SUPREME COURT OF INDIA

Commissioner of Central Excise, Indore

Vs.

Grasim Industries Ltd.

C.A.No.3159 of 2004

(Ranjan Gogoi,J., Arun Mishra and Prafulla C.Pant,JJ.)

30.03.2016

ORDER

1. By order dated 30.7.2009 the following questions have been referred for consideration by a larger Bench in terms of which the matters have been posted before us.

> "1. Whether Section 4 of the Central Excise Act, 1944 (as substituted with effect from 01.07.2000) and the definition of "Transaction Value" in Clause (d) of sub- Section (3) of Section 4 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?
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> 3. Whether the concept of "Transaction Value" makes any material departure from the deemed normal price concept of the erstwhile Section 4(1)(a) of the Act?"

2. The facts in brief are as follows:

> "The respondents-assessees are manufacturers of dissolved and compressed industrial gases and allied products. These gases are transported and 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. Some container items are provided by the assessees and in some instances the customers bring their own cylinders/containers. For providing the containers, the assessees charge the customers certain amounts under different heads. These amounts are not reflected in the sale invoices for the purpose of computation of assessable value. The assessees treat the said amounts as their income from ancillary or allied ventures."

3. The issue arising in all these appeals is whether the aforesaid charges 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 1.7.2000.

4. Section 3 of the Act is the charging section and reads as follows:

> "3. (1) There shall be levied and collected in such manner as may be prescribed,
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> (a) a duty of excise to be called the Central Value Added Tax (CENVAT)] on all excisable goods (excluding goods produced or manufactured in special economic zones) 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);

5. Section 4 (1) (a) of the Act, as substituted with effect from 01.07.2000, reads as under:

> "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 their value, then, on each removal of the goods, such value shall—
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> (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;"

6. "Transaction Value" as defined by Section 4 (3) (d) reads as follows:

> "(d) "transaction value" means the prices 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."

7. Prior to amendment of Section 4 (1) (a) with effect from 1. 7.2000 the unamended Section 4 (1) (a) read as follows:

> "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 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."

8. Section 4 (1) (a) [prior to the substitution] was considered by a Three Judges Bench of this Court in *Union of India & Ors. Vs. Bombay Tyre International Ltd. & Ors*[1] . While considering the interplay between Section 3 and 4, it was held as follows:

> "...Section 3 of the Central Excises and Salt Act provides for the levy of the duty of excise. It creates the charge, and defines the nature of the charge. That it is a levy on excisable goods, produced or manufactured in India, is mentioned in terms in the Section itself. Section 4 of the Act provides the measure by reference to which the charge is to be levied. The duty of excise is chargeable with reference to the value of the excisable goods, and the value is defined in express terms by that Section. It has long been recognized that the measure employed for assessing a tax must not be confused with the nature of the tax. It is apparent, therefore, that when enacting a measure to serve as a standard for assessing the levy the Legislature need not contour it along lines which spell out the character of the levy itself. Viewed from this standpoint, it is not possible to accept the contention that because the levy of excise is a levy on goods manufactured or produced the value of an excisable article must be limited to the manufacturing cost plus the manufacturing profit. We are of opinion 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. In our opinion, the original Section 4 and the new Section 4 of the Central Excises and Salt Act satisfy this test.
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> A contention was raised for some of the assesses, that the measure was to be found by reading Section 3 with Section 4, thus drawing the ingredients of Section 3 into the exercise. We are unable to agree. We are concerned with Section 3(1), and we find nothing there which clothes the provision with a dual character, a charging provision as well as a provision defining the measure of the charge."

9. In *Commissioner of Central Excise Vs. Acer Ltd*[2]. , the scope and purport of Section 3 of the Act, Section 4 (1) (a) as substituted with effect from 1.7.2000 and Section 4 (3) (d) defining "transaction value" came up for consideration before another Three Judges Bench of this Court. In the said case, the question that arose is whether value of software attached to a computer, which is otherwise exempt from duty, is liable to be included in the assessable value of the computer for the purposes of levy of duty. Paragraphs 67, 69 and 84 of the judgment in *Commissioner of Central Excise Vs. Acer Ltd. (supra*) would be relevant and is, therefore, noticed below:

> "67. It is not in dispute that operational softwares are available in the market separately. They are separately marketable commodities. The essentiality test or the functional test cannot be applied for the purpose of levy of Central excise inasmuch as the tax is on manufacture of "goods". The Act being a fiscal legislation an attempt must be made to read the provisions thereof reasonably. Computer comes within the definition of excisable goods. So is a software. They find place in different

classifications. The rate of duty payable in relation to these two different goods is also different.

69. While calculating the value of the computer the value of the hard disc, value of the firmware, the cost of the motherboard as also the costs for loading operating softwares is included. What is excluded from the total value of the computer is the value of the operating softwares like Windows 2000, Windows XP which are secondary softwares. Indisputably, when an operating software is loaded in the computer, its utility increases. But does it mean that it is so essential for running the computer that exclusion thereof would make a computer a dead box? The answer to the said question as would appear from the discussions made hereinafter must be rendered in the negative. It is not disputed before us that even without operational softwares a computer can be put to use although by loading the same its utility is enhanced. Computers loaded with different operational softwares cater to the specific needs of the buyer wherefor he is required to place definite orders on the manufacturer. It is also not in dispute that an operating software loaded on the hard disc is erasable. It is also accepted that the operating software despite being loaded on to the hard disc is usually supplied separately to the customers. It is also beyond any controversy that operating software can be updated keeping in view the development in the technology and availability thereof in the market without affecting the data contained in the hard disc. Concededly, even in the case of hard disc crash the software contained in the CDs is capable of being reloaded on to the hard disc and its utility by the users remains the same. An operational software, therefore, does not form an essential part of the hardware.

84. In other words, computers and softwares are different and distinct goods under the said Act having been classified differently and in that view of the matter, no Central excise duty would be leviable upon determination of the value thereof by taking the total value of the computer and software. So far as the valuation of goods in terms of "transaction value" thereof, as defined in Section 4(3) (d) of the Act is concerned . suffice it to say that the said provision would be subject to the charging provisions contained in Section 3 of the Act as also sub-section (1) of Section 4. The expressions "by reason of sale" or "in connection with the sale" contained in the definition of "transaction value" refer to such goods which is excisable to excise duty and not the one which is not so excisable. Section 3 of the Act being the charging section, the definition of "transaction value" must be read in the text and context thereof and not dehors the same. The legal text contained in Chapter 85, as explained in Chapter Note 6, clearly states that a software, even if contained in a hardware, does not lose its character as such. When an exemption has been granted from levy of any excise duty on software whether it is operating software or application software in terms of Heading 85.24, no excise duty can be levied thereupon indirectly as it was impermissible to levy a tax indirectly. In that view of the matter the decision in PSI Data Systems must be held to have correctly been rendered."

10. From the above, it clearly appears that, though in the backdrop of different factual scenarios, two Coordinate Benches (Three Judges) have taken what would appear to be contrary views with regard to purport and effect and the interconnection between Section 3 and 4 of the Central Excise Act, 1944.

11. In the above situation, we are of the view that another Coordinate Bench should not venture into the issues raised and even attempt to express any opinion on the merits of either of the views expressed in *Union of India & Ors. Vs. Bombay Tyre International Ltd. & Ors. (supra) and Commissioner of Central Excise Vs. Acer Ltd. (supra).* Rather, according to us, the questions referred should receive consideration of a Larger Bench for which purpose the connected papers may now be placed before the Hon'ble the Chief Justice of India for appropriate directions.

Judgment Referred.

[1]*(1984) 1 SCC 0467*
[2]*(2004) 8 SCC 0173*