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NON-REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 3159 OF 2004

Commissioner of Central Excise, Indore

...Appellant (s)

Versus

M/s Grasim Industries Ltd

...Respondent (s)

WITH

C.A. Nos.2982-2985/2005, C.A. No.2986/2005, C.A.

No.7143/2005, C.A. No.2261/2006, C.A.

Nos.2246-2247/2008, C.A. Nos.2934-2935/2008, C.A.

No. 3528/2008, C.A. No.4820/2008, C.A. No.

6695/2008, C.A. No.2534/2009, C.A. No.8541/2009 ,

C.A. No. 253/2010, C.A. No.445/2010, C.A.

No.1382/2010, C.A. Nos.2003-2004/2010, C.A.

No.2363/2010, C.A. No.2430/2010, C.A.

Nos.7174-7175/2010, C.A. No. 4696/2011, C.A.

No.2705/2012, C.A. No.3455/2004, C.A.

No.6984/2011 and C.A. No.7272/2005.

O R D E R

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?

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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 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-assesseees 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 assesseees and in some instances the customers bring their own cylinders/containers. For providing the containers, the assesseees 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 assesseees 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

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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,

(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);

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

â S 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--

(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;â \235

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6. â S Transaction Valueâ \235 as defined by Section 4 (3) (d) reads as follows:

â S (d) &#34;transaction value&#34; 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.â \235

7. Prior to amendment of Section 4 (1) (a) with effect from 1.7.2000 the unamended Section 4 (1) (a) read as follows:

â S 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--

(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.â \235

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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: &#34;...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

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( 1984 ) 1 SCC 467

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opinion, the original Section 4 and the new Section 4 of the Central Excises and Salt Act satisfy this test.

... ..

A contention was raised for some of the assesseees, 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 substitute

d 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:

¶ S 67. It is not in dispute that operational softwares are

2 ( 2004 ) 8 SCC 173

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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



M/S. GRASIM INDUSTRIES LTD.  
WITH

RESPONDENT(S)

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C.A. NO. 2261/2006  
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C.A. NO. 2534/2009  
C.A. NO. 8541/2009  
C.A. NO. 253/2010  
C.A. NO. 445/2010  
C.A. NO. 1382/2010  
C.A. NO. 2003-2004/2010  
C.A. NO. 2363/2010  
C.A. NO. 2430/2010

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C.A. NO. 7174-7175/2010  
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C.A. NO. 2705/2012  
C.A. NO. 3455/2004  
C.A. NO. 6984/2011  
C.A. NO. 7272/2005

Date : 30/03/2016 These appeals were called on for pronouncement of judgment today.

For parties : Mr. K. Radhakrishnan, Sr. Adv.  
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Ms. Meera Mathur, Adv.  
Mr. V. Lakshmikumaran, Adv.  
Mr. M.P. Devanath, Adv.  
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Mr. P. Srinivasan, Adv.  
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Mr. S. Nandakumar, Adv.  
Mr. Parivesh Singh, Adv.  
Mr. P. Srinivasan, Adv.  
Mr. Prateek Gupta, Adv.  
Mr. Ranjeet Singh, Adv.  
Mr. V. N. Raghupathy, Adv.  
Mr. Rajan Narain, Adv.  
Mr. Nikhil Nayyar, Adv.  
Mr. Brij Bhusan, Adv.  
For M/s. Ap & J Chambers, Adv.

Mr. M. P. Devanath, Adv.

Hon&#39;ble Mr. Justice Ranjan Gogoi pronounced the order of the Bench comprising His Lordship, Hon&#39;ble Mr. Justice Arun Mishra and Hon&#39;ble Mr. Justice Prafulla C. Pant.

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&#39;ble the Chief Justice of India for appropriate directions.

[VINOD LAKHINA]

COURT MASTER [ASHA SONI]

COURT MASTER

[SIGNED NON-REPORTABLE ORDER IS PLACED ON THE FILE]