Supreme Court of India
Union Of India & Ors. Etc. Etc vs Bombay Tyre International Ltd. ... on 7 October, 1983
Equivalent citations: 1984 SCR (1) 347, 1983 SCALE (2)449
Author: R Pathak
Bench: Pathak, R.S.

PETITIONER:
UNION OF INDIA & ORS. ETC. ETC.

Vs.

RESPONDENT:
BOMBAY TYRE INTERNATIONAL LTD. ETC. ETC.

DATE OF JUDGMENT07/10/1983

BENCH:
PATHAK, R.S.
BENCH:
PATHAK, R.S.
BHAGWATI, P.N.
SEN, AMARENDRA NATH (J)

CITATION:
1984 SCR (1) 347 1983 SCALE (2)449

ACT:

Central Excises and Salt Act, 1944 (1 of 1944)-Old s. 4 prior to and new s. 4 after amendment by the Central Excises and Salt (Amendment) Act, 1973 (22 of 1973)-Interpretation of-Section validly enacted-Scheme and object of old s. 4 and new s. 4 are same. Mode of determining value of an article for excise levy-Value-Whether can be confined to manufacturing cost and manufacturing profit only-Whether post manufacturing expenses like freight, insurance and packing etc. can be included in the value of article.

Central Excises and Salt Act , 1944-S. 4 (4) (c)-Definition of "related person"-Scope of. Definition not unduly wide-Does not suffer from constitutional infirmity. Words "a relative and a distributor of the Assessee" do not refer to any distributor but only to a distributor who is a relative of the assessee within the meaning of the Companies Act, 1956.

Central Excises and Salt Act , 1944-S. 4 (4) (d)-'Value'-Definition of-Scope of. Packing-Primary, secondary and special secondary-Cost of special secondary packing to be excluded from value.

Constitution of India Art.246, Schedule 7, List 1. Entry 84-Concept of duty of excise-What is.

HEADNOTE:

Sub-sec. (1) of sec. 3 of the Central Excises and Salt Act, 1944 provided that duties of excise shall be levied and collected on all excisable goods, other than salt which were produced or manufactured in India at the rates set-forth in the First Schedule. Sub-sec. (2) of sec. 3 empowered the Central Government to fix, for the purpose of levying the duties, tariff values of the articles enumerated in the First Schedule as chargeable with duty ad valorem. Section 4 of the Act provided that the value of an article for the purposes of duty shall be (a) the wholesale cash price for which an article of the like kind and quality was sold or was capable of being sold at the time removal of the article chargeable with duty from the factory or any other premises of manufacture or production for delivery at the place of manufacture or production or (b) where such price was not ascertainable, the price at which an article of the like kind and quality was sold or was capable of being sold at the time of the removal of the article chargeable with duty from such factory or other premises for delivery at the place of manufacture or production. With the increase in the ad valorem levies in the Central Excise Tariff the operation of sec. 4 presented certain practical difficulties; some of which were prominently brought out in the judgment of this court in A.K. Roy and Anr. v. Voltas Ltd, [1973] 2 S.C.R. 1089. In that case, the Court inter alia said that

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the real value of an article for the purposes of the excise levy would include only the manufacturing cost plus manufacturing profits. In order to overcome various difficulties, the original sec. 4 of the Act was substituted by a new sec. 4 by Act 22 of 1973. The new sec. 4 provided that the value of an article for the purposes of duty shall, subject to the other provisions of this section, be deemed to be the normal price thereof that is to say, the price at which such goods were 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 was not a related person and the price was the sole consideration for the sale and where the normal price of such goods was not ascertainable for the reason that such goods were not sold or for any other reason, the nearest ascertainable equivalent thereof determined in such manner as may be prescribed. Clauses (c) and (d) of sub-sec. (4) of sec. 4 defined "related person" and "value" respectively.

The Central issue which arose between the Revenue and the assessees in these appeals was whether the value of an article for the purposes of the excise levy must be determined by reference exclusively to the manufacturing cost and the manufacturing profit of the manufacturer as contended by the assessees or should be represented by the entire wholesale price charged by the manufacturer which consisted of not merely his manufacturing cost and his

manufacturing profit but included "post manufacturing expenses" and "post manufacturing profit" arising between the completion of the manufacturing process and the point of sale by the manufacturer. The other points of dispute were principally in respect of the connotation of the expression 'related person' in the new s.4 as well as the nature of the deductions which could be claimed by the assessee as post manufacturing expenses and post manufacturing profit from the price for the purpose of determining the "value".

HELD: The question whether the value of an article for the purpose of the excise levy must be confined to the manufacturing cost and the manufacturing profit in respect of the article has to be answered in the negative. While the levy of excise duty is on the manufacture or production of goods, the stage of collection need not in point of time synchronize with the completion of the manufacturing process. While the levy in this country has the status of a constitutional concept, the point of collection is located where the statute declares it will be. [384 H, 364 F-G]

The Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938, [1938-39] F.C.R. 18; The Province of Madras v. Messers Boddu Paidanna and Sons, [1942] F.C.R. 90, 101; Governor-General in Council v. Province of Madras, [1945] F.C.R. 179; R.C. Jall v. Union of India, [1962] Suppl. 3 S.C.R. 436; In Re. The Bill To Amend s. 20 of the Sea Customs Act, 1878, and s. 3 of the Central Excises And Salt Act, 1944, [1964] 3 S.C.R. 787; Union of India v. Delhi Cloth & General Mills, [1963] Suppl. 1 S.C.R. 586; M/S Guruswamy & Co. Etc. v. State of Mysore & Ors.,[1967] 1 S.C.R. 548; and South Bihar Sugar Mills Ltd. etc. v. Union of India & Ors.,[1968] 3 S.C.R. referred to.

The levy of a tax is defined by its nature, while the measure of the tax may be assessed by its own standard. It is true that the standard adopted as the
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measure of the levy may indicate the nature of the tax but it does not necessarily determine it. When enacting a measure to serve as a standard for assessing the levy the legislature need not contour it along lines which spell out the character of the levy itself. A broader based standard of reference may be adopted for the purpose of determining the measure of the levy. Any standard which maintains a nexus with the essential character of the levy can be regarded as a valid basis for assessing the measure of the levy. The original s. 4 and the new s. 4 of the Central Excises and Salt Act satisfy this test. [366 C; 367 D-F]

Ralla Ram v. The Province of East Punjab, [1948] F.C.R. 207; Atma Ram Budhia v. State of Bihar , A.I.R. 1952 Patna 359; M/s Sainik Motors, Jodhpur and Ors. v. The State of Rajasthan, [1962] 1 S.C.R. 517; D.C. Gouse and Co. etc. v. The State of Kerala & Anr. etc., [1980] 1 S.C.R. 804; Searvai's Constitutional Law of India, Second Edition. Vol. 2 at page 1258; Re. A Reference under the Government of

Ireland Act, 1920 and Sec. 3 of the Finance Act (Northern Ireland), 1934, L.R. 1936 A.C. 352; R.R. Engineering Co. v. aila Parished, Bareilly & Anr., [1980] 3 S.C.R. 1; and The Hingir-Rampur Coal Co., Ltd. and Ors. v. The State of Orissa and Ors., [1961} 2 S.C.R. 537 referred to.

It was open to the legislature to specify the measure for assessing the levy. The legislature has done so. In both the old s. 4 and the new s. 4 the price charged by the manufacturer on a sale by him represents the measure. Price and sale are related concepts, and price has a definite connotation. The "value" of the excisable article has to be computed with reference to the price charged by the manufacturer, the computation being made in accordance with the terms of s. 4. [368 D-E]

On a true construction of its provisions in the context of the statutory scheme the old s. (4) (a) should be considered as applicable to the circumstances of the particular assessee himself and not of manufacturers generally.[381 C-D]

Pursuant to the old s. 4 (a) the value of an excisable article for the purpose of the excise levy should be taken to be the price at which the excisable article is sold by the assessee to a buyer at arm's length in the course of wholesale trade at the time and place of removal. Where, however, the excisable article is not sold by the assessee in wholesale trade but, for example, is consumed by the assessee in his own industry the case is one where under the old s. 4 (a) the value must be determined as the price at which the excisable article or an article of the like kind and quality is capable of being sold in wholesale trade at the time and place of removal. [376 F-H]

Where the excisable article or an article of the like kind and quality is not sold in wholesale trade at the place of removal, that is, at the factory gate, but is sold in the wholesale trade at a place out side the factory gate, the value should be determined as the price at which the excisable article is sold in the wholesale trade at such place, after deducting therefrom the cost of transportation of the excisable article from the factory gate to such place. [376 H; 77 A-B]

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Where the wholesale price of the excisable article or an article of the like kind and quality is not ascertainable, then pursuant to the old s. 4 (b) the value of the excisable article shall be the price at which the excisable article or an article of the like kind and quality is sold or is capable of being sold by the assessee at the time and place of removal or if the excisable article is not sold or is not capable of being sold at such place, then the price at which it is sold or is capable of being sold by the assessee at any other place nearest thereto. [377 B-C]

In every case the fundamental criterion for computing the value of an excisable article is the price at which the

excisable article or an article of the like kind and quality is sold or is capable of being sold by the manufacturer and it is not the bare manufacturing cost and manufacturing profit which constitutes the basis for determining such value. [377 D]

Vacuum Oil Company v. Secretary of State for India in Council L.R. 59 I.A. 258; Ford Motor Company of India Ltd. v. Secretary of State for India in Council, L.R. 65 I.A. 32; and Atic Industries Ltd. v. H.H. Dave, Asst Collector of Central Excise and Ors.,[1975] 3 S.C.R. 563, referred to.

The basic scheme for determination of the price in the new s. 4 is characterised by the same dichotomy as that observable in the old s. 4. It was not the intention of Parliament, when enacting the new s. 4 to create a scheme materially different from that embodied in the superseded s. 4. The object and purpose remained the same, and so did the central principle at the heart of the scheme. The new scheme was merely-more comprehensive and the language employed more precise and definite. As in the old s. 4, the terms in which the value was defined remained the price charged by the assessee in the course of wholesale trade for delivery at the time and place of removal. [377 H; 378 A-B]

It is not possible to conceive of the price under the new s. 4 (1) (a) being confined to the manufacturing cost and the manufacturing profit. Moreover, it is reasonable to suppose that the central principle for the determination of the value of the excisable article should be the same, whether the case falls under cl. (a) or cl. (b) of the old s. 4 or under the new s. 4 (1). When regard is had to the provision of cl. (b) in each case, it is not possible to limit the price to its components representing the manufacturing cost and manufacturing profit. [379 E-G]

The contention that the provisions regarding related persons are wholly unnecessary because to counter act evasion of tax any artificially arranged price between the manufacturer and his wholesale buyer can be rejected in any case under s. 4 is not acceptable. The new s. 4 (1) contains inherently within it the power to determine the true value of the excisable article, after taking into account any concession shown to a special or favoured buyer because of extra-commercial consideration, in order that the price be ascertained only on the basis that it is a transaction at arm's length. That requirement is emphasised by the provision in the news. 4 (1) (a) that the price should be the sole consideration for the sale. In every such case, it will

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be for the Revenue to determine on the evidence before it whether the transaction is one where extra-commercial considerations have entered and, if so, what should be the price to be taken as the value of the excisable article for the purpose of excise duty. Nonetheless it was open to Parliament to incorporate provisions in the section

declaring that certain specified categories of transactions fall within the tainted class, in which case an irrebuttable presumption will arise that transactions belonging to those categories are transactions which cannot be dealt with under the usual meaning of the expression "normal price" set forth in the new s. 4 (1) (a). They are cases where it will not be necessary for the Revenue to examine the entire gamut of evidence in order to determine whether the transaction is one prompted by extra-commercial considerations. It will be open to the Revenue, on being satisfied that the third provision to the new s. 4 (1) (a) read with the definition of "related person" in s. 4 (4) (c) is attracted, to proceed to determine the "value" in accordance with the terms of the third proviso. [385 F-H; 386 A-D]

The argument that the assessment on the manufacturer by reference to the sale price charged by his distributor is "wholly incompatible with the nature of excise" has no force. It is a well known legislative practice to enact provisions in certain limited cases where an assessee may be taxed in respect of the income or property truly belonging to another. They are cases where the Legislature intervenes to prevent the circumvention of the tax obligation by tax payers seeking to avoid or reduce their tax liability through modes resulting in the income or property arising to another. The provisions of the law may be so enacted that the actual existence of such motive may be wholly immaterial, even if what has been done by the assessee may proceed from wholly bona fide intention. With the aid of a legal fiction, the Legislature fastens the liability on the assessee. When the Legislature employs such a device, and the liability is attached without qualification, it is reasonable to infer that an irrebuttable presumption has been created by law. Such provisions have been held to be within the legislative competence of the Legislature and as falling within its power of taxation. [386 D-H]

Balaji v. Income-Tax Officer, Special Investigation Circle, [1962] 2 S.C.R. 938; Navnitlal C. Javeri v. K.K.Sen, Appellate Assistant Commissioner of Income tax. 'D' Range, [1965] 1 S.C.R. 909; Bombay and Punjab Distilling Industries Ltd. v. Commissioner of Income-Tax, Punjab, [1965] 3 S.C.R. 1, referred to.

The argument that the definition of the expression "related person" is so arbitrary that it includes within it a distributor of the assessee is also without much force. The provision in the definition of "related person" relating to a distributor can be legitimately read down and its validity upheld. The definition of related person should be so read that the words "a relative and a distributor of the assessee" should be understood to mean a distributor who is a relative of the assessee. The Explanation to s. 4 (4) (c) provides that the expression "relative" has the same meaning as in the Companies Act, 1956. The definition of "related person ', as being "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 .," shows a sufficiently restricted basis for employing the legal fiction. Here again,
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regard must be had to the Explanation which provides that the expression "holding company and subsidiary" have the same meanings as in the Companies Act, 1956. It is well settled that in a suitable case the court can lift the corporate veil where the companies share the relationship of a holding company and a subsidiary company and also to pay regard to the economic realities behind the legal facade, [387 B-H; 388 A]

Tata Engineering and Locomotive Co. Ltd. v. State of Bihar and Others. [1964] 6 S.C.R. 885; Juggi Lal Kamlapat v. Commissioner of Income-Tax, U.P. [1969] 1 S.C.R. 988, referred to.

The true position under the Central Excises and Salt Act 1944 as amended by Act XXII of 1973 is as follows:

(i) The price at which the excisable 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 as defined in subsection (4) of section 4 is the basis for determination of excisable value provided, of course, the buyer is not a related person within the meaning of sub-section (4) section 4 and the price is the sole consideration for the sale. The proposition is subject to the terms of the three provisos to sub-section (1) of section 4. [388 D-F]

(ii) Where the price of excisable goods in the course of wholesale trade for delivery at the time and place of removal cannot be ascertained for the reason that such goods are not sold or for any other reason, the nearest ascertainable equivalent thereof determined in the manner prescribed by the Central Excise (Valuation) Rules, 1975 should be taken as representing the excisable value of the goods; [388 G-H]

(iii) Where wholesale price of any excisable goods for delivery at the place of removal is not known and the value thereof is determined with reference to the wholesale 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 should be excluded from such price; [389 A-B]

(iv) Of course, these principles cannot apply where the tariff value has been fixed in respect of any excisable goods under sub-section (2) of section 4 ; [389 B]

(v) On a proper interpretation of the definition of 'related person' in sub-section (4) of section

the words "a relative and a distributor of the assessee" do not refer to any distributor but they are limited only to a distributor who is a relative of the

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assessee within the meaning of the Companies Act, 1956. So read, the definition of 'related person' is not unduly wide and does not suffer from any constitutional infirmity. It is within the legislative competence of Parliament. It is only when an assessee so arranges that the goods are generally not sold by him in the course of wholesale trade except to or through such a related person that the price at which the goods are ordinarily sold by the related person in the course of wholesale trade at the time of removal to dealers (not being related persons) or where such goods are not sold to such dealers, to dealers (being related persons) who sell such goods in retail is liable to be taken as the excisable value of the goods under proviso (iii) to sub-section (1) of section 4. [389 D-F]

For the purpose of determining the "value", broadly speaking both old s. 4 (a) and the new s. 4 (1) (a) speak of the price for sale in the course of wholesale trade of an article for delivery at the time and place of removal, namely, the factory gate. Where the price contemplated under the old s. 4 (a) or under new s. 4 (1) (a) is not ascertainable, the price is determined under the old s. 4 (b) or the new s. 4 (1) (b). Now, the price of an article is related to its value (using this term in a general sense), and into that value have poured several components, including those which have enriched its value and given to the article its marketability in the trade. Therefore, the expenses incurred on account of the several factors which have contributed to its value upto the date of sale, which apparently would be the date of delivery, are liable to be included. Consequently, where the sale is effected at the factory gate, expenses incurred by the assessee upto the date of delivery on account of storage charges, outward handling charges, interest on inventories (stocks carried by the manufacturer after clearance), charges for other services after delivery to the buyer, namely after-sales service and marketing and selling organisation expenses including advertisement expenses marketing and selling organisation expenses and after-sales service promote the marketability of the article and enter into its value in the trade. Where the sale in the course of wholesale trade is effected by the assessee through its sales organisation at a place or places outside the factory gate, the expenses incurred by the assessee upto the date of delivery under the aforesaid heads cannot, on the same grounds, be deducted. [391 C-H]

The assessee will be entitled to a deduction on account of the cost of transportation of the exciseable article from the factory gate to the place or places where it is sold. The cost of transportation will include the cost of insurance on the freight for transportation of the goods from the factory gate to the place or places of delivery. [391 H; 392 A]

Where freight is averaged and the averaged freight is included in the wholesale cash price so that the wholesale cash price at any place or places outside the factory gate is the same as the wholesale cash price at the factory gate, the averaged freight included in such wholesale cash price has to be deducted in order to arrive at the real wholesale cash price at the factory gate and no excise duty can be charged on it. [392 A-B]

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The new s. 4 (4) (d) (i) has made express provision for including the cost of packing in the determination of "value" for the purpose of excise duty. 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. 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, must be regarded as falling within s. 4 (4) (d) (i). There is 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 ? One 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. If 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. [392 C; 392 G-H; 393 A-E]

If any special secondary packing is provided by the assessee at the instance of a whole-sale buyer which is not generally provided as a normal feature of the wholesale trade, the cost of such packing shall be deducted from the wholesale cash price. [393 F]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2269 of 1980 etc. From the Judgment and order dated 30.7.80 of the High Court of Bombay in Appeal No. 252/1980 etc. K. Parasaran Sol. Genl., N.C. Talukdar, Dr. Y.S. Chitale, K.K Venugopal, Suraj Udai Singh, Dalveer Bhandari, C.V. Subba Rao, R.N. Poddar, M.S. Ganesh, Ravi Naghmave, T. Shrinivasamoorthi, K.S. John, Vithalbhai B. Patel, R.P. Kapur, Bhaskar Gupta, R.K Chaudhary, A. T. Patra and Parveen Kumar for the Appellants Petitioners.

N.A. Palkhivala, J.C. Bhatt, Soli J. Sorabjee, Ashok Desai, D.B. Engineer, B.H. Antia, Ravinder Narain, O.C. Mathur. Talat Ansari, Mrs. A.K Verma, Ashok Sagar, Miss Rainu Walia, Sukumaran, D.N. Mishra and A.N. Haskar for the Respondents.

The Judgment of the Court was delivered by PATHAK. J: On May 9, 1983 we made an order setting forth the legal position in respect of various aspects of the levy of excise duty under the Central Excises and Salt Act, 1944, both before its amendment by the Central Excises and Salt (Amendment) Act. 1973 (Act XXII of 1973) and after such amendment. We record now the reasons for that order.

At the outset, we may state that it is not possible in this judgment to deal with the numerous individual appeals, writ petitions, special leave petitions and transferred cases before us on the particular facts of each, and we propose to consider the points arising therein from a general perspective.

The Central Excises and Salt Act, 1944 relates to central duties of excise and to salt. Sub-s. (1) of s.3 provides that duties of excise shall be levied and collected on all excisable goods, other than salt, which are produced or manufactured in India, at the rates set forth in the First Schedule. We are not concerned with the provision relating to salt. Sub-s. (2) empowers the Central Government to fix, for the purpose of levying the duties, tariff values of the articles enumerated in the First Schedule as chargeable with duty ad valorem.

Before its amendment by Act XXII of 1973 s.4 read as follows:

> "4. Determination of value for the purposes of duty.- Where, under this Act, any article is chargeable with duty at a rate dependent on the value of the article, such value shall be deemed to be-
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> (a) the wholesale cash price for which an article of the like kind and quality is sold or is capable of being sold at the time of the removal of the article chargeable with duty from the factory or any other premises of manufacture or production for delivery at the place of manufacture or production, or if a wholesale market does not exist for such article at such place, at the nearest place where such market exists, or

(b) where such price is not ascertainable, the price at which an article of the like kind and quality is sold or is capable of being sold by the manufacturer or producer, or his agent, at the time of the removal of the article chargeable with duty from such factory or other premises for delivery at the place of manufacture or production, or if such article is not sold or is not capable of being sold at such place, at any other place nearest thereto.

Explanation-In determining the price of any article under this section, no abatement or deduction shall be allowed except in respect of trade discount and the amount of duty payable at the time of the removal of the article chargeable with duty from the factory or other premises aforesaid."

It seems that with the increase in the ad valorem levies in the Central Excise Tariff the operation of s.4 presented certain practical difficulties, some of which were prominently brought out in the judgment of this Court in A. K. Roy & Anr, v. Voltas Limited. Among other observations the Court appears to have said that the real value of an article for the purposes of the excise levy would include only the manufacturing cost plus the manufacturing profit. In order to overcome the various difficulties, Parliament enacted Act XXII of 1973 which substituted a new s.4 for the original Provision with effect from October 1, 1975. The new section 4 provides:-

"4. Valuation of excisable goods for purposes of charging of duty of excise.-(1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to value, such value shall, subject to the other provisions of this section be deemed to be-

(a) the normal price thereof, that is to say, the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal, where the buyer is not a related person and the price is the sole consideration for the sale:

Provided that-

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

(ii) where such goods are sold by the assessee in the course of wholesale trade for delivery at the time and place of removal at a price fixed under any law for the time being in force, or at a price, being the maximum fixed under any such law, then, notwithstanding anything contained in cl. (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;

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

(b) where the normal price of such goods is not ascertainable for the reason that such goods are not sold or for any other reason, the nearest ascertainable equivalent thereof determined in such manner as may be prescribed.

(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.

(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. (4) or 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-

(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;

(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.

Explanation.-In this clause "holding company", "a subsidiary company" and "relative" have the same meanings as in the Companies Act, 1956;

(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 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 wrapped. contained or wound;

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

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

In the cases before us there has been considerable debate on the true meaning and scope of s.4 before and after its amendment. The points raised are not without difficulty, but we have had the advantage of hearing counsel of eminence on both sides, and we are grateful to them for the considerable assistance they have given us throughout the hearing of these cases.

The central issue between the parties is whether the value of an article for the purposes of the excise levy must be determined by reference exclusively to the manufacturing cost and the manufacturing profit of the manufacturer or should be represented by the entire wholesale price charged by the manufacturer. The wholesale price actually charged by the manufacturer consists of not merely his manufacturing cost and his manufacturing profit but includes, in addition, a whole range of expenses and an element of profit (conveniently referred to as "post manufacturing expenses" and "post manufacturing profit") arising between the completion of the manufacturing process and the point of sale by the manufacturer.

Mr. N.A. Palkhivala, learned counsel for the assessees, has propounded three principles which, he contends, form the essential characteristics of a duty of excise. Firstly, he says, excise is a tax on manufacture or production and not on anything else. Secondly, uniformity of incidence is a basic characteristic of excise. And thirdly, the exclusion of post manufacturing expenses and post manufacturing profits is necessarily involved in the first principle and helps to achieve the second. Learned counsel urges that where excise duty is levied on an ad valorem basis the value on which such duty is levied is a "conceptual value", and that the conceptual nature is borne out by the circumstance that the identity of the manufacturer and the identity of the goods as well as the actual wholesale price charged by the manufacturer are not the determining factors. It is urged that the old s.4

(a) clearly indicates that a conceptual value forms the basis of the levy, and that the actual wholesale price charged by the particular assessee cannot be the basis of the excise levy. It is said that the criterion adopted in clause (a) succeeds in producing uniform taxation, whether the assessees are manufacturers who sell their goods in wholesale, semi-wholesale or in retail, whether they have a vast selling and marketing net work or have none, whether they sell at depots and branches or sell at the factory gate, and whether they load the ex-factory price with post manufacturing expenses and profits or do not do so. Because the value of the article rests on a conceptual base, it is urged, the result of the assessment under s.4 (a) cannot be different from the result of an assessment under s 4 (b). The contention is that the principle of uniformity of taxation requires the exclusion of post manufacturing expenses and profits, a factor which would vary from one manufacturer to another. It is pointed out that such exclusion is necessary to create a direct and immediate nexus between the levy and the manufacturing activity, and to bring about a uniformity in the incidence of the levy. Learned counsel contends that the position is the same under the new s.4 which, he says, must needs be so because of the fundamental nature of the principles propounded earlier. Referring to the actual language of the new s.4 (1) (a), it is pointed out that the expression "normal price" therein means "normal for the purposes of excise", that is to say, that the price must exclude post manufacturing expenses and post manufacturing profit and must not be loaded with any extraneous element. It is conceded, however, that under the new s.4 (1) (a) there is no attempt to preserve uniformity as regards the amount of duty between one manufacturer and another, but it is urged that the basis on which the value is determined is constituted by the same conceptual criterion, that post manufacturing expenses and post manufacturing profit must be excluded. Considerable emphasis has been laid on the submission that as excise duty is a tax on the manufacture or production of goods it must be a tax intimately linked with the manufacture or production of the excisable article and, therefore, it can be imposed only on the assessable value determined with reference to the excisable article at the stage of completed manufacture and to no point beyond. To preserve this intimate link or nexus between the nature of the tax and the assessment of the tax, it is urged that all extraneous elements included in the "value" in the nature of post manufacturing expenses and post manufacturing profits have to be off-loaded. It is pointed out that factors such as volume, quantity and weight, which enter into the measure of the tax, are intimately linked with the manufacturing activity, and that the power of Parliament under Entry 84 of List I of the Seventh Schedule to the Constitution to legislate in respect of "value" is restricted by the conceptual need to link the basis for determining the measure of the tax with the very nature of the tax.

Shri K. Parasaran, the learned Solicitor General of India (when these cases were heard), and now the Attorney General of India) has strongly contended that the value of an excisable article for the purposes of the levy must be taken at the price charged by the manufacturer on a wholesale transaction, the computation being made strictly in terms of the express provisions of the statute and, he says, there is no warrant for confining the value to the assessee's manufacturing cost plus manufacturing profit. According to him, although excise is a levy on the manufacture of goods, it is open to Parliament to adopt any basis for determining the value of an excisable article, that the measure for assessing the levy need not correspond completely to the nature of the levy, and no fault can be found with the measure so long as it bears a nexus with the charge.

Besides this fundamental issue, there are other points of dispute, principally in respect of the connotation of the expression "related person" in the new s.4 as well as the nature of the deductions which can be claimed by the assessee as post manufacturing expenses and post manufacturing profit from the price for the purpose of determining the "value".

The submissions made by learned counsel for the parties in support of their respective contentions cover a wide area, and several questions of a fundamental nature have been raised. We consider it necessary to deal with them because they enter into and determine the conclusions reached by us.

We think it appropriate that at the very beginning we should briefly indicate the concept of a duty of excise. Both Entry 45 of List I of the Seventh Schedule to the Government of India Act, 1935, under which the original Central Excises and Salt Act was enacted, and Entry 84 of List I of the Seventh Schedule to the Constitution under which the Amendment Act of 1973 was enacted, refer to "Duties of excise on.....goods manufactured or produced in India". A duty of excise, according to the Federal Court in The Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938 is a duty ordinarily levied on the manufacturer or producer in respect of the manufacture or production of the commodity taxed. A distinction was drawn between the nature of the tax and the point at which it was collected, and Gwyer C.J. observed that theoretically "there can be no reason why an excise duty should not be imposed even on the retail sale of an article, if the taxing Act so provides. Subject always to the legislative competence of the taxing authority, a duty on home-produced goods will obviously be imposed at the stage which the authority find to be most convenient and the most lucrative, wherever it may be; but that is a matter of the machinery of collection, and does not affect the essential nature of the tax. The ultimate incidence of an excise duty, a typical indirect tax, must always be on the consumer, who pays as he consumes or expends; and it continues to be an excise duty, that is, a duty on home-produced or home-manufactured goods, no matter at what stage it is collected" (emphasis supplied). The position was explained further in The Province of Madras v. Messers. Boddu Paidanna and Sons where the Federal Court observed:-

> "There is in theory nothing to prevent the Central Legislature from imposing a duty of excise on a commodity as soon as it comes into existence, no matter what happens to it afterwards, whether it be sold, consumed, destroyed, or given away. A taxing authority will not ordinarily impose such a duty, because it is much more convenient administratively to collect the duty (as in the case of most of the Indian Excise Acts) when the commodity leaves the factory for the first time, and also because the duty is intended to be an indirect duty which the manufacturer or producer is to pass on to the ultimate consumer, which he could not do if the commodity had, for example, been destroyed in the factory itself. It is the fact of manufacture which attracts the duty, even though it may be collected later."

The observations show that while the nature of an excise is indicated by the fact that is imposed in respect of the manufacture or production of an article, the point at which it is collected is not determined by the point of time when its manufacture is completed but will rest on considerations of administrative convenience, and that generally it is collected when the article leaves the factory

for the first time. In other words, the circumstance that the article becomes the object of assessment when it is sold by the manufacturer does not detract from its true nature, that it is a levy on the fact of manufacture. In a subsequent case, Governor-General in Council v. Province of Madras, the Privy Council referred to both in The Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938 (supra) and The Province of Madras v. Messers. Boddu Paidanna and Sons (supra) and affirmed that when excise was levied on a manufacturer at the point of the first sale by him "that may be because the taxation authority imposing a duty of excise finds it convenient to impose that duty at the moment when the excisable article leaves the factory or workshop for the first time on the occasion of its sale. But that method of collecting the tax is an accident of administration; it is not of the essence of the duty of excise, which is attracted by the manufacture itself." This Court had occasion to consider a similar question in R.C. Jall v. Union of India. In that case, the Central Government was authorised by an ordinance to levy and collect as a cess on coal and coke despatched from collieries in British India duty of excise at a specified rate. Rule 3 made under Ordinance empowered the Government to impose a duty of excise on coal and coke when such coal and coke was despatched by rail from the collieries of the coke plants, and the duty was to be collected by the Railway Administration by means of a surcharge on freight either from the consignor or consignee. It was contended by the assessee that the excise duty could not legally be levied on the consignee who had nothing to do with the manufacture or production of coal. The Court remarked:

> "The argument confuses the incidence of taxation with the machinery provided for the collection thereof,"

and reference was made to In re. the Central Provinces and Berar Act No. XIV of 1938 (supra), The Province of Madras v. Boddu Paidanna and Sons (supra) and Governer-General in Council v. Province of Madras (supra). This Court then summarised the law as follows:-

> "Excise duty is primarily a duty on the production or manufacture of goods produced or manufactured within the country. It is an indirect duty which the manufacturer or producer passes on to the ultimate consumer, that is, its ultimate incidence will always be on the consumer. Therefore, subject always to the legislative competence of the taxing authority, the said tax can be levied at a convenient stage so long as the character of the impost, that is, it is a duty on the manufacture or production, is not lost. The method of collection does not affect the essence of the duty, but only relates to the machinery of collection for administrative convenience."

Other cases followed where the nature of excise duty was reaffirmed in the terms set out earlier, and reference may be made to In Re. The Bill To Amend S. 20 of the Sea Customs Act, 1878, and S. 3 of the Central Excises And Salt Act, 1944, Union of India v. Delhi Cloth & General Mills, M/s Guruswamy & Co. Etc. v. State of Mysore & Ors. and South Bihar Sugar Mills Ltd. etc. v. Union of India & Ors.

We think we have shown sufficiently that while the levy is on the manufacture or production of goods, the stage of collection need not in point of time synchronize with the completion of the

manufacturing process. While the levy in our country has the status of a constitutional concept, the point of collection is located where the statute declares it will be. We shall return to this later when it is necessary to consider a submission in regard to the effect of transactions to or through "related persons".

We move on now to a different dimension, to the conceptual consideration of the measure of the tax. S. 3 of the Central Excises and Salt Act provides for the levy of the duty of excise. It creates the charge, and defines the nature of the charge. That it is a levy on excisable goods, produced or manufactured in India, is mentioned in terms in the section itself. Section 4 of the Act provides the measure by reference to which the charge is to be levied. The duty of excise is chargeable with reference to the value of the excisable goods, and the value is defined in express terms by that section. It has long been recognised that the measure employed for assessing a tax must not be confused with the nature of the tax. In Ralla Ram v. Province of East Punjab the Federal Court held that a tax on buildings under s. 3 of the Punjab Urban Immovable Property Tax Act, 1940 measured by a percentage of the annual value of such buildings remained a tax on buildings under that Act even though the measure of annual value of a building was also adopted as a standard for determining income from property under the Income Tax Act. It was pointed out that although the same standard was adopted as a measure for the two levies, the levies remained separate and distinct imposts by virtue of their nature. In other words, the measure adopted could not be identified with the nature of the tax. The distinction was observed by a Special Bench of the Patna High Court in Atma Ram Budhia v. State of Bihar where a tax on passengers and goods was assessed as a rate on the fares and freights payable by the owners of the motor vehicles. Atma Ram Budiha (supra) was referred to with approval by this Court in M/s Sainik Motors, Jodhpur and Others v. The State of Rajasthan. This Court in that case repelled the contention that the levy was a tax upon income and not upon passengers and goods. It pointed out that "though the measure of the tax is furnished by the fares and freights it does not cease to be a tax on passengers and goods". The point was considered by this Court again in D.C. Gouse and Co. etc. v. State of Kerala & Anr. etc. where reference was made to the measure adopted for the purpose of the levy of tax on buildings under the Kerala Building Tax Act. The Court examined the different modes available to the Legislature for measuring the levy, and upheld the action of the Legislature in linking the levy with the annual value of the building and prescribing a uniform formula for determining its capital value and for calculating the tax. In the course of its judgment, the Court cited with approval a passage from Seervai's Constitutional Law of India.

> "Another principle for reconciling apparently conflicting tax entries follows from the fact that a tax has two elements: the person, thing of activity on which the tax is imposed, and the amount of the tax. The amount may be measured in may ways; but decided cases establish a clear distinction between the subject matter of a tax and the standard by which the amount of tax is measured. These two elements are described as the subject of a tax and the measure of a tax."

It is, therefore, clear that the levy of a tax is defined by its nature, while the measure of the tax may be assessed by its own standard. It is true that the standard adopted as the measure of the levy may indicate the nature of the tax but it does not necessarily determine it. The relationship was aptly

expressed by the Privy council in Re. A Reference under the Government of Ireland Act, 1920 and Sect. 3 of the Finance Act (Northern Ireland), 1934 when it said:-

> ".....It is the essential characteristic of the particular tax charged that is to be regarded, and the nature of the machinery-often complicated-by which the tax is to be assessed is not of assistance, except in so far as it may throw light on the general character of the tax."

The case was referred to by a Constitution Bench of this Court in R.R. Engineering Co. v. Zila Parishad, Bareilly & Anr., where the relationship was succinctly described thus:-

> "It may be, and is often so, that the tax on circumstances and property is levied on the basis of income which the assessee receives from his profession, trade, calling or property. That is, however, not conclusive on the nature of the tax. It is only as a matter of convenience that income is adopted as a yardstick or measure for assessing the tax. As pointed out in Re. a Reference under Govt. of Ireland Act (supra), the measure of the tax is not a true test of the nature of the tax. Therefore, while determining the nature of a tax, though the standard on which the tax is levied may be a relevant consideration, it is not a conclusive consideration."

The principle was reaffirmed by this Court in The Hingir- Rampur Coal Co., Ltd. and Others v. The State of Orissa and Others where the form in which the levy was imposed was held to be and impermissible test for defining in itself the character of the levy. It was observed:-

> ".....the mere fact that the levy imposed by the impugned Act had adopted the method of determining the rate of the levy by reference to the minerals produced by the mines would not by itself make the levy a duty of excise. The method thus adopted may be relevant in considering the character of the impost but its effect must be weighed along with and in the light of the other relevant circumstances."

It is apparent, therefore, that when enacting a measure to serve as a standard for assessing the levy the Legislature need not contour it along lines which spell out the character of the levy itself. Viewed from this standpoint, it is not possible to accept the contention that because the levy of excise is a levy on goods manufactured or produced the value of an excisable article must be limited to the manufacturing cost plus the manufacturing profit. We are of opinion that a broader based standard of reference may be adopted for the purpose of determining the measure of the levy. Any standard which maintains a nexus with the essential character of the levy can be regarded as a valid basis for assessing the measure of the levy. In our opinion, the original s.4 and the new s.4 of the Central Excises and Salt Act satisfy this test.

S.4 envisages a method of collecting tax at the point of the first sale effected by the manufacturer. Under the old s.4 (a), the value of the excisable article was deemed to be the wholesale cash price for which an article of the like kind and quality was sold, or was capable of being sold, at the time of the removal of the article chargeable with duty from the factory or any other premises of manufacture or

production for delivery at the place of manufacture or production, or if a wholesale market did not exist for such article at such place, then delivery was envisaged at the nearest place where such market existed. Sec.4 (b) declared that where such price was not ascertainable, the value would be deemed to be the price to be the price at which an article of the like kind and quality was sold or was capable of being sold by the manufacturer or producer, or his agent, at the time of the removal of the article chargeable with duty from such factory or other premises for delivery at the place of manufacture or production, and if such article was not sold or was not capable of being sold at such place, at any other place nearest thereto. Then there was an explanation which declared that no abatement or deduction would be allowed except in respect of trade discount and the duty payable at the time of the removal of the article from the factory. The wholesale price was envisaged as a cash price in order to make it a uniform standard, because it was then a price freed from the burden of an increase on account of credit or other advantage allowed to a buyer, a factor which may vary from transaction to transaction and from buyer to buyer. The essential distinction between cl. (a) and cl. (b) of s.4 appears to lie in this, that cl. (a) is invoked when the wholesale cash price is ascertainable and cl. (b) when the wholesale cash price cannot be ascertained.

As we have said, it was open to the Legislature to specify the measure for assessing the levy. The Legislature has done so. In both the old s.4 and the new s.4, the price charged by the manufacturer on a sale by him represents the measure. Price and sale are related concepts, and price has a definite connotation. The "value" of the excisable article has to be computed with reference to the price charged by the manufacturer, the computation being made in accordance with the terms of s.4.

A contention was raised for some of the assessees, that the measure was to be found by reading s.3 with s.4, thus drawing the ingredients of s.3 into the exercise. We are unable to agree. We are concerned with s.3(1), and we find nothing there which clothes the provision with a dual character, a charging provision as well as a provision defining the measure of the charge.

At this stage, it would be advantageous to refer to certain decisions which have some bearing on the proper construction of cl. (a) and cl. (b) of the old s.4.

In Vacuum Oil Company v. Secretary of State for India in Council the Privy Council had to construe the scope of s.30 of the Sea Customs Act, 1878 which contained cls. (a) and (b) substantially comparable with the two clauses of the old s.4 of the Central Excises and Salt Act. The appellants in this case manufactured different grades of lubricating oil in the United States. Large quantities of lubricating oil of particular manufacture and mark were imported into India through the port of Bombay and sold by the appellants directly to consumers. A dispute arose as to the provisions under which duty under the Sea Customs Act was attracted. Section 30 of that Act provided that for the purposes of the duty the real value should be deemed to be "(a) the wholesale cash price, less trade discount, for which goods of the like kind and quality are sold or are capable of being sold, at the time and place of importation.....or

(b) where such price is not ascertainable, the cost at which goods of the like and quality could be delivered at such place,....." The government contended that the real value of the appellants' oil was its "wholesale cash price" referred to in s.30(a) a price ascertainable, without difficulty. The

appellants replied that in view of the unique character of their oil and of the invariable course of business pursued by them in relation to its sale, a "wholesale cash price" for that oil had never existed and was not ascertainable and that therefore its real value must be determined in accordance with s.30(b) of the Act. The Privy council observed that there was no other oil in Bombay which could be said to be "of the like kind and quality" as the oil imported by the appellants and therefore the relevant "wholesale cash price" for the appellants, if there be such price, was to be found in the actual sales of those oils in Bombay by the appellants themselves provided that such sales had taken place. It was noted that large stocks of oil were imported at Bombay and all contracts for sale were made with reference to stocks. The oils were disposed of directly to consumers and never to dealers. The appellants themselves discharged all the functions of retailers of their oil as so sold. Besides, the selling price to consumers was about 70 per cent above the entry price, the difference representing the appellant's retailing profit and the expenses incurred by them in respect of matters subsequent to importation. The quantities of oil purchased by individual consumers were in some cases very large indeed. The Privy council took the view that in no sense could the price charged to consumers for the oils imported by the appellants be regarded as "a wholesale case price", and that therefore the case did not fall within s.30(a) but must be regarded as attracting s.30

(b).

On the other side of the line is Ford Motor Company of India Ltd. v. Secretary of State for India in Council, in which the Privy Council had to consider the scope of s. 30 of the Indian Sea Customs Act again. The appellants imported Ford motor vehicles into India from Canada and sold them to authorised dealers or distributors. They possessed a monopoly in India as regards the supply of such vehicles. The appellants issued from time to time a price list and the terms of business were that the retail price to be charged by the distributors to the public was that stated in the price list current at the time of arrival of the vehicles in India, and the price payable by the distributors to the appellants was the same price less a discount of 20 per cent. The Collector of Customs assessed customs duty on a consignment of 256 Ford motor cars under s. 30 (a). The appellants contended that for the motor-cars in question no wholesale cash price was ascertainable and the duty should have been assessed under s. 30 (b). The Privy Council approached the case from the stand point that if a wholesale price satisfying the description contained in s. 30 (a) was ascertainable, the goods could not be dealt with under s. 30

(b), and in this connection they referred to the expression "ascertainable" as importing more than could be satisfied by the result of a mere estimate. The Privy Council held that the appellant's price to the distributors was a wholesale price within the meaning of s. 30 (a) because it was a cash price, and only discount had been deducted, and the sum payable by the distributor had been deduced to a price referable to a car in the condition in which it arrived in Bombay. It was contended for the appellants that "goods of the like kind and quality" in cl. (a) was a phrase which suggested other goods than that under assessment and therefore, the price fetched by the goods, themselves must be disregarded or should be considered only to see what price other similar goods would have realised. It was urged that since that test was not satisfied cl.(a) could not be invoked. The Privy Council rejected the contention, observing that the application of cl.(a) did not depend upon any hypothesis to the effect that at the time and place of importation an indefinite amount of further goods added to

the available supply had effect upon the wholesale price. And what is important, the Privy Council further observed: "But if there is an actual price for the goods themselves at the time and place of importation, and if it is a "wholesale cash price, less trade discount" the clause is not inapplicable for want of sales of other goods. The clause can be applied distributively to each of the motor cars in this consignment, and even if they are regarded collectively the clause is not defeated. A particular car may be sold at a price which, having regard to other transactions in such cars, or to other circumstances, is too high or too low. In that sense, the actual price in a particular instance does not necessarily or finally establish a wholesale price to satisfy cl. (a), whether the particular car or cars sold be part of the shipment in question or not. But the goods under assessment may under cl. (a) be considered as members of their own class even although at the time and place of importation there are no other members. The price obtained for them may correctly represent the price obtainable for goods of the like kind and quality at the time and place of importation."

These two cases illustrate the fundamental distinction between provisions such as the two clauses of s. 4 of the Central Excises and Salt Act.

Great reliance has been placed by the assessees on two important decisions of this Court in support of the contention that only the manufacturing cost and the manufacturing profit can be taken into account for assessing the "value" of an excisable article. The first case is A.K. Roy v. Voltas Ltd. (supra). The assessee manufactured air conditioners and water coolers, and sold those article from its head office at Bombay and at branch officers in different towns in the country directly to consumers at list prices. The sales so effected amounted to about 90% to 95% of its production. It also sold the articles to wholesale dealers on terms which required them to sell the products at list prices, and that the assessee would sell them the articles at the listed price less 22% discount. The assessee contended before the excise authorities that the list price minus 22% discount allowed to the wholesale dealers would constitute the "wholesale cash price" for ascertaining the real value of the articles. The contention was accepted by the excise authorities, and assessments were made on that basis. Subsequently, the Superintendent of Central Excise began to assess the duty on the basis of the retail price and not the wholesale cash price. The case was taken by writ petition to the High Court, which held that the duty fell to be assessed under the old s.4(a) of the Central Excises and Salt Act on the basis of the wholesale cash price payable by the wholesale dealers, and not under s.4(b) on the basis of the price of retail sales effected directly to the consumers. The case was brought in appeal to this Court. The Court observed that for the purposes of s.4(a), it was not necessary for a wholesale market to exist in the physical sense of the term where articles of a like kind or quality are or could be sold. A wholesale market, it was observed, could also mean "the potentiality of the articles being sold on a wholesale basis". What was necessary was that the articles could be sold wholesale to traders. It was observed further that the application of s.4(a) of the Act did not depend upon any hypothesis to the effect that at the time and place of sale any further articles of the like kind and quality should have been sold. If there was an actual price for the goods themselves at the time and place of sale and if that was a 'wholesale cash price', the clause was not inapplicable for want of sale of other goods of a like kind and quality. Later follow the words which have brought on the present controversy:

> "Excise is a tax on the production and manufacture of goods (see Union of India v. Delhi Cloth and General Mills (supra). Section 4 of the Act therefore provides that the real value should be found after deducting the selling cost and selling profit and that the real value can include only the manufacturing cost and the manufacturing profit. The section makes it clear that excise is levied only on the amount representing the manufacturing cost plus the manufacturing profit and excludes post manufacturing cost and the profit arising from post manufacturing operation, namely selling profit."

Those observations were made when the Court was examining the meaning of the expression "wholesale cash price". What the Court intended to say was that the entire cost of the article to the manufacturer (which would include various items of expense composing the value of the article) plus his profit on the manufactured article (which would have to take into account the deduction of 22% allowed as discount) would constitute the real value had to be arrived at after off-loading the discount of 22%, which in fact represented the wholesale dealer's profit. A careful reading of the judgment will show that there was no issue inviting the Court's decision on the point now raised in these cases by the assessees.

The other case is Atic Industries Ltd. v. H.H. Dove, Asstt. Collector of Central Excise and Ors. The appellant, Atic Industries Ltd., was a manufacturer of dye stuffs. It sold its products to two wholesale buyers, 70% of its total production to one and 30% to the other. The price charged was a uniform price described as the "basic selling price" less a trade discount of 18%. The wholesale dealers in turn resold the dyestuffs to distributors and also directly to large consumers, including textile mills. The large consumers paid the basic selling price, while the distributors paid a higher price but subject to a trade discount. The distributors sold the product to consumers. The question arose as to how the value of the dyestuffs manufactured by the appellants should be determined under s.4. The appellants contended that the value should be the price at which the appellants sold in wholesale to the two wholesale buyers, less a uniform trade discount of 18%. The excise authorities took the view that the value should be the price at which the wholesale buyers had sold the dye stuffs to the distributors without taking into account the discount given to the distributors. Before this Court, the excise authorities pressed the same contention, urging that s.4 (a) did not provide that in every case the wholesale price charged by the manufacturer should be taken into consideration and not the wholesale price charged by the wholesale buyers who sold the product also in wholesale to the next buyers. One of us (Bhagwati J.) spoke for the Court in that case, and delivered a closely enunciated and lucid exposition of the true legal position. It was explained:

> "The value of the goods for the purpose of excise must take into account only the manufacturing cost and the manufacturing profit and it must not be loaded with post manufacturing cost or profit arising from post- manufacturing operation. The price charged by the manufacturer for sale of the goods in wholesale would, therefore, represent the real value of the goods for the purpose of assessment of excise duty. If the price charged by the whole sale dealer who purchases the goods from the manufacturer and sells them in wholesale to another dealer were taken as the value of the goods, it would include not only the manufacturing cost and the manufacturing profit of the manufacturer but also the wholesale dealer's selling cost and selling

profit and that would be wholly incompatible with the nature of excise. It may be noted that wholesale market in a particular type of goods may be in several tiers and the goods may reach the consumer after a series of wholesale transactions. In fact the more common and less expensive the goods, there would be greater possibility of more than one tier of wholesale transactions. For instance, in a textile trade, a manufacturer may sell his entire production to a single wholesale dealer and the latter may in his turn sell the goods purchased by him from the manufacturer to different wholesale dealers at State level, and they may in their turn sell the goods to wholesale dealers at the district level and from the wholesale dealers at the district level the goods may pass by sale to wholesale dealers at the city level and then, ultimately from the wholesale dealers at the city level, the goods may reach the consumers. The only relevant price for assessment of value of the goods for the purpose of excise in such a case would be the wholesale cash price which the manufacturer from sale to the first wholesale dealer, that is, when the goods first enter the stream of trade. Once the goods have entered the stream of trade and are on their onward journey to the consumer, whether along a short or a long course depending on the nature of the goods and the conditions of the trade, excise is not concerned with what happens subsequently to the goods. It is the first immediate contact between the manufacturer and the trade that is made decisive for determining the wholesale cash price which is to be the measure of the value of the goods for the purpose of excise. The second or subsequent price, even though on wholesale basis, is not material. If excise were levied on the basis of second or subsequent wholesale price, it would load the price with a post manufacturing element, namely, selling cost and selling profit of the wholesale dealer. That would be plainly contrary to the true nature of excise as explained in the Voltas' case (supra). Secondly, this would also violate the concept of the factory gate sale which is the basis of determination of value of the goods for the purpose of excise.

There can, therefore, be no doubt that where a manufacturer sells the goods manufactured by him in wholesale to a wholesale dealer at arms length and in the usual course of business, the wholesale cash price charged by him to the wholesale dealer less trade discount would represent the value of the goods for the purpose of assessment of excise. That would be the wholesale cash price for which the goods are sold at the factory gate within the meaning of s.4 (a). The price received by the wholesale dealer who purchases the goods from the manufacturer and in his turn sells the same in wholesale to other dealers would be irrelevant to the determination of the value and the goods would not be chargeable to excise on that basis."

This case also does not support the case of the assessees. When it refers to post-manufacturing expenses and post-manufacturing profit arising from post-manufacturing operations, it clearly intends to refer not to the expenses and profits pertaining to the sale transactions effected by the manufacturer but to those pertaining to the subsequent sale transactions effected by the wholesale buyers in favour of other dealers.

Having explained the true scope of Voltas Ltd. (supra) and Atic Ltd. (supra), we may now proceed directly to the consideration of certain aspects of the provisions of the old s.4. There has been serious argument on the question whether s.4 (a) provides for the value of the assessee's excisable article being determined on the basis of the wholesale cash price charged or chargeable for articles of the like kind and quality sold by manufacturers generally or on the basis of the wholesale cash price of articles of the like and quality sold by the assessee. At first blush, it would seem that the former construction should be accepted, and indeed some support can be derived for that view from the observations of the Privy Council in Vacuum Oil Co. (supra), where the "wholesale cash price" mentioned in s.30

(a) of the Sea Customs Act, 1878, was construed to mean "that price current for staple articles. the amount of which, if not a subject of daily publication in the press, is easily ascertainable in appropriate trade circles". But this general observation can be of no help to the assessees, because since then, he courts have proceeded to make the position amply clear. The problem presented itself again to the Privy Council in Ford Motor Co. of India Ltd. (supra), and while taking note of what it had said in the earlier case, the Privy Council laid down that where the excisable goods constituted a class of their own and it was not possible to say that other manufacturers produced goods of that kind and quality, the goods under assessment could be considered as members of their own class for the purpose of s.30 (a) even although at the time and place of importation there were no other members. The price obtained for them, it was said, would correctly represent the price obtainable for goods of the like kind and quality at the time and place of importation. Then in Voltas Ltd. (supra), this Court observed that the application of s.4 (a) of the Central Excises and Salt Act did not depend upon any hypothesis to the effect that at the time and place of sale, any further articles of like kind and quality should have been sold. If there was an actual price for the goods themselves at the time and place of sale and if that was a "wholesale cash price", the clause was not inapplicable for want of sale of other goods of a like kind and quality. It seems to us that the more practical way of looking at the problem is that there are very few cases indeed where two manufacturers produce an article of the like kind and quality. An instance has been supplied by learned counsel for the assessees, and we are referred to the case of a factory which manufactures identical electric bulbs for supply to a number of companies who sell them in the market under their own distinctive trade names. While such examples are possible, we are inclined to accept the statement of the learned Solicitor General that goods manufactured by different manufacturers generally differ in both kind and quality. Further, the manufacturing and other costs would vary from one manufacturer to another, depending on the efficiency of manufacturing techniques and management methods employed. Other important considerations are certainty and convenience in the administration of the levy from the view-point of both the assessee and the Revenue. There is the further consideration that the wholesale cash price charged by the assessee must be ascertained on the basis that the sale to the wholesale dealer is at arm's length. We are, therefore, of the view that we should prefer the construction suggested by the Revenue that s.4 (a) applies to the goods manufactured by the assessee himself. We may also point out that this conclusion is in accord with the general intent expressed in the new s.4 (1) (a), and as we shall show presently it is the case of both the assessees and the Revenue that in enacting the new s.4 in supersession of the old section, no material departure was intended from the basic scheme for determining the value of the excisable article.

Accordingly, we hold that pursuant to the old s.4 (a) the value of an excisable article for the purpose of the excise levy should be taken to be the price at which the excisable article is sold by the assessee to a buyer at arm's length in the course of wholesale trade at the time and place of removal. Where, however, the excisable article is not sold by the assessee in wholesale trade but, for example, is consumed by the assessee in his own industry the case is one where under the old s.4 (a) the value must be determined as the price at which the excisable article or an article of the like kind and quality is capable of being sold in wholesale trade at the time and place of removal.

Where the excisable article or an article of the like kind and quality is not sold in wholesale trade at the place of removal, that is, at the factory gate, but is sold in the wholesale trade at a place outside the factory gate, the value should be determined as the price at which the excisable article is sold in the wholesale trade at such place, after deducting therefrom the cost of transportation of the excisable article from the factory gate to such place. The claim to other deductions will be dealt with later.

Finally, where the wholesale price of the excisable article or an article of the like kind and quality is not ascertainable, then pursuant to the old s.4 (b) the value of the excisable article shall be the price at which the excisable article or an article of the like kind and quality is sold or is capable of being sold by the assessee at the time and place of removal or if the excisable article is not sold or is not capable of being sold at such place, then the price at which it is sold or is capable of being sold by the assessee at any other place nearest thereto.

In every case the fundamental criterion for computing the value of an excisable article is the price at which the excisable article or an article of the like kind and quality is sold or is capable of being sold by determining such value.

As we have noted, Parliament amended the General Excises and Salt Act by Act XXII of 1973. In particular, Parliament introduced a new s.4 which totally superseded the old section, and embodied a much more comprehensive and clearly enunciated scheme for the determination of the real value of an excisable article. Clause (a) of the new s.4 speaks of the "value" being the "normal price, that is to say, the price at which such goods are ordinarily sold 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."

Where the normal price of such good is not ascertainable for the reason that such goods are not sold or for any other reason, the new s.4 (1) (b) provides that the nearest ascertainable equivalent thereof determined in such manner as may be prescribed shall be the value of the excisable goods for the purpose of charging the excise duty.

It will be noticed that the basic scheme for determination of the price in the new s.4 is characterised by the same dichotomy as that observable in the old s.4. It was not the intention of Parliament, when enacting the new s.4 to create a scheme materially different from that embodied in the superseded s.4. The object and purpose remained the same, and so did the central principle at the heart of the scheme. The new scheme was merely more comprehensive and the language employed

more precise and definite. As in the old s.4, the terms in which the value was defined remained the price charged by the assesseee in the course of wholesale trade for delivery at the time and place of removal. Under the new s.4 the phrase "place of removal" was defined by s.4 (b) not merely as "the factory or any other place or premises of production or manufacture of the excisable goods" from where such goods are removed but was extended to "a warehouse or any place or premises wherein the excisable goods have been permitted to be deposited without payment of duty" and from where such goods are removed. The judicial construction of the provisions of the old s.4 had already declared that the price envisaged under clauses (a) and (b) of that section was the price charged by the manufacturer in a transaction at arms length. After referring to several cases, some of which have already been mentioned here earlier, this Court pointed out in Voltas Limited (supra) that "the wholesale cash has to be ascertained only on the basis of transactions at arms length. If there is a special or favoured buyer to whom a specially low price is charged because of extra-commercial considerations, e.g., because he is a relative of the manufacturer, the price charged for those sales would not be the "wholesale cash price" for levying excise under s.4 (a) of the Act. A sole distributor might or might not be a favoured buyer according as terms of the agreement with him are fair and reasonable and were arrived at on purely commercial basis."

That was also the view taken in Atic Industries Ltd. (supra). The new s.4 makes express provision in that behalf. Under the new s.4 also, it is necessary to take the price charged by the manufacturer as one which is un-effected by any concessional or manipulative considerations, and therefore the "normal price" mentioned in the new s.4 (1)

(a) speaks of a price "where the buyer is not the related person and the price is the sole consideration for the sale." The expression "related person" has been specifically defined in the new s.4 (4) (c), and transactions in which a "related person" is involved are covered by the third proviso of s.4 (1) (a).

Both learned counsel for the assessees and the learned Solicitor General for the Revenue are agreed that in enacting the new s.4 Parliament did not intend to bring into existence a scheme of valuation different from that embodied in the old s.4 Reference was made in that connection to the Statement of Objects and Reasons. The difference, however, lies in this that while learned counsel for the assessee attempted to show by reference to the old s.4 that the legislative intent was to confine the value of an excisable article to the manufacturing cost and manufacturing profit and that therefore the same limitations should be read into the new s.4, the learned Solicitor General approached the problem from the other end and contended that since on a plain reading of the new s.4 the price actually charged by the assessee was the true criterion and was not limited to the manufacturing cost and manufacturing profit it is that construction which should be put also on the old s.4. We have earlier indicated our inability to accept the proposition that the old s.4 defined the value of an excisable article in terms of the manufacturing cost and manufacturing profit exclusively. We find from an examination of the provisions of the new s.4 that a similar conclusion must follow. The normal price mentioned in the new s.4 (1) (a) is the price at which the goods are ordinarily sold by the assessee in the course of wholesale trade. It is the wholesale price charged by him. It is a price which may vary, according to the first proviso to the new s.4 (a) with different classes of buyers. It may also be, according to the second proviso to the new s.4 (1) (a) the price fixed as the wholesale

price under any law or the maximum price where the law fixes a maximum. The price may also be a different price if the case falls within the third proviso to the new s 4 (1) (a). In that event it will be the price charged by a related person in the course of wholesale trade. Clearly, it is not possible to conceive of the price under the new s.4 (1) (a) being confined to the manufacturing cost and the manufacturing profit. Moreover, it is reasonable to suppose that the central principle for the determination of the value of the excisable article should be the same, whether the case falls under cl. (a) or cl (b) of the old s.4 or under the new s.4 (1). When regard is had to the provision of cl. (b) in each case, it is not possible to limit the price to its components representing the manufacturing cost and manufacturing profit.

We have examined the principles of an excise levy and have considered the statutory construction of the Act, before and after its amendment, in view of the three propositions formulated, on behalf of the assessees, as principle constituting the essential characteristics of a duty of excise. It is apparent that the first proposition, that excise is a tax on the manufacture or production of goods, and not on anything else, is indisputable and is supported by a catena of cases beginning with The Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act. 1938 (supra). As regards the second proposition, that uniformity of incidence is a basic characteristic of excise, we are inclined to think that the accuracy of the proposition depends on the level at which the statute rests it. We shall discuss that presently. As to the third proposition, that the exclusion of post manufacturing expenses and post manufacturing profit is necessarily involved in the first principle does not inevitably follow. The exclusion of post manufacturing expenses and post manufacturing of profits is a matter pertaining to the ascertainment of the "value" of the excisable article, and not to the nature of the excise duty, and as we have explained, the standard adopted by the Legislature for determining the "value' may possess a broader base than that on which the charging provision proceeds. The acceptance of the further statement contained in the formulation of the third proposition, that the exclusion of post manufacturing expenses and post manufacturing profits helps to achieve uniformity of incidence in the levy of excise duty, depends on what is the point at which such uniformity of incidence is contemplated. It is not necessarily involved at the stage of sale of the article by the manufacturer because we find for example that under the amended s.3 (3) of the Central Excises and Salt Act, different tariff values may be fixed not only (a) for different classes of descriptions of the same excisable goods, but also (b) for excisable goods of the same class or description (i) produced or manufactured by different classes of producers or manufacturers, or (ii) sold to different classes of buyers. That the "value" of excisable goods determined under the new s.4 (a) may also vary according to certain circumstances is evident from the three clauses of the proviso to that clause. Clause (i) recognises that in the normal practice of wholesale trade the same class of goods may be sold by the assessee at different prices to different classes of buyers; in that event, each such price shall, subject to the other conditions of cl.

(a), be deemed to be the normal price of such goods in relation to each class of buyers. Clause (ii) provides that where the goods are sold in wholesale at a price fixed under any law or at a price being the maximum, fixed under any such law, then the price or the maximum price, as the case may be, so fixed, shall in relation to the goods be deemed to be the normal price thereof. Under cl. (iii), where the goods are sold in the course of wholesale trade by the assessee to or through a related person, the normal price shall be the price at which the goods are sold by the related person in the

course of wholesale trade at the time of removal to dealers (not being related persons) or where such goods are not sold to such dealers, to dealers (being related persons) who sell such goods in retail. The verity of the three principles propounded by learned counsel for the assessees has been, as indeed it had to be, examined in the context of the Act before and after its amendment. For the case of the assessees is that the amendment has made no material change in the basic scheme of the levy and the provisions for determining the value of the excisable article.

Learned counsel for the assessees has contended that the old s. 4 (a) expresses the conceptual nature of the "value" of an excisable article because neither the identity of the manufacturer nor the identity of the goods sought to be charged nor the actual wholesale price charged by the manufacturer is the determining factor. We have come to the conclusion after carefully weighing the matter that on a true construction of its provisions in the context of the statutory scheme the old s (a) should be considered as applicable to the circumstances of the particular assessee himself and not of manufacturers generally. As regards the second element, namely, the identity of the goods sought to be charged, that also, to our mind, is a determining factor because the statute speaks of "an article of the like kind and quality". The third element, namely, the actual wholesale price charged by the manufacturer is likewise a determining factor in view of our conclusion that the identity of the manufacturer is material in the application of the old s. 4 (a).

Learned counsel for the assessees urged that the expression "normal price" in the new s. 4 (1) (a) means the price normal for the purposes of the excise duty and that, it is said, means the manufacturing cost plus the manufacturing profit. It is urged that the normal price for the purposes of the levy must be a price not loaded with extraneous elements, extraneous to the nature of the impost. It is pointed out that in order to bring the operation of the statute within the purpose intended by the Legislature the courts are justified is doing "some violence to the words" and support is taken from Luke v. I.R.C., and the principle adopted by this Court in Commissioner of Income- Tax, Central, Calcutta v. National Taj Traders and in KP. Varghese v. Income-Tax Officer, Ernakulam and Another. A somewhat similar approach had already been adopted by this Court in Commissioner of Income Tax, (Central), Calcutta v. B.N. Bhattachargee and Another. Learned counsel also referred to Commissioner of Wealth-Tax, Bihar and Orissa v. Kripashankar Dayashankar Worah and R.B Jodha Mal Kuthiala v. Commissioner of Income-Tax. Punjab. Jammu & Kashmir and Himachal Pradesh. When the new s. 4 (1)

(a) is read as a whole, the meaning of the expression "normal price" becomes plainly evident. It will be noticed the expression "normal price' is followed by the phrase "that is to say". The phrase "that is to say" says Stroud's Judicial Dictionary (Fourth Edition, Vol. 5 p. 2753)" is the commencement of an ancillary clause which explains the meaning of the principal clause. It bas the following properties: (1) it must not be contrary to the principal clause; (2) it must neither increase nor diminish it; (3) but where the principal clause is general in terms it may restrict it," and reference has been made to Stuckeley v. Butler and Harrington v Pole. Therefore, the phrase "normal price" is defined by the words in s. 4 (1) (a) which follow. It is 'the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal where the buyer is not a related person and the price is the sole consideration for the sale,"

Learned counsel for the assessees contended that the new s. 4 (1) (a) also levies excise on the basis of a conceptual value which must exclude post manufacturing profit and in support of that submission he has adduced a number of reasons. It is said that the essential principle of excise dictates the exclusion of post manufacturing expenses and profit. That, it is pointed out, is also suggested by the principle of uniformity of incidence, for it is only by such exclusion that uniform criterion can be applied to all manufacturers, those who have selling and marketing organisations and who load the ex-factory wholesale price to recoup themselves the costs of the selling organisation and of equalised freight and those who do not load their wholesale price with such post manufacturing expenses. Reliance is placed on the legislative history, it being contended that the new s. 4. should be interpreted on the same basis as the old s. 4. Reference is made to the Statement of Objects and Reasons of Act XXIII of 1973 to show that no change of substance in the basis of the charge or levy was intended by the amendment of s. 4. It is said that the phrase "that is to say" in the new s. 4 (1) (a) indicates that the conceptual criterion for determining the value is substantially the same as it was in the old s. 4. Then, it is pointed out, s. 4 (1) (b) enacts that "where the normal price is not ascertainable, the nearest ascertainable equivalent thereof" has to be determined. As a consequence, it is urged that where sales are made on ex-depots post manufacturing expenses and post manufacturing profit must be deducted. The same principle should apply in the construction of the new s. 4 (1) (a). By adopting the same principle for cases falling under s. 4 (1) (a) and s. 4 (1)

(b) it is possible it is said, to reach uniformity of incidence in both classes of cases. It is pointed out, that the value of the goods must be the same for the purposes of the levy, whether the goods are sold ex-factory or ex-depot. It is urged that although the new s. 4 (4) (d) (ii) permits two types of deductions of taxes and discount, it does not prohibit deductions other shall the two permitted. Finally, if the wholesale p. ice can be adjusted upward by the department making additions thereto, it can be adjusted, downward, at the instance of the assessee, to make it conform to the conceptual criterion of the value on which excise can be levied.

The essential content of the reasons stated by learned counsel proceeds on the assumption that a conceptual value governs the assessment of the levy. We have already examined the validity of the three principles underlying the concept, and we have indicated the extent to which they cannot be accepted. We have observed that . the old s 4 as well as the new s. 4 determine the value on the basis price charged or chargeable by the particular assessee, and the price is charged or is chargeable in respect of the article manufactured by him. The value of the excisable article is determined in that context. When that is so, the fundamental basis on which the argument has been raised on behalf of the assessees cannot survive. We may add that whether any further deductions can be claimed beyond those already mentioned in the statute will depend on the nature of those claims in the case of a particular assessee.

Our attention has been drawn to the observation of this Court in Chotabhai Jethabhai Patel and Co. v. The Union Of India and Another that "a duty of excise is a tax-levy on home-produced goods of a specified class or description, the duty being calculated according to the quantity or value of the goods and which is levied because of the mere fact of the goods having been produced or manufactured and unrelated to and not dependent on any commercial transaction in then". Clearly, when the Court referred to the calculation of the duty according to the quantity or value of the

goods, it referred disjunctively- to the nature of the levy, and it is the nature of the levy 13 not the value for assessing the levy, which it had in mind when it pointed to the goods having been produced or manufactured, and observed that the nature of the levy is not related to or dependent on any commercial transaction. The following observation of Gwyer, C.J. in The Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938 (supra) was also placed before us:

> "In my opinion the power to make laws with respect to duties of excise given by the Constitution Act to the Federal Legislature is to be construed as a power to impose duties of excise upon the manufacturer or producer of the excisable articles, or at least at the stage of, or in connection with, manufacture or production, and extends no further."

The learned Chief Justice was referring in this statement to the power to make a law respect of a duty of excise. He construed it as a power to impose the duty upon the manufacturer or producer, and explained that the levy related to the manufacture or production and to no further stage. It was the nature of the levy which was adverted to by the learned Chief Justice, namely, that it was a levy on goods manufactured or produced. It will be remembered that the question before the Federal Court in that case whether the levy in question was a levy of excise or a levy of sales tax. A levy of excise turns on the manufacture or production of the excisable article, while a levy of sales tax by its nature, arises at a stage beyond, namely, the sale of the article. The task before the Court was to identify the nature of the levy. It was not concerned with the assessment of the value of the article for the purpose of the levy.

This brings to a close in these cases the question whether the value of an article for the purpose of the excise levy must be confined to the manufacturing cost and the manufacturing profit in respect of the article. In our judgment, the question has to be answered in the negative.

The next question for consideration is whether the provisions in the new s. 4 in respect of transactions' effected by the assessee to or through "a related person" are invalid. The new s. 4 (1) (a) provides that the value shall be deemed to be the normal price, and the normal price is defined as the price at which the goods are ordinarily sold by the assessee in the course of wholesale trade where the buyer is not a "related person" and the price is the sole consideration for the sale. The third proviso to the new s. 4 (1) (a) provides that where the assessee so arranges that the goods are generally not sold by him in the course of wholesale trade except to or through a related person, the normal price of the goods sold by the assessee to or through such related person shall be deemed to be the price at which they are ordinarily sold by the related person in the course of wholesale trade at the time of removal, to dealers (not being related persons) or where such goods are not sold to such dealers, to dealers (being related persons) who sell such goods in retail. The new s. 4 (4) (c) defines the expression "related person" as follows:

> "(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.

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

Learned counsel for the assessees contends that the provisions regarding related persons are wholly unnecessary because to counter-act evasion or avoidance any artificially arranged price between the manufacturer and his wholesale buyer can be rejected in any case under s. 4, and we are referred to the observations of this Court in Voltas Limited (supra) and Atic Industries Ltd. (supra). It is true, we think, that the new s. 4 (1) contains inherently within it the power to determine the true value of the excisable article, after taking into account any concession shown to a special or favoured buyer because of extra-commercial considerations, in order that the price be ascertained only on the basis that it is a transaction at arms length. That requirement is emphasised by the provision in the new s. 4 (1) (a) that the price should be the sole consideration for the sale. In every such case, it will be for the Revenue to determine on the evidence before it whether the transaction is one where extra-commercial considerations have entered and, if so, what should be the price to be taken as the value of the excisable article for the purpose of excise duty. Nonetheless, it was open to Parliament to incorporate provisions in the section declaring that certain specified categories of transactions fall within the tainted class, in which case an irrebuttable presumption will arise that transactions belonging to those categories are transactions which cannot be dealt with under the usual meaning of the expression "normal price" set forth in the new s. 4 (1) (a). They are cases where it will not be necessary for the Revenue to examine the entire gamut of evidence in order to determine whether the transaction is one prompted by extra- commercial considerations. It will be open to the Revenue on being satisfied that the third proviso to the new s. 4 (l)

(a) read with the definition of "related person" in s. 4 (4)

(c) is attracted, to proceed to determine the "value in accordance with the terms of the third proviso.

It is urged on behalf of the assessee that the provisions are, whimsical and arbitrary, and cannot be said to be reasonably calculated to deal with the issue of evasion or avoidance of excise. It is said that the assessment on the manufacturer by reference to the sale price charged by his distributor is "wholly incompatible with the nature of excise", and we are referred to Atic Industries Ltd. (supra). Now, is a well known legislative practice to enact provisions in certain limited case where an assessee may be taxed in respect of the income or property truly belonging to another. They are cases where the Legislature intervenes to prevent the circumvention of the tax obligation by tax payers seeking to avoid or reduce their tax liability through modes resulting in the income or property- arising to another. The provisions of the law may indeed be so enacted that the actual existence of such motive may be wholly immaterial, and what has been done by the assessee may even, proceed from wholly bona fide intention. With the aid of legal fiction, the Legislature fastens the liability on the assessee. When the legislature employs such a device, and the liability is attached without qualification, it is reasonable to infer that an irrebuttable presumption has been created by law. Such provisions have been held to be within the legislative competence of the Legislature and as falling within its power of taxation, and reference may be made to Balaji v. Income-Tax Officer, Special Investigation Circle, Navnitlal C. Javeri v. K.K Sen, Appellate Assistant Commissioner of Income-Tax, 'D' Range, Bombay and Punjab Distilling Industries Ltd. v. Commissioner of

Income-Tax, Punjab.

It is contended for the assessees that the definition of the expression "related person" is so arbitrary that it includes within that expression a distributor of the assessee. It is urged that the provision falls outside the ambit of Entry 84 of List I of the Seventh Schedule to the Constitution inasmuch as it is wholly inconsistent with the levy of excise, and if it is attempted to seek support for the provision from the residuary Entry 97 of List l as a non-descript tax the attempt must fail because there is no charging section in the Central Excises and Salt Act empowering the levy of such non-descript tax nor any machinery provision in the Act for collection such a tax. The charging provision and the machinery provisions of the Act, it is pointed out, deal exclusively with excise duty and not with any other tax. The validity of the provisions is assailed also on the ground that it violates Articles 14 and 19 of the Constitution. The challenge made on behalf of the assessees is powerful and far-reaching. But it seems to us unnecessary to enter into that question because we are satisfied that the provision in the definition of "related person" relating to a distributor can be legitimately read down and its validity thus upheld. In our opinion, the definition of related person should he so read that the words "a relative and a distributor of the assessee" should be understood to mean a distributor who is a relative of the assessee. It will be noticed that the Explanation provides that the expression "relative" has the same meaning as in the Companies Act, 1956. As regards the other provisions of the definition of "related person", that is to say, "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. .", we think that the provision shows a sufficiently restricted basis for employing the legal fiction. Here again, regard must be had to the Explanation which provides that the expression "holding company and subsidiary" have the same meanings as in the Companies Act, 1956. Reference in this connection may be made to Tata Engineering and Locomotive Co. Ltd. v. State of Bihar and others where the principle was approved by this Court that the corporate veil could be lifted where the companies shared the relationship of a holding company and a subsidiary company, and to Juggi Lal Kamlapat v. Commissioner Of Income-Tax, U.P., where this Court held that the veil of corporate entity could be lifted to pay regard to the economic realities behind the legal facade, for example, where the corporate entity was used for tax evasion or to circumvent tax obligation.

At one stage, it was urged for the assessees that by making provision in the Central Excises and Salt Act respecting transactions to or through a "related person", Parliament was very close to making the levy a sales tax. The contention cannot be accepted and we need merely refer to the position delineated earlier and set forth in the series of cases beginning with The Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938 (supra) See also Jullundur Rubber Goods Manufacturers' Association v. Union of India & Anr, From what has gone before, we consider that the true position under the Central Excises and Salt Act, 1944 as amended by Act XXII of 1973 can be set forth as follows .

(i) The price at which the excisable 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 as defined in sub-section (4)

(b) of section 4 is the basis for determination of excisable value provided, of course, the buyer is not a related person within the meaning of sub-section (4) (c) of section 4 and the price is the sole consideration for the sale. This proposition is subject to the terms of three provisos to sub-section (1) (a) of section 4.

(ii) There the price of excisable goods in the course of wholesale trade for delivery at the time and place of removal cannot be ascertained for the reason that such goods are not sold or for any other reason, the nearest ascertainable equivalent thereof determined in the manner prescribed by the Central Excises (Valuation) Rules. 1975 should be taken as representing the excisable value of the goods;

(iii) Where wholesale price of any excisable goods for delivery at the place of removal is not known and the value thereof is determined with reference to the wholesale 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 should be excluded from such price;

(iv) Of course, these principles cannot apply where the tariff value has been fixed in respect of any excisable goods under sub-section (2) of section 3;

(v) On a proper interpretation of the definition of 'related person' in sub-section (4) (c) of section 4, the words "a relative and a distributor of the assessee" do not refer to any distributor but they are limited only to a distributor who is a relative of the assessee with in the meaning of the Companies Act, 1956. So read, the definition of 'relates person' is not unduly wide and does not suffer from any constitutional infirmity. It is within the legislative competence of Parliament. It is only when an assessee so arranges that the goods are generally not sold by him in the course of wholesale trade except to or through such a related person that the price at which the goods are ordinarily sold by the related person in the course of wholesale trade at the time of removal to dealers (not being related persons) or where such goods are not sold to such dealers, to dealers (being related persons who sell such goods in retail is liable to be taken as the excisable value of the goods proviso under

(iii) to sub-section (1) (a) of section 4.

We now proceed to the question whether any post manufacturing expenses are deductible from the price when determining the "value" of the excisable article. The old s. 4 provided by the Explanation there to that in determining the price of any article under that section no abatement or deduction would be allowed except in respect of trade discount and the amount of duty payable at the time of the removal of the article chargeable with duty from the factory or other premises aforesaid. The new s. 4 provides by subs.(2) that where the price of excisable goods for delivery at the place of removal is not known and the value is determined with reference to the price for delivery at a place other than the place of removal, the cost of transportation from the place of removal to the place of delivery has to be excluded from such price. The new s. 4 also contains sub-s. (4) (d)

(ii) which declares that the expression "value" in relation to any excisable goods, does not include the amount of the duty of excise, sales tax and other taxes, if any, payable on such goods and, subject

to such rules as may be made, the trade discount (such discount not being refundable on any account whatsoever allowed in accordance with the normal practice of the wholesale trade at the time of removal in respect of such goods sold or contracted for sale. Now these are clear provisions expressly a providing for deduction, from the price, of certain items of expenditure. But learned counsel for the assessees contend that besides the heads so specified a proper construction of the section does not prohibit the deduction of other categories of post manufacturing expenses. It is also urged that although the new s. 4(4) (d) (i) declares that in computing the "value" of an excisable article, the cost of packing shall be included, the provision should be construed as confined to primary packing and as not extending to secondary packing. The head under which the claim to deduction is made are detailed below :

(1) Storage charges.

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

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

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

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

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

(7) Packing charges.

(8) Marketing and Selling organisation expenses, including advertisement and Publicity expenses.

At the outset, we must make it clear that the contentions in this regard on behalf of the assessees proceeds on two broad bases.

The first is that to determine the value of an excisable article, all expenses must be excluded which do not enter into the formula of manufacturing cost plus manufacturing profit. This follows from the principal plank of the assessees' case that the "value" must be confined to the manufacturing cost, and the manufacturing profit. For, it is said, that if the deductions claimed are allowed, the price would be brought down to the conceptual value. All post manufacturing expenses are claimed from that perspective and within that context. The other basis on which the claim proceeds, is that the price at the factory gate and the price at a depot outside the factory gate are identical.

We shall now examine the claim. It is apparent that for the purpose of determining the "value", broadly speaking both the old s. 4(a) and the now s 4(1) (a) speak of the price for sale in the course of wholesale trade of an article for delivery at the time and place of removal namely, the factory gate where the price contemplated under the old s. 4(a) or under the new s. 4(1)(a) is not ascertainable, the price is determined under the old s. 4(b) or the new s. 4 (1) (b). Now, the price of an article is

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

Where freight is averaged and the averaged freight is included in the wholesale cash price so that the wholesale cash price at any place or places outside the factory gate is the same as the wholesale cash price at the factory gate, the averaged freight included in such wholesale cash price has to be deducted in order to arrive at the real wholesale cash price at the factory gate and Do excise duty can be charged on it.

The case in respect of the cost of packing is somewhat complex. The new s. 4(4)(d)(i) has made express provision for including 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 s. 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 S. 4(4) (d) (i) reads:

> "(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 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 sarp beam or any other thing in which or on which the excisable goods are wrapped, contained or wound."

It is relevant to note that the packing, of which the cost is included is the packing of 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 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 s. 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 which 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 in to 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 it 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.

If any special secondary packing is provided by the assessee at the instance of a wholesale buyer which is not generally provided as a normal feature of the wholesale trade, the cost of such packing shall be deducted from the wholesale cash price.

We have also been referred to s. 2(f) of the Act which defines the expression "manufacture", and it is urged that the degree of packing to be considered for the purpose of including its cost in the "value" of an excisable article should be spelled out from that definition. We are unable to accept the suggestion. The expression "manufacture" is related to the taxable event and refers to a process which enters into the character of the article, while "packing" has been defined by s. 4 (4) (d) (i) in relation to the "value" of the article.

That, we think, is the position in regard to the cost of packing under the Act, both before a its amendment and after.

We have considered the claim to deductions under the specific heads enumerated by the assessees, and our judgment is confined to those items. No other head of expenses has been placed before us for our opinion.

Learned counsel for the parties have drawn our attention to a number of decisions rendered by different High Courts on some of the points raised before us. We have examined those cases, but we think it unnecessary to refer to them as they do not add to the considerations we have kept before us

in arriving at our conclusions.

These are the reasons for our order of May 9,1983, and they explain the scope within which that order must be construed as well as the basis on which it was made.

The individual appeals, writ petitions, special leave petitions and transferred cases will be listed now for appropriate orders in the light of this judgment on October 31, 1983.

H.S.K.