REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 1648-1649 OF 2004

Commissioner of Central Excise, Mumbai ... **Appellant(s)**

Versus

M/s. Fiat India (P) Ltd. & Anr. ...**Respondent(s)**

J U D G M E N T

H. L. DATTU, J.

1. These appeals, by special leave, are directed against the judgment and order dated 21.11.2003 passed by the Customs, Excise and Service Tax Appellate Tribunal, West Regional Bench at Mumbai (hereinafter referred to as "the Tribunal") in Appeal Nos. E/3695/02 &

E/302/02. By the impugned judgment, the Tribunal has reversed the finding of the Commissioner (Appeals) and thereby, allowed the appeals filed by the respondents-assessees.

2. **Facts in nutshell are:** The respondents-assessees are the manufacturer of motor cars, i.e. Fiat Uno model cars. The said goods are excisable under chapter sub-heading No. 8703.90 of the Central Excise Tariff Act, 1985. The said business was initially managed by M/s Premier Automobiles Ltd. However, M/s Premier Automobile surrendered its central excise registration on 6.4.1998. Thereafter, M/s Ind Auto Ltd. (now M/s Fiat India Ltd.) carried on the said business after obtaining fresh central excise registration. The assessees have filed several price declarations in terms of Rule 173C of the Central Excise Rules, 1944 (hereinafter referred to as 'the 1944 Rules') declaring wholesale price

of their cars for sale through whole sale depots during the period commencing from 27.05.1996 to 04.03.2001.

3. The authorities under the Central Excise Act, 1944 (hereinafter referred to as 'the Act') had made enquiries on 20.12.1996 and 31.12.1996, under Sub-rule 3 of Rule 173C of the 1944 Rules read with Section 14 of the Act. They had prima facie found that the wholesale price declared by the assessees is much less than the cost of production and, therefore, the price so declared by them could not be treated as a normal price for the purpose of quantification of assessable value under Section 4(1)(a) of the Act and for levy of excise duty as it would amount to short payment of duty.

4. Since further enquiry was required to be conducted regarding the assessable value of the

cars, the Assistant Commissioner, Central Excise, Kurla Division, vide his order dated 03.01.1997, had *inter alia* directed for the provisional assessment of the cars at a price which would include cost of production, selling expenses (including transportation and landing charges, wherever necessary from 28.09.1996) and profit margin, on the ground that the cars were not ordinarily sold in the course of wholesale trade as the cost of production is much more than their wholesale price, but were sold at loss for a consideration, that is, to penetrate the market which has been confirmed by the assessee vide its letter dated 30.10.1996 and during the course of enquiry under Section 14 of the Act read with sub Rule (3) of Rule 173C of the 1944 Rules. He had further directed the respondents to execute B-13 bond for payment of differential duty with surety or sufficient security, that is, 25% of the bond

amount. Thereafter, respondents executed B-13 bond for Rs. 7.70 crores. However, the respondents showed their inability to submit 25% bond amount as a bank guarantee and requested the Revenue authorities to reduce the same. On such request, the Commissioner, vide letter dated 23.04.2007, directed the respondents to execute bank guarantee equivalent to 5% of the bond amount. Accordingly, the respondent furnished a bank guarantee of Rs. 38 lakhs which was subsequently renewed and later fresh bank guarantees in lieu of original were submitted by the respondents.

5. The Preventive and Intelligence Branch of the Kurla Division sometime in the year 1997-98 had conducted investigation into the affairs of the respondents, whereby it was found that the respondents were importing all the kits in CKD/SKD condition for manufacturing the cars and the cost of production of a single car was Rs.

3,98,585/- for manufacture from SKD condition and ` 3,80,883/- for manufacture from CKD condition against the assessable value of Rs. 1,85,400/-. In the investigation, it was also revealed that the respondents had entered into a spin-off agreement vide Deed of Assignment dated 30.03.1998, whereby M/s Fiat India Ltd. would be liable for any excise liability accruing from 29.09.1997 onwards, in respect of the Cars in issue.

6. After completion of the investigation, the Commissioner of Central Excise, Mumbai-II, had appointed Cost Accountant M/s Rajesh Shah and Associates on 25.01.1999 under Section 14A of the Act to conduct special audit to ascertain the correctness of the price declared by the respondents. The Cost Accountant had calculated the average price of the Fiat UNO Car by adding material cost (import, local, painting and others),

rejection at 1% of total cost and notional profit at 5% of total cost for the period from April, 1998 to December, 1998 vide his report dated 31.03.1999, which came to Rs. 5,04,982/- per car.

7. In the meantime, the Superintendent of Central Excise, Kurla Division had issued 11 show cause notices to assessees for the period from June 1996 to February 2000, *inter alia,* making a demand of differential duty on the assessable value calculated on the basis of manufacturing cost plus manufacturing profit minus MODVAT availed per car, and the duty which the respondents were actually paying on the assessable value. It is alleged in the show cause notices that the respondents have failed to determine and pay the correct duty on Fiat UNO cars while clearing them. It is further stated that the assessees have not taken into account the cost of raw material, direct wages, overheads and profits for calculating the

assessable value of the cars which were declared in the invoices and declarations for the purpose of Section 4 of the Act. In this regard, the assessees were required to show cause as to why the correct duty due on the said goods along with interest should not be recovered from them under Rule 9 of the 1944 Rules read with Sections 11A and 11AB of the Act, the goods should not be confiscated and penalty imposed under Rule 9 read with Rule 52-A and Rule 173Q of the Rules, and further, penalty equal to the amount of duty should not be imposed under Section 11AC of the Act.

8. Assessees had replied in detail to the show cause-cum-demand notices. The assessees had submitted that they have declared assessable value or normal price in terms of Section 4(1)(a) of the Act. The assessees apart from others had also stated that the proper interpretation of Section 4(1)

(a) of the Act would mean that the assessable value should be the normal price at which such goods are ordinarily sold in wholesale trade where price is the sole consideration; that they are not getting any additional consideration over and above the assessable value declared by them; that there is no flow back of money from the buyers and dealings between the assessees and their buyers are at arms length and since the price declared by them is proper as per Section 4(1) (a) of the Act, the question of determining the assessable value as per Section 4(1)(b) read with Central Excise (Valuation) Rules, 1975 (hereinafter referred to as 'the 1975 Valuation Rules) would not arise. In other words, the assessees, relying on various decisions of this Court, had submitted that when normal price is available then recourse to any other method of valuation is incorrect and improper. They had also submitted that Section 4 of the Act nowhere

mandates that price should always reflect the manufacturing cost and profits and, therefore, the price declared by them requires to be accepted. The assessees had further submitted that since they have launched new models of the cars which require import of the cars in kit-form (CKD and SKD), thereafter they were assembled and sold. This cost of imports, assembly and overheads lead to increase in overall cost of production of their cars. Further, they were facing intense competition from Maruti car manufacturers which required them to keep the price of their cars at a lower price. Therefore, they were forced to sell their cars at a loss in order to compete and attract buyers in the market. The assessees had also stated that the amount quantified in the show cause-cum-demand notices is excessive since they were based on the initial costs in 1996 which has continuously come down due to the continuous process of

indigenisation of imported components. They would further submit that this strategy of indigenisation of imported components is very common to automobile industry. The assessees had further submitted, the order of provisional assessment was erroneous as well not sustainable in the eyes of the law. They further submitted that the assessable value declared by them should be accepted even if it is below manufacturing cost. The assessees had also contended that there is no short levy or short payment of duty.

9. After receipt of the reply so filed, the adjudicating authority vide his order-in-original dated 31.01.2002 has proceeded to conclude that the assessees' main consideration was to penetrate the market, therefore, the price at which they were selling the Cars in the market could not be considered to be a normal price as per Section 4 of the Act. He has also observed that the cost of

production of the Fiat UNO Cars is much higher than the price at which the assessees are selling them to the general public; that the price is artificial and arrived at without any basis just to capture the market and drive out the opponents from business; that the Fiat UNO Cars in issue are equipped with powerful Fire Engine and superior quality gadgets and that when normal price cannot be ascertained as per Section 4(1) (a) of the Act, the alternate procedure under the Valuation Rules, i.e. cost of production and profit has to be applied. He also observed, by referring to the decisions of this Court in Bombay Tyre's and MRF Tyre's cases, that all costs incurred to make goods saleable/marketable should be taken into account for determining the assessable value and that the loss incurred by the assessees to penetrate the market should be borne by them and in the process Government should not lose revenue. He further

found the basis of the price arrived at by the Cost Accountant in its report as authentic and acceptable, but adopted the average price of Rs.4,53,739/- reached by the Range Superintendent for different models of Cars in the show cause-cum-demand notices as more reasonable and appropriate. Accordingly, he had confirmed the show cause-cum-demand notices issued and, thereby, had directed the respondents to pay the difference in duty.

10. The assessees had carried the matter in appeal before the First Appellate Authority, being aggrieved by the order passed by adjudicating authority. The appellate authority by its orders dated 11.09.2002 and 30.09.2002 has sustained the order passed by the adjudicating authority and rejected the appeals.

11. The assessees, being aggrieved by the order so passed, had carried the matter in appeal before the Tribunal. The Tribunal vide its judgment and order dated 21.11.2003, has reversed the findings and conclusions reached by the First Appellate Authority and the Adjudicating Authority and, accordingly, allowed the appeals on the ground that there is no allegation that the wholesale price charged by the assessee was for extra commercial consideration and that dealing of the assessees and their buyers was not at arms length or that there is a flow back of money from the buyers to the assessees and, therefore, the price declared by the assessees is the ascertainable normal price in view of the decision of this Court in *Commissioner of Central Excise, New Delhi* v. *Guru Nanak Refrigeration Corporation*, 2003 (153) ELT 249 (SC). It is the correctness or otherwise of the findings

and conclusions reached by the Tribunal is the subject matter of these appeals.

SUBMISSIONS

12. Before we proceed to examine the relevant provisions, it is necessary to notice the submissions made by learned counsel on both sides. Shri. Bhattacharya, the learned ASG, contends that the assessees are not fulfilling the conditions enumerated in Section 4(1)(a) of the Act and therefore, the valuation has to be done in accordance with Section 4(1)(b) of the Act read with the 1975 Valuation Rules. He would contend that the price fixed by the assessees do not reflect the true value of the goods as manufacturing cost and the profit is much higher than the sale price. He would further contend that since the price of the cars sold by the assessees do not reflect the true value of goods and that sole reason for lowering the

price by the assessees below the manufacturing cost is just to penetrate the market and compete with other manufacturers and, therefore, such price cannot be treated as "normal price" in terms of Section 4(1)(a) of the Act. He would submit that since the price of the cars sold by the assessees was not ascertainable, the Revenue is justified in computing the assessable value of the goods for the levy of excise duty under Section 4(1)(b) of the Act and the relevant rules. The learned counsel further contends that under Section 4(1)(a) of the Act, value shall be deemed to be the normal price. A normal price, as per Section 4(1)(a), is the price at which the goods are ordinarily sold. A loss making price cannot be the price at which goods are ordinarily sold and the loss making price cannot be the normal price. Shri Bhattacharya would heavily rely on the decision of this Court in *Union of India v. Bombay Tyre* International, 1983 (14) ELT 1896

(SC), and contends that the judgement makes it abundantly clear that for arriving at the assessable value, the department is entitled to take into account the manufacturing cost plus manufacturing profit.

13. *Per contra*, Shri. Joseph Vellapally learned senior counsel would submit that the charging Section and the computation Section are independent to each other and should not be mixed up. He would contend that the normal price as found in Section 4(1)(a) of the Act is nothing but the price at which the particular assessee sold his goods to his buyers in the ordinary course of business. He would state that the reason for the assessees for selling the Cars for lower price than the manufacturing cost was because the assessees had no foothold in the Indian market and, therefore, had to sell at a lower price than the

manufacturing cost in order to compete in the market. He would submit that the issue raised by the Revenue in the instant case is squarely covered by the decision of this Court in the case of *Guru Nanak Refrigeration* (supra). He submits that the case of Bombay Tyre International (Supra) would only assist the assessees and not the Revenue. He would submit that this Court in Bombay Tyre's case has held that though the incident of excise is the manufacturing activity, the legislature was free to choose the time of collection and imposition of excise duty. He further points out that this Court in Bombay Tyre's case (supra) has separated the levy from the collection, that being the case, the learned senior counsel would submit that the cost of manufacture is irrelevant for the purpose of valuation under Section 4 of the Act. He would submit that 'normal price' is the selling price at which that particular assessee has sold the goods

to all the buyers in the ordinary course of business. He would refute Shri Bhattacharya's argument that the price is not the sole consideration, by stating the word 'consideration' is used in the Section in the same sense as used in the Section 2 (d) of the Indian Contract Act, and it is only the monetary consideration from the buyer to the assessee that requires to be taken note of for the purpose of valuation under the Act. He would point out from the show cause notice that the sole ground for rejecting the invoice price of the assessee is that the price was not the sole consideration. He would submit that the intention and consideration cannot be treated as same; it is only the intention of the assessee to penetrate the market and the only consideration for the assessee from the buyer was the sale price. He would further submit that the assessable value has to be gathered from the normal price and not from cost of manufacture

which is irrelevant when normal price is ascertainable. Therefore, he would submit only when the normal price is not ascertainable in terms of Section 4(1)(a), then Section 4(1)(b) read with the 1975 Valuation Rules would come into play to determine nearest equivalent assessable value of the goods. He would contend that the Valuation Rules have to be applied sequentially, namely, Rules 4 and 5 should be invoked first in order to determine the assessable value and if Rules 4 and 5 of the 1975 Valuation Rules are not applicable or assessable value cannot be ascertained by applying the said Rules, then only Rule 6 can be invoked. He would further submit that it is only Rule 6(b)(ii) of the 1975 Valuation Rules which contemplates determination of assessable value on the basis of cost of manufacture only when the goods are captively consumed by the manufacturer and value of comparable goods manufactured by the assessee

or any other assessee is not available. In this regard, he would submit, relying on few decisions of this Court, that fiscal provisions have to be construed strictly and also where a statute prescribes that a particular thing has to be done in a particular manner, then, that thing has to be done only in that manner and not otherwise.. Shri Vellapally submits that when the normal price is not ascertainable under Section 4(1)(a) of the Act when transaction is between related persons or price is not the sole consideration, then nearest equivalent at the time of removal of the goods is the criteria for the purpose of computation of assessable value. He would contend that it is when there is no like or identical article available at the time or place of removal, only then, Rule 6 of the 1975 Valuation Rules is invoked which deals with cost of manufacture. He would further submit by relying on the Bombay Tyre's case (Supra) that even

old Section 4 (b) (prior to the 1973 amendment) suggests that in case wholesale price for the valuation is not ascertainable under old Section 4(a), then, the value of nearest equivalent article of like kind and quality, which is sold or capable of being sold at the time and place of removal, is considered for the purpose of valuation. He would further submit that it is not practical to go into cost of manufacture in each and every case in order to determine whether goods are sold below the cost of production. He would submit that if wholesale price under Section 4(1)(a) is not ascertainable, then, assessing authority can go to the nearest equivalent to determine assessable value for the purpose of levy of excise duty under the Act.

14. Shri Vellapally would further submit by referring to Section 2(d) of the Indian Contract Act, that the consideration should flow from buyer to the seller. He would submit that the meaning of the

expression 'consideration' in Section 4 should be determined by comprehensively reading Section 4 along with the Valuation Rules. In this regard, he would submit by referring to Rule 5 that in case the price is not the sole consideration then the value of the goods can be determined by taking into account the monetary value of the additional consideration flowing directly or indirectly from the buyer to the seller. He would submit that any additional consideration should flow from buyer to seller. He would submit that intention of the assessee to penetrate the market cannot be treated as a consideration as no money consideration flows from the buyer to the seller. Therefore, there is no additional consideration flowing from buyer to seller and whole transaction is bonafide. He would submit that this Court has already answered this issue of 'sole consideration' in the cases of Guru Nanak

Refrigeration (supra) and *CCE v. Bisleri International Pvt.Ltd.*, 2005 (186) ELT 257 (SC).

15. Shri. V. Lakshmi Kumaran, learned counsel, who also appears for the assessees but for the period April 1998 to June 2001, would submit that the Cost Auditor's report has not been relied on or referred to in any of the show cause notices issued to the assessee, which are the basis of entire proceedings and, therefore, proceedings initiated by the assessing authority are contrary to the settled principles enunciated by this Court. He would submit that all the show cause notices are identical or verbatim the same while alleging that assessee has not adopted any basis to determine the price and goods are sold at loss in order to penetrate the market. The allegations on the basis of Cost Auditors report amount to an issuance of new show cause notice. He would submit that the assessees'

declared price is based on the competitive price in the market at arms length and where price is the sole consideration. He would submit that nothing as to sole consideration or transaction between related person has been alleged in the show cause notices, therefore, the show cause notices are without any basis. He would submit that the assessee has not been furnished with Cost Auditor's report till date. He would submit that the Revenue is not justified in rejecting the assessee's price as the price is a bench mark in order to sell the goods in market and it is even higher in comparison to other similar cars, although it is less than the cost of manufacture. He would further submit that the economic concept to penetrate the market is recognized by Article 6 of the WTO and Article VII of Customs Valuation Rules of WTO and further, Section 14 of the Indian Customs Act incorporates the above concept in harmony with

other countries. He would submit that when the price of assessee is higher than that of its competitors, it would mean that the assessee is bench marking his prices. He would submit that the price at which goods are sold by the assessee to the buyer is purely a competitive price and there is no allegation as to transactions are with related person(s) and price is not the sole consideration and that there is flow back from buyer to the assessee in any form. He would further submit that whenever goods are sold in a competitive market at a price at arms length then it should be treated as assessable value. He would submit that value is a function of price and where price is not available, one of the methodology to determine it is cost. He would further submit, relying on Ship Breaker's case that this Court while explaining the meaning of expression 'Ordinary sale' occurring in Section 14 of the Customs Act which is in *pari*

materia with Section 4 of the Act has observed that "Ordinary Sale' would mean the sale where goods are sold to unrelated parties and price is the sole consideration.

16. Shri. V. Lakshmi Kumaran would further submit that Section 4 of the Act was amended on 1st April 2000 to incorporate 'transaction value' as an assessable value instead of 'normal price' and the expression 'ordinarily' was dropped. Therefore, the new Section 4 (after 2000 amendment) is applicable to the transactions which took place during the period from July, 2000 to June, 2001. He would further submit that the word 'ascertain' and 'determination' have different meaning and connotation. He would submit that the word 'ascertain' would mean to find a thing which already exists whereas determination mean to arrive at something by adding or subtracting. He would then submit that when ascertainment of

normal price is not possible under Section 4(1)(a) then that price has to be determined by the process of computation as provided under Section 4 (1) (b) of the Act read with the Rules framed thereunder. He would submit by relying on the decision of this Court in *Elgi Equipment Pvt. Ltd.* v. *CCE*, Coimbatore, 2007 (215) ELT 348 (SC) that the word 'Ordinary sale' would mean the normal practice or the practice followed by majority of persons in the wholesale trade in the concerned goods. He would submit that in the present case, the assessee is better placed as the entire sale is at the same price or rate, so the condition of the expression 'ordinarily sold' is being satisfied.

17. Shri. V. Lakshmi Kumaran would further submit that certain considerations for fixing the price like quantity or volume, long term relationship and status of buyer are all commercial consideration. He would further contend that

consideration can be in any form but must flow from buyer to the seller. He would submit relying on the decision of this Court in *Philips India Ltd. v. Collector of Central Excise, Pune,* 1997 (91) E.L.T. 540 (SC), that where the buyer is taking responsibility on behalf of the seller, then it would be added in the sale price of seller while assessing him and in case where seller and buyer share expenditure, then, it cannot be added in the sale price of the seller-assessee. He would further submit relying on the decision of this Court in *VST Industries Ltd. v. Collector of Central Excise, Hyderabad*, 1998 (97) E.L.T. 395 (SC) that this Court has distinguished Metal Box decision by observing that the notional interest on interest free deposit made by the buyer to the seller should not be included in the sale price of the seller-assessee as no extra commercial consideration is flowing from the buyer to the seller, there is no nexus

between the security deposit and sale price, and if department is not able to quantify the money value of the additional consideration, then Rule 7 of the Valuation Rules is not applicable.

18. Shri. V. Lakshmi Kumaran would further submit that expression 'sale and purchase' is defined under Section 2(h) of the Act which would mean the transfer of possession of goods from one person to other in the ordinary course of trade for cash or deferred payment or other valuable consideration. He would submit by relying on the constitution bench decision of this Court in *Devi Das Gopal* v. *State of Punjab*, (1967) 20 STC 430, that the term 'purchase' would mean acquisition of goods for sale for cash or deferred payment or other valuable consideration. He would further submit that sale and purchase are different perspectives of same transaction and the price is defined in the Sale of Goods Act as "money consideration" and the

expression 'cash', 'deferred payment' and 'other valuable consideration' are consistently used as monetary consideration. He further contended that Section 4(1)(a) of the Act has six ingredients and if any one of these ingredients is missing, then only the Revenue could invoke the Valuation Rules. He relies on Circular, issued by the Board, No.215/49/96-Cx., dated 27.05.1996, wherein the Board has clarified that if price was not the sole consideration then any additional consideration that flow from the buyer to assessee would have to be quantified in terms of money, if the Department was not in a position to determine the same, then Rule 7 would not be applicable. Learned counsel would state that Rule 7 was the only Rule which could be applied in case the price was not sole consideration and if that Rule was not applicable then no Rule of the Valuation Rules would apply.

19. Shri. V. Lakshmi Kumaran would further submit by relying on the decision of this Court in *Basant Industries v. Addl. Collector of Customs, Bombay*, 1996 (81) E.L.T. 195 (SC), that ordinarily Courts would not interfere in the price fixation by merely stating that there is undervaluation and proceed on such presumption. He further relied on the decision of this Court in *CCE v. Rajasthan Spinning and Weaving* Mills, (2007) 218 E.L.T. 641 (SC), to contend that different methods prescribed under the Valuation Rules have to converge to a common valuation and it is not possible to accept wide variation in the results in order to ascertain the basis of assessable value. In conclusion, the learned counsel would submit that the Tribunal was justified in allowing the assessees' appeals by relying on the decision of this Court in Guru Nanak Refrigeration's case (supra). In nutshell, the arguments of both the learned senior counsel is

that in terms of Section 4 of the Act, duty liability is on the normal price at which the goods are sold in wholesale trade to the buyers when the sale price is the sole consideration. The basis for valuation of excisable goods is the normal price at which the goods are sold. Only if, such a sale price is not available, valuation based on cost production can be resorted to. In summarization, it is contended that once the normal price at which the goods are sold is available, the Revenue cannot reject the normal price merely because it is less than the cost of production, specially when the genuineness of the sale price is not in doubt. Since the adjudicating authority does not question the genuineness of the sale price in the show cause notices issued, he cannot resort to Section 4(1)(b) of the Act read with relevant Rules for the purpose of quantification of assessable value.

ISSUES:

20. **1.** Whether the Price declared by assessees for their cars which is admittedly below the Cost of manufacture can be regarded as "normal price" for the purpose of excise duty in terms of Section 4(1) (a) of the Act.

2. Whether the sale of Cars by assessees at a price, lower than the cost of manufacture in order to compete and penetrate the market, can be regarded as the "extra commercial consideration" for the sale to their buyers which could be considered as one of the vitiating factors to doubt the normal price of the wholesale trade of the assessees.

21. The decision in the present case turns upon the interpretation of Section 4(1)(a) and Section 4(1)(b) of the Act read with relevant Rules in order to

determine the correctness or otherwise of impugned judgment and order.

22. To begin with, we might like to state here that the facts of the case undoubtedly reveal that if the provisions of the Section 4(1)(b) were to apply, it may work serious hardship to the respondents-asseessees as contended by learned senior counsel for the assessees, but as we are concerned with interpretation of a statutory provision, the mere fact that a correct interpretation may lead to hardship would not be a valid consideration for distorting the language of the statutory provisions.

23. Section 3 of the Act is the charging provision. The taxable event for attracting excise duty is the manufacture of excisable goods. The charge of incidence of duty stands attracted as soon as taxable event takes place and the facility of

postponement of collection of duty under the Act or Rules framed thereunder can in no way effect the incidence of duty. Further, the sale or ownership of the end products is also not relevant for the purposes of taxable event under the central excise. Since excise is a duty on manufacture, duty is payable whether or not goods are sold. Duty is payable even when goods are used within the factory or goods are captively consumed within factory for further manufacture. Excise duty is payable even in case of free supply or given as replacement. Therefore, sale is not a necessary condition for charging excise duty.

24. Section 3 of the Act provides for levy of duty of excise and Section 3(i) thereof states that there shall be levied and collected in the prescribed manner, a duty of excise on excisable goods manufactured in India at the rates set forth in the

first Schedule. Neither Section 3 nor the first Schedule lays down the manner in which *ad valorem* price of the goods has to be calculated. This is found in Section 4 of the Act. Section 4 of the Act lays down the measure by reference to which the duty of excise is to be assessed. The duty of excise is linked and chargeable with reference to the value of the exercisable goods and the value is further defined in express terms by the said Section. In every case, the fundamental criterion for computing the value of an excisable article is the normal price at which the excisable article is sold by the manufacturer, where the buyer is not a related person and the price is the sole consideration. If these conditions are satisfied and proved to the satisfaction of the adjudicating authority, then, the burden which lies on the assessee under Section 4(1)(a) would have been discharged and the price would not be ignored and

the transaction would fall under the protective umbrella contained in the Section itself.

25. Section 4 of the Act is the core provision containing statutory formula for assessment and collection at *ad valorem* basis of duty under Central Excise laws. Therefore, the Section requires to be noticed and some of the expressions contained therein, which are necessary for the purpose of the case, require to be analysed to appreciate the stand of the parties. Since the large part of the demand in question primarily pertains to the period after the year 1975, we will notice Section 4 of the Act, which has come into force with effect from 01.10.1975.

> "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 clause (iii) of this proviso the price or the maximum price, as the case may be, so fixed,+ shall, in relation to the goods so sold, be deemed to be the normal price thereof;

(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."

26. Section 4 of the Act lays down the valuation of excisable goods chargeable to duty of excise. The duty of excise is with reference to value and such value shall be subject to other provisions of Section 4, that is the normal 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. To determine the value, the legislature has created a legal fiction to equate the value of the goods to the price which is actually obtained by the assessee, when such goods are sold in the market, or the nearest equivalent thereof. In other words, the legal fiction so created by Section 4 makes excise duty leviable on the actual market value of the goods or the nearest equivalent thereof. In *Bangaru Laxman* v. *State* (through CBI) and Anr.- (2012) 1 SCC 500, this Court relying on *J.K. Cotton Spinning and Weaving Mills Ltd. v. U.O.I*, (1987) Supp. (1) SCC 350, observed that a deeming provision creates a legal fiction and something that is in fact not true or in existence, shall be considered to be true or in existence. Therefore, though the price at which the assessee sells the excisable goods to a buyer or the nearest ascertainable price may not reflect the actual value

of the goods, for the purpose of valuation of excise duty, by the deeming fiction created in Section 4(1), such selling price or nearest ascertainable price in the market, as the case may be, is considered to be the value of goods.

27. It is well settled that whenever the legislature uses certain terms or expressions of well-known legal significance or connotations, the courts must interpret them as used or understood in the popular sense if they are not defined under the Act or the Rules framed thereunder. Popular sense means "that sense which people conversant with the subject matter, with which the statute is dealing, would attribute to it."

28. The normal rule of interpretation is that the words used by the legislature are generally a safe guide to its intention. Lord Reid in *Westminster Bank Ltd.* v. *Zang* [(1966) A.C. 182] observed that

'no principle of interpretation of statutes is more firmly settled than the rule that the court must deduce the intention of Parliament from the words used in the Act." Applying such a rule, this Court observed in *S. Narayanaswami* v. *G. Pannerselvam & Ors*. (1973) 1 SCR 172 that 'Where the statute's meaning is clear and explicit, words cannot be interpolated.'

29. Section 4 of the Act, as we have already noticed, speaks of valuation of excisable goods, with reference to their value. The `value' subject to other stipulation in Section 4 is deemed to be the `normal price' at which the goods are 'ordinarily' sold to the buyer in the course of 'wholesale trade' where the buyer is not `related person' and the `price' is the `sole consideration' for the sale. Against this background, for the purpose of this case, we have now to consider the meaning of the

words 'value', 'normal price', 'ordinarily sold' and 'sole consideration', as used in Section 4(1) (a) of the Act.

30. The `value' in relation to excisable commodity means normal price or the price at which the goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade at the time and place of removal where the buyer is not a related person and price is the sole consideration for sale. Stated another way, the Central Excise duty is payable on the basis of the value. The assessable value is arrived on the basis of Section 4 of the Act and the Central Excise Valuation Rules.

31. Section 4(1) (a) deems the `normal price' of the assessee for selling the excisable goods to buyers to be the value of the goods for purpose of levy of excise duty. The expression 'normal price' is not defined under the Act. In "Advanced Law Lexicon"

by P. Ramanatha Aiyar, it is defined as the price which would have been payable by an ordinary customer of the goods. This Court while construing the meaning of the aforesaid expression in *Ashok Leyland Ltd.* v. *Collector of Central Excise, Madras* (2002) 10 SCC 344 has stated "Generally speaking the expression 'normal price' occurring in Section 4(1)(a) and (b) means the price at which goods are sold to the public. Where the sale to public is through dealers, the 'normal price' would be the 'sale price' to the dealer.

32. In *Commissioner of Central Excise, Ahemedabad* v. *Xerographic Ltd.* (2006) 9 SCC 556, this Court has explained the concept of normal price. That was in the context of transaction between the related persons. It was observed "that the existence of any extra commercial consideration

while fixing a price would not amount to normal price."

33. In *Burn Standard Co. Ltd.* & Anr. v. *Union of India* (1991) 3 SCC 467, it is stated, "*Section 3 of the Act provides for levy of the duty of excise. It is a levy on goods produced or manufactured in India. Section 4 of the Act lays down the measure by reference to which the duty of excise is to be assessed. The duty of excise is linked and chargeable with reference to the value of the excisable goods and the value is further defined in express terms by the said section. In every case the fundamental criterion for computing the value of an excisable article is the normal 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.*"

34. In *Tata Iron and Steel Co. Ltd.* v. *Collector of Central Excise, Jamshedpur* (2002) 8 SCC 338, it is held that "*it is true to be seen that under the said Act excise duty is chargeable on the value of the goods. The value is the normal price i.e. the price at which such goods are ordinarily sold by the assessee to a buyer, where the buyer is not a related person and the price is the sole consideration for sale.*"

35. In *Union of India and others* v. *Bombay Tyre International Ltd & Ors.*. (1984) 1 SCC 467, it is held that "*it is true, we think, that the new Section 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 arm's length. That requirement is emphasised by the*

provision in the new Section 4(l)(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."

36. In *Metal Box India Ltd.* v. *CCE* (1995) 2 SCC 90, this Court held:

> "10. ... *It has been laid down by Section 4(1)(a) that normal price would be price which must be the sole consideration for the sale of goods and there could not be other consideration except the price for the sale of the goods and only under such a situation sub-section (l)(a) would come into play.*"

37. In *Calcutta Chromotype Ltd.* v. *CCE,* (1998) 3 SCC 681, it is held:

> 14. *... Law is specific that when duty of excise is chargeable on the goods with reference to its value then the normal price on which the goods are sold shall be deemed to be the value provided (1) the buyer is not a related person and (2) the price is the sole consideration. It is a deeming provision and the two conditions have to be satisfied for the case to fall under clause (a) of Section 4(1) keeping in view as to who is the related person within the meaning of clause (c) of Section 4(4) of the Act. Again if the price is not the sole consideration, then again clause (a) of Section 4(1) will not be applicable to arrive at the value of the excisable goods for the purpose of levy of duty of excise."*

38. In *Commissioner of Central Excise* v. *Ballarpur Industries Ltd.*, (2007) 8 SCC 89, it is observed:

> "*19. Under Section 4(1)(a) normal price was the basis of the assessable value. It was the price at which goods were ordinarily sold by the assessee to the buyer in the course of wholesale trade. Under Section 4(1)(b) it was provided that if the price was not ascertainable for the reason that such goods were not sold or for any other reason, the nearest equivalent thereof had to be determined in terms of the Valuation Rules, 1975. Therefore, Rule 57-CC has to be read in the context of Section 4(1) of the 1944 Act, as it stood at the relevant time. Section 4(1)(a) equated "value" to the "normal price" which in turn referred to goods being ordinarily sold in the course of wholesale*

trade. In other words, normal price, which in turn referred to goods being ordinarily sold in the course of wholesale trade at the time of removal, constituted the basis of the assessable value."

39. *In Siddhartha Tubes Ltd.* v. *CCE, (2005) 13 SCC 564, at page 567, it is held*:

"5.....*The essential basis of valuation under Section 4 of the Act is the wholesale cash price charged by the appellant. Normal price under Section 4(1)(a) constituted a measure for levy of excise duty. In the present case, we are concerned with assessment and not with classification. Duty under Section 4 was not leviable on the "conceptual value" but on the normal price charged or chargeable by the assessee. (See Union of India v. Bombay Tyre International Ltd.)*"

40. In *CCE* v. *Bisleri International (P) Ltd.*, (2005) 6 SCC 58, at page 61, it is held**:**

> "10. *At the outset, it may be mentioned that under Section 4(1)(a), "value" in relation to any excisable goods is a function of the price. In other words, "value" is derived from the normal price at the factory gate charged to an unrelated person on wholesale basis and at the time and place of removal.*
>
> *11. It is for the Department to examine the entire evidence on record in order to determine whether the transaction is one prompted by extra-commercial considerations. It is well settled that under Section 4 of the said Act, as it stood at the material time, price is adopted as a measure or a yardstick for assessing the tax. The*

said measure or yardstick is not conclusive of the nature of the tax. Under Section 4, price and sale are related concepts. 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 Section 4. In every case, it will be for the Revenue to determine on evidence whether the transaction is one where extra-commercial considerations have entered and, if so, what should be the price to be taken into account as the value of the excisable article for the purpose of excise duty. These principles have been laid down in the judgment of this Court in the case of Union of India v. Bombay Tyre International Ltd."

41. In *Ashok Leyland Ltd.* v. *Collector of Central Excise, Madras,* (2002) 10 SCC 344, at page 348, it is held:

> "10. *In our view, the provisions of the Act are very clear. Excise duty is payable on removal of goods. As there may be no sale at the time of removal, Section 4 of the Act lays down how the value has to be determined for the purposes of charging of excise duty. The main provision is Section 4(l)(a) which provides that the value would be the normal price thereof, that is, the price at which the goods are ordinarily sold by the assessee to a buyer in the course of a wholesale trade. Section 4(4)(e) clarifies that a sale to a dealer would be deemed to be wholesale trade. Therefore, the normal price would be the price at which the goods are sold in the market in the wholesale trade.*

Generally speaking, the normal price is the one at which goods are sold to the public. Here the sale to the public is through the dealers. So the normal price is the sale price to the dealer. The proviso, which has been relied upon by learned counsel, does not make any exception to this normal rule. All that the proviso provides is that if an assessee sells goods at different prices to different classes of buyers, then in respect of each such class of buyers, the normal price would be the price at which the goods are sold to that class. The proviso does not mean or provide that merely because the assessee sells at different prices to different classes of buyers, the price of that commodity becomes an unascertainable price. The price of that commodity will remain the normal price at which those

goods are ordinarily sold by the assessee to the public, in other words, the price at which they are sold in the market."

42. In *Procter & Gamble Hygiene & Health Care Ltd.* v. *Commissioner of Central Excise, Bhopal*, (2006) 1 SCC 267, it is held :

"9. *This case relates to valuation. At the outset, we would like to clarify certain concepts under the excise law. The levy of excise duty is on the "manufacture" of goods. The excisable event is the manufacture. The levy is on the manufacture. The measure or the yardstick for computing the levy is the "normal price" under Section 4(l)(a) of the Act. The concept of "excisability" is different from the concept of "valuation". In the present case, as stated above, we are concerned with valuation and*

not with excisability. In the present case, there is no dispute that AMS came under Sub-Heading 3402.90 of the Tariff. There is no dispute in the present case that AMS was dutiable under Section 3 of the Act. In Union of India v. Bombay Tyre International Ltd., this Court observed that the measure of levy did not conclusively determine the nature of the levy. It was held that the fundamental criterion for computing the value of an excisable article was the price at which the excisable article was sold or was capable of being sold by the manufacturer. It was further held that the price of an article was related to its value and in that value, we have several components, including those components which enhance the commercial value of the article and which give to the article its marketability in the trade.

Therefore, the expenses incurred on such factors inter alia have to be included in the assessable value of the article up to the date of the sale, which was the date of delivery."

43. What can be construed from the plain reading of Section 4 of the Act and the interpretation that is given by this Court on the expression `normal value' is, where excise duty is chargeable on any excisable goods with reference to value, such value shall be deemed to be 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 and where the assessee and the buyer have no interest directly or indirectly in the business of each other and the price is the sole consideration for the sale. Normal price, therefore, is the amount paid by the buyer for the purchase of goods. In the present

case, it is the stand of the revenue that 'loss making price' cannot be the 'normal price' and that too when it is spread over for nearly five years and the consideration being only to penetrate the market and compete with other manufacturers who are manufacturing more or less similar cars and selling at a lower price. The existence of extra commercial consideration while fixing the price would not be the 'normal price' as observed by this Court in *Xerographic Ltd.*'s case (supra). If price is the sole consideration for the sale of goods and if there is no other consideration except the price for the sale of goods, then only provisions of Section 4 (1)(a) of the Act can be applied. In fact, in *Metal Box's* case (supra) this Court has stated that under sub-Section (1) (a) of Section 4 of the Act, the 'normal price' would be the price which must be the sole consideration for the sale of goods and there cannot be any other consideration except the price

for the sale of goods and it is only under such situation Sub-Section (1) (a) of Section 4 would come into play. In the show cause notices issued, the Revenue doubts the normal price of the wholesale trade of the assessees. They specifically allege, which is not disputed by the assessees, that the `loss making price' continuously for a period of more than five years while selling more than 29000 cars, cannot be the normal price. It is true that in notices issued, the Revenue does not allege that the buyer is a related person, nor do they allege element of flow back directly from the buyer to the seller, but certainly, they allege that the price was not the sole consideration and the circumstance that no prudent businessman would continuously suffer huge loss only to penetrate the market and compete with other manufacturer of more or less similar cars. A prudent businessman or woman and in the present case, a company is expected to

act with discretion to seek reasonable income, preserve capital and, in general, avoid speculative investments. This court in the case of *Union of India v. Hindalco Industries* 2003 (153) ELT 481, has observed that, `if there is anything to suggest to doubt the normal price of the wholesale trade, then recourse to clause (b) of sub-section(1) of Section 4 of the Act could be made'. That the price is not the normal price, is established from the following three circumstances which the assessees themselves have admitted; that the price of the cars was not based on the manufacturing cost and manufacturing profit, but have fixed at a lower price to penetrate the market; though the normal price for their cars is higher, they are selling the cars at a lower price to compete with the other manufacturers of similar cars. This is certainly a factor in depressing the sale price to an artificial level; and, lastly, the full commercial cost of

manufacturing and selling the cars was not reflected in the lower price. Therefore, merely because the assessee has not sold the cars to the related person and the element of flow back directly from the buyer to the seller is not the allegation in the show cause notices issued, the price at which the assessees had sold its goods to the whole sale trader cannot be accepted as 'normal price' for the sale of cars.

44. We now deal with the second limb of the argument of Shri Bhattacharya, learned ASG that the loss price at which the goods are sold by the assessee clearly indicates or reflects that these goods are not "ordinarily sold" in terms of Section 4 (1) (a) of the Act. He submits that admittedly assessees are selling their goods at 100% loss continuously for five years i.e. from the year 1996 to 2001 and therefore, the transactions of the

assessees cannot fit into description of expression 'ordinarily sold'. While countering this argument, Shri Joseph Vellapally would submit that the selling price at which the goods are sold in the ordinary course of business by the assessee to all the buyers is the same or uniform without any exception. He would, therefore, contend that the goods are ordinarily sold in terms of Section 4 (1) (a) of the Act. While adopting the submission of Shri Vellapally, Shri Lakshmi Kumaran would further contend, relying on *Ship Breaker's* case (supra) that this Court while explaining the meaning of the expression 'ordinarily sold', occurring in Section 14 of the Customs Act, 1962 which is in *pari materia* with Section 4 of the Act, would mean the sale where the goods are sold to un-related persons and price is the sole consideration. He would also contend that Section 4 of the Act was amended with effect from 1stApril,

2000, to incorporate 'transaction value' as an 'assessable value' instead of 'normal price' and the expression 'ordinarily' was omitted. Therefore, the new Section is applicable to the transactions which took place for the period from July 2000 to June 2001. He would submit by relying on the decision of this Court in *Elgi Equipment Pvt. Ltd.*'s case (supra), that the word 'ordinarily sold' would mean the normal practice or the practice followed by majority of persons in the wholesale trade in the concerned goods. He would submit that in the present cases, the assessees are better placed as the entire sale is at the same price or rate, so the condition of the expression 'ordinarily sold' is being satisfied.

45. The expression 'ordinarily sold' is again not defined under the Act, but came up for consideration before this Court while construing

the said expression under the Customs Act. This Court in *Eicher Tractors Ltd.*, Haryana v. *Commissioner of Customs, Mumbai* (2001) 1 SCC 315 has held:

> "6. *Under the Act customs duty is chargeable on goods. According to Section 14(1) of the Act, the assessment of duty is to be made on the value of the goods. The value may be fixed by the Central Government under Section 14(2). Where the value is not so fixed, the value has to be determined under Section 14(1). The value, according to Section 14(1), shall be deemed to be the price at which such or like goods are ordinarily sold, or offered for sale, for delivery at the time and place of importation - in the course of international trade. The word "ordinarily" necessarily implies the*

exclusion of "extraordinary" or "special" circumstances. This is clarified by the last phrase in Section 14 which describes an "ordinary" sale as one "where the seller and the buyer have no interest in the business of each other and the price is the sole consideration for the sale ....". Subject to these three conditions laid down in Section 14(1) of time, place and absence of special circumstances, the price of imported goods is to be determined under Section 14(1-A) in accordance with the Rules framed in this behalf."

46. In *Ispat Industries Ltd.* v. *Commissioner of Customs, Mumbai*, (2006) 12 SCC 583, it is held:

"14. *From a perusal of the above provisions (quoted above), it is evident that the most*

important provision for the purpose of valuation of the goods for the purpose of assessment is Section 14 of the Customs Act, 1962. Section 14(1), has already been quoted above, and a perusal of the same shows that the value to be determined is a deemed value and not necessarily the actual value of the goods. Thus, Section 14(1) creates a legal fiction. Section 14(1) states that the value of the imported goods shall be the deemed price at which such or like goods are ordinarily sold, or offered for sale, for delivery at the time and place of importation in the course of international trade. The word "ordinarily" in Section 14(1) is of great importance. In Section 14(1) we are not to see the actual value of the goods, but the value at which such goods or like goods are ordinarily sold or offered for sale

for delivery at the time of import. Similarly, the words "in the course of international trade" are also of great importance. We have to see the value of the goods not for each specific transaction, but the ordinary value which it would have in the course of international trade at the time of its import."

47. *In Varsha Plastics Private Limited & Anr.* v. *Union of India & Ors., (2009) 3 SCC 365, at page37l*, it is observed:

"19. *Section 14(1) of the Act prescribes a method for determination of the value of the goods. It is a deeming provision. By legal fiction incorporated in this section, the value of the imported goods is the deemed price at which such or like goods are ordinarily sold or offered for sale for delivery at the time*

and place of importation in the course of international trade.

20. The word "ordinarily" in Section 14(1) is a word of significance. The ordinary meaning of the word "ordinarily" in Section 14(1) is "non-exceptional" or "usual". It does not mean "universally". In the context of Section 14(1) for the purpose of "valuation" of goods, however, by use of the word "ordinarily" the indication is that the ordinary value of the goods is what it would have been in the course of international trade at the time of import. Section 14(1), thus, provides that the value has to be assessed on the basis of price attached to such or like goods ordinarily sold or offered for sale in the ordinary course of events in international trade at the time and place of transportation."

48. *In Rajkumar Knitting Mills (P) Ltd.* v. *Collector of Customs, Bombay (1998) 3 SCC 163*, at page 165, it is held:

> *"7. ... The words "ordinarily sold or offered for sale" do not refer to the contract between the supplier and the importer, but to the prevailing price in the market on the date of importation or exportation."*

49. *In Ashok Leyland Ltd.* v. *Collector of Central Excise, Madras,* (2002) 10 SCC 344, at page 348, it is held :

> "The price of that commodity will remain the normal price at which those goods are ordinarily sold by the assessee to the public, in other words, the price at which they are sold in the market."

50. In the context of Section 4(1)(a) of the Act, the word 'ordinarily' does not mean majority of the sales; what it means is that price should not be exceptional. In our considered opinion, the word 'ordinarily', by no stretch of imagination, can include extra-ordinary or unusual. In the instant cases, as we have already noticed, the assessees sell their cars in the market continuously for a period of five years at a loss price and claims that it had to do only to compete with the other manufacturers of cars and also to penetrate the market. If such sales are taken as sales made in the ordinary course, it would be anathema for the expression 'ordinarily sold'. There could be instances where a manufacturer may sell his goods at a price less than the cost of manufacturing and manufacturing profit, when the company wants to switch over its business for any other manufacturing activity, it could also be where the

manufacturer has goods which could not be sold within a reasonable time. These instances are not exhaustive but only illustrative. In the instant cases, since the price charged for the sale of cars is exceptional, we cannot accept the submission of the learned counsel to give a meaning which does not fit into the meaning of the expression 'ordinarily sold'. In other words, in the transaction under consideration, the goods are sold below the manufacturing cost and manufacturing profit. Therefore, in our view, such sales may be disregarded as not being done in the ordinary course of sale or trade. In our view, for the purpose of Section 4(1) (a) all that has to be seen is: does the sale price at the factory gate represent the wholesale cash price. If the price charged to the purchaser at the factory gate is fair and reasonable and has been arrived at only on purely commercial basis, then that should represent the wholesale

cash price under Section 4(1)(a) of the Act. This is the price which has been charged by the manufacturer from the wholesale purchaser or sole distributor. What has to be seen is that the sale made at arms length and in the usual course of business, if it is not made at arms length or in the usual course of business, then that will not be real value of the goods. The value to be adopted for the purpose of assessment to duty is not the price at which the manufacturer actually sells the goods at his sale depots or the price at which goods are sold by the dealers to the customers, but a fictional price contemplated by the section. This Court in *Ram Kumar Knitting Mills* case (supra), while construing the said expression, has held that the word `ordinarily sold' do not refer to contract between the supplier and the importer, but, the prevailing price in the market on the date of importation and exportation. Excise duty is

leviable on the value of goods as manufactured. That takes into account manufacturing cost and manufacturing profit.

51. Excise is a tax on the production and manufacture of goods and Section 4 of the Act provides for arriving at the real value of such goods. When there is fair and reasonable price stipulated between the manufacturer and the wholesale dealer in respect of the goods purely on commercial basis that should necessarily reflect a dealing in the usual course of business, and it is not possible to characterise it as not arising out of agreement made at arms length. In contrast, if there is an extra-ordinary or unusual price, specially low price, charged because of extra-commercial considerations, the price charged could not be taken to be fair and reasonable, arrived at on purely commercial basis, as to be counted as the

wholesale cash price for levying excise duty under Section 4(1)(a) of the Act.

52. The next submission of Shri Bhattacharya, learned ASG, is that the price at which the cars sold by the assessees is not the sole consideration as envisaged under Section 4(1)(a) of the Act. He would contend that admittedly there exists a consideration other than the price, that is, to penetrate the market. He would also submit that the lower price would enable the assessee to generate higher turnover and this higher turnover is monetary consideration for the assessee received directly from various buyers. In other words, he would submit, the intention to penetrate the market is intertwined with receiving a higher monetary turnover. Therefore, the price is not the sole consideration. However, it is contended by learned senior counsel Shri Vellapally that the

reason for the assessees for selling their cars at a lower price than the manufacturing cost was because the assessees had no foothold in the Indian market and, therefore, had to sell at a lower price than the manufacturing cost and profit in order to compete in the market. He would submit that the intention of the assessees to penetrate the market cannot be treated as extra commercial consideration as it does not flow from the buyer to the seller. Therefore, there is no additional consideration flowing from buyer to seller and whole transaction is bona fide.

53. Now what requires to be considered is what is the meaning of the expression `sole consideration'. Consideration means something which is of value in the eyes of law, moving from the plaintiff, either of benefit to the plaintiff or of detriment to the defendant. In other words, it may consist either in

some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility, given, suffered or undertaken by the other, as observed in the case of Currie v. Misa (1875) LR 10 Ex. 153.

54. Webster's Third New International Dictionary (unabridged) defines, consideration thus:

> "Something that is legally regarded as the equivalent or return given or suffered by one for the act or promise of another."

55. In volume 17 of Corpus Juris Secundum (p.420-421 and 425) the import of 'consideration' has been described thus:

> "Various definitions of the meaning of consideration are to be found in the text-books and judicial opinions. A sufficient one, as stated in Corpus Juris and which has been quoted and cited with approval is

"a benefit to the party promising or a loss or detriment to the party to whom the promise is made.....

At common law every contract not under seal requires a consideration to support it, that is, as shown in the definition above, some benefit to the promisor, or some detriment to the promisee."

56. In Salmond on Jurisprudence, the word 'consideration' has been explained in the following words.

"A consideration in its widest sense is the reason, motive or inducement, by which a man is moved to bind himself by an agreement. It is for nothing that he consents to impose an obligation upon himself, or to abandon or transfer a right. It is in consideration of such and such a

fact that he agrees to bear new burdens or to forego the benefits which the law already allows him."

57. The gist of the term 'consideration' and its legal significance has been clearly summed up in Section 2(d) of theIndian Contract Act which defines 'consideration' thus:

"When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration to the promise."

58. From a conspectus of decisions and dictionary meaning, the inescapable conclusion that follows is that 'consideration' means a reasonable equivalent or other valuable benefit passed on by the promisor

to the promisee or by the transferor to the transferee. Similarly, when the word 'consideration' is qualified by the word 'sole', it makes consideration stronger so as to make it sufficient and valuable having regard to the facts, circumstances and necessities of the case.

59. To attract Section 4(1)(a) of the Act what is required is to determine the 'normal price' of an excisable article which price will be the price at which it is ordinarily sold to a buyer in the course of wholesale trade. It is for the Excise authorities to show that the price charged to such selling agent or distributor is a concessional or specially low price or a price charged to show favour or gain in return extra-commercial advantage. If it is shown that the price charged to such a sole selling agent or distributor is lower than the real value of the goods which will mean the manufacturing cost plus

manufacturing profit, the Excise authorities can refuse to accept that price.

60. Since under new Section 4(1)(a) the price should be the sole consideration for the sale, it will be open for the Revenue to determine on the basis of evidence whether a particular transaction is one where extra-commercial consideration has 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 and that is what exactly has been done in the instant cases and after analysing the evidence on record it is found that extra-commercial consideration had entered into while fixing the price of the sale of the cars to the customers. When the price is not the sole consideration and there are some additional considerations either in the form of cash, kind, services or in any other way, then according to Rule

5 of the 1975 Valuation Rules, the equivalent value of that additional consideration should be added to the price shown by the assessee. The important requirement under Section 4(1)(a) is that the price must be the sole and only consideration for the sale. If the sale is influenced by considerations other than the price, then, Section 4(1)(a) will not apply. In the instant case, the main reason for the assessees to sell their cars at a lower price than the manufacturing cost and profit is to penetrate the market and this will constitute extra commercial consideration and not the sole consideration. As we have already noticed, the duty of excise is chargeable on the goods with reference to its value then the normal price on which the goods are sold shall be deemed to be the value, provided: (1) the buyer is not a related person and (2) the price is the sole consideration. These twin conditions have to be satisfied for the case to fall under Section 4(1)(a)

of the Act. We have demonstrated in the instant cases, the price is not the sole consideration when the assessees sold their cars in the wholesale trade. Therefore, the assessing authority was justified in invoking clause(b) of Section 4(1) to arrive at the value of the exercisable goods for the purpose of levy of duty of excise, since the proper price could not be ascertained. Since, Section 4(1)(b) of the Act applies, the valuation requires to be done on the basis of the 1975 Valuation Rules.

61. After amendment of Section 4 :- Section 4 lays down that the valuation of excisable goods chargeable to duty of excises on *ad-valorem* would be based upon the concept of transaction value for levy of duty. `Transaction value' means the price actually paid or payable for the goods, when sold, and includes any amount that the buyer is liable to pay to the assessee in connection with the sale,

whether payable at the time of sale or at any other time, including any amount charged for, or to make provisions for advertising or publicity, marketing and selling, and storage etc., but does not include duty of excise, sales tax, or any other taxes, if any, actually paid or payable on such goods. Therefore, each removal is a different transaction and duty is charged on the value of each transaction. The new Section 4, therefore, accepts different transaction values which may be charged by the assessee to different customers for assessment purposes where one of the three requirements, namely; (a) where the goods are sold for delivery at the time and place of delivery; (b) the assessee and buyers are not related; and (c) price is the sole consideration for sale, is not satisfied, then the transaction value shall not be the assessable value and value in such case has to be arrived at, under the Central Excise Valuation (Determination of Price of Excisable

Goods) Rules 2000 ('the Rules 2000' for short) which is also made effective from 1st July, 2000. Since the price is not the sole consideration for the period even after 1st July, 2000, in our view, the assessing authority was justified in invoking provisions of the Rules 2000.

62. <u>Reference to the Citations :</u>

Shri Bhattacharya, learned ASG, submits that in view of the decision of this Court in Bombay Tyre International case (supra), the nominal price of the goods, even if it is sold for a loss price, for the purpose of assessable value under Section 4 of the Act, at least the manufacturing cost and manufacturing profit should be taken into consideration. In view of this decision, the learned counsel goes to the extent of saying the judgements relied upon by the opposite side on the decision of this Court in Guru Nanak Refrigeration (supra) and Bisleri International (supra) should be treated as

per-incurium. We cannot agree. In Bombay Tyre's case, the issue before the Court was whether the value of an article for the purpose of excise duty had to be determined by reference exclusively to the manufacturing cost and manufacturing profit of the manufacturer or should be represented by the wholesale price charged by the manufacturer which would include post-manufacturing expenses and post-manufacturing profits arising between the completion of manufacturing process and the point of sale by the manufacturer. It is relevant to notice at this stage, in the Bombay Tyre's case, this Court considered the scope of Section 4 before its amendment and after the new section 4 was substituted with effect from 01.10.1975. This Court in the said case, after detailed consideration of rival contentions and after referring to several precedents of this Court has concluded that the levy of excise duty was on the manufacture or

production of goods, the stage of collection need not in point of time synchronise with the completion of the manufacturing process while the levy had the status of a constitutional concept, the point of collection was located where the statute declared it would be. The Court further went on to observe when enacting the measure to serve as a standard for assessing the levy, legislature need not contour it along lines which spell out the character of the levy itself. From this stand point, 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 the excisable article must be limited to the manufacturing cost plus the manufacturing profit. The Court further was of the opinion, that a broad-based standard of reference may be adopted for the purpose of determining the measure of levy. Any standard which maintains a manner with the essential character of levy could

be regarded as a valid basis for assessing the measure of levy. This Court in this decision also distinguished the view expressed in *A.K. Roy & Anr. v. Voltas Ltd.*, 1977 (1) ELT 177 (SC), wherein this Court had held that the value for the purpose of Section 4 would include only the manufacturing cost plus manufacturing profit and exclude post-manufacturing cost plus manufacturing profit but exclude post-manufacturing cost and profit arising from post-manufacturing operation by observing that this Court in the aforesaid decision intended to say was that entire cost of the article plus profit minus trade discount would represent the assessable value and in that decision there was no issue on the question of including the post manufacturing cost and post-manufacturing profits. In conclusion, insofar as amended Section 4 of the Act, the Court has observed that the assessable value will be the price at which the

goods are ordinarily sold by the assessee to the buyer in the course of wholesale trade at the factory gate. However, firstly, the buyer should not be a related person and the price should be sole consideration for the same. This proposition is subject to Section 4(1)(a). Secondly, if the price of the excisable goods cannot be ascertained either because the goods are not sold or for any other reason, the value will have to be determined as per the Central Excise Valuation Rules.

63. Our attention was also drawn by learned counsel Shri Bhattacharya to the decision of this Court in *Assistant Collector of Central Excise & Ors.. v. M.R.F. Ltd.* 1987 (27) ELT 553 (SC), wherein the Court dealt with concept of post-removal expenses.

64. Shri Vellapally and Shri Lakshmi Kumaran learned Counsel by placing reliance on Guru

Nanak's case (supra) and Bisleri's case (supra) contends that the issue raised in these appeals is no more *res integra*. We cannot agree. In Guru Nanak's case, the facts are: the assessee therein was engaged in the manufacture of refrigeration and air-conditioning machinery. They had cleared the goods after approval of the price list by the department. The adjudicating authority being of the view that the assessable value declared by the assessee was low as compared to the cost of material used in the manufacture of the said machinery, had issued a show cause, to show cause why the assessable value should not be re-fixed and the duty fixed on the re-fixed assessable value after taking into consideration the cost of raw material plus manufacturing cost plus reasonable profit margin. The adjudicating authority after considering the reply filed had confirmed the show cause notice and had directed the assessee to pay

the difference in excise duty. In the appeal filed before the Tribunal, the assessee had succeeded. In the appeal filed by the department, this Court was of the view that since in the show cause notice issued by the adjudicating authority there was no allegation that the wholesale price to the buyers was for consideration other than the one at which it was purported to be sold or that it was not at arms length and further, there was no allegation that there was any flow back from the buyer to the assessee and therefore, the department cannot take a stand that the normal price was not ascertainable for the purpose of valuation under Section 4(1)(a) of the Act and therefore, the Tribunal was justified in accepting the whole sale price as the correct price.

65. In Bisleri's case, the issue as noted by the Court was, whether the assessee had undervalued

the aerated water (Beverages) by excluding two items, namely, the amounts received under credit notes as price support incentive and rent on containers as assessable value. The Court after referring to provisions of Section 4(1)(a) of the Act and the decision of this Court in *Bombay Tyre's* case (supra) has held that the amounts received under credit notes as price support incentives from supplier of raw materials cannot be included in the assessable value, since the department failed to prove that there was flow back of additional consideration from buyers of aerated waters to the assessee and further, the price was not uniformly maintained and favour of exra-commercial consideration was shown to the buyers of aerated waters (beverages). The Court has also observed that under Section 4, the price and sale are related concepts. 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 Section 4. In every case, it will be for the revenue to determine on evidence whether the transaction is one where extra-commercial consideration have entered and if so, what should be the price to be taken into account as the value of the excisable article for the purpose of excise duty.

66. In our considered view, either the decision of Guru Nanak's case (supra) or the decision in Bisleri's case (supra) would assist the assessee in any manner whatsoever. We say so for the reason, that, in *Guru Nanak's* case, the department had accepted the price declared by the assessee and the narration of the facts both by the Tribunal and this Court would reveal that it was one time transaction and lastly, this Court itself has specifically observed that the view that they have taken, is primarily based on the facts and circumstances of the case.

In the instant cases, the department never accepted the declared value. It is for this reason, provisional assessments were completed instead of accepting declared price by the assessee under Rule 9B of the Rules *inter alia* holding that during the enquiry, the assessees had admitted that they did not have any basis to arrive at the assessable value but they are selling their goods at 'loss price' only to penetrate the market. Secondly, as we have already noticed that for nearly five years the assessee was selling its cars in the wholesale trade for a 'loss price' and therefore, the conditions envisaged under Section 4(1)(a) of the Act, namely; the normal price, ordinarily sold and sole consideration are not satisfied. We further hold that the decision in Bisleri's case (supra) will also not assist the assessees for the reason that the issue that came up for consideration is entirely different from the legal issue raised in these civil

appeals. Before we conclude on this issue, we intend to refer to the often quoted truism of Lord Halsbury that a case is only an authority for what it actually decides and not for what may seem to follow logically from it. We may also note the view expressed by this Court in the case of *Sushil Suri* vs. *Central Bureau of Investigation & Anr.* (2011) 5 SCC 708, wherein this Court has observed, "Each case depends on its own facts and a close similarity between one case and another is not enough because either a single significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cardozo) by matching the colour of one case against the colour of another. To decide, therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive." We do not intend to overload this judgment by

referring to other decisions on this well settled legal principle.

67. <u>Reference to Valuation Rules :</u>

Shri. Bhattacharya, the learned ASG, contends that the assessees are not fulfilling the conditions enumerated in Section 4(1)(a) of the Act and therefore, the valuation has to be done in accordance with Section 4(1)(b) read with the 1975 Valuation Rules. He would submit that since the price of the cars sold by the assessee was not ascertainable, the Revenue is justified in computing the assessable value of the goods for the levy of excise duty under Section 4(1)(b) of the Act and the relevant rules. He would further submit that the Valuation Rules need not be applied sequentially. He would contend that all the Rules 3, 4, 5, 6 and 7 of the 1975 Valuation Rules specifically use the expression "shall…be determined", "shall be based"

or "shall determine the value" and nowhere word "sequentially" occurs in these Rules, unlike Rule 3(ii) of the Customs Valuation Rules, 1988. He would submit that merely the presence of word "shall" does not imply that all the Rules has to be applied sequentially. He would further submit that in the facts and circumstances of the present cases, Rule 7 is the only applicable Rule in view of the decision in Bombay Tyre's case and assessing authority as well as the first appellate authority correctly adopted the application of this Rule.

68. Per Contra, Shri Joseph Vellapally, would submit that only when the normal price is not ascertainable in terms of Section 4(1)(a), then Section 4(1)(b) read with the 1975 Valuation Rules would come into play to determine the nearest equivalent assessable value of the goods. He would contend that the Valuation Rules have to be applied

sequentially, *i.e.* first, Rules 4 and 5 should be invoked in order to determine the assessable value and if Rules 4 and 5 are not applicable or assessable, value cannot be ascertained by applying the said Rules, and then only Rule 6 can be invoked. He would further submit that it is only Rule 6(b)(ii) of the 1975 Valuation Rules which contemplates determining of assessable value on the basis of cost of manufacture, only when the goods are captively consumed by the manufacturer and value of comparable goods manufactured by the assessee or any other assessee are not available.

69. Under Section 4(1)(b) of the Act, 1944, any goods which do not fall within the ambit of Section 4(1)(a) i.e. if the 'normal price' cannot be ascertained because the goods are not sold or for any other reason, the 'normal price' would have to

be determined in the prescribed manner i.e. prior to 1st day of July, 2000, in accordance with Rules, 1975 and after 1st day of July 2000, in accordance with Rules, 2000.

70. Rule 2 of the 1975 Valuation Rules provides for definition of certain terms, such as "proper officer", "value" etc., Rule 3 of the above Rules, provides that the value of any excisable goods, for the purposes of Clause (b) of Sub-Section (1) of Section 4 of the Act be determined in accordance with these Rules. Rule 4 provides that the value of the excisable goods shall be based on the value of such goods by the assessee for delivery at any other time nearest to the time of removal of goods under assessment. Rule 5 provides that when the goods are sold in the circumstances specified in Clause (a) of Sub-Section (1) of Section (4) of the Act except that the price is not the sole consideration, the

value of such goods shall be based on the aggregate price and the amount of the money value of any additional consideration flowing directly or indirectly from the buyer to the assessee. Rule 6 provides, that, if the value of the excisable goods under assessment cannot be made, then to invoke provisions of Rule 6 of the Rules, wherein certain adjustments requires to be made as provided therein. Rule 7 is in the nature of residuary clause. It provides that if the value of excisable goods cannot be determined under Rule 4, 5 and 6 of the Rules, the adjudging authority shall determine the value of such goods according to the best of his judgment and while doing so, he may have regard to any one or more methods provided under the aforesaid Rules. A bare reading of these rules does not give any indication that the adjudging authority while computing the assessable value of the excisable goods, he had to follow the rules

sequentially. The rules only provides for arriving at the assessable value under different contingencies. Again, Rule 7 of the Valuation Rules which provides for the best judgment assessment gives an indication that the assessing authority while quantifying the assessable value under the said Rules, may take the assistance of the methods provided under Rules 4, 5 or 6 of the Valuation Rules. Therefore, contention of the learned counsel that the assessing authority before invoking Rule 7 of the 1975 Valuation Rules, ought to have invoked Rules 4, 5 and 6 of the said Rules cannot be accepted. In our view, since the assessing authority could not do the valuation with the help of the other rules, has resorted to best judgment method and while doing so, has taken the assistance of the report of the 'Cost Accountant' who was asked to conduct special audit to ascertain the correct price that requires to be

adopted during the relevant period. Therefore, we cannot take exception of the assessable value of the excisable goods quantified by the assessing authority.

71. In the result, the appeals require to be allowed and, accordingly, they are allowed and the impugned order is set aside and the order passed by the adjudicating authority is restored. No order as to costs.

.....J.
(H. L. DATTU)

.....J.
(ANIL R. DAVE)

NEW DELHI;
AUGUST 29, 2012.