A COMMISSIONER OF CENTRAL EXCISE, BELGAUM

v.

M/S. AKAY COSMETICS PVT. LTD.

APRIL 1, 2005

B [S.N. VARIAVA, DR. AR. LAKSHMANAN AND S.H. KAPADIA, JJ.]

Central Excise Act, 1944:

Sections 4(1)(a), 4(4)(c) and (d)—Excise duty—Manufacture of goods
C *by assessee—Selling price of 'a related person' considered as basis of assessable value—Deduction from the assessable value in respect of cost of secondary packing, turnover tax, octroi, boughtout items, freight, insurance and handling charges—Admissibility of—Held: Deduction for expenses for secondary packing, turnover tax, octroi and brought out items are admissible*
D *subject to assessee submitting proof of actual expenses—Deductions in respect of freight, insurance and handling charges are not admissible.*

Section 11-A—Differential duty—Demand of—Without issue of show cause notice—Permissibility—Held: Such demand is unsustainable.

E **The question for determination in the present case is whether the claim of assessee for deduction from the assessable value in respect of cost of secondary packing (special packing), freight, handling charges, insurance, octroi, turnover tax and cost of bought out items was admissible u/s 4(4) 4(4)(d) of Central Excise Act, 1944, if the selling price of 'a related person' as defined in Section 4(4)(c) was considered as the basis of the**
F **assessable value in terms of proviso(iii) to Section 4(1)(a) for the goods manufactured and cleared by the assessee.**

Partly allowing the appeal, the Court

HELD: 1.1. Deduction for expenses incurred on account of special
G **packing, turnover tax, octroi and bought out items was admissible subject to the assessee submitting proof of incurring actual expenses in respect of the above items before the Commissioner (Appeals). The department was right indisallowing deduction for expenses on account of freight, insurance and handling charges. [139-B]**

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Union of India and Ors. **v.** *Bombay Tyres International Pvt. Ltd.,* **(1984) 17 ELT 329 and** *Commissioner of Customs and Excise, Bangalore* **v.** *M/s. Sujata Textile Mills Ltd.,* **(2005) 181 ELT 379, relied on.** A

1.2. Once the goods become marketable in the individual packing of the assessee and removed from its factory gate, as such, the question as to whether the company alleged to be related was a "related person" or not became insignificant and consequently, the cost of special packing was not includible in the assessable value. [137-D-E] B

Commissioner of Central Excise, Allahabad etc. **v.** *M/s. Hindustan Safety Glass Works Ltd. etc.,* **(2005) 2 Scale 246, relied on.** C

Hindustan Polymers **v.** *Collector of Central Excise,* **(1989) 43 ELT 165, referred to.**

1.3. Applying the test of essentiality, it is found that the bought out items hand-gloves and measuring cups were not essential for delivery of the product in question in wholesale at the factory gate of the assessee. Hence the cost of the bought-out items was not includible in the assessable value during the period. However, it is clarified that although in principle the deduction for these items was admissible, on the facts of this case, the assessee was required to produce evidence indicating the price at which the assessee had bought these items during the entire period. The assessee was also required to prove the supply of these items with the product. Accordingly, the matter is remitted to the Commissioner (Appeals) to decide the quantification of deduction in respect of these two items for the period. [139-B-F] D E

1.4. In the matter of interpretation of tax laws, deductions are admissible in terms of the Section and not on the basis of general concepts. Hence, deduction for transport was confined to section 4(2). Similarly, under section 4(4)(d)(ii), the expression "value" was defined so as not to include excise duty, sales tax and other taxes. Similarly, section *4(4)(d)(i)* made an express provision for including the "cost of packing" in the determination of "value" for the purposes of excise duty provided it was for goods ordinarily sold in the course of wholesale trade. [132-D-E] F G

1.5. There is a difference between the nature of levy and the measure of the levy. The method of collection does not affect the essence of the duty. While the nature of excise duty was indicated by the fact that it was H

A imposed in respect of the manufacture, the point at which it was collected was when the article left the factory gate. Therefore the article became an object of assessment when it was sold by the manufacturer. The measure employed for assessing a tax must not be confused with the nature of tax. The factors such as volume, quantity, weight and price which enter into the measure of the tax have nexus with the manufacturing activity. [133-A-C]

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

1.6. In respect of Section 4(1)(a), the Parliament by Amendment Act C XXII of 1973 opted for "price" as the measure of tax, without altering the nature of the levy, and co-related it to "value" as defined under Section 4(4)(d). Hence, the article became the object of assessment only when it was cleared by the manufacturer at the factory gate. The "value" under Section 4 depended on price, place and person. The word "assessment" had to be read in the context of Section 4. The article becomes the object D of assessment only when it was sold. The only change brought above by the three provisos was that under given circumstances the price which would not be the "normal price" or the "value", was deemed to be the normal price for the purposes of assessment under Section 4. The implication of the manufacturer, the assessee and the buyer being related E to each other was that the price charged to the related person was presumed to be understated and to dissuade such sales, the legislature had introduced the said proviso as anti-evasion measure. Hence, to give deductions to the assessee, as claimed, would defeat the very object of the third proviso. Under all the three provisos, the manufacturer remained the assessee, the "object" of the assessment remained the same and neither F the identity of the manufacturer nor the identity of the excisable goods underwent any change. Even the place of removal remained unchanged. Under the third proviso, the basis of assessable value alone changed when the price of the related person was adopted as the basis of the valuation. Therefore, proviso (iii) did not break the nexus between price and value G under Section 4(1)(a) of the Act. [133-D-H; 134-A]

1.7. For the purposes of assessment, price and value are co-related under Section 4. "Price" was taken as a factor in determination of "value" under Section 4. However "deduction", though a part of assessment, had to be strictly construed. No deduction could be allowed if it was extended H beyond the levy. Every deduction from the "gross profit" was not

deduction. To constitute "deduction", the item had to fall within Section 4. For example, in cases falling under section 4(2), the cost of transportation was deductible. Similarly, deduction was admissible for taxes actually paid under section 4(4)(d)(ii). So also for trade discounts, deduction was allowable under section 4(4)(d)(ii). However, the Court in this connection had to examine the nature of deduction.

[134-B-C; 135-F-G]

Bombay Tyre International Pvt. Ltd., **(1984) 17 ELT 329, relied on.**

1.8. In tax accounting, there is a matching concept. Value as defined under section 4(4)(d) was co-related to the price at the factory gate. Therefore, costs (expenses) for factors up to the stage of "price" at the factory gate alone could be taken into account. Deduction is a matter of adjustment. It is a matter of set off. When the "value" for the purposes of section 4 was the price at the factory gate, the costs which are includible up to that stage alone were includible. Cost is the function of time and place under section 4(4)(d). Therefore, costs beyond that stage was not includible in the assessable value as it was not capable of being deducted from the price beyond the factory gate. If the price at the factory gate was the basis for the purposes of assessable value, deduction had to be confined to that price alone. Hence, secondary packing costs was not includible. Therefore, levy could not extend beyond the manufactured article itself. [136-B-D]

1.9. In the present case, section 4(2) was not applicable as a finding of fact stood recorded that price was known at the factory gate. This matter came under the third proviso to section 4(1)(a) and not under section 4(2) of the Act. [136-D-E]

2. The demand for differential duty for the period without issue of show-cause notice under section 11A was unsustainable. [139-E-F]

Union of India and Ors. **v.** *Madhumilan Syntex Pvt. Ltd.*, **(1988) 35 ELT 349, relied on.**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 3792-3803 of 2000.

From the Judgment and Order dated 6.1.2000 of the Central Excise, Customs and Gold (Control) Appellate Tribunal, South Zonal Bench at Madras

A in F.O. Nos. 60-71/2000 in A. No. E/389/97, e/390- 396/97 and E/1006-1009 of 1997/Md.

K. Swamy, Tufail A. Khan, Rupesh Kuamar, P. Parmeswaran and B. Krishna Prasad for the Appellant

B Anoop Choudhary and Rajesh Kumar with him for the Respondent.

The Judgment of the Court was delivered :

KAPADIA, J. If the selling price of M/s Nemaru "a related person" as defined in section 4(4)(c) of the Central Excise Act, 1944 (for short "the C 1944 Act") was considered as the basis of the assessable value in terms of proviso (iii) to section 4(1)(a) for the goods manufactured and cleared by M/s Akay Cosmetics Pvt. Ltd. (assessee herein), then was the claim for deduction from the assessable value in respect of cost of secondary packing (special packing), freight, handling charges, insurance, octroi, turnover tax and cost of bought-out items admissible under section 4(4)(d) of the 1944 Act, is the D question which arises for determination in these captioned civil appeals filed by the department under section 35-L (b) of the 1944 Act, as it then stood.

M/s Akay Cosmetics Pvt. Ltd., Hubli (hereinafter referred to for the sake of brevity as "the assessee") was the manufacturer of instant hair colour E under the brand name "Bigen", falling under chapter sub-heading 3305.90. The assessee filed its price list no.1/88-89 effective from 1.1.1988 in respect of the said product seeking approval of the assessable value @ Rs. 4.38 per bottle of 6 grams. Since the product was sold and marketed by M/s Nemaru Coiffure (for short "M/s Nemaru") @ Rs. 18.78 per bottle of 6 grams at Hubli, the Assistant Collector approved the price-list by fixing the assessable F value @ Rs. 7 per bottle of 6 grams for the period 1/88 to 8/88, vide order dated 29.8.1988. Against the said approval, the assessee had appealed before the Collector of Central Excise (Appeals), who remanded the case back to the Assistant Collector for determining the assessable value and to ascertain the wholesale price of M/s Nemaru at Hubli (hereinafter referred to for the sake G of brevity as "*de novo* adjudication").

Accordingly, in the *de novo* adjudication, the Assistant collector issued show-cause notice dated 21.3.1989 asking the assessee to show-cause as to why the assessable value of a bottle of instant hair colour of 6 grams should not be determined under section 4 based on wholesale price of M/s Nemaru, H Hubli, which, as stated above, effected the sale of the said product @ Rs.

18.78 per bottle of 6 grams. A

In the meantime, the Superintendent of Central Excise issued seven show-cause notices for the period 9/88 to 7/91 proposing revision of assessable value from Rs. 7 per bottle to Rs. 7.80 per bottle of 6 grams.

In the above *de novo* adjudication, the Assistant Collector, vide his B order dated 29.9.1991, revised the assessable value from Rs. 7 to Rs. 7.80 per bottle, not only in respect of the above show-cause notices covering the period 9/88 to 7/91 but also in respect of the clearances made by the assessee during the period 1/88 to 8/88 already covered under order dated 29.8.1988.

Aggrieved by the *de novo* order dated 29.9.1991, the assessee filed an C appeal before the Collector (Appeals), who vide his order dated 29.5.1992 remanded the case back to the Assistant Collector *inter alia* on the ground of lack of discussion on the point of disallowance of trade-discount and cost of accessories from the assessable value (hereafter referred to as the "second *de novo* adjudication).

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By order dated 11.1.1994, the Assistant Collector re-decided the issue against the assessee holding that M/s Nemaru, Hubli was the "related person" and the price of the bottle should be fixed taking into consideration the price at which M/s Nemaru sold the product at Hubli; that since the basis of the sale price was the price charged by M/s Nemaru, the assessee was not entitled to deduction for freight, insurance, octroi, selling and handling charges as E these expenses contributed to the selling price of M/s Nemaru. It was further held that the office of M/s Nemaru was in the compound of the assessee, M/s Akay Cosmetics Pvt. Ltd., Hubli and, therefore, the assessee was not entitled to deduction in respect of storage and transportation charges, as claimed. However, deduction was allowed to the assessee for payment of sales tax and F central excise duty. With regard to bought-out items, namely, the plastic measuring cups and hand-gloves, deduction was disallowed on the ground that the assessee had failed to prove that the gloves and measuring cups were supplied with their product (Bigen); that there was no evidence of bulk purchase of measuring cups; and lastly, that there was no evidence to show that these measuring cups were sold along with the product as accessories. G Accordingly, vide order dated 11.1.1994, the Assistant Collector confirmed the assessable value at Rs. 7.80 per bottle of 6 grams from 1/88 to 7/91 and claimed the differential duty of Rs. 5,60,166.63.

Being aggrieved by the decision dated 11.1.1994, the matter was carried in appeal by the assessee to the Commissioner (Appeals), who by his order H

A dated 30.8.1996 came to the conclusion that the assessee was not entitled to deduction for the cost of special packing as such cost was incurred by M/s Nemaru. By the said decision, it was further held that the assessee had failed to produce evidence indicating payment of additional tax and turnover tax and, therefore, the assessee was not entitled to deduction. Further, it was held that without the measuring cup, the product could not be used and, therefore, B the value of the measuring cup supplied with the carton was not deductible from the assessable value. By the said decision, the Commissioner (Appeals) disallowed deduction on account of freight, insurance, octroi, selling and handling charges. Accordingly, the Commissioner confirmed the demand raised by the department.

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Aggrieved by the decision, the assessee carried the matter in appeal to the Customs, Excise and Gold (Control) Appellate Tribunal (hereinafter referred to as "the tribunal). By the impugned decision dated 6.1.2000, the tribunal came to the conclusion that the demand for Rs. 1,59,606.22 towards the differential duty for the period 1/88 to 8/88 was not sustainable as there D was no show-cause notice given to the assessee raising the demand for the said period under section 11-A of the Act. On the question of the assessee and M/s Nemaru being related person under section 4(4)((c), the tribunal recorded the concession made on behalf of the assessee that the assessee and M/s Nemaru were related person up to 3/91.

E On the question of deduction, the tribunal held that the assessee was entitled to deduction for the special packing. In this connection, the tribunal found that the assessee was engaged in the manufacture of hair-dye, which was sold in bottles of 6 grams each, which bottles in turn were packed in individual cartons of 12 units. According to the tribunal, these individual F cartons constituted packing necessary for the marketability of the product at the factory gate. According to the tribunal, the individual cartons were placed in the bigger cartons by M/s Nemaru within its premises and not in the factory premises of the assessee. The tribunal found that even the cost of the bigger cartons was borne by M/s Nemaru and not by the assessee and, therefore, the tribunal held that the cost of the bigger cartons (special packing) G was not includible in the assessable value in the hands of the assessee. Lastly, the tribunal found that the cost of special packing was not recovered by the assessee from M/s Nemaru and, therefore, it was not includible in the assessable value.

By the impugned judgment, the tribunal allowed deduction under section H 4(4)(d)(ii) for turnover tax and octroi.

As regards bought-out items supplied with the bottles, the tribunal held that the measuring-cups and hand-gloves were not essential items to be used by the customers and, consequently, allowed deduction for the said bought-out items.

The tribunal also allowed deduction for freight, insurance as well as selling handling charges. However, there is no discussion for granting such deduction.

Lastly, the tribunal found, on examination of facts, that, on and after 1.4.1991, M/s Nemaru had undergone organizational changes; that, the assessee had filed its price-list with reference to a new agreement dated 2.1.1991 with M/s Nemaru and consequently, the tribunal remanded the matter back to the Commissioner (Appeals) to re-examine the demand for differential duty for the period from 4/91 to 3/93. This remand became necessary as the assessee submitted that M/s Nemaru was no longer a related person in terms of section 4(4)(c) in view of the above changes.

Aggrieved by the decision of the tribunal dated 6.1.2000, the department has come to this Court by filing these civil appeals under section 35-L (b) of the 1944 Act.

Shri K. Swamy, learned counsel for the department submitted that the assessee was not entitled to deduction for special packing, freight, insurance, handling charges, octroi, turnover tax and cost of bought-out items during the period 1/88 to 3/91. In this connection, it was urged that hair-dye bottles of 6 grams were sold by M/s Nemaru @ Rs. 18.78 per bottle. That, admittedly, during the aforestated period, M/s Nemaru was a related person under section 4(4)(c) of the Act. That, the department was, therefore, right in treating the said price of Rs. 18.78 per bottle as the basis of the assessable value under proviso (iii) to section 4(1)(a) of the Act and in the circumstances, the department was justified in disallowing the deductions in respect of the above items. According to the learned counsel, the department was right in holding that the deduction for the special packing done by M/s Nemaru was not admissible as M/s Nemaru was "a related person" under section 4(4)(c) and that in view of the third proviso to section 4(1)(a), the factory gate had shifted from the place of removal of the assessee to the premises of M/s Nemaru.

Learned counsel submitted that in view of the recent judgments of this Court, the assessee was entitled to deduction for turnover-tax and octroi

A subject to the assessee's producing proof of payment of taxes during the relevant period.

Learned counsel for the department next contended that the assessee was not entitled to deduction on bought-out items. In this connection, it was urged that under the literature supplied to the customer, dosage of hair-dye
B of prescribed measure had been mentioned and, therefore, the measuring-cup was not only meant to facilitate the user in pouring out the stipulated quantity of the dye but it was an essential part of the product as the customer was required to use the prescribed dosage of the product. It was urged that without the measuring cup, the customer was not in a position to apply the prescribed
C dosage of hair-dye and, therefore, the cost of the measuring cup was includible in the assessable value. The same argument was also applied to hand-gloves. That, in any event, the assessee had failed to produce evidence regarding purchase of hand-gloves and measuring cups during the aforestated period 1/88 to 3/91. That, there was no evidence of supply of these items with the product during the said period.

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Lastly, it was urged that the tribunal had erred in remanding the matter back to the Commissioner (Appeals) in respect of the differential duty demanded for the period 4/91 to 3/93, as M/s Nemaru continued to be a related person even after 1.4.1991. It was submitted that the new contract dated 2.1.1991 was a pretence, that there was no change in the constitution
E of the firms and that there was no evidence of the new pattern of pricing on and after 1.4.1991. In the circumstances, it was submitted that the tribunal should not have remitted the matter.

Learned counsel next contended that the tribunal had erred in allowing
F deduction in respect of freight, insurance and handling charges. In this connection, it was urged that the actual amount spent on the above heads, even if admissible, was not proved. That, the tribunal erred in allowing deduction without proof of actual expenditure.

Learned counsel next submitted that the tribunal had erred in setting
G aside the demand for differential duty under section 11A for the period 1/88 to 8/88 on the ground that there was no show-cause notice given to the assessee for that period. That, the tribunal had erred in holding that the assessee was entitled to the show cause notice. That, the tribunal had taken hyper technical view in setting aside the demand.

H Shri Anoop Chaudhary, learned senior counsel appearing on behalf of

the assessee submitted that during the period 1/88 to 3/91, M/s Nemaru admittedly was a related person to the assessee; that during this period, M/s Nemaru was almost the sole buyer of the said product; that as the case came under proviso (iii) to section 4(1)(a), the factory gate of the assessee had shifted to the deemed factory gate of M/s Nemaru; that when the price of M/s Nemaru was taken as the basis for determination of the assessable value, the department had erred in disallowing deduction in respect of freight, insurance, handling charges from the assessable value. In this connection, it was further urged that it was not open to the department to adopt the price of M/s Nemaru as the basis of assessable value and at the same time deny deduction therefrom on the basis of the clearance of the product from the factory gate of the assessee. That, in any event, in respect of special packing, the assessee was entitled to deduction as the said packing was done by M/s Nemaru after clearance of the product from the factory gate of the assessee in individual cartons. That, the cost of the special packing was borne by M/s Nemaru. That, this special packing was done in the premises of M/s Nemaru. In the circumstances, learned counsel submitted that the cost of the special packing was not includible in the assessable value.

As regards, the bought-out items, it was submitted that the measuring cups and hand-gloves were accessories and were not essential parts of the product. A user of the hair-dye could use the product even without the measuring cup and the hand-gloves and in the circumstances, the cost of these bought-out items was also not includible in the assessable value.

Lastly, on behalf of the assessee, it was urged that on 2.1.1991, the assessee had entered into a new contract with M/s Nemaru; that after 2.1.1991, the organizational set-ups of both the entities had undergone a change and in the circumstances, M/s Nemaru had ceased to be a related person under section 4(4)(c) of the Act. Learned counsel submitted that on 8.4.1991, the assessee had submitted its price-list w.e.f. 1.4.1991 on the basis of the new contract and the new set-up and, therefore, the tribunal was right in remanding the matter back to the Commissioner (Appeals) for reconsideration of the demand for differential duty in respect of the period 4/91 to 3/93.

The key question to be answered is : how and when the assessable value of the manufactured product is to be determined?

To answer the above question, we quote hereinbelow section 4 of the 1944 Act (as it then stood):

A "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 B 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:

Provided that—

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(i) where, in accordance with the normal practice of the wholesale trade in such goods, such goods are sold by the assessee at different prices to different classes of buyers (not being related persons) each such price shall, subject to the existence of the other circumstances specified in clause (a), D be deemed to be the normal price of such goods in relation to each such class of buyers;

(ii) where such goods are sold by the assessee in the course of wholesale trade for delivery at the time and place of removal at a price fixed under any law for the time being in force or E at a price, being the maximum, fixed under any such law, then, notwithstanding anything contained in clause (iii) of this proviso, the price or the maximum price, as the case may be, so fixed, shall, in relation to the goods so sold, be deemed to be the normal price thereof;

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(iii) where the assessee so arranges that the goods are generally not sold by him in the course of wholesale trade except to or through a related person, the normal price of the goods sold by the assessee to or through such related person shall be deemed to be the price at which they are ordinarily sold G by the related person in the course of wholesale trade at the time of removal, to dealers (not being related persons) or where such goods are not sold to such dealers, to dealers (being related persons) who sell such goods in retail;

(b) where the normal price of such goods is not ascertainable for the

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reason that such goods are not sold or for any other reason, the nearest ascertainable equivalent thereof determined in such manner as may be prescribed. A

(2) Where, in relation to any excisable goods the price thereof for delivery at the place of removal is not known and the value thereof is determined with reference to the price for delivery at a place other than the place of removal, the cost of transportation from the place of removal to the place of delivery shall be excluded from such price. B

(3) The provisions of this section shall not apply in respect of any excisable goods for which a tariff value has been fixed under sub-section (2) of Section 3. C

(4) *For the purposes of this section,-*

(a) "assessee" means the person who is liable to pay the duty of excise under this Act and includes his agent;

(b) "place of removal" means D

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

(ii) a warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty, from where such goods are removed; E

(c) "related person" means a person who is so associated with the assessee that they have interest, directly or indirectly, in the business of each other and includes a holding company, a subsidiary company, a relative and a distributor of the assessee, and any sub-distributor of such distributor. F

Explanation. In this clause "holding company", "subsidiary company" and "relative" have the same meanings as in the Companies Act, 1956 (1 of 1956).

(d) "value" in relation to any excisable goods, G

(i) where the goods are delivered at the time of removal in a packed condition, includes the cost of such packing except the cost of the packing which is of a durable nature and is returnable by the buyer to the assessee.

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A *Explanation.*—In this sub-clause "packing" means the wrapper, container, bobbin, pirn, spool, reel or warp beam or any other thing in which or on which the excisable goods are wrapped, contained or wound;

(ii) does not include the amount of the duty of excise, sales tax B and other taxes, if any, payable on such goods and, subject to such rules as may be made, the trade discount (such discount not being refundable on any account whatsoever) allowed in accordance with the normal practice of the wholesale trade at the time of removal in respect of such goods sold or contracted for sale;

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Explanation.—For the purposes of this sub-clause, the amount of the duty of excise payable on any excisable goods shall be the sum total of

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

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

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

(i) in a case where a notification or order providing for any exemption (not being an exemption for giving credit with respect to, or reduction of duty of excise under such Act on F such goods equal to, any duty of excise under such Act, or the additional duty under Section 3 of the Customs Tariff Act, 1975 (51 of 1975), already paid on the raw material or component parts used in the production or manufacture of such goods) from the duty of excise under such Act is for the time being in force, the duty of excise computed with G reference to the rate specified in such Act in respect of such goods as reduced so as to give full and complete effect to such exemption; and

(ii) in any other case, the duty of excise computed with reference to the rate specified in such Act in respect of such

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goods. A

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

Parliament amended the Central Excise Act, 1944 by Act XXII of 1973. Clause (a) of section 4(1) spoke of the "value" being the "normal price", that is to say, the price at which such goods were ordinarily sold to a buyer in the course of wholesale trade for delivery *at the time and place of removal*, where the buyer was not a related person and price was the sole consideration for the sale. In cases of intermediate products, where the normal price was not ascertainable for the reason that such goods were not sold or for any other reason, like captive consumption, section 4(1)(b) provided that the nearest ascertainable equivalent shall be the "value" of the excisable product for the purpose of charging excise duty. Under section 4(4)(b), the phrase "place of removal" was defined not merely as "the factory or any other place or premises of production or manufacture" from where such goods are removed but it also covered "a warehouse" from where such goods are removed. However, three circumstances were mentioned in the three provisos to section 4(1)(a) under which "value" could vary. Proviso (i) recognized that in the normal practice the same class of goods could be sold by the assessee at different prices to different classes of buyers; in that event each such price was deemed to be the "normal price" of such goods in relation to such buyers. Proviso (ii) provided that where the goods were sold in wholesale at a price statutorily fixed then such price was deemed to be the "normal price". Under the third proviso, where the goods were sold through a "related person" as defined under section 4(4)(c), the normal price was the price at which the goods were sold by the related person in the course of wholesale trade *at the time of removal* to the dealers. B C D E F

Under section 4(2), it was provided that where the price of the excisable product for delivery at the place of removal *was not known* and the value was determined with reference to the price for delivery at a place other than the place of removal, the cost of transportation from the place of removal to the place of delivery had to be excluded from such a price. The reason is important. Section 4(2) is a residuary section and applied only to cases where the price at the place of removal was not known and the taxable value of the excisable product had to be determined with reference to the price for delivery (sale) at a place other than the price of removal. Under section 4(2), the cost of transportation from the place of removal to the place of delivery was G H

A deductible, provided that the assessable value (taxable value) was not known at the factory gate and had to be determined with reference to another place. If the goods were manufactured at place "X" but the assessable value was determined with reference to place "Y", the cost of transportation had to be deducted. The answer is given in the judgment of this Court in *Union of India and Ors.* v. *Bombay Tyre International Ltd.*, reported in AIR (1984) SC B 420, paras 50 and 51. Under the Excise Act, price was co-related to the value and not only to the manufacturing cost. When the assessable value was determined with reference to place "Y" in the above illustration, it did not represent the "normal price" at the factory gate because the price at place "Y" was higher than the "normal price" on account of transportation cost. C Hence deduction. The object of such deduction was to bring down the price at place "Y" to derive the "normal price" at place "X", as the legislature intended to fix the assessable value on the basis of the price for delivery at the factory gate. Ultimately, the excisable article became the object of assessment when it was sold for a price in the wholesale trade at the factory gate.

D

In the matter of interpretation of tax laws, deductions are admissible in terms of the section and not on the basis of general concepts. Hence, deduction for transport was confined to section 4(2). Similarly, under section 4(4)(d)(ii), the expression "value" was defined so as not to include excise duty, sales tax and other taxes. Similarly, section 4(4)(d)(i) made an express provision for E including the "cost of packing" in the determination of "value" for the purposes of excise duty provided it was for goods ordinarily sold in the course of wholesale trade.

As stated above, it has been contended on behalf of the assessee that F when the basis of the assessable value was the price of the related person, namely, M/s Nemaru in this case, the department had erred in denying to the assessee the deduction for expenses incurred by the assessee towards freight, insurance and handling charges. It was urged that if the price at which M/s Nemaru effected sales in the course of wholesale trade was the basis for determination of the assessable value under section 4(1)(a) read with the G proviso (iii) then the assessee was entitled to deduction for the said three items, particularly when the goods are delivered from the premises of M/s Nemaru and not from the factory gate of the assessee. It was urged that the department cannot fix the assessable value on the basis of the price charged by the related person and at the same time refuse deductions on the basis of H the pricing at the factory gate of the assessee.

We do not find any merit in the above argument advanced on behalf of the assessee. As held by this Court in *Union of India and Ors.* v. *Bombay Tyre International Ltd.*, reported in AIR (1984) SC 420, there is a difference between the nature of levy and the measure of the levy. The method of collection does not affect the essence of the duty. While the nature of excise duty was indicated by the fact that it was imposed in respect of the manufacture, the point at which it was collected was when the article left the factory gate. *Therefore, the article became an object of assessment when it was sold by the manufacturer.*

It has now been recognized that the measure employed for assessing a tax must not be confused with the nature of tax. The factors such as volume, quantity, weight and price which enter into the measure of the tax have nexus with the manufacturing activity.

Applying the above tests to section 4(1)(a), it is clear that the Parliament opted for "price" as the measure of tax, without altering the nature of the levy, and co-related it to "value", as defined under section 4(4)(d). Hence, the article became the object of assessment only when it was cleared by the manufacturer at the factory gate. The circumstance that the article becomes the object of assessment when it was sold by the manufacturer, as held in the case of *Bombay Tyre* (supra), remained unchanged even under the three provisos to section 4(1)(a). The "value" under section 4 depended on price, place and person. The word "assessment" had to be read in the context of section 4. The article becomes the object of assessment only when it was sold. The only change brought above by the three provisos was that under given circumstances the price which would not be the "normal price" or the "value", was deemed to be the normal price for the purposes of assessment under section 4. For example, under the proviso (ii) to section 4(1)(a), the statutory price was deemed to be the normal price for purposes of assessment. Similarly, in the case of proviso (iii), the price charged by the related person was deemed to be the normal price. The reason was obvious. The implication of the manufacturer, the assessee and the buyer being related to each other was that the price charged to the related person was presumed to be understated and to dissuade such sales, the legislature had introduced the said proviso as anti-evasion measure. Hence, to give deductions to the assessee, as claimed, would defeat the very object of the third proviso. Under all the three provisos, the manufacturer remained the assessee, the "object" of the assessment remained the same and neither the identity of the manufacturer nor the identity of the excisable goods underwent any change. Even the place of removal

A remained unchanged. Under the third proviso, the basis of assessable value alone changed when the price of the related person was adopted as the basis of the valuation. Therefore, proviso (iii) did not break the nexus between price and value under section 4(1)(a) of the Act.

Now coming to the question of deduction, we may point out that for the B purposes of assessment, price and value are co-related under section 4. As stated above, "price" was taken as a factor in determination of "value" under section 4. However, "deduction", though a part of assessment, had to be strictly construed. The reason was obvious. No deduction could be allowed if it was extended beyond the levy. In this connection, we may usefully quote C paragraph 53 of the judgment of this Court in the case of *Bombay Tyre* (supra) in the context of claim for deduction in respect of cost of primary packing which reads as under:-"

> 53. The case in respect of the cost of packing is somewhat complex. The new Section 4(4)(d)(i) has made express provision for including D the cost of packing in the determination of "value" for the purpose of excise duty. Inasmuch as the case of the parties is that the new Section 4 substantially reflects the position obtaining under the unamended Act, we shall proceed on the basis that the position in regard to the cost of packing is the same under the Act, both before and after the amendment of the Act. Section 4(4)(d)(i) reads:
>
> E
>
> (4) *For the purposes of this section,*
>
> (d) "value" in relation to any excisable goods,
>
> (i) where the goods are delivered at the time of removal in a packed condition, includes the cost of such packing except F the cost of the packing which is of a durable nature and is returnable by the buyer to the assessee.
>
> *Explanation.*—In this sub-clause "packing" means the wrapper, container, bobbin, pirn, spool, reel or warp beam or any other thing in which or on which the excisable goods are G wrapped, contained or wound."

It is relevant to note that the packing, of which the cost is included, is the packing in which the goods are wrapped, contained or wound when the goods are delivered at the time of removal. In other words, it is the packing in which it is ordinarily sold in the course of wholesale H

trade to the wholesale buyer. The degree of packing in which the excisable article is contained will vary from one class of articles to another. From the particulars detailed before us by the assessees, it is apparent that the cost of primary packing, that is to say, the packing in which the article is contained and in which it is made marketable for the ordinary consumer, for example a tube of toothpaste or a bottle of tablets in a cardboard carton, or biscuits in a paper wrapper or in a tin container, must be regarded as falling within Section 4(4)(d)(i). That is indeed conceded by learned counsel for the assessee. It is the cost of secondary packing which has raised serious dispute. Secondary packing is of different grades. There is the secondary packing which consists of larger cartons in which a standard number of primary cartons (in the sense mentioned earlier) are packed. The large cartons may be packed into even larger cartons for facilitating the easier transport of the goods by the wholesale dealer. Is all the packing, no matter to what degree, in which the wholesale dealer takes delivery of the goods to be considered for including the cost thereof in the "value"? Or does the law require a line to be drawn somewhere? We must remember that while packing is necessary to make the excisable article marketable, *the statutory provision calls for strict construction because the levy is sought to be extended beyond the manufactured article itself.* It seems to us that the degree of secondary packing which is necessary for putting the excisable article in the condition in which it is generally sold in the wholesale market at the factory gate is the degree of packing whose cost can be included in the "value" of the article for the purpose of the excise levy. To that extent, the cost of secondary packing cannot be deducted from the wholesale cash price of the excisable article at the factory gate."

As stated above, the word "deduction" in terms of section 4(4)(d) had to be strictly construed. Every deduction from the "gross profit" was not deduction. To constitute "deduction", the item had to fall within section 4. For example, in cases falling under section 4(2), the cost of transportation was deductible. Similarly, deduction was admissible for taxes actually paid under section 4(4)(d)(ii). So also for trade discounts, deduction was allowable under section 4(4)(d)(ii). However, the Court in this connection had to examine the nature of deduction. For example, under proviso (i) to section 4(1)(a), an assessee was entitled to file separate price-lists for the Government, to whom concessional price is charged, *vis-a-vis* Other Dealers. In such a case, it was not open to the assessee to treat the price difference as a trade discount under

A section 4(4)(d)(ii). This was because under the first proviso to section 4(1)(a) the price charged to the Government was treated by a deeming fiction to be "normal price".

In tax accounting, we have what is called a matching concept. As stated above, value as defined under section 4(4)(d) was co-related to the price at B the factory gate. Therefore, costs (expenses) for factors up to the stage of "price" at the factory gate alone could be taken into account. Deduction is a matter of adjustment. It is a matter of set off. When the "value" for the purposes of section 4 was the price at the factory gate, the costs which are includible up to that stage alone were includible. Cost is the function of time C and place under section 4(4)(d). Therefore, costs beyond that stage was not includible in the assessable value as it was not capable of being deducted from the price beyond the factory gate. If the price at the factory gate was the basis for the purposes of assessable value, deduction had to be confined to that price alone. Hence, secondary packing costs was not includible. Therefore, as stated above, levy could not extend beyond the manufactured D article itself.

Lastly, in the present case, section 4(2) was not applicable as a finding of fact stood recorded that price was known at the factory gate. This matter came under the third proviso to section 4(1)(a) and not under section 4(2) of the Act.

E

For the aforestated reasons, we hold that the department was right in disallowing deduction for expenses in respect of freight, insurance and handling charges from the assessable value for the period 9/88 to 3/91.

Now coming to the question of deduction claimed by the assessee on F account of payment of octroi and turnover tax, we are in agreement with the view expressed by the tribunal in the impugned judgment that the expenses for these items were deductible from the assessable value under section 4(4)(d)(ii).

G In the case of *Union of India and Ors.* v. *Bombay Tyres International Pvt. Ltd.*, reported in (1984) 17 ELT 329, this Court has taken the view that sales tax, turnover tax, surcharge on sales tax and other local taxes are deductible from the sale price in order to arrive at the assessable value.

In the case of *Commissioner of Customs & Excise, Bangalore* v. *M/s* H *Sujata Textile Mills Ltd.* reported in (2005) 181 ELT 379, this Court [speaking

through one of us, Variava, J.] has held that under section 4(4)(d)(ii), the value will not include duty of excise, sales tax and other local taxes payable on the goods. However, it was clarified by this Court that in the matter of deduction, the department while granting deduction can ask for proof indicating actual payment of tax.

Accordingly, we hold that the assessee was entitled to deduction on account of expenses incurred towards the octroi and turnover tax, subject to the assessee's producing requisite proof of actual payment during the entire period 9/88 to 3/91.

As regards the special packing, the facts brought on record show that the assessee was the manufacturer of hair-dyes. That, the assessee had sold the product in bottles, each containing 6 grams of powder. These bottles in turn were packed in an individual cartons of 12 units. These individual cartons were manufactured in the factory of the assessee. That, the said bottles were packed in the individual cartons and delivered at the factory gate to M/s Nemaru. After taking delivery, M/s Nemaru packed the product in bigger cartons in its premises at its own cost. That, once the goods become marketable in the individual packing of the assessee and removed from its factory gate, as such, the question as to whether M/s Nemaru was a "related person" or not became insignificant and consequently, the cost of special packing was not includible in the assessable value. [See: *Hindustan Polymers* v. *Collector of Central Excise,* reported in (1989) 43 ELT 165].

In the case of *Commissioner of Central Excise, Allahabad etc.* v. *M/s Hindustan Safety Glass Works Ltd.* etc. reported in (2005) 2 Scale 246, this Court [speaking through one of us, Variava, J.], observed:

> "14. The question is not for what purpose the packing is done. The test is whether the packing is done in order to put the goods in a marketable condition. Another way of testing would be to see whether the goods are capable of reaching the market without the type of packing concerned. Each case would have to be decided on its own facts. It must also be remembered that Section 4(4)(d)(i) specifies that the cost of packing is includible when the packing is not of a durable nature and returnable to the buyer. Thus, the burden to show that the costs of packing is not includible is always on the assessee. Also under Section 4(a) the value is to be the normal price at which such goods are ordinarily sold in the course of wholesale trade for

delivery at time and place of removal. Thus, at this stage, it would be convenient to refer to the case of *A.K. Roy and Anr.* v. *Voltas Limited* reported in (1977) 1 ELT J177 wherein the concept of wholesale market has been explained in the following terms:-

> 8. We do not think that for a wholesale market to exist, it is necessary that there should be a market in the physical sense of the term where articles of a like kind or quality are or could be sold or that the articles should be sold to so-called independent buyers.
>
> 9. Even if it is assumed that the latter part of s. 4(a) proceeds on the assumption that the former part will apply only if there is a wholesale market at the place of manufacture for articles of a like kind and quality, the question is what exactly is the concept of wholesale market in the context. A wholesale market does not always mean that there should be an actual place where articles are sold and bought on a wholesale basis. These words can also mean that potentiality of the articles being sold on a wholesale basis. So, even if there was no market in the physical sense of the term at or near the place of manufacture where the articles of a like kind and quality are or could be sold, that would in any way affect the existence of market in the proper sense of the term provided the articles themselves could be sold wholesale to traders, even though the articles are sold to them on the basis of agreements which confer certain commercial advantages upon them. In other words, the sales to the wholesale dealers did not cease to be wholesale sales merely because the wholesale dealers had entered into agreement with the respondent under which certain commercial benefits were conferred upon them is consideration of their undertaking to do service to the articles sold, or because of the fact that no other person could purchase the articles wholesale from the respondent. We also think that the application of clause (a) of s. 4 of the Act does not depend upon any hypothesis to the effect that at the time and place of sale, any further articles of like kind and quality have been sold. If there is an actual price for the goods themselves at the time and the place of sale and if that is a "wholesale cash price", the clause is not inapplicable for want of sale of other goods of a like kind and quality."

Consequently, the department is directed to allow deduction from the assessable value in respect of special packing for the period 9/88 to 3/91. A

Lastly, as regards bought-out items, namely, hand-gloves and plastic measuring cups, we find no infirmity in the impugned judgment. In this connection, we reiterate that initially the assessee used to supply plastic measuring cups and hand-gloves with the product for use of the product by the user. Subsequently, the supply of hand-gloves stood discontinued. Applying the test of essentiality, we find that the hand-gloves and measuring cups were not essential for delivery of the product in question in wholesale at the factory gate of the assessee. As held by the tribunal in its impugned judgment herein, hand-gloves were used as protective cover by the users. That, the said product was capable of being used without the hand-gloves. That, the measuring cup was not essential for the simple reason that the liquid was capable of being applied without the measuring cup. In the circumstances found by the tribunal on evidence, we hold that the cost of the said bought-out items was not includible in the assessable value during the period 9/88 to 3/91. However, we need to clarify, that, although in principle the deduction for these two items was admissible, on the facts of this case, the assessee was required to produce evidence indicating the price at which the assessee had bought these items during the entire period 9/88 to 3/91. The assessee was also required to prove the supply of these items with the product. Accordingly, we remit the matter to the Commissioner (Appeals) to decide the quantification of deduction in respect of these two items for the above period. B C D E

Lastly, we find that the demand for differential duty for the period 1.1.1988 to 31.8.1988 without issue of show-cause notice under section 11-A, was unsustainable. F

In the case of *Union of India and Ors.* v. *Madhumilan Syntex Pvt. Ltd.*, reported in (1988) 35 ELT 349, this Court held that the demand raised without notice was invalid. That, section 11-A clearly proceeded to say that prior show-cause notice must be issued to the person against whom any demand on grounds of short-levy or non-levy was proposed and, therefore, post-facto show-cause notice cannot be regarded as adequate in law. G

Applying the said judgment to the facts of the present case, we hold that the demand for differential duty for the period 1/88 to 8/88 without issue of show-cause notice under section 11A was unsustainable. Absence of show-cause notice was not disputed. In the circumstances, the tribunal was right in setting aside the demand for differential duty amounting to Rs. 1,59,606.22 H

A for the said period. Consequently, demand made for the said period under any of the seven items is set aside.

To sum up, we hold, that, deduction for expenses incurred on account of special packing, turnover tax, octroi and bought-out items was admissible for the period 9/88 to 3/91, subject to the assessee submitting proof of incurring
B actual expenses in respect of the above items before the Commissioner (Appeals). That, the department was right in disallowing deduction for expenses on account of freight, insurance and handling charges for the period 9/88 to 3/91.

C We also do not see any reason to interfere with the impugned order of the tribunal remanding the matter to the Commissioner (Appeals) to decide afresh the question of "related person" during the period 4/91 to 3/93, in view of the changed circumstances indicated hereinabove.

Accordingly, the appeals filed by the department are partly allowed,
D with no order as to costs.

K.K.T. Appeal dismissed.