have contributed to its value upto the date of sale, which apparently would be the date of delivery, are liable to be included. Consequently, where the sale is effected at the factory gate, expenses incurred by the assesseeupto the date of delivery on account of storage charges, outward handling charges, interest on inventories (stocks carried by the manufacturer after clearance), charges for other services after delivery to the buyer, namely after-sales service and marketing and selling organisation expenses including advertisement expenses cannot be deducted. It will be noted that advertisement expenses, marketing and selling organisation expenses and after-sales service promote the marketability of the article and enter into its value in the trade. Where the sale in the course of wholesale trade is effected by the assessee through its sales organisation at a place or places outside the factory gate, the expenses incurred by the assesseeupto the date of delivery under the aforesaid heads cannot, on the same grounds, be deducted. But the assessee will be entitled to a deduction on account of the cost of transportation of the excisable article from the factory gate to the place or places where it is sold. The cost of transportation will include the cost of insurance on the freight for transportation of the goods from the factory gate to the place or places of delivery."

***(Underlining is ours)***

G 20. We find no room whatsoever for any disagreement with the above view taken by this court in ***Bombay Tyre International Ltd.***(supra). It is a view consistent with what was held by the Federal Court and the Privy Council in ***Central Provinces and Berar*** (supra),**BodduPaidanna**(supra) and **Province of Madras** (supra) and

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the decisions that followed thereafter including the decision in ***Voltas Limited***(supra) and **Atic Industries Limited vs. H.H. Dewa, Asstt. Collector of Central Excise and ors**[9] the true purport of which was explained in ***Bombay Tyre International Ltd.***(supra). Both the above opinions were clarified to mean that neither of themlay down any proposition to the effect that the excise duty can be levied only on the manufacturing cost plus the manufacturing profit only.

21. At this stage, the amendment to Section 3 by substitution of the words "a duty of excise on all excisable goods" by the words "a duty of excise to be called the Central Value Added Tax (CENVAT) on all excisable goods" is conspicuous. The amendment of Section 3 to the Act not only incorporates the essentials of achanged concept of charging of tax onadditions to the value of goods and services at each stage of production but also engrafts in the statute what was judicially held to be permissible additions to the manufacturing cost and manufacturing profit in***Bombay Tyre International Ltd.***(supra). This fundamental change by introduction of the concept underlying value-added taxation in the provisions of Section 3 really find reflection in the definition of 'transaction value' as defined by Section 4(3)(d) of the Act besides incorporating what was explicitly held to be permissible in ***Bombay Tyre International Ltd.*** (supra). Section 4(3)(d), thus, defines 'transaction value' by specifically including all value additions made to the manufactured article prior to its clearance, as permissible additions to be price charged for purpose of the levy.

22. This would bring us to a consideration of the decision of this Court in ***Acer India Ltd***(supra). The details need not detain us. Softwares which were duty free items and could be transacted as softwares came to be combined with the computer hardware which was a dutiable item for purposes of clearance. The Revenue sought to take into account the value of the computer software for the purposes of determination of 'transaction value' with regard to the computer. This Court negatived the stand of the Revenue taking the view that when software as a separate item was not dutiable its inclusion in the hard-disk of the computer cannot alter the duty liability of the software so as to permit the addition of the price/value of the software for the purpose of levy of duty. It is in the above context that the decision of this Court in ***Acer India Ltd.***(supra)has to be understood.The observations made in

[9] (1975) 1 SCC 499

A paragraph 84 thereof to the effect that 'transaction value' defined in Section 4(3)(d) of the Act would be subject to the charging provisions contained in Section 3 of the Act will have viewed in the context of a situation where an addition of the value of a non-dutiable itemwas sought to be made to the value of a dutiable item for the purpose of determination of the transaction value of the composite item. This is the limited context in which the subservience of Section 4(3)(d) to Section 3 of the Act was expressed and has to be understood. If so understood, we do not see how the views expressed in paragraph 84 of ***Acer India Ltd.*** **(supra)** can be read to be in conflict with the decision of ***Bombay Tyre International Ltd.*** (supra).

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23. Accordingly, we answer the reference by holding that the measure of the levy contemplated in Section 4 of the Act will not be controlled by the nature of the levy.So long a reasonable nexus is discernible between the measure and the nature of the levy both Section 3 and 4 would operate in their respective fields as indicated above.The D view expressed in **Bombay Tyre International Ltd.**(supra) is the correct exposition of the law in this regard. Further, we hold that "transaction value" as defined in Section 4(3)(d) brought into force by the Amendment Act,2000, statutorily engrafts the additions to the 'normal price' under the old Section 4 as heldto be permissible in **Bombay Tyre International Ltd.** (supra) besides giving effect to the changed E description of the levy of excise introduced in Section 3 of the Act by the Amendment of 2000. Infact, we are of the view that there is no discernible difference in the statutory concept of 'transaction value' and the judicially evolved meaning of 'normal price'.

24. The above answers would comprehend the issues specifically F arising in all the three questions that have been referred for our opinion.

Ankit Gyan Referred issues answered.