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COMMISSIONER OF CENTRAL EXCISE, PONDICHERRY

v.

M/S. ACER INDIA LTD.

SEPTEMBER 24, 2004

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[N. SANTOSH HEGDE, S.B. SINHA AND TARUN CHATTERJEE, JJ.]

Central Excise Act, 1944—Sections 3 and 4:

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Central Excise Tariff Act, 1985—Heading 84.71 and 85.24:

Excise duty—Levy of—On operational Software loaded in hardware—Software exempted from duty—Held: Duty is not leviable on such software while it is not provided under Tariff Act—Computer and Software both are distinct and separate both as a matter of commercial parlance as also under the statute—Despite being loaded in the hardware the software does not lose its character as is still marketable as a separate commodity.

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Interpretation of Taxing Statute:

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Rule of Construction of Charging Section—Held: While interpreting taxing statute natural meaning of the language of the provision is to be seen and not the implication—Such statute demands strict construction—It should never be stretched against a tax payer—Principle of purposive construction to be adhered to when literal meaning result in absurdity—The interpretation should be user friendly.

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Interpretation of valuation or classification contained in Tariff Act—Held: Meaning of an entry should be explained in view of legal text in the Chapter Note—In the absence of its applicability general rules of interpretation should be adhered to.

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Maxim:

"quando aliquid prohibetur fieri, prohibitur ex directo et per obliquim"—Meaning of.

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Words and Phrases:

"Firmware" and "Operating System"—Meaning of.

Respondent is a Company manufacturing computers, and accessories falling under different headings of Chapter 84 of Schedule appended to Central Excise Tariff Act, 1985. Upon a licence, it also used to load operational softwares. It used to deduct the value of the operational software from the total value of the Computer, while calculating the amount of central excise payable thereupon. Appellant-Revenue issued show cause notices to it demanding a differential duty on the premise that duty is payable on the entire value of the computer including the value of operational softwares. Revenue thereafter directed payment of differential duty. Customs, Excise and Service Tax Appellate Tribunal allowed the appeal of the respondent relying on decision in ***PSI Data System Ltd.*** **v.** ***Collector of Central Excise,*** **[1997] 2 SCC 78 holding that no duty is payable on a software loaded in a hardware. In appeal, Division Bench of this Court doubted the correctness of the judgment opining that as a computer would not function without an operational software, the latter would form part of the former and thus excise duty would be payable on the total value thereof. Hence the matter was referred to the larger Bench.**

Appellant-Revenue contended that excise duty is leviable on the total value of the computer as operational software implanted in a hardware becomes a part thereof; that the definition of "Transaction Value" as contained in Section 4(3)(d) of Central Excise Act, 1944 would include the value of all manufactured goods charged as price including any amount that the buyer is liable to pay by reason of or in connection with the sale together therewith any other amount which adds to the value thereof.

Respondent-assessee contended that operational softwares which are implanted on specific orders would retain the characteristics of software and would not lose its identity only because information contained therein together with the right to use the same is implanted in the computer itself; that hardwares and softwares are classified separately under different headings viz. 84.71 and 85.24 of the Customs Tariff Act; that in respect of computers rate of duty is 16% and for softwares it is nil and thus assessee was entitled to claim deduction of the value thereof from the total value of the computer; that as both the

A hardware and software are assessed separately, in view of Chapter Note 6 of Chapter 85, which contains a legal text, the valuation of a computer and software cannot be clubbed together for the purpose of assessment.

Dismissing the appeals, the Court

B HELD: 1.1. A duty of excise primarily is levied upon a manufacturer or producer in respect of the commodity manufactured or produced. It is a tax upon goods and not upon sales or the proceeds of sale of goods. In terms of Entry 84, List I of the Seventh Schedule of Constitution of India, the taxable event in respect of the duty of excise is the manufacture or C production. No tax in terms of Article 265 of the Constitution of India can be imposed, levied or collected except by the authority of law.[689-G-H]

Cape Brandy Syndicate v. *Inland Revenue Commissioners,* [1921] 1 KB 64, referred to

D 1.2. Central excise duty cannot be equated with sales tax. They have different connotations and apply in different situations. Excise duty would be leviable only on the goods which answer the definition of "excisable goods" and satisfy the requirement of Section 3 of Excise Act, 1944. A machinery provision contained in Section 4 and that too the explanation E contained therein by way of definition of 'transaction value' can neither override the charging provision nor by reason thereof a 'goods' which is not excisable would become an excisable one only because one is fitted into the other unless the context otherwise requires. [694-B-D]

1.3. The legal text contained in Chapter 85, as explained in Chapter F 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. [704-C, D]

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1.4. The softwares, thus, whether they are cleared with the apparatus for which they are intended, viz., with the computer or not they remain classified under the same heading. By reason of the provisions of the Tariff Act, the rate of duties specified becomes part of a Parliamentary H Act. Chapter Note 6 of Chapter 85 being the legal text must be taken

aid of for the purpose of interpretation of the different headings in preference to the interpretation rules. Once 'no duty' is payable on softwares being classified under 8524.20 being a magnetic tape, the recorders whereof is classified under 8520.00, a duty would not be payable only because the information contained therein are loaded in the hardware. [696-E-G]

1.5. 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. An operating software loaded on the hard disc is erasable. It, despite being loaded on to the hard disc is usually supplied separately to the customers. It 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. 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 remain the same. An operational software, therefore, does not form an essential part of the hardware. [697-F-H; 698-A]

1.6. Computer and operative softwares are different marketable commodities. They are available in the market separately. They are classified differently. The rate of excise duty for computer is 16% whereas that of a software is nil. Accessories of a machine promote the convenience and better utilization of the machine but nevertheless they are not machine itself. The computer and software are distinct and separate, both as a matter of commercial parlance as also under the statute. Both must be subject to corresponding rates of duties separately. The information contained in a software although are loaded in the hard disc, the operational software does not lose its value and is still marketable as a separate commodity. It does not lose its character as tangible goods being of the nature of CD-ROM. A licence to use the information contained in a software can be given irrespective of the fact as to whether they are loaded in the computer or not. The fact that the manufacturers put different prices for the computers loaded with different types of operational softwares whether separately or not would not make any difference as regard nature and character of the 'computer'. Even if the appellants in terms of the provisions of a licence were obliged to preload

A **a software on the computer before clearing the same from the factory, the characteristic of the software cannot be said to have transformed into a hardware so as to make it subject to levy of excise duty along with computer while it is not under the Tariff Act. [703-B-G]**

B **1.7. 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** C **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** *de hors* **the same. [704-A-C]**

D *PSI Data Systems Ltd.* v. *Collector of Central Excise,* (1997) 89 ELT 3 SC [1997] 2 SCC 78; *O.R.G. Systems* v. *Commissioner of Central Excise, Vadodara,* (1998) 102 ELT 3 SC; *HCI, Hewlett Packard Ltd.* v. *CCF, Meerut,* (2000) 116 ELT 667; *Sprint R.P.G. India Ltd.* v. *Commissioner of Customs, Delhi,* (2000) 116 E.L.T. 268; *Sprint R.P.G. India Ltd.* v. *Commissioner of Customs-I, Delhi,* (2000) 116 ELT 6 SC [2000] 2 SCC E 486; *Shriram Bearings Ltd.* v. *Collector of Central Excise, Patna,* (1997) 91 ELT 255 SC; *Photopone Industries Pvt. Ltd.* v. *CCF, Goa,* (1999) 108 ELT 523 and *Philips India Ltd.* v. *Collector of Central Excise, Pune,* (1997) 6 SCC 31, relied on.

F **2.1. The one and the only proper test in interpreting a Section in a taxing statute would be that the question is not at what transaction the Section is according to some alleged general purpose aimed, but what transaction its natural meaning fairly and squarely hits. Before taxing a person it must be shown that he falls within the ambit thereof by clear words used as no one can be taxed by implication. A transaction in a fiscal** G **legislation cannot be taxed only on any doctrine of "the substance of the matter" as distinguished from its legal signification, for a subject is not liable to tax on supposed "spirit of the law" or "by inference or by analogy". The taxing authorities cannot ignore the legal character of the transaction and tax it on the basis of what may be called "substance of the** H **matter". One must find the true nature of the transaction. [690-C-G]**

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Union of India and Ors. **v.** *Play World Electronics Pvt. Ltd. and Anr.* **[1989] 3 SCC 181, referred to.**

2.2. Imposition of tax is a constitutional function. A taxing or a fiscal statute demands strict construction. It must never be stretched against a tax payer. So long as natural meaning for the charging Section is adhered to and when the law is certain, then a strange meaning thereto should not be given. When the statutory provision is reasonably akin to only one meaning, the principle of strict construction may not be adhered to. A provision enacted for the benefit of an assessee should be so construed which enables the assessee to get its benefit. However, principle of purposive construction will be adhered to when a literal meaning may result in absurdity. [690-D, E; 692-C; 692-F, G].

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Mathuram Agrawal **v.** *State of Madhya Pradesh,* **[1999] 8 SCC 667;** *Indian Banks' Association, Bombay and Ors.* **v.** *M/s. Devkala Consultancy Services and Ors.,* **JT (2004) 4 SC 587;** *Hansraj and Sons* **v.** *State of Jammu and Kashmir and Ors.,* **[2002] 6 SCC 227 and** *Mysore Minerals Ltd. M.G. Road, Bangalore* **v.** *The Commissioner of Income Tax, Karnataka Bangalore,* **[1999] 7 SCC 106, referred to.**

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W.M. Cory and Sons Ltd. **v.** *Inland Revenue Commissioners,* **[1965] 1 All ER 917, referred to.**

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Francis Bennion's Statutory Interpretation, **Fourth Edition, p. 828, referred to.**

2.3. The statute, however, should not be interpreted in such a manner which may lead to wide scale evasion of duty. The Court should adopt an interpretation which would be user friendly. If any other interpretation is made, the same would encourage the manufacturers to sell the operational computer separately as a result of which the buyers may have to incur extra charges. The customers, thus, may not be able to get the benefit of the information contained in the operational computer loaded in the factory. Furthermore, it may encourage in loading of pirated softwares in the computer. [691-C, D]

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2.4. Artificial rules to give the tax payer the 'breaks' are not out of place for taxation is now not an "impertinent intrusion into sacred rights of private property" [692-D]

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A *Oxford University Press* v. *Commissioner of Income-tax,* **[2001] 3 SCC 359, referred to.**

2.5. For the purpose of interpretation of a taxing statute, the fiscal philosophy, a feel of which is necessary to gather the intent and effect of its different clauses should be applied. A consideration of public policy may also be relevant in interpreting and applying a taxing Act. [692-E, F]

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Maddi Venkataraman and Co. (P) Ltd. v. *Commissioner of Income Tax,* **[1998] 2 SCC 95, referred to.**

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2.6. While interpreting valuation or classification contained in the Tariff Act, one cannot lose sight of the legal text contained in the Chapter Note explaining the meaning of the entry and in absence of its applicability thereto the general rules of interpretation. While construing a taxing statute, the existing market practice may also be taken into consideration. [691-A, B]

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CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 10185-10186 of 2003.

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From the Judgment and Order dated 29.8.2003 of the Customs, Excise and Service Tax Appellate Tribunal South Zonal Bench, Bangalore in A.No. E/Misc/131/2003 and E/St/272/2003 in E/410/2003, E/St/810-811/2002 in E/1307, 1308/2002.

WITH

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C.A. Nos. 1148-1149 of 2004 & I.A. Nos. 3-4/2004.

A. Subba Rao and B.K. Krishna Prasad for the Appellant.

V. Lakshmikumaran, Alok Yadav and Rajesh Kumar for the Respondents.

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Dushyants, Dave, K.T.A., Harris Beeran, Tarak Damani and Vasudevan Raghavan for Intervenor.

The Judgment of the Court was delivered by.

S.B. SINHA, J. : The Revenue is in appeal before us being aggrieved

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by and dissatisfied with the judgment and order dated 29.08.2003 passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Bangalore whereby and whereunder the appeal filed by the Respondent herein from an order passed by the Commissioner of Central Excise, Pondicherry dated 27.1.2003 was allowed holding that no central excise duty is payable on a software loaded in a hardware, i.e., computer.

FACTS:

The Respondent is a company manufacturing computers, peripherals, servers, note books and accessories falling under different headings of Chapter 84 of the Schedule appended to the Central Excise Tariff Act, 1985. Upon a licence obtained by WIPRO, the Respondent, on orders received from the customers load operational softwares. While calculating the amount of central excise payable thereupon, it would deduct the value of the operational softwares from the total value of the computer supplied to the customers. The revenue objected to the said procedure on the premise that excise duty is payable on the entire value of the computer including the value of operational softwares.

A show cause notice dated 8.8.2002 was issued by the Superintendent of Central Excise for the period July 2001 to May, 2002 asking it to show cause as to why it would not be called upon to pay the differential duty of Rs. 48,65,003.

Yet again a show cause notice was issued on 19.8.2002 demanding a differential duty of Rs. 54,90,700 for the period 1.7.2000 to 30.6.2001 by the Commissioner of Central Excise, Trichy purported to be in terms of the proviso appended to Section 11A (1) of the Central Excise Act, 1944. The respondent pursuant to the said notices filed their show causes.

The Commissioner of Central Excise by an order dated 27.1.2003 directed payment of the differential duty specified in the two show cause notices and further levied interest thereupon as also penalty holding:

> "i) That the value/cost of the operational software installed by the assessee on the computers before clearance from the factory is includible in the assessable value/ transaction value of the computer system and therefore the differential duty demanded in the two show cause notices need to be confirmed.

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> ii) That there were justifying grounds and evidences for the invocation of the proviso to Section 11A (1) in the present case besides imposition of penalty....."

It was further held that the loading of operational software in the factory would come within the mischief of 'transaction value' of the computer in terms of Section 4 of the Central Excise Act, 1944 with effect from 1.4.2000 having regard to the expressions "by reason of sale" or "in connection with the sale" as contained in the definition thereof.

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The Respondent preferred an appeal thereagainst before the Tribunal which by reason of the impugned judgment dated 29.8.2003 was allowed. The Tribunal passed the said judgment relying on or on the basis of a decision of this Court in *PSI Data Systems Ltd.* v. *Collector of Central Excise,* (1997) 89 ELT 3 (SC) : [1997] 2 SCC 78.

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A Division Bench of this Court in its order dated 27.02.2004 doubted the correctness of the said decision opining that as a computer would not function without an operational software, the latter would form a part of the former and, thus, excise duty would be payable on the total value thereof. Distinguishing between softwares without which a computer cannot work and those containing additional or ancillary applications and which a customer may want to buy separately, the Bench observed:

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> "But a buyer has to buy software without which the computer cannot work. The computer would otherwise be a dead box, if software, without which the computer cannot work, is not purchased. When one talks of a computer, as understood in the trade, it is not just the box or the hardware. A computer contains of both hardware and the operating software. The price of such softwares is thus the amount which a buyer is bound to pay by reason of or in connection with the sale of computers. It appears to us that the price of such software is thus includable in the value for purposes of excise duty."

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The matter was, thus, referred to a larger Bench.

SUBMISSIONS:

Mr. A. Subba Rao, learned counsel appearing on behalf of the Appellant would contend that an operational software implanted in a hardware becomes

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a part thereof and as such central excise duty is leviable on the total value of the computer. Drawing our attention to the provisions of Section 4 of the Central Excise Act, 1944 (The Act) and in particular the definition of "Transaction Value" as contained in Clause (d) of Sub-Section (3) of Section 4 thereof, the learned counsel would submit that the same would include the value of all manufactured goods charged as price including any amount that the buyer is liable to pay by reason of or in connection with the sale together therewith any other amount which adds to the value thereof. As a software implanted is a part of the computer, it was urged, excise duty would be payable on the total value thereof.

Mr. Subba Rao would submit that a bare perusal of the judgment of this Court in *PSI Data Systems Ltd.* (supra) would indicate that therein this Court was not concerned with any software, which was implanted into a computer and was only concerned with a software which is a tangible one being of the nature of discs, floppies and CD-ROMs. It was also not concerned with intellectual property also called software, that is recorded or stored thereon.

A software which is implanted with a licence to right to use the informations contained therein, Mr. Subba Rao would argue, should not be compared with a disc, floppy or CD-ROM which is available in the market separately.

Drawing our attention to the findings of fact arrived at by the Commissioner of Central Excise, the learned Counsel would submit that not only the operational softwares like Windows 98 OS or W2K are implanted in the computers by the Respondent but as would appear from the price list furnished by it the configurations of different models of computers including operational software are also quoted therein. Furthermore, the Respondent was also being under an obligation to preload a software on the computer before clearing the same from the factory, the central excise duty would be payable on the entire value thereof.

Mr. V. Lakshmikumaran, learned counsel appearing on behalf of the Respondent, on the other hand, would submit that a computer which is a hardware is marketable as such containing a firm or etched software being implanted therein, the valuation thereof also is taken into consideration for the purpose of excise duty but the operational softwares which are implanted on specific orders placed by the customers would retain the characteristics of software and would not lose its identity only because the informations

A contained therein together with the right to use the same is implanted in the computer itself. A computer may have different systems, Mr. Lakshmikumaran would contend, containing parallel or sequential process which would make a computer system complete and the same should not be confused with a mere hardware.

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The learned counsel would argue that the hardwares and softwares are classified differently under different Headings, viz., 84.71 and 85.24 of the Customs Tariff Act. Whereas in respect of the computers the rate of duty is 16%, for softwares the same is nil and, thus, the assessee was entitled to claim deduction of the value thereof from the total value of the computer. It was C argued that as both the hardware and the software are assessed separately, keeping in view Chapter Note 6 of Chapter 85, which contains a legal text, the valuation of a computer and software cannot be clubbed together for the purpose of assessment of excise duty.

D Mr. Dushyant Dave, learned senior counsel appearing on behalf of the intervenor, supplemented the submissions of Mr. Lakshmikumaran contending that the value of the goods which would be subject matter of central excise cannot be enhanced by implanting a software as it retains its own character irrespective of the fact that the informations contained therein are loaded in the computer itself.

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The learned counsel would argue that the value of the goods may be enhanced in terms of the definition of the "Transaction Value" but the explanation contained therein must be read in the context of the main provision, viz., Section 4(1) and not de'hors the same.

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RELEVANT STATUTORY PROVISIONS:

Central Excise Act, 1994:

"2(d) "excisable goods" means goods specified in the First Schedule G and the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as being subject to a duty of excise and includes salt;

3. Duties specified in the Schedule to the Central Excise Tariff Act, 1985 to be levied. (1) There shall be levied and collected in such H 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 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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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;

... ...

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(3) for the purposes of this section, -

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(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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A COMPUTER:

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Before adverting to consider the rival submissions at the bar, we may notice the meaning of certain terms as also the functioning of a computer.

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In Newton's Telecom Dictionary, "Application Program" has been defined at page 54 as under:

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> "A computer software program designed for a specific job, such as word processing, accounting, spreadsheet, etc."

In the said dictionary, "Firmware" has been defined at pages 281-282 as under:

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> "Software kept in semipermanent memory. Firmware is used in conjunction with hardware and software. It also shares the characteristics of both. Firmware is usually stored on PROMS (Programmable Read only Memory) or EPROMs (Electrical PROMS). Firmware contains software which is so constantly called upon by a computer or phone system that it is "burned" into a chip, thereby becoming firmware. The computer program is written into the PROM electrically at higher than usual voltage, causing the bits to "retain" the pattern as it is "burned in". Firmware is nonvolatile. It will not be "forgotten" when the power is shut off. Handheld calculators contain firmware with the instructions for doing their various mathematical operations. Firmware programs can be altered. An EPROM is typically erased using intense ultraviolet light."

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"Operating system" has been defined at page 500 of the said dictionary as under:

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> "A software program which manages the basic operations of a computer system. It figures how the computer main memory will be apportioned, how and in what order it will handle tasks assigned to it, how it will manage the flow of information into and out of the main processor, how it will get material to the printer for printing, to the screen for viewing, how it will receive information from the keyboard, etc. In short, the operating system handles the computer's basic housekeeping MS-DOS, UNIX, PICK, etc, are operating systems."

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Thus, there are different operating systems.

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Computers of various models and types with different configurations including Servers and Personal Computers are manufactured by the Respondent. They are classifiable under Chapter Sub-heading 8471.00 of the Central Excise Tariff Act, 1985 (Tariff Act) as automatic data processing machines.

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A In the computers there exists a flash memory chip in the motherboard. The software that is essential to the starting of the computer which is the Basic Input Output Software is etched on to this memory chip. This Basic Input Output Software which is etched or burnt into the Electrically Erasable Programmable Read Only Memory (EEPROM) is called firmware. The firmware provides for interactions with the microprocessor to enable it to B access the operating software contained in the hard disc.

As is the general practice in the computer industry, the value of the firmware etched on to the EEPROM is always included in the assessable value of the computers.

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A customer may place a specific order upon the manufacturers of computers for supply of CDs which contain operating softwares like Windows 2000, Windows XP etc. as also the right to use the same under licence. The said softwares indisputably can be purchased separately and loaded in the computer by the purchasers themselves. They can be loaded even at the D premises of the purchasers and by persons other than the manufacturers. The computers, however, are also loaded with different types of softwares on to the hard disc along with licence to use, if and when specifically ordered by the customers. Computers and operational softwares admittedly are available in the market separately. For the purpose of this case, however, we would E proceed on the premise that all the computers are cleared with the softwares loaded onto the hard disks and with the CDs containing the softwares along with the licence to use.

The invoice-cum-challan issued by the assessee contains the total value of the computer but therefrom value of the operating softwares is deducted F for the purpose of computing the central excise duty payable thereupon.

PRINCIPLES OF INTERPRETATION OF A TAXING/FISCAL STATUTE:

A duty of excise primarily is levied upon a manufacturer or producer G in respect of the commodity manufactured or produced. It is a tax upon goods and not upon sales or the proceeds of sale of goods. In terms of Entry 84, List I of the Seventh Schedule of Constitution of India, the taxable event in respect of the duty of excise is the manufacture or production. No tax in terms of Article 265 of the Constitution of India can be imposed, levied or collected except by the authority of law.

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A In *Cape Brandy Syndicate* v. *Inland Revenue Commissioners,* (1921) 1 KB 64 at p. 71, it is stated:

> "...In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

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[See also *State of West Bengal* v. *Kesoram Industries Ltd. and Ors,* (2004) 1 SCALE 425].

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It is also well-known that the one and the only proper test in interpreting a section in a taxing statute would be that the question is not at what transaction the section is according to some alleged general purpose aimed, but what transaction its language according to its natural meaning fairly and squarely hits. [See *St. Aubyn (LM) and Others* v. *Attorney General (No. 2),* (1951) 2 All ER 473, p. 485].

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Imposition of tax is a constitutional function.

A taxing or a fiscal statute demands strict construction. It must never be stretched against a tax payer. So long natural meaning for the charging section is adhered to and when the law is certain, then a strange meaning thereto should not be given. [See *W.M. Cory & Sons Ltd.* v. *Inland Revenue Commissioners,* (1965) 1 All ER 917].

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It is also well-settled rule of construction of a charging section that before taxing a person it must be shown that he falls within the ambit thereof by clear words used as no one can be taxed by implication.

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It is further well-settled that a transaction in a fiscal legislation cannot be taxed only on any doctrine of "the substance of the matter" as distinguished from its legal signification, for a subject is not liable to tax on supposed "spirit of the law" or "by inference or by analogy".

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The taxing authorities cannot ignore the legal character of the transaction and tax it on the basis of what may be called 'substance of the matter'. One must find the true nature of the transaction. [See *Union of India and Others* v. *Play World Electronics Pvt. Ltd and Another.,* [1989] 3 SCC 181].

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While interpreting valuation or classification contained in the Tariff Act, one cannot lose sight of the legal text contained in the Chapter Note explaining the meaning of the entry and in absence of its applicability thereto the general rules of interpretation.

The entries in the instant case are covered by the Chapter Note 6 *vis-à-vis* Rule 1 of the general rules of interpretation and Rule 3 thereof.

While construing a taxing statute, the existing market practice may also be taken into consideration.

The statute, however, should not be interpreted in such a manner which may lead to wide scale evasion of duty. The Court should adopt an interpretation which would be user friendly. If any other interpretation is made, the same would encourage the manufacturers to sell the operational computer separately as a result of which the buyers may have to incur extra charges. The customers, thus, may not be able to get the benefit of the information contained in the operational computer loaded in the factory. Furthermore, it may encourage in loading of pirated softwares in the computer.

In *Mathuram Agrawal* v. *State of Madhya Pradesh*, [1999] 8 SCC 667, the law is stated in the following terms:

> "...The intention of the legislature in a taxation statute is to be gathered from the language of the provisions particularly where the language is plain and unambiguous. In a taxing Act it is not possible to assume any intention or governing purpose of the statute more than what is stated in the plain language. It is not the economic results sought to be obtained by making the provision which is relevant in interpreting a fiscal statute. Equally impermissible is an interpretation which does not follow from the plain, unambiguous language of the statute. Words cannot be added to or substituted so as to give a meaning to the statute which will serve the spirit and intention of the legislature. The statute should clearly and unambiguously convey the three components of the tax law i.e. the subject of the tax, the person who is liable to pay the tax and the rate at which the tax is to be paid. *If there is any ambiguity regarding any of these ingredients in a taxation statute then there is no tax in*

A *law. Then it is for the legislature to do the needful in the matter."*

(Emphasis Supplied)

[See also *Indian Banks' Association, Bombay and Ors.* v. *M/s. Devkala Consultancy Services and Ors.,* JT (2004) 4 SC 587]

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In *Hansraj and Sons* v. *State of Jammu and Kashmir and Others,* AIR (2002) SC 2692 : [2002] 6 SCC 227 rule of strict construction of a taxing statute was recommended.

C We are also not oblivious of the fact that when the statutory provision is reasonably akin to only one meaning, the principle of strict constructions may not be adhered to.

D Artificial rules to give the tax payer the 'breaks' are not out of place for taxation is now not an 'impertinent intrusion into sacred rights of private property'. [See *Oxford University Press* v. *Commissioner of Income-tax,* [2001] 3 SCC 359].

E Furthermore, for the purpose of interpretation of a taxing statute, the fiscal philosophy, a feel of which is necessary to gather the intent and effect of its different clauses should be applied. [See *K.P. Verghese* v. *Income Tax Officer, Ernakulam and Another,* [1981] 4 SCC 173].

A consideration of public policy may also be relevant in interpreting and applying a taxing Act. [See *Maddi Venkatraman & Co. (P) Ltd.* v. *Commissioner of Income Tax,* [1998] 2 SCC 95].

F A provision enacted for the benefit of an assessee should be so construed which enables the assessee to get its benefit. [See *Mysore Minerals Ltd., M.G. Road, Bangalore* v. *The Commissioner of Income Tax, Karnataka, Bangalore,* [1999] 7 SCC 106].

G However, principle of purposive construction will be adhered to when a literal meaning may result in absurdity.

In Francis Bennion's Statutory Interpretation, Fourth Edition, page 828, it is stated:

H "Section 310. Purposive construction not excluded for taxing etc.

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> Acts: Particular types of Acts (for example taxing Acts) are not excluded from strained and purposive construction. The presumption as to purposive construction applies to them as to other Acts."

We may also notice that in Francis Bennion's Statutory Interpretation, Fourth edition at pages 879-880, the maxim *'quando aliquid prohibetur fieri, prohibitur ex directo et per obliquum'* has been quoted which means "Whenever a thing is prohibited, it is prohibited whether done directly or indirectly."

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With the aforementioned principles in mind, answers to the questions involved in these matters are required to be found out.

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INTERPRETATION OF THE RELEVANT PROVISIONS:

Section 2(d) of Central Excise Act, 1944 defines the "excisable goods" to mean the goods specified in the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 as being subject to a duty of excise. It must, therefore, be 'goods' which would be subject to a duty of excise and not the 'goods' which would not be.

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Section 3 thereof is the charging provision. It not only lays down the mode and manner for levy and collection of central excise duty but in no uncertain terms states that a duty of excise shall be levied on all excisable goods which are produced or manufactured in India, as, and at the rates, set forth in the Tariff Act.

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Section 4 provides for the manner in which an enquiry is required to be made for valuation of goods for the purpose of levy of excise duty on "goods". In terms of Clause (a) of Sub-section (1) of Section 4 when the duty of excise is chargeable on the concerned excisable goods with reference to their value, the same shall be calculated in the manner laid down therein.

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It may be true that the definition of "Transaction Value" which is incorporated in Clause (d) of Sub-section (3) of Section 4 for the purpose of said Section states that the price actually paid or payable for the goods, when sold, would include 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. Only because the expressions "by reason of, or in connection with the sale" have been used in the definition

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A of "Transaction Value", the same by itself would not take away the rigours of Sub-section (1) of Section 4 as also the requirement of charging section as contained in Section 3.

It must be borne in mind that central excise duty cannot be equated with B sales tax. They have different connotations and apply in different situations. Central excise duty is chargeable on the excisable goods and not on the goods which are not excisable. Thus, a 'goods' which is not excisable if transplanted into a goods which is excisable would not together make the same excisable goods so as to make the assessee liable to pay excise duty on the combined value of both. Excise duty, in other words, would be leviable only on the C goods which answer the definition of "excisable goods" and satisfy the requirement of Section 3. A machinery provision contained in Section 4 and that too the explanation contained therein by way of definition of 'transaction value' can neither override the charging provision nor by reason thereof a 'goods' which is not excisable would become an excisable one only because D one is fitted into the other, unless the context otherwise requires.

It is not a case where the software is being supplied to the customer along with the computer by way of incentive or gift. The Respondent is charging the price therefor. Software therefor along with a computer is being sold both in the form of the information loaded in the computer as also in E the form of a CD-ROM. In the invoice, the composite price of the computer and software is being shown, as noticed hereinbefore and therefrom, the price of the software is only being deducted. The invoice price, thus, also shows the actual price of the computer as also the price of the software together with the licence to use the same. The Appellant while calculating the price of the F computer had shown all expenses which are borne by it in terms of the decision of this Court in *Union of India and Others* v. *Bombay Tyre International Ltd. and Others,* [1984] 1 SCC 467. Thus, the requirements contained in the second part of the definition of 'transaction tax' are met. Furthermore, invoice value is not always excisable value in respect of the goods.

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In the instant case, having regard to the decision of this Court in *Bombay Tyre International Ltd.* (supra) the excisable value of the computer has been disclosed. The cost of loading the softwares which would enhance the value of the goods had also been added. There cannot, thus, be any doubt H whatsoever that while computing such costs of manufacturing expenses

which would add to the value of the excisable goods (in this case the computer) must be taken into consideration but not the value of any other goods which is not excisable.

CLASSIFICATION :

Automatic data processing machines are classifiable under the sub-heading 84.71. Softwares, however, are classifiable under the sub-heading 85.24; the duties payable for are 16% and 'Nil' respectively.

Chapter Note 5(a) of Chapter 84 of the Tariff Act states:

> "5. (a) For the purposes of heading No. 84.71, the expression 'automatic data processing machines' means :
>
> (i) Digital machines, capable of (1) storing the processing programme or programmes and at least the data immediately necessary for the execution of the programme; (2) being freely programmed in accordance with the requirements of the user; (3) performing arithmetical computations specified by the user; and (4) executing, without human intervention, a processing programme which requires them to modify their execution by logical decision during the processing run;"

Chapter Note 6 of Chapter 85 states:

> "6. Records, tapes and other media of heading No. 85.23 or 85.24 remain classified in those headings, whether or not they are cleared with the apparatus for which they are intended."

It is profitable to notice at this juncture the general principles of interpretation and in particular Rules 1 and 3 thereof. The interpretative rules, in our opinion, should be considered keeping in view of the Chapter (s) of the Tariff Act.

Rule 1 of the Rules for the Interpretation of the First Schedule states that the titles of Sections and Chapters are provided for ease of reference only which having regard to Chapter 84 providing for nuclear reactors, boilers, machinery and mechanical appliances; parts thereof are required to be referred to for reference only. However, for legal purposes, the classification

A is to be determined according to the terms of the headings. The subject matter of the heading is important. Once a particular subject matter falls within the specified classification, the determination of valuation for the purpose imposition of duty must be done according to the terms of the heading and any relative Section or Chapter Notes unless such headings or Notes B otherwise do not require. For our purpose, therefore, the rule of interpretation as contained in Chapter Notes would be given effect to for the purpose of classification in preference to the general rules of interpretation.

Rule 3, on the other hand, refers to a situation where any reference in a heading to a material or substance includes a reference to mixtures or C combinations of that material or substance with other materials or substances, as a result whereof the goods are *prima facie* classifiable under two or more headings. Only in that event, the different rules of interpretation specified in Rule 3 may be taken recourse to.

D Rule 3 pre-supposes three conditions under which goods classifiable under two or more headings may be classified under one heading or the other. Such conditions are not applicable in the instant case. Rules 3 of the Rules for interpretation shall not be applicable whereas Rule 1 does.

In the instant case having regard to the Chapter Note, the legal text E contained in Rule 1 will apply and not Rule 3.

The softwares, thus, whether they are cleared with the apparatus for which they are intended, viz., with the computer or not they remain classified under the same heading. By reason of the provisions of the Tariff Act, the rate of duties specified becomes part of a Parliamentary Act. Chapter Note F 6 of Chapter 85 being the legal text must be taken aid of for the purpose of interpretation of the different headings in preference to the interpretation rules. Suffice it to point out that once 'no duty' is payable on softwares being classified under 8524.20 being a magnetic tape, the recorders whereof is classified under 8520.00, a duty would not be payable only because the G informations contained therein are loaded in the hardware.

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 H fiscal legislation an attempt must be made to read the provisions thereof

A 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.

In terms of Chapter Note 6 of Chapter 85, as noticed hereinbefore, a software retains its character irrespective of the fact as to whether it is sold B with the apparatus, viz., the computer. Once it is held that the essential characteristic of a software is not lost by reason of its being loaded in the hardware; having regard to the different sub-headings contained in different chapters of the Tariff Act, the intent and purport of the legislature, in our opinion, cannot be permitted to be withered away only because the informations C contained in a software are loaded in a hardware. In other words, as the central excise duty is not leviable on a software in terms of the Act, only because it is implanted in a hardware which can be subjected to the assessment of central excise under different head, the same would not attract central excise duty.

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ANALYSIS :

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 E 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 dead box? The answer to the said question as would appear from F 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 G 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 effecting the data contained in the hard disc. Concededly, even in H the case of hard disc crash the software contained in the CDs is capable of

A being reloaded on to the hard disc and its utility by the users remain the same. An operational software, therefore, does not form an essential part of the hardware.

CASE LAWS :

B In *PSI Data Systems Ltd.* (supra) this Court in paragraph 2 of the judgment excluded a firm or etched software and not the operational software. It has been clarified that the softwares with which the Bench was concerned were tangible softwares of the nature of discs, floppies and CD-ROMs. It is not in dispute that the operational softwares despite being C implanted in the computer retain its characteristic of a tangible software of a CD-ROM and can be marketted separately. This Court also noticed that the computers and softwares are classified differently in different chapters being Chapter Nos. 84 and 85 under the heading 84.71 and heading 85.24 respectively.

D Drawing a distinction between a computer system and a computer, it was held:

> "12. In the first place, the Tribunal confused a computer system with a computer; what was being charged to excise duty was the E computer."

It was furthermore opined:

> "13. Secondly, that a computer and its software are distinct and separate is clear, both as a matter of commercial parlance as also F upon the material on record. A computer may not be capable of effective functioning unless loaded with software such as discs, floppies and CD ROMs, but that is not to say that these are part of the computer or to hold that, if they are sold along with the computer, their value must form part of the assessable value of the computer for the purposes of excise duty. To give an example, a G cassette recorder will not function unless a cassette is inserted in it; but the two are well known and recognised to be different and distinct articles. The value of the cassette, if sold along with the cassette-recorder, cannot be included in the assessable value of the cassette recorder. Just so, the value of software, if sold along with H the computer, cannot be included in the assessable value of the

computer for the purposes of excise duty."

The functional test or the essentiality test, thus, had been given a complete go by therein and, thus, it is not possible to agree that without an operating software, the computers would become disfunctional.

The decision in the case of *PSI Data Systems Ltd.* (supra) has been followed by this Court in *O.R.G. Systems* v. *Commissioner of Central Excise, Vadodara,* (1998) (102) ELT 3 SC.

In *O.R.G. Systems* (supra), the principal issues in controversy were:

> "(a) whether the computers manufactured and cleared by the DSI and Orbit are liable to be treated as the computers manufactured and cleared by the appellant and, therefore, liable for excise duty at the hands of the Appellant; (b) Whether the value of peripheral devices and/ or computer systems sold by Adprint along with computers are includible in the assessable value of the Computer; and (c) Whether the amount or value of the service charges recovered by the Appellant under service contracts can be included in the assessable value of the computer."

Referring to *P.S.I. Data Systems Ltd.* (supra) in extenso, this Court held:

> "7. The above judgment of this Court completely answers the principal issues in controversy in favour of the appellant. In the case on hand, it cannot be disputed that the computers manufactured and supplied by Orbit, DSI or the appellant (from May, 1982 onwards) were complete computers, which had a Central Processing Unit, with "etched-in" or "burnt-in" software, a Key Board (input device) the monitor (output device) and Disc drives. The computers, as above, were cleared after complying with all requirements under the Excise Law and proper duty as computed was paid. The peripheral devices and other systems software were merely additional devices meant to increase the memory or storage capacity of the computers and other facilities. It is also not disputed by the Revenue that the peripheral devices were imported by the appellant and the appellant had paid countervailing duty on such imported peripherals."

[See also *HCL Hewlett Packard Ltd.* v. *CCE, Meerut,* (2000) 116 ELT 667].

A We may notice that the Tribunal in *Sprint R.P.G. India Ltd.* v. *Commissioner of Customs, Delhi,* (2000) 116 E.L.T. 268 (Tribunal) in a similar situation observed:

> "9. The contention of the appellants is that when the software is loaded on the hard disk drive, it becomes software and, therefore, is classifiable under Tariff Heading 85.24 which covers records, tapes and other recorded media, sound or other similarly recorded phenomena, including matrices and masters for the production of records. Further contention of the appellants is that Note 6 to Chapter 85 provides that the records tapes and other media of Heading 85.24 remains classifiable under this heading whether or not which presented with the apparatus. We find that the appellants imported hard disk drive loaded with the software. It is not the case of the appellants that the software was assembled with the disk drive. In fact, the software was installed on the hard disk drive from the recorded software media for the purpose of executing commands to the system. In these circumstances, the software becomes an integral part of the hard disk drive. Therefore, we do not find any force in the arguments of the appellants that the goods, in question, are, in fact, software."

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E On an appeal preferred therefrom by the assessee, a Division Bench of this Court in *Sprint R.P.G. India Ltd.* v. *Commissioner of Customs-I, Delhi,* (2000) 116 E.L.T. 6 SC : [2000] 2 SCC 486, upon taking into consideration the rules of interpretation mentioned in the First Schedule appended to the Customs Tariff Act which lay down the general rules for interpretation and classification of goods, held:

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> "11. Testing it from the aforesaid rules of interpretation, it would be clear that the disk or a floppy on which computer data is recorded, would be covered by Heading 85.24. Rule 3(a), *inter alia*, provides that when two or more headings each refer to part only of the materials or composite goods, those headings are to be regarded as equally specific in relation to those goods, even if one of item (sic them) gives a more complete or precise description of the goods. Further, considering imported goods to be a mixture of two substances namely "hard disk drive" and "software" as per Rule 3(b) they can be classified under the heading which gives them their essential

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> character. In the present case, considering its price factor it would be computer software. The price of the imported consignment was approximately Rs. 68 lakhs. As against this, the value of the seven hard disk drives would be roughly Rs. 60,000 that is to say, value of the computer software is hundred times more than its containers hard disk. Hence, the essential character of the imported goods is computer software."

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While reversing the decision of the Tribunal this Court rejected the contention of the Revenue that in view of Chapter Note 5 of Chapter 84 for the purposes of Heading No. 84.71, the expression "automatic data processing machine" means automatic data processing machines or a unit as being a part of a complete system if it meets the conditions specified therefor stating:

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> "13. He referred to clauses (b) and (c) and contended that this hard disk drive can be used either directly or through one or more other units for processing the data and, therefore, it would be automatic data-processing, machine falling under Heading No. 84.71. This submission cannot be accepted for the consignment in question is essentially a computer software covered by specific Heading No. 85.24 which is for levying duty on records, tapes and other recorded media for sound or other similarly recorded phenomena. As mentioned in the notification dated 16th March, 1995, computer software is covered by Heading No. 85.24. The said notification also covers computer software imported in the form of printed books, pictures, manuscripts and typed scripts covered by Chapter 49. Computer software can be brought either on a floppy or a magnetic tape or on a hard disk or in a printed form and hence, what is imported is software on a container which is a hard disk drive. The value of the containers (hard disks) approximately in the present case is Rs. 60,000 or Rs. 65,000. As against this, the cost of the computer software is roughly Rs. 67 lakhs. Therefore, it can be said that what is imported by the appellant is essentially a computer software."

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We may also notice that in *Shriram Bearings Ltd.* v. *Collector of Central Excise, Patna,* (1997) 91 ELT 255 SC, this Court while considering the question as to whether where ball bearings fitted with accessories like snap rings, sleeve lock devices, oil seals etc. would still retain the character of ball bearings or can be subjected to payment of excise duty under a different head, held :

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A "2. The first issue relates to the value for the purpose of excise duty of ball bearings manufactured by the assessee. It was the case of the assessee that the ball bearings were complete when they consisted of the inner ring, the outer ring, the ball or rollers and the cage. Snap rings, sleeve lock devices, cup assemblies, oil seals, eccentric
B collars, dust shields, etc., were accessories and not necessary for the manufacture of the complete ball bearings. The Revenue, however, argued that the duty liability had to be determined at the time of clearance and the ball bearings had been actually removed from the appellant's factory fitted with accessories. Therefore, the composite value thereof was the excisable value of the ball bearings. The
C Tribunal upheld the contention of the Revenue on the basis that (i) the entire article was cleared as ball bearings; (ii) in the price list, invoices and catalogue, the assessee had quoted the item as ball bearings and the price for the entire article was stated; and (iii) no separate price was quoted for accessories and the ball bearings.

D 3. It is not the case of the Revenue that the snap rings, sleeve lock devices, etc., are parts of ball bearings. It is the Revenue's case that these are accessories but they were fitted to the ball bearings when the ball bearings were removed from the appellant's factory. The Tariff Entry at the relevant time (No. 49) read, "Rolling bearings,
E that is to say, ball or roller bearings, all sorts". Clearly, what fell under this entry were the ball bearings and not what, admittedly, are the accessories thereof. Accordingly, the conclusion of the Tribunal on this issue must be set aside."

F Once it is held that the computer is complete without the operating softwares, the question of adding the cost of software therewith would not arise since what is under assessment is only the computer. To the same effect is the judgment in *Photopone Industries Pvt. Ltd.* v. *CCF, Goa,* (1999)108 ELT 523.

G In *Philips India Ltd.* v. *Collector of Central Excise, Pune,* [1997] 6 SCC 31, this Court upon noticing the terms and conditions between the manufacturer and their dealers stating the same to be one as between principal and principal observed that making a deduction on this account was uncalled for as the advertisement which the dealer was required to make at its own cost benefited
H in equal degree the Appellant and the dealer. Similarly, with regard to after-

sales service, it was held that the same benefited not only the manufacturer but also the dealer. It was observed:

> "7. We think that in adjudicating matters such as this, the Excise authorities would do well to keep in mind legitimate business considerations."

CONCLUSION:

Computer and operative softwares are different marketable commodities. They are available in the market separately. They are classified differently. The rate of excise duty for computer is 16% whereas that of a software is nil. Accessories of a machine promote the convenience and better utilization of the machine but nevertheless they are not machine itself. The computer and software are distinct and separate, both as a matter of commercial parlance as also under the statute. Although a computer may not be capable of effective functioning unless loaded with softwares, the same would not tantamount to bringing them within the purview of the part of the computer so as to hold that if they are sold along with the computer their value must form part of the assessable value thereof for the purpose of excise duty. Both computer and software must be classified having fallen under 84.71 and 85.24 and must be subject to corresponding rates of duties separately. The informations contained in a software although are loaded in the hard disc, the operational software does not lose its value and is still marketable as a separate commodity. It does not lose its character as a tangible goods being of the nature of CD-ROM. A licence to use the information contained in a software can be given irrespective of the fact as to whether they are loaded in the computer or not. The fact that the manufacturers put different prices for the computers loaded with different types of operational softwares whether separately or not would not make any difference as regard nature and character of the 'computer'. Even if the Appellants in terms of the provisions of a licence were obliged to preload a software on the computer before clearing the same from the factory, the characteristic of the software cannot be said to have transformed into a hardware so as to make it subject to levy of excise duty along with computer while it is not under the Tariff Act.

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

A 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 B 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 de'hors the same. The legal text contained in Chapter C 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 D to levy a tax indirectly. In that view of the matter the decision in *PSI Data Systems* (supra) must be held to have correctly been rendered.

We, however, place on record that we have not applied our mind as regard the larger question as to whether the informations contained in a software would be tangible personal property or not or whether preparation E of such software would amount to manufacture under different statutes.

For the reasons aforementioned, we do not find any merit in the appeals of the Revenue which are dismissed accordingly. However, interlocutory applications are allowed. No Costs.

F K.K.T. Appeals dismissed.