**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA**
**EASTERN ZONAL BENCH: KOLKATA**

**Appeal No. E/719/2009**

(Arising out of Order-in-Appeal No. 114/KOL-III/09 dated 29/06/2009 passed by the Commissioner of Central Excise (Appeals-I), Kolkata.)

M/s. Jumac Manufacturing Pvt. Ltd. Applicant (s)/Appellant (s)
**Vs.**
Commissioner of Central Excise, Kolkata-III Respondent (s)
Appearance:
Shri N. K. Chowdhary, Adv. for the Appellant (s)
Shri H. S. Abedin, A. C. (A.R.) for the Revenue
**CORAM:**
**HON'BLE SHRI P. K. CHOUDHARY, MEMBER (JUDICIAL)**
**HON'BLE SHRI BIJAY KUMAR, MEMBER (TECHNICAL)**

Date of Hearing: -12.07.2018
Date of Pronouncement:-02/01/2019
ORDER NO. FO/75016/2019
**PER SHRI P. K. CHOUDHARY**

Briefly stated the facts of the case are that the appellant was manufacturing HDPE Silver Can and parts, as classifiable under Chapter 39 & 76 of the First Schedule to the Central Excise Tariff Act, 1985. Show Cause Notice dated 24/03/2005 was issued alleging that the appellant assessee raised commercial invoices/bills to their clients whereby they realized "packing and forwarding charges" over and above assessable value shown in their Central Excise invoices. It is the case of the department that on from 08/08/2003, the assessee started to include the aforesaid charges in the assessable value. Accordingly, allegation of evasion of Central Excise during the period from 1/04/2000 to 08/08/2003 amounting to Rs. 50,298/- has been charged upon the assessee.

2. The Adjudicating Authority confirmed the demand of Rs.50,298/- along with interest and imposed penalty of equal amount under Section 11AC of the Central Excise Act, 1944.

3. On appeal, the Ld. Commissioner (appeals) upheld the Adjudication Order and rejected the appeal filed by the assessee. Hence, the present appeal before the Tribunal.

4. The Ld. Advocate appearing on behalf of the appellant submits that they are manufacturing Textile Machinery Spares. No packing is required for marketing the said goods. Only in some cases, packing is done at the instance of the buyers for protecting the goods in transit. It is the case of the appellant, that the cost of such packing and forwarding charges is not includible in the assessable value prior to 01/07/2000 and even thereafter on the introduction of the transaction value.

The Ld. Advocate further argued that the demand is also barred by limitation as period of dispute is from 01/04/2000 to 08/08/2003 and the Show Cause Notice was issued only on 24/03/2005.

The Ld. Advocate further contended that the commercial invoices raised for realizing Packing and Forwarding charges were being maintained by the appellant assessee and there is no allegation that the appellant was not submitting the statutory returns. There was no suppression of facts, mis-statement etc with intent to evade payment of Central Excise Duty.

The Ld. Advocate submitted synopsis and a compilation of relied upon decisions. The Ld. DR appearing on behalf of the respondent, department submitted that such expenses are includable in the assessable value. He referred to Board's Circular dated 30/06/2000 and made the Bench go through Para 12 of the Circular which is reproduced.

5. Herd both sides and perused the appeal records.

6. We find that the issue is no more res-entigra in view of the decision of the Hon'ble Supreme Court in the case of Union of India vs. Bombay

Tyre International Ltd. as reported in 1983 (14) ELT 1896 (S.C.) is applicable to the period prior the introduction of transaction value with effect from 1/7/2000 and for the period after 1/07/2000 the issue is covered by the decision of the Larger Bench of Hon'ble Supreme Court in the case of CCE Indore vs. Grasim Industries Ltd. as reported in 2018 (360) E.L.T. 769 (S.C.). The ratio as laid down by the Larger Bench of the Hon'ble Supreme Court is thus:-

> ***"14.****In Bombay Tyre International Ltd. (supra) the issue, shortly put, was whether determination of assessable value for the levy of excise duty can be only on the manufacturing cost and the manufacturing profit. It was contended before this Court, by relying on the decision of this Court in A.K. Roy and Another v. Voltas Limited - (1973) 3 SCC 503 = 1977 (1) E.L.T. (J177) (S.C.), that having regard to the character of the levy the measure must be restricted thereto. The contention was rejected by referring to a long line of precedents including those referred to herein above to hold 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 further view expressed in Bombay Tyre International Ltd. (supra) is that merely because excise is a levy on manufactured goods the value of the excisable article for the purpose of levy cannot be limited to only the manufacturing cost plus manufacturing profit. This Court went on to hold 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."*
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> ***15.****A reading of Section 4 of the Act, as originally enacted; as amended by 1973 Amendment; and as further amended by 2000 Amendment would clearly show that the value of the article for the purposes of levy of ad valorem duty was with reference to the price i.e. 'normal price' prior to the 2000 Amendment and thereafter with reference to the 'transaction value' which has been defined (already extracted) to mean "the price actually paid or payable for the goods, when sold, and includes in addition to the amount charged as price……."*
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> ***16.****The measure for the purpose of the levy is, therefore, essentially the price charged in respect of a transaction which must necessarily be at arm's length. Inclusions and additions that enrich the value of the Article till its clearance are permissible additions to the price that can be taken into account to determine 'value' under the old Section 4 (prior to 2000) as well as the 'transaction value' under the amended section effective from 1-7-2000. While such additions have been judicially held to be permissible under the old Act in Bombay Tyre International Ltd. (supra) the very same heads have been statutorily engrafted by the amendment made in 2000.*
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> ***17.****The price charged for a manufactured article at the stage when the article enters into the stream of trade in order to determine the value/transaction value for computation of the*

*quantum of excise duty payable does not come into conflict with the essential character or nature of the levy. The measure is the value and value is related to price. The price charged at the stage of clearance, in addition to manufacturing cost and manufacturing profit, can include certain value additions and inclusions which enrich the value of the product to make it suitable for sale or to facilitate such sale. At this stage, impost has nothing to do with the sale. The impost is on manufacture. But it is the value upto the stage of the first sale that is taken as the measure. Doing so does not introduce any inconsistency between the nature and character of the levy and the measure adopted.*

***18.****The above aspect had been considered in Bombay Tyre International Ltd. (supra) on a specific contention advanced on behalf of the Assessees that the deductions under the following heads should be made from the sale price in the following terms :*

*We now proceed to the question whether any "48. post-manufacturing expenses are deductible from the price when determining the "value" of the excisable article. The old Section 4 provided by the Explanation thereto 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 Section 4 provides by sub-section (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 Section 4 also contains sub-section (4)(of)(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 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 Section 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 heads 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.*

*(Underlining is ours)*

***19.** The above issue was answered by saying -*

*“50. We shall now examine the claim. It is apparent that for the purpose of determining the “value”, broadly speaking both the old Section 4(a) and the new Section 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 Section 4(a) or under the new Section 4(1)(a) is not ascertainable, the price is determined under the old Section 4(b) or the new Section 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 aftersales 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.”*

*(Underlining is ours)*

***20.** We find no room whatsoever for any disagreement with the above view taken by this court in Bombay Tyre International Ltd. (supra). It is a view consistent with what was held by the Federal Court and the Privy Council in Central Provinces and Berar (supra) Boddu Paidanna (supra) and Province of Madras (supra) and the decisions that followed thereafter including the decision in Voltas Limited (supra) and Atic Industries Limited v. H.H. Dewa. Asstt. Collector of Central Excise and ors - (1975) 1 SCC 499 = 1978 (2) E.L.T. (J444) (S.C.) the true purport of which was explained in Bombay Tyre International Ltd. (supra). Both the above opinions were clarified to mean that neither of them lay down any* *proposition to the effect that the excise duty can be levied only on the manufacturing cost plus the manufacturing profit only.*

***21.****At this stage, the amendment to Section 3 by substitution of the words "a duty of excise on all excisable goods" by the words "a duty of excise to be called the Central Value Added Tax (CENVAT) on all excisable goods" is conspicuous. The amendment of Section 3 to the Act not only incorporates the essentials of a changed concept of charging of tax on additions to the value of goods and services at each stage of production but also engrafts in the statute what was judicially held to be permissible additions to the manufacturing cost and manufacturing profit in Bombay Tyre International Ltd. (supra). This fundamental change by introduction of the concept underlying value-added taxation in the provisions of Section 3 really find reflection in the definition of 'transaction value' as defined by Section 4(3)(d) of the Act besides incorporating what was explicitly held to be permissible in Bombay Tyre International Ltd. (supra). Section 4(3)(d), thus, defines 'transaction value' by specifically including all value additions made to the manufactured article prior to its clearance, as permissible additions to be price charged for purpose of the levy.*

***22.****This would bring us to a consideration of the decision of this Court in Acer India Ltd. (supra). The details need not detain us. Softwares which were duty free items and could be transacted as softwares came to be combined with the computer hardware which was a dutiable item for purposes of clearance. The Revenue sought to take into account the value of the computer software for the purposes of determination of 'transaction value' with regard to the computer. This Court negative the stand of the Revenue taking the view that when software as a separate item was not dutiable its inclusion in the hard-disk of the computer cannot alter the duty liability of the software so as to permit the addition of the price/value of the software for the purpose of levy of duty. It is in the above context that the decision of this Court in Acer India Ltd. (supra) has to be understood. The observations made in paragraph 84 thereof to the effect that 'transaction value' defined in Section 4(3)(d) of the Act would be subject to the charging provisions contained in Section 3 of the Act will have viewed in the context of a situation where an addition of the value of a non-dutiable item was sought to be made to the value of a dutiable item for the purpose of determination of the transaction value of the composite item. This is the limited context in which the subservience of Section 4(3)(d) to Section 3 of the Act was expressed and has to be understood. If so understood, we do not see how the views expressed in paragraph 84 of Acer India Ltd. (supra) can be read to be in conflict with the decision of Bombay Tyre International Ltd. (supra).*

***23.****Accordingly, we answer the reference by holding that the measure of the levy contemplated in Section 4 of the Act will not be controlled by the nature of the levy. So long a reasonable nexus is discernible between the measure and the nature of the levy both Section 3 and 4 would operate in their respective fields as indicated above. The view expressed in Bombay Tyre International Ltd. (supra) is the correct exposition of the law in this regard. Further, we hold that "transaction value" as defined in Section 4(3)(d) brought into force by the Amendment Act, 2000, statutorily engrafts the additions to the 'normal price' under the old Section 4 as held to be permissible in Bombay Tyre International Ltd. (supra) besides giving effect to the changed description of the levy of excise introduced in Section 3 of the Act by the Amendment of 2000. In fact, we are of the view that there is no discernible difference in the statutory concept of 'transaction value' and the judicially evolved meaning of 'normal price'.*

> ***24.****The above answers would comprehend the issues specifically arising in all the three questions that have been referred for our opinion".*

7. Regarding the reliance of the Ld. DR on the circular dated 30/06/2000 issued by the Central Excise Board of Excise and Customs, the observation of the Hon'ble Supreme Court in the case of CCE Bolpur Vs. Ratan melting & Wire Industry is reported in 2008 (231) E.L.T. 22 (S.C.) is thus:-

> ***"6.*** *Circulars and instructions issued by the Board are no doubt binding in law on the authorities under the respective statutes, but when the Supreme Court or the High Court declares the law on the question arising for consideration, it would not be appropriate for the Court to direct that the circular should be given effect to and not the view expressed in a decision of this Court or the High Court. So far as the clarifications/circulars issued by the Central Government and of the State Government are concerned they represent merely their understanding of the statutory provisions. They are not binding upon the court. It is for the Court to declare what the particular provision of statute says and it is not for the Executive. Looked at from another angle, a circular which is contrary to the statutory provisions has really no existence in law."*

8. By respectfully following the ratio as laid down by the Hon'ble Supreme Court in the aforesaid cases, it is held that the goods are otherwise marketable without packing and the same is done only at the request of the customers. The activity being a post manufacturing activity, the value of such packing material is not includible in the assessable value.

9. In view of the above discussion, the impugned order is set aside and the appeal filed by the appellant is allowed with consequential relief, if any, to the appellant.

(Pronounced in the court on 02/01/2019.)

Sd/-
**(BIJAY KUMAR)**
**MEMBER (TECHNICAL)**

Sd/-
**(P. K. CHOUDHARY)**
**MEMBER (JUDICIAL)**

Pooja