

(1979) 02 GUJ CK 0005

In the Gujarat High Court

Case No : Special Civil Application No. 119 of 1976

Cibatul Limited

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 21-02-1979

Acts Referred:

Central Excises and Salt Act, 1944 — Section 2(D), 2(d), 3, 4

Citation : (1979) CENCUS 404 : (1980) GLR 825 : (1980) GLR 284

Hon'ble Judges : S.H. Sheth, J;N.H. Bhatt, J

Bench : Division Bench

Judgement

S.H. Sheth, J.—Cibatul Limited, a company registered under the Companies Act. 1956, is the petitioner (hereinafter referred to as "the manufacture"). They are manufacturing U.P. Resins, M.F. Resins and Epoxy Resins. They are "excisable goods" within the meaning of that expression given in Section 2(d) of the Central Excises and Salt Act, 1944 (I of 1944) (hereinafter referred to as "the Excise Act"). Ciba Geigy of India Limited are their wholesale buyers. They are a company incorporated in India and are hereinafter referred to as "the buyer". Ciba Geigy Limited is a third company incorporated in Switzerland and is referred to hereinafter as "the Swiss Company". 65% of the share capital of the manufacturer is held by Atul Products Limited, 30% of its share capital is held by the Swiss company and the remaining 5% of its share capital is held by the buyer. So far as the buyer is concerned, 65% of its capital is held by the Swiss Company. The Swiss company has registered trade marks in respect of which licence has been granted by it to buyer to use them. Two agreements dated 24th March 1971 and 7th December 1971 were entered into between the manufacturer and the buyer. Agreement dated 24th March 1971 provided for the sale of certain manufactured goods to buyer. Agreement dated 7th March 1971 is a tripartite agreement between the manufacturer, the buyer and the Swiss company. Under this agreement, the manufacturer is permitted to affix a certain trade mark of the Swiss company on goods manufactured by the manufacturer and sold to the buyer under the agreement dated 24th March 1971. Two more

agreements, similar in character, dated 1st June 1973 and 1st December 1973, in respect of certain other goods manufactured by the manufacturer were entered into.

2. The manufacturer is required by Central excise authorities to pay excise duty not on the price which the manufacturer charges the buyer but which the buyer charges his buyer on the ground that the manufacturer and the buyer are "related persons". Therefore the manufacturer has filed this petition in which, broadly speaking, it has raised the twofold challenge:

I. The concept of "related person" introduced by Parliament in amended Section 4 of the Excise Act is ultra vires the legislative competence of Parliament under Article 246 read with Entry 84 in List I in Seventh Schedule to the Constitution of India (hereinafter referred to as the "Union List").

II. The manufacturer and the buyer are not "related person" within the meaning of that expression given in the Excise Act.

3. The examination of the first contention necessarily involves the examination of the legislative competence of the Parliament in this behalf under Article 246 read with entry 84 in the Union List. Entry 84 reads thus:

84. Duties of Excise on tobacco and other goods manufactured or produced in India except-

(a) Alcoholic liquors for human consumption ;

(b) opium, Indian hemp and other narcotic drugs and narcotics, but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.

What is the width and amplitude of the expression "Duties of excise" ? We may state that the Government of India Act, 1935 also contained a similar entry. It was entry 45 in List I in VII Schedule to that Act. For the sake of convenience, it may be reproduced here:

45. Duties of excise on tobacco and other goods manufactured or produced in India except

(a) alcoholic liquors for human consumption

(b) opium, Indian hemp and other narcotic drugs and narcotics; non-narcotic drugs:

(c) medicinal and toilet preparations containing alcohol, or any substance included in sub-paragraph (b) of this entry.

Comparison of these two entries makes it abundantly clear that they are part materia except that Entry 45 in the Federal legislative list excluded non-narcotic drugs. They are not excluded by Entry 84 in the Union List. Secondly, while the federal legislative list excluded medicinal and toilet preparations specified in sub-

paragraph (b) of that Entry, they are included in Entry 84 in Union list. These variations do not make any difference for the purpose of this case. We are concerned in the instant case with discovering the width and amplitude of the expression "Duties of Excise". The question, in our opinion, is not open to debate because it has been the subject matter of several decisions of the highest Court of this country. They are binding on us.

4. In the matter of the Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act AIR 1938 F.C.I 1939, the Federal Court has laid down certain principles which may be noted. So far as the interpretation of legislative powers of the Federal Legislature and Provincial legislatures was concerned, the Federal Court observed that no narrow and technical construction should be placed upon them. Taking into account the magnitude of subjects dealt with by the Government of India, 1935, in a few words, a large and liberal interpretation should be given to them so that the Central Government, within certain fixed limits, may be mistress in her own house and the Provinces, to a great extent but again within certain fixed limits, are mistresses in their houses. So far as the width and amplitude of the duties of excise was concerned, Sir Maurice Gwyer C.J. stated that power to make laws with respect to duties of excise given to the Federal Legislature was power to impose duties of excise upon the manufacturer or producer of the excisable articles or at least at the stage of or in connection with manufacture or production and that it extends no further. Pointing out the distinction between excise duties and sales tax, the learned Chief Justice observed that they are two mutually exclusive spheres and that there is no overlapping between them. The Central Legislature may impose excise duties on excisable articles at the stage of manufacture or production before they become part of the general stock of the province while the Provincial Legislature will have an exclusive power to impose a tax on sales thereafter. Mr. Justice Sulaiman, in a concurring judgment, observed that excise duties may be imposed by the Centre on manufacture or production of excisable articles at the place or in the Province of their origin while sales tax can be imposed on all retail sales of such goods within the Province, Mr. Justice Jaykar, in his concurring judgment, observed that as regards centrally excisable goods "taxes on their sale within the province for the purposes of consumption, when such taxes are in no way connected with their production, manufacture etc. within the Province, but are imposed on their sale in the Province merely as existing articles of trade and commerce," are a sales-tax and that, all other duties on those goods, whether levied or collected at the stage of manufacture, production or any subsequent stage upto consumption will be duties of excise.

5. Mr. Vakil in his turn has relied upon this decision and invited our attention to the observation that the expression "sales tax" means a good deal more than what is, understood by "tax on the sale of goods" in the ordinary and natural meaning of those words and that the expression "turnover tax," seems to be in one sense wider and in another sense narrower. Next, he has also relied upon the following observations : "The words "taxes on the sale of goods" are every

general, and there is no good reason for confining their meaning to a turnover tax. on the gross sale proceeds only." He has also placed reliance upon the following observation of Mr. Justice Sulaiman : "The validity of the impugned Act therefore depends on the meaning to be given to these two competing entries, and on the question whether they are mutually exclusive or overlap". Mr. Vakil has also pointed out to us that the taxes on the sale of goods include even first sales that, while approaching a question of this kind, the Court must try to find out the pith and substance of the levy and not its form. Mr. Vakil has made this, attempt to show that under the scheme of Section 4(as amended), there is no overlapping of excise duty and sales tax and that, if there is any, on a liberal construction of the relevant Entries, it is constitutionally permissible.

6. In *The Province of Madras v. Messrs Boddu Paidanna & Sons* AIR 1942 F.C. 33 the Federal Court observed in the context of Entry 45 of the federal legislative list that the duties of excise which the Government of India Act, 1935, assigned exclusively to the Central Legislature were duties leviable upon the manufacturer or producer. Where power to levy duties of excise and sales tax has been given to two independent authorities, the expression "duty of excise" must be given a more restricted meaning than it might otherwise bear even though that expression is wide enough to include a tax on sales. The principles laid down in the earlier decision in *Central Provinces case* (supra) were affirmed by the Federal Court in this decision. Mr. Vakil has in his turn relied upon this decision and invited our attention to the following passage in furtherance of his attempt:

The tax on the sale of goods, which the Act assigns exclusively to the Provincial Legislatures, is a tax levied on the occasion of the sale of the goods. A tax levied on the first sale must in the nature of things be a tax on the sale by the manufacturer or producer; it is levied upon him qua seller and not qua manufacturer or producer. It may well be that a manufacturer or producer is sometimes doubly hit. If the tax payer who pays a sale tax is also a manufacturer of commodities subject to a central duty of excise there may no doubt be an overlapping in law. The two taxes which he is called on to pay are economically two separate and distinct imposts. There is in theory nothing to prevent the Central Legislature from imposing a duty of excise on a commodity as soon as it comes into existence, no matter what happens to it after wards,..

7. In AIR 1945 98 (Privy Council) , the Privy Council observed that a duty of excise is primarily a duty levied upon a manufacturer or producer in respect of the commodity manufactured or produced and that it is a tax upon goods, not upon sales or the proceeds of sale of goods, Relying upon this decision in his turn Mr. Vakil has drawn our attention to principle that when an Entry in the Provincial List can be fairly reconciled they should be reconciled and that if the legislative powers of the Federal and Provincial Legislatures which are enumerated in List I and List II of Schedule 7 cannot fairly be reconciled, the latter must give way to the former.

8. These three decisions laid down the width and applitude of Entry 45 in the

Federal Legislative List. The Privy Council has in the last mentioned decision, approved the decision of the Federal Court in *Boddu Paidanna's* case (supra).

9. Turning to the decisions of the Supreme Court on the subject, we must first refer to the decision in *Chhotabhai Jethabhai Patel and Co. Vs. The Union of India and Another*, . It was a case in which Entry 84 in the Union List came up directly for construction. In that case, Australian, American and Canadian decisions were cited before the Supreme Court. The Supreme Court felt that not much assistance could be derived from those decisions for discovering the scope and content of the expression "duty of excise" used in Entry 84 in the Union List. On behalf of the Central Government, it was contended in that case (hat an excise duty is a duty which may be imposed upon home-produced goods at any stage from production to consumption and that, therefore, the central legislative power extended to imposing excise duty at any stage. It was observed by the Supreme Court that there was no reason in theory why an excise duty should not be imposed even on a retail sale of an article if the taxing Act so provided subject always to the legislative competence of the taxing authority. It has also been laid down by the Supreme Court in that case that the taxable event in case of an excise duty is manufacture or production of goods and that it is immaterial what happens to the goods afterwards, whether they are sold, destroyed or given away. The Supreme Court has referred with approval to the following paragraph in the decision of the Privy Council in the *Province of Madras* case (supra):

Consistently with this decision their Lordships are of the opinion that a duty of excise is primarily a duty levied on a manufacturer or producer in respect of the commodity manufactured or produced. It is a tax on goods not on sales or the proceeds of sale of goods.

In paragraph 14 of the report, the Supreme Court has observed in the context of Canadian decisions on the subject:

In view of this clear exposition of the content of the term "duty of excise" in the Indian setting, we think, no assistance can be derived for the meaning ascribed and the characteristics attributed to it in the decisions construing the relative taxing powers of the Dominion and the Provinces under the *British North America Act, 1867*.

Replying to this decision, Mr. Vakil has argued that the stage at which excise duty can be imposed has no reference to the question of measure of tar; or a component thereof and that this decision does not militate against the proposition that excise duty may be imposed at any stage of manufacture and production and that it can as well be related to the retail price. It is indeed true that an excise duty can be levied at any stage. However, while trying to point out this distinction Mr. Vakil has overlooked the basic proposition laid down by Supreme Court that, irrespective of the stage at which the excise duty is leived, it must have relation to the manufacture or production of an excisable commodity and to nothing else. This decision makes it clear beyond any doubt

that excise duty is a tax of manufacturing activity. In other words, it is a tax which is levied upon the manufacture or production of goods. Entry 84 in the Union List itself uses the expression "manufactured or produced" in the context of levy of "Duties of excise".

10. In *R.C. Jall Vs. Union of India (UOI)*, , a similar question arose in the context of Coal Production Rules. In that case, it was contended that the excise duty could not be legally levied upon the consignee who had nothing to do with the manufacture or production of coal. The Supreme Court has observed in that context that the argument confused the impost with the machinery provided for the collection thereof. The Supreme Court has approved in that case the decision of the Federal Court that the primary and fundamental meaning of the expression "duties of excise" is that it is a tax on articles produced or manufactured in the taxing country and intended for home consumption. Relying to this decision, Mr. Vakil has argued that the observations made by the Supreme Court have no relation to the measure of tax, to any component thereof or to any considerations relevant to the measure of tax. He has also tried to argue that this decision merely relates to the rational connection between the tax and the persons on whom it is imposed. It is true that this decision does not deal with the measure of tax. But can it, therefore, be said that this decision authorizes the collection in the name of excise duty of something else which clearly falls within the State List or can it be said that it is totally irrelevant and inapplicable to the question which we are called upon to answer ? We think not.

11. In *Union of India (UOI) Vs. Delhi Cloth and General Mills*, , the Supreme Court has laid down that the excise duty is a tax on the manufacture of goods and not on their sale. Mr. Vakil has tried to distinguish this decision by arguing that it deals with the taxable event in case of a duty of excise and does not deal with the measure of tax. This is no reply at all because if manufacture or production is the taxable event for levying an excise duty, the later must have casual relation with manufacturing cost and manufacturing profit. Mr. Vakil's argument itself boomerangs on the case advanced by him.

12. In *In re: Sea Customs Act (1878)* AIR 1963 S.C. 1760, the Supreme Court has referred with approval to the decisions of the Federal Court referred to above. The following extract from the decision of the Supreme Court is very apposite in this behalf.

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

(emphasis supplied).

It has been next observed:

...the taxable event in the case of duties of excise is the manufacture of goods and the duty is not directly on the goods but on the manufacture thereof.

The Supreme Court in that decision has contrasted Sales-tax with excise duty and observed that in case of sales-tax, the taxable event is an act of sale. Therefore, though both excise duty and sales-tax are levied with reference to goods, the two are very different imposts; in one case the imposition is on the act of manufacture or production while in the other it is on the act of sale.

13. In *Shinde Brothers etc. Vs. Deputy Commissioner and Others, etc.*, after having referred to the earlier decisions of the Federal Court and the Supreme Court to which we have already referred, the Supreme Court has observed that in order to be an excise duty the levy must be upon "goods" and the taxable event must be the manufacture or production of goods. Further the levy need not be imposed at the stage of production or manufacture but may be imposed later. Whether a particular levy is on the manufacture or production of goods has to be decided on the facts of each case. While deciding the question, the following principles are required to be borne in mind. Firstly, it must be uniform in its incidence. Secondly, it must be closely related to production or manufacture of goods. Thirdly, if a levy is made not at the moment of manufacture or production but at a later stage, it does not matter. Fourthly, if a duty has been levied on an excisable article but is collected from a dealer, it does not necessarily cease to be an excise duty. Fifthly, if the levy is made for the privilege of selling an excisable article and if the excisable article has already borne the duty and the duty has been paid, there must be clear terms in the charging section to indicate that what is being levied for the purpose of privilege of sale is, in fact, a duty of excise. This question arose in the context of the Mysore Health Case Act (28 of 1962). In reply, Mr. Vakil has only stated that this decision deals with the levy and not the measure. He did not amplify his reply and left us to guess what he was driving at. If he could not show his desideratum, we would not, on our own, venture to discover one for him.

14. In *South Bihar Sugar Mills Ltd., etc. Vs. Union of India (UOI) and Others*, in the context of kiln gas produced by lime kilns and used in manufacture of sugar by carbonisation process and of soda ash, the Supreme Court has held that for the purpose of attracting excise duty, it does not matter whether the gas which is produced is sold or used only in the manufacturing processes (vide paragraph 15 of the report).

15. In *A.K. Roy and Another Vs. Voltas Limited*, in the context of Section 4 of the Excise Act before it was amended, the Supreme Court has observed that the excise is a tax on the production and manufacture of goods and the excise duty is levied only on the amount representing the manufacturing cost plus the manufacturing profit and excludes post-manufacturing cost and the profit arising

from post-manufacturing operation, namely, selling profit (vide paragraph 21 of the report). Mr. Vakil has in reply asked us to ignore this decision because it has interpreted Section 4 before it was amended. We cannot do so. We must apply to this case whatever applicable has been laid down in it. The arguments raised by Mr. Vakil were either oversimplifications or born of some confusion of thought.

16. In *Amar Dye-chem Limited and Another Vs. The Union of India (UOI) and Others*, , the Supreme Court affirmed the principles laid down in its earlier decisions but remanded the case to the High Court because there was no evidence to determine the marketable identity of the commodity which was subject to the levy of excise duty.

17. In *Atic Industries Ltd. Vs. H.H. Dewa, Asstt. Collector of Central Excise and Others*, , the Supreme Court has referred with approval to its own decision in *Volta's case* (supra) and reproduced the following extracts from it: "Excise is a tax on the production and manufacture of goods." Expanding this proposition further, the Supreme Court has observed in the context of Section 4 (prior to its amendment) of the Excise Act that the real value of the excisable commodity for the purpose of assessing the excise duty payable should be found after deducting the selling cost and selling profit and that the real value should include only the manufacturing costs and the manufacturing profits. In the opinion of the Supreme Court, the excise duty should be levied on the amount of manufacturing cost and manufacturing profits and post-manufacturing costs and post-manufacturing profits arising from post-manufacturing operations, viz. the sale ought to be excluded. Next while determining the assessable value of goods for the purpose of excise duty, manufacturing costs and manufacturing profits alone should be taken into account and they must not be loaded with post-manufacturing profits arising from post manufacturing operations. In this context, it has been observed that the price charged by the manufacturer on the wholesale goods would represent the real value of the goods for the purpose of assessment of excise duty. Adverting to the attempt to assess excise duty on the price charged by the wholesaler and not by the manufacturer from whom the wholesaler has purchased the excisable goods, this is what the Supreme Court has observed:

If the price charged by the wholesale dealer who purchases the goods from the manufacturer and sells them in wholesale to another dealer were taken as the value of the goods, it would include not only the manufacturing cost and the manufacturing profit of the manufacturer but also the wholesale dealer's selling cost and selling profit and that would be wholly incompatible with the nature of excise. It may be noted that wholesale market in a particular type of goods may be in several tiers and the goods may reach the consumer after a series of wholesale transactions. In fact the more common and less expensive the goods, there would be greater possibility of more than one tier of wholesale transactions. For instance, in a textile trade, a manufacturer may sell his entire production to a single wholesale dealer and the latter may in his turn sell the

goods purchased by him from the manufacturer to different wholesale dealers at State level and they may in their turn sell the goods to wholesale dealers at the district level and from the wholesale dealers at the district level the goods may pass by sale to wholesale dealers at the city level and then, ultimately from the wholesale dealers at the city level, the goods may reach the consumers. The only relevant price for assessment of value of the goods for the purpose of excise in such a case would be the wholesale cash price which the manufacturer receives from sale to the first wholesale dealer, that is, when the goods first enter the stream of trade. Once the goods have entered the stream of trade and are on their onward journey to the consumer, whether along a short or a long course depending on the nature of the goods and the conditions of the trade, excise is not concerned with what happens subsequently to the goods. It is the first immediate contact between the manufacturer and the trade that is made decisive for determining the wholesale cash price which is to be the measure of the value of the goods for the purpose of excise. The second or subsequent price, even though on wholesale basis, is not material. If excise were levied on the basis of second or subsequent wholesale price, it would load the price with a post-manufacturing element, namely, selling cost and selling profit of the wholesale dealer. That would be plainly contrary to the true nature of excise as explained in the *Voltas* case (supra). Secondly, this would also violate the concept of the factory gate sale which is the basis of determination of value of the goods for the purpose of excise

In reply, Mr. Vakil has argued that in that decision, the Supreme Court has interpreted repealed Section 4 and not Entry 84 in the Union List. The interpretation which a Court places upon a particular section must necessarily be consistent with its legislative competence if it holds it valid. Therefore, it is erroneous to say that the interpretation placed by the Supreme Court upon repealed Section 4 has no connection whatsoever with Entry 84 in the Union List. For the purpose of determining the legislative competence of Parliament and for the purpose of finding out the mischief which the Parliament has tried to cure, we are bound to take into account the binding principles laid down by the Supreme Court. What the Parliament has now done by amending Section 4 is not what was done by the Central Excise authorities earlier. The executive action of the Central excise authorities was called in question in the earlier decisions. In order to get over the decisions of the Supreme Court in this behalf, the Parliament has amended Section 4. But, amended Section 4 cannot enjoy grater sanctity if the Parliament does not have the legislative competence to enact it. In this behalf, it will be appropriate to note the STATEMENT OF OBJECTS AND REASONS published when Section 4 was amended. This is what is stated in that statement:

With the increase in the ad valorem levies in the Central Excise Tariff, the operation of that section has presented certain practical difficulties some of which got highlighted in the recent judgement of the Supreme Court (*A.K. Roy and Anr. v. Voltas Limited*) in a case where a manufacturer was selling a small percentage

of his production through a distributor and the rest directly to the consumers from his branch offices at much higher price. The Court held that the sale to the distributor constituted transactions in the wholesale market, and, therefore," the entire production should be assessed under Clause (a) of that section and not Clause (b) thereof, i.e, on the basis of the price charged to the distributor.

It further states:

... the valuation for purposes of excise levy would include only manufacturing cost plus the manufacturer's profits. In order to overcome the various difficulties experienced in the working of the section it is proposed to suitably revise the valuation provision contained in Section 4 of the Act, providing, as far as practicable, for assessment of excisable goods at the transaction value, except in areas where there may be scope for manipulation (such as sales to or through related persons) and making specific stipulations with respect to situations frequently encountered in the sphere of valuation.

This statement makes it quite clear that whilst amending Section 4, what the Legislature tried to do was to overcome the decision of the Supreme Court in *Voltas*" Case (supra). If it is competent for the Legislature to do so it may do so. The question, therefore, which we are called upon to examine is, whether, within the meaning of Entry 84 in the Union List read with Entry 54 in the State List as expounded by the Supreme Court. Parliament has provided for a measure, which, quantum apart, nets in only the excise duty and, no other tax in respect of which it is forbidden to legislate.

18. In *A.B. Abdul Kadir and Others Vs. State of Kerala*, , in the context of the luxury tax levied on tobacco under the Kerala Luxury Tax on Tobacco (Validation) Act, 1964, the Supreme Court has observed:

Excise duty, it is now well settled, is tax on articles produced or manufactured in the taxing country. Generally speaking, the tax is on the manufacturer or the producer, yet laws are to be found which impose a duty of excise at stages subsequent to the manufacture or production." (Vide paragraph 9).

It has been further observed that the levy of excise duty should be essentially linked with production or manufacture of an excisable article, though it may be recovered in the form of a licence fee (Paragraph 10 of the report). Where, however, the levy or tax has no nexus with the manufacture or production of an article, the impost or tax cannot be regarded to be one in the nature of excise duty.

19. It is clear from all these decision rendered during a period 37 years from 1939 to 1976 that a duty of excise within the meaning of Entry 84 in the Union List is a tax on manufacture or production. In other words, it must be linked with manufacture or production of an excisable article. It can be levied on the assessable value of excisable goods which consists of manufacturing costs and manufacturing profits and which cannot be loaded with post-manufacturing costs

and post-manufacturing profits such as those which arise out of subsequent sales. Once the link of the levy with the manufacture or production of an exisable commodity has been established, it does not matter at what stage it is recovered.

20. The learned Counsel appearing on both the sides have invited our attention to certain unreported decisions of other High Courts as well. A series of decisions of the Supreme Court to which we have referred leave no doubt in our minds about the content of Entry 84 in the Union List. Therefore, we do not propose to expand the size of this judgment further by referring to them. Its size has already reached an unwieldy stage. The learned Counsel appearing on behalf of the Central Government has tried to argue that these decisions are not binding on us. We may only smile at this boyish attempt and proceed ahead.

21. Learned Counsel appearing on behalf of the Union of India in reply has argued that though the expression "Duties of excise" used in Entry 84 in the Union List means the tax on production or manufacture of an exciseable goods, manufacturing costs and manufacturing profits alone need not necessarily make up the assessable value of such an excisable goods This argument cannot be upheld because it runs counter to several decisions of the Supreme Court to which we have already referred. The width and amplitude of Entry 84 in the Union List must necessarily govern the width and amplitude of Section 3 and 4(as amended) of the Excise Act. To assign wider connotation to Section 3 and 4(as amended) is to violate the Constitution. It was exactly for the purpose of escaping the rigour of these decisions that Mr. Vakil told us that they are not binding on us, Sandstorm in a desert cannot be weathered by an ostrich by burying its head in the sands,

22. We may, out of abundant caution, note that the question whether costs incurred under a particular head will be a part of manufacturing costs or not has not arisen in this petition for our decision. We may note, indeed at the cost of repetition, that the Federal Court in "Central Provinces" case (Supra) traced the history of the word "excise" in Indian legislation and showed that the only kind of excise duty which is known in India by that name is usually payable on the issue of an excisable goods from the place of manufacture or production. Therefore, according to the Federal Court, the Legislature used the expression "Duty of excise" in that sense. That view has found repeated approval of the Supreme Court in several decisions rendered in context of Entry 84 in the Union List We may also note that in the "Central Provinces" case (supra), the Federal Court applied the doctrine of "pith and substance,"

23. Our attention has also been invited to certain decisions which have a bearing upon the principles of construction. In *Chaturbhai M. Patel Vs. Union of India (UOI) and Others*, , the principle which has been laid down is:

In every case where the legislative competence of a legislature in regard to a particular enactment is challenged with reference to the entries in the various lists it is necessary to examine the pith and substance of the Act and if the

matter comes substantially within an item in the Central List it is not deemed to come within an entry in the Provincial list even though the classes of subjects looked at singly overlap in many respects. It is within the competence of the Central Legislature to provide for matters which may otherwise fall within the competence of the provincial legislature if they are necessarily incidental to effective legislation by the Central legislature on a subject of legislation expressly within its power. Moreover, it is a fundamental principle of constitutional law that everything necessary to the exercise of a power is included in the grant of the power.

24. In *Patel Gordhandas Hargovindas Vs. Municipal Commissioner, Ahmedabad*, , it has been observed that if a certain expression which had come to acquire a special meaning before an Act which used it was passed or if a term well-recognized legally has been used in an enactment, it must be interpreted to have the same special meaning and to have the same legal import.

25. In *Attorney-General For Ontario v. Reciprocal Insurers and Ors.* 1924 A.C. 328, the Judicial Committee of the Privy Council has in the context of Section 91 of the British North America Act, 1867, observed : "...where the law-making authority is of a limited or qualified character, obviously it may be necessary to examine with some strictness the substance of the legislation for the purpose of determining what it is that the Legislature is really doing." This principle of interpretation to which our attention has been invited cannot be placed in the forefront in this case because so far as the width and amplitude of Entry 84 in the Union List is concerned, the question has been concluded by several binding decisions of the Supreme Court.

26. When Sections 3 and 4 of the Excise Act are read with Schedule I, we find several bases of assessing excise duty levied u/s 3. They are, as for example, value, weight, length, volume, area, etc. In the instant case, we are concerned with examining the basis of "assessable value" provided u/s 4.

27. Bearing in mind, the width and amplitude of Entry 84 in the Union List as laid down by the Supreme Court in its several decisions, let us try to discover whether Section 4 as amended is afflicted by any constitutional vice.

28. In order to appreciate the challenge which has been raised to Section 4 of the Excise Act as amended by Act 22 of 1973 which came into force on 1st October 1975, it is necessary to reproduce the old and the new sections in so far as they are relevant. Section 4 prior to its amendment, inter alia, read as follows:

4. Determination of value for the purposes of duty--

Where under this Act, any article is chargeable with duty at a rate dependent on the value of the article, such value be deemed to be--

(a) the wholesale cash price for which an article of the like kind and quality is sold or is capable of being sold at the time of the removal of the article chargeable with duty from the factory or any other premises of manufacture or

production for delivery at the place of manufacture or production or if a wholesale market does not exist for such article at such place, at the nearest place where such market exists, or...

We are not concerned with Clause (b) of Section 4 in the instant case. Section 4 after its amendment, inter alia, provides as follows:

4(i) Where under this Act, the duty of excise is chargeable on any exisable 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 whole-sale 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)...

(ii)...

(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) who sell such goods in retail.

The expression "related person" has been denned as follows:

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

What has been called in question is, the vidth and amplitude of the expression "where the buyer is not a related person" used in amended Section4, Supreme Court decisions to which we have referred lay down that the price which is the sole consideration for the sale can alone be the assessable value for the assessment of excise duty Therefore, the price which reflects extra-commercial considerations cannot be taken into account, A concessional price which the manufacturer charges his buyer will lead to undue loss of revenue. It may be charged, where it is so, on account of several reasons. One of them may be that the manufacturer and the buyer are hand in glove to deprive the revenue of its just dues. It may be charged because the buyer is "related" to the manufacturer. However, whether the manufacturer charges his buyer a wholly commercial price or a concessional price which reflects extra-commercial considerations is a matter to be decided by the Central excise authorities in each individual case depending upon the facts of that case. Now, in a given case, if the central excise

authorities find that the price which the manufacturer charges his buyer is not a commercial price but reflects extra-commercial considerations, they may ignore it and take as assessable value any other price which, according to them, is the commercial price fully representing manufacturing costs and manufacturing profits.

29. But, the question which Mr. Bhatt has raised in the context of amended Section 4 of the Excise Act for our consideration is should the price which a "related person" is charged by the manufacturer be necessarily ignored as Section 4 provides? The definition of the expression "related person" casts its sweep wide and large. But, that is a matter of legislative policy for the Parliament to determine. The basic question which has been raised is this. Assuming that the manufacturer charges "a related person" a fully commercial price representing the manufacturing costs and manufacturing profits, can it be ignored? Section 4 wants it to be done. Parliament, under Entry 84 in the Union List, cannot levy excise duty upon anything other than manufacturing costs and manufacturing profits. However, Section 4 wants the fully commercial price a manufacturer charges his "related person" to be ignored. If it is ignored, which is the price which should be taken into account?

30. Proviso (iii) to Clause (a) of Sub-section (1) of Section 4 if read in light of the principal part of Sub-section (1) of Section 4, makes it very clear to us that in case of a sale to a "related person", the price which that related person charges his buyer is the assessable value for the purpose of assessing excise duty even through the buyer, in his turn, must have paid the manufacturer the commercial price fully reflecting the manufacturing costs and the manufacturing profits. Therefore, even though the "related person" pays the manufacturer a fully commercial price, the manufacturer is required to pay the excise duty on the price which the "related person" charges his buyer. If the buyer from the "related person" is also a "related person", then the price which the first related person charges the second related person is also required to be ignored and the price which the second related person charges his buyer is required to be taken into account for the purpose of assessing the excise duty. In other words, all sales one after another to "related persons" have got to be excluded until the central excise authorities come across a sale in favour of a person other than a "related person". There may be an intervention of one "related person" or there may be an intervention of many "related persons". However, merely because the first sale has been effected by the manufacturer in favour of "related person" or merely because a number of "related persons" beginning with a "related person" have intervened in the series of transactions which take place, right from the removal of the excisable goods at the factory gate, the manufacturer will be required to pay excise duty on the ultimate price which the last "related person" has charged his buyer (unrelated person) even though the manufacturer's buyer has himself paid the manufacturer a fully commercial price representing the manufacturing costs and the manufacturing profits or even though the transaction between them was at an arm's length. The Supreme Court in a

number of decisions has held that under Entry 84 in the Union List, an excise duty cannot be levied on anything other than the manufacturing costs or manufacturing profits which alone should enter in the determination of the assessable value. We see no constitutional justification, in light of this width and amplitude of Entry 84 in the Union List, for assessing excise duty on the second or subsequent price which a manufacturer's buyer charges his buyer even though the first price which the manufacturer has charged his buyer--a "related person",--fully reflects manufacturing costs or manufacturing profits.

31. An analysis of the concept of "related person" in the context of proviso (iii) to Clause (a) of Sub-section (1) of Sec. 4 of the Excise Act brings out the following result. We assume that the manufacturer's buyer is a "related person". We also assume that the manufacturer has charged such buyer of his the commercial price which fully reflects manufacturing costs and manufacturing profits and that the transaction between the two has been at arm's length. Now, this fully commercial price, in terms of Sub-section (1) of Section 4, must be ignored and the second or subsequent price which the manufacturer's buyer charges his buyer must be taken into account as the assessable value of the excisable goods. The second price will consist of four elements: (i) manufacturing costs and (ii) manufacturing profits which the manufacturer's buyer (related person) has paid the manufacturer; (iii) selling cost and (iv) selling profits of the manufacturer's buyer (the related person). I, cannot be gainsaid that selling costs and selling profits of the "related person" has nothing to do with the manufacturing activity. It is a pure transaction of sale totally unrelated to manufacturing activity of the manufacturer. In fact, it is a post-manufacturing activity. In our opinion, any tax on selling costs and selling profits will be a sales-tax and will trench upon Entry 54 in the State List.

32. We have no doubts in our minds that the central excise authorities are entitled to ignore all the first or subsequent prices which do not reflect the manufacturing costs and manufacturing profits but are deflected by extra-commercial considerations. They cannot however ignore those first prices which are not deflected by extra-commercial considerations but which fully reflect the manufacturing costs and the manufacturing profits. Even in absence of the concept of "related person" used in Section 4, the central excise authorities would be justified in ignoring the first price where it does not fully reflect the manufacturing costs and the manufacturing profits and is deflected by extra-commercial considerations even if the manufacturer has charged his buyer such price notwithstanding the fact that he is not a "related" person".

33. Therefore, when, in the name of a sale to a "related person", the Parliament, by amending Section 4, directs the authorities to ignore the fully commercial first price consisting of manufacturing costs and manufacturing profits and to take into account the second or subsequent price, it, in fact, encroaches upon Entry 54 in the State List upon, which it cannot legislate by virtue of the provisions of Article 246(3) of the Constitution. It is therefore, clear that the concept of

"related person" brings by itself something in respect of which Parliament lacks power to legislate "Related person" or no "related person" Parliament can levy excise duty only on assessable value of "excisable goods" made up of manufacturing costs and manufacturing profits. It cannot levy excise duty upon anything else Therefore, merely because the manufacturer's sale of his excisable goods is to a "related person", it cannot be assumed that what the "related person" has paid to the manufacturer is not a fully commercial price. In our opinion therefore, the expression "the buyer is not a related person" appearing in Clause (a) of sub Section (1) of Section 4 of the Excise Act is ultra vires." the legislative competence of Parliament under Article 246 read with Entry 84 in the Union List and in light of Entry 54 in the State List.

34. Proviso (iii) to Clause (a) of Sub-section (1) of Section 4 also suffers from the same vice. It does not matter whether the assessee arranges to sell his excisable goods in the course of wholesale trade at the time of their removal to or through a "related person" if such "related person" pays the price which wholly reflects manufacturing costs and manufacturing profits. Merely because a manufacturer has sold the goods to a "related person", it does not mean that the price which he pays even though it is a fully commercial price should be ignored and that the second price should be taken into account. Therefore, "related person" or no "related person"-as long as the manufacturer charges his buyer a fully commercial price, reflecting manufacturing costs and manufacturing profits, it ought to be taken into account for the purpose of determining the assessable value for excise duty.

35. Again, "related person" or no "related person" if a manufacturer charges his buyer a concessional price which is deflected by extra-commercial considerations and which does not fully reflect the manufacturing costs and manufacturing profits, the central excise authorities are entitled to ignore it In other words, the test of "transaction at an arm's length" which the Supreme Court has evolved in several decisions to which we have referred is the only test by which an assessable value for the purpose of excise duty can be determined. If a transaction is at an arm's length, the price paid by the manufacturer's buyer determines the assessable value. If the transaction is not at an arm's length, then, whoever is the buyer, the price, paid by him cannot form the basis for determining the assessable value for collection of excises duty.

36. Proviso (iii) to Clause (a) of Sub-section (1) of Section 4 is ultra vires the Parliament's legislative competence under Article 246 read with, Entry 84 in the Union List and Entry 54 in the State List, because, even though the manufacturer has charged his buyer--a "related person"-- a fully commercial price consisting of manufacturing costs and manufacturing profits, he is liable to pay excise duty on the second price which his buyer--"related person"--charges his buyer--an unrelated person. The second price, as observed above, is loaded with the selling costs and selling profits of the manufacturer's buyer--a "related person." Assessment of excise duty on selling costs and selling profits with which the

assessable value is loaded partakes of sales-tax which falls under Entry 54 in the State List.

37. Now, before we turn to the arguments which Mr. Vakil has raised, it is necessary to note that he took as many as 13 to 14 hours, spread over three working days, to repeatedly canvass only two propositions. One of his propositions was that excise duty is different from sales-tax and went on citing decisions after decisions to show what the sales-tax is. Next, he canvassed the proposition that the impost is different from its measure and that if the impost is valid the question of validity of the measure does not arise. The task of the Court was made extremely difficult by his consistent refusal to pin himself down to a particular proposition advanced by him because he went on modifying them to the extent of being inconsistent. He *ex facie* appeared to relish this exercise. This "hide-and-seek" game took several hours and at the close of the third day of his arguments, he could not delineate what he was arguing and we could not find out his exact and precise propositions which we were required to deal with. Next, he repeatedly summed up wrongly the contentions raised by the petitioner's learned Counsel. It appeared to us that he was making an attempt to answer the contentions raised by the petitioner's learned Counsel after paraphrasing them in his own language to suit his answers. In this process, he took 13 to 14 hours to do what he could have done within two hours. Our repeated attempts to persuade him to avoid repetitions and to advance clear and precise propositions failed. We were, therefore, driven to ask him to give us in writing his submissions. He did so besides orally arguing his case. Counsel appearing for the Central Government must be quick, concise and precise--eschewing all repetitions and irrelevancies so as to enable the Court to save judicial time when arrears are accumulating at an alarming rate and people justifiably complain of them.

38. We now turn to examine other arguments advanced by Mr. Vakil. He has argued that the amending legislation was enacted during emergency and that, therefore, it could not be called in question under Article 250 on the ground of legislative incompetence. The undisputed facts in that behalf are as follows: The first emergency was proclaimed on 3rd December 1971. The Second emergency was proclaimed on 21st November 1975. The contention that the amending legislation was an emergency legislation and was, therefore, not open to constitutional challenge by virtue of the provisions of Article 250 was not raised on behalf of the respondents in their affidavits-in-reply. This contention was for the first time raised by Mr. Vakil in the written submissions which he tendered to the Court in course of his arguments after the petitioner's learned Counsel had closed his case. Obviously, therefore, the petitioners did not have an opportunity to meet this contention. We, therefore, disallowed this contention in limine only on the ground that the respondents, having failed to raise it in their written pleadings, have denied the petitioners a reasonable opportunity of being heard in the matter. However, Mr. J. C. Bhatt out of abundant caution submitted extempore that this was not an emergency legislation. The amending legislation

was enacted on 19th May 1973. It received the presidential assent on 21st May 1973. Expect Section 2, which amended Section 4 of the Excise Act, all provisions came into force at once on 21st May 1975. Section 2 which amended Section 4 was brought into force on 1st October 1975 by a "notification issued on" 8th August 1975. According to Mr. Bhatt, these facts-show that the material section of the amending Act Section 2- which amended Section 4-was enacted before the second "emergency was proclaimed. We are not expressing any opinion on this aspect because the petitioners did not have a reasonable opportunity to meet it on account of the fact that the respondents did not raise it in their affidavits-in-reply.

39. Mr. S.B. Vakil has next argued that constitutional validity of Section 4 or a part thereof which is a machinery section cannot be challenged unless the constitutional validity of Section 3 which is the charging section is challenged. We do not find any substance in this argument of his. It is true that when Parliament levies a tax, it also provides machinery for collecting it. Ordinarily, if the levy of a tax is constitutionally valid, the machinery provided to make it effective does not suffer from a constitutional vice. However, when, under the Constitution, the Parliament has legislative competence to levy a particular tax and when it does so, it cannot competently enact the machinery section which in the name of collecting that particular tax collects something else which is not within the legislative competence of Parliament to levy or collect. Therefore, the general principle that if the charging section is intra vires, the machinery section cannot be ultra vires is subject to the exception that machinery section does not stretch its long arms to pick up the forbidden fruit along with others. Parliament having levied a tax is entitled to, provide the mode of its assessment and the method of its collection. However, the mode of its assessment and the method of its collection cannot encroach upon the legislative field earmarked exclusively for the States. In the instant case, though Section 3 is valid (its constitutionality has not been challenged), Section 4 suffers from a vice because it trenches upon Entry 54 in the State List.

40. It has next been argued by Mr. Vakil that Section 4 is merely a "definition" section and that therefore it cannot be challenged. In other words, what is excise duty within the meaning of Section 3 has been, according to Mr. Vakil, "defined" by Section 4. As long as Section 4 defines "excise duty" levied by Section 3, no vice can be discovered therein. But, when it goes beyond its parentage and issues a legislative direction to collect not only the excise duty but in its name sales tax which is specified in the State List, it can certainly be challenged.

41. He has also argued that excise duty levied by Section 3 is the excise duty assessable u/s 4 and that what is assessable u/s 4 need not necessarily have any relation to Entry 84 in the Union List because that Entry only denotes the legislative field. We are unable to accede to the argument raised by Mr. Vakil because whichever section, whether the charging section or the machinery section, goes beyond the legislative field denoted by Entry 84 in the Union List

and entrenches upon Entry 54 in the State List suffers from the constitutional vice and must be struck down.

42. The next argument which Mr. Vakil has raised is that if there is any encroachment which Section 4 makes on the legislative field earmarked for a State Legislature and Entry 54 in the State List, it is incidental and that such an impost, in pith and substance, falls, under Entry 84 in the Union List. In the, first instance, what the Parliament has done by amending Section 4 is not an incidental encroachment upon the State List, because the Parliament has classified manufacturers and producers into two categories : (i) those who sell their products to or through "related persons" and (ii) the rest. In case of the first mentioned class of manufacturers or producers Parliament wants the second price to be taken into account and not the first price even though the first price fully reflects manufacturing costs and manufacturing profits. Under these circumstances it is difficult to bring into play the doctrine of incidental encroachment or the doctrine of pith and substance to cure the constitutional vice. Next, since the machinery section enacted by Parliament directly encroaches upon the State List, the doctrine of incidental encroachment or the doctrine of pith and substance cannot be brought into play.

43. He has also tried to show that the excise duty levied on a manufacturer who sells his goods to a "related person" need not necessarily be related to the fully commercial price and if it is levied on something more than the fully commercial price it is not a tax on the sale and purchase of goods. In his written submissions. Mr. Vakil has in terms stated : "Even if it is a tax on sale and purchase of goods, it does not necessarily fall under Entry 54 of the State List but may fall under Entry 92A of the Union List." His argument relating to Entry 92A will be separately dealt with by us. We are unable to hold that even if it is a tax on sale or purchase, it will not fall under Entry 54 in the State List--Entry 92A apart. He has next tried to justify it under Entry 97 of the Union List the residuary entry. We shall deal with this aspect later.

44. The next argument which he has raised is that the real nature and character of a tax depends upon the subject matter of the tax and not upon the measure or standard by which the amount of tax is determined. This proposition which Mr. Vakil has advanced before us cannot, as a sheer principle, be called in question. The only question which arises for our consideration is whether the measure or standard provided by Section 4 changes the character of the tax altogether and enters the forbidden field or whether it is merely a measure simpliciter provided to recover the levy imposed by Section 3. He has invited our attention in that behalf to a few decisions to which we, out of sheer respect for him, make passing references.

45. The first decision to which he has invited our attention is in *Sir Byramjee Jeejeebhoy v. The Province of Bombay* 42 Bom. L.R.10. In that case, tax on lands and buildings was imposed by Bombay Provincial Legislature under the Bombay Finance Act, 1932. The question which arose was whether it was Income Tax.

The second question in that context which arose was whether it was intra vires Bombay Provincial Legislature. It was held by the Full Bench of the Bombay High Court that prima facie it was not a tax on income. It is in this context that Mr. Justice Broomfield in his separate but concurring judgment observed that the mode of assessment does not determine the character of a tax. The learned Judge has further observed that the Court in each case has to discover what is the "essential character" of the tax and what is it "in pith and substance" apart from the more machinery by which it is assessed. He has also relied upon the next observation that the measure of tax is not the test. This observation was borrowed from a reference to the Government of Ireland Act, 1920 (1936 A. C. 352).

46. The next decision upon which he has relied is AIR 1949 81 (Federal Court) . In that case, tax on buildings payable by the owner was levied under Punjab Urban Immovable Property Tax Act, 1940. The question which arose was whether it was a tax within the legislative competence of the Provincial legislature under Entry 42, List II Seventh Schedule, Government of India Act, 1935 or whether it was an Income Tax falling under the federal legislative list in the Government of India Act, 1935. Therein, the Federal Court has referred with approval to the observations of Lord Atkin in *Gallagher v. Lynn* 1937 A. C. 863 to the effect that the Court has to look at the "true nature and character of the legislation" and "the pith and substance of legislation". If on the view of the statute as a whole, the Court finds that the substance of the legislation is within its express powers, then it is not invalidated if incidentally it affects matters which are outside the authorized field. The challenge to the constitutional validity of the levy of tax on buildings under Punjab Urban Immovable Property Tax Act, 1940 was turned down by the Federal Court on the ground that the tax on the annual value of the property did not necessarily become a tax on income but that there are other factors by which income may be measured.

47. The third decision to which our attention has been invited is in *Municipal Commissioner, the Municipal Corporation of the City of Ahmedabad v. Gordhandas Hargovandas Patel* 55 Bom. L.R. 1028. In that decision, reference was made to the decision of the Federal Court in *Ralla Ram v. The Province of East Punjab* (supra) and to the decision of the Bombay High Court in *Sir Byramjee Jeejeebhoy v. The Province of Bombay* (supra). In that case also, the question which arose was whether the tax levied upon buildings amounted to a tax on income because the method of assessment which was provided related to the annual income of the immovable property. It is in this context that the High Court of Bombay observed that similarity between the two methods--namely, method for assessing the impugned tax and the method for assessing tax on income--could not be disputed but held that merely because of this similarity of the means or the machinery or the identity of the two taxes, it could not be established that it was a tax on income. In this case, the doctrine of "pith and substance" was applied.

48. In *The Hingir-rampur Coal Co. Ltd. and Others Vs. The State of Orissa and Others*, , the question which arose related to distinction between "tax" and fee" in the context of cess levied under Orissa Mining Areas Development Fund Act, 1952. It was intended to be used for rendering service to the community in the shape of developing the notified areas. On consideration of several factors, the Supreme Court held that it was neither a tax nor an excise duty but was a fee. In this context, the Supreme Court has observed that where an impugned statute passed by a State Legislature is relatable to an Entry in List II it is not permissible to challenge its vires on the ground that the method adopted by it for the recovery of the impost is generally adopted in levying a duty of excise.

49. In *Sudhir Chandra Nawn Vs. Wealth-tax Officer, Calcutta and Others*, , a similar question arose in the context of Wealth tax Act, under which assets were adopted as the basis of valuation. That basis was challenged on the ground that it fell under Entry 49 in the State List and not under Entry 86 in the Union List. That argument was negated by the Supreme Court with an observation that, assuming that there was some overlapping between the two Entries, tax on the capital value of assets bears no definable relation to lands and buildings which may form a component of the total assets of the assessee.

50. In *the Second Gift Tax Officer, Man. galore, etc. v. D.H. Haxareth etc.* AIR 1970 S.C. 999, the question of overlapping entries arose in the context of Gift Tax Act, 1959. It was held that it fell under Entry 97 in the Union List, the residuary entry and not under Entry 49 in the State List. The doctrine of "pith and substance" was applied in this case.

51. These decisions which Mr. Vakil has cited bring out two doctrines to which we have already referred : (i) the doctrine of incidental encroachment on the forbidden field and (ii) the doctrine of pith and substance. It also brings out the principle that the measure or the method of recovery provided for realising a tax does not vitiate a tax. We are not holding in the instant case that the tax levied by Section 3 is unconstitutional. The decisions to which Mr. Vakil has referred do not help him in making good his contention because Section 4 as amended by Parliament destroys the basic character of the tax imposed by Section 3 and collects along with the excise duty the sales tax which the Parliament is forbidden to legislate upon because it falls under Entry 54 in the State List.

52. Mr. Vakil has then pointed out to us that assessment of excise duty on the second price does not amount to collection of sales-tax within the meaning of Entry 54 in the State List. Entry 54 in the State List provides as under;

54. Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92A of List I.

Entry 48 in the List II in Seventh Schedule to the Government of India Act, 1935--the corresponding entry--provided as follows:

48. Taxes on the sale of goods and on advertisements.

Mr. Vakil has argued that the assessment of excise duty on the second price does not bring in sales-tax because, according to him sales-tax is levied separately for each sale. The argument is ex facie untenable because it can never be postulated that a tax to be a sales-tax must necessarily be imposed on all sales -- one after another--of the same commodity and not on any one sale.

53. Mr. Vakil, in this context, has referred to several decisions in this behalf some of Which have been relied upon by both the sides. We have dealt, in the earlier part of this judgment, with those decisions to which both the sides have referred and noted their respective contentions. We now proceed to refer to some other decisions upon which Mr. Vakil alone has relied.

54. In *Tata Iron & Steel Co. Ltd v. State of Bihar* AIR 1958 S.C. 452, the Supreme Court has laid down that the essential characteristics of the sales-tax levied under Bihar Sales Tax Act, 1947, is that sales-tax is payable in the event of a sale, whereas a duty of excise is primarily levied on the commodity or the manufacture and is a tax on goods and not on the sales of the produce or the goods. The sales-tax is ordinarily a tax on the sales or proceeds of the sales of goods.

55. Next decision upon which" reliance has been placed by Mr. Vak 1 is in *A.B. Abdulkadir and Others Vs. The State of Kerala and Another*, . It has been laid down in that decision that while a duty of excise is a tax on goods produced or manufactured in the taxing country, the levy of sale-tax pre-supposes levy thereof on each sale and that it is the essence of sales-tax.

56. In *Deputy Commercial Tax Officer, Saidapet and Another Vs. Enfield India Ltd., Co-operative Canteen Ltd.*, , the question as to what was the meaning of the expression "sale of goods" within the meaning of the relevant legislative entries in the Constitution and in the Government of India Act, 1935 in the context of the said expression used in the Sale of Goods Act, 1930, arose before the Supreme Court. In that context it has been observed that the expression "sale of goods used in Entry 54 in the State List bears the same meaning which, has been given to it in the sale of Goods Act, 1930, and that, therefore, the State Legislature may legislate in respect of a series of acts beginning with an agreement of sale between parties competent to contract and resulting in transfer of property from one of the parties to the agreement to the other for a price and matters incidental thereto. It has been further observed that if the element of transfer of property from one person to another is lacking in any transaction there is no sale and that the Legislature cannot by treating it as a sale by a deeming clause bring it within the ambit of the taxing statute. This question arose under the Madras General Sales Tax Act, 1959.

57. In *The Joint Commercial Tax Officer, Harbour Division, II-Madras Vs. The Young Men's Indian Association (Regd.), Madras and Others*, , it has been laid down that the expression "sale of goods" used in Entry 54 in the State List bears the same meaning which has been given to it in the Sale of Goods Act, 1930.

58. The last decision is in *State of Maharashtra and Another Vs. Champalal Kishanlal Mohta*, . In this case, the Supreme Court has affirmed its earlier view as to the meaning of the expression "sale of goods" used in Entry 54 in the State List.

59. All these decisions do not carry the proposition advanced by Mr. Vakil further because if the first price is a fully commercial price even though the buyer is a "related person", then second price must necessarily include the selling costs and selling profits. Therefore, any tax on them would satisfy the basic characteristics of a sales-tax.

60. It has next been argued by Mr. Vakil that the transaction of sale is the taxable event in the case of sales-tax and that sale of his goods by a manufacturer or a producer to his buyer-a "related person/- is also a sale. Therefore, according to him, whatever is levied on the first sale is excise duty. This argument reflects slight confusion of thoughts. Excise duty is levied on manufacture or production irrespective of whether excisable goods after they are manufactured or produced are sold, consumed, destroyed or given away as laid down in *Proddu, Paidanna's case* (supra) by the Federal Court. Therefore, for the purpose of levying excise duty, the first sale is only incidental. It is not the first sale which attracts the levy of excise duty but it is the manufacture or production which attracts it irrespective of whether the excisable goods, after manufacture or production, are sold or not.

61. He has next argued that it is open to the Parliament to levy excise duty at any rate, may be at 100% of the assessable value or even at 200% of the assessable value. This argument has been pressed into service in order to show that so far as the rates of taxes are concerned, the Parliament does not suffer from any fetters. It may be so. Assuming that Parliament has unlimited power to levy excise duty at any rate, it may do so but whatever rate it prescribes must be in relation to the manufacturing cost and manufacturing profits of an excisable commodity. However, it cannot prescribe a lower rate and provide machinery under which tax is realized in a larger quantity and under some other head which is not within its legislative competence.

62. In this context, we were surprised to hear the argument raised by Mr. Vakil that if what the petitioner's learned Counsel has contended is true, excise duty can be levied only on the exact assessable value representing the manufacturing costs and manufacturing profits and not on less than that assessable value. This argument proceeded on a thorough misconception and total confusion. If a Legislature has the constitutional competence to do a particular thing, it may do the whole of it or a part of it but it cannot do more. Therefore, if the Legislature does something less than what it is competent to do, by no stretch of imagination or by no process of reasoning, it can be said that the Legislature has done something, which is not within its competence. However, if a Legislature does more than what it is authorized under the Constitution to do, it can certainly be called in question on the ground of its constitutional incompetence to

do it.

63. Mr. Vakil has then tried to distinguish between the impost and its measure. If in the form of providing of measure, Legislature tries to net in something on which it cannot lay its hands under the Constitution and under the charging section, it can certainly be called in question. A wrong, erroneous, defective or excessive measure may not ordinarily be open to a constitutional challenge, but, if it exceeds the constitutional competence of the Legislature which enacts it, it can certainly be called in question even though the charging section has not been called in question. To illustrate, having levied excise duty u/s 3, can the Legislature provide that excise duty on cloth which it has levied shall be assessed not in the terms of the quantity of cloth produced, nor in terms of its value, nor in terms of its length but in terms of the width of the principal, road of the city in which it is produced ? Secondly can the Legislature provide that the excise duty on the cloth produced by a manufacturer shall be assessed on the length of the petticoat which the manufacturer's wife wears ? It is, therefore, wrong to say that having imposed excise duty under the charging section, unrelated, strange or unconnected measure can be provided to realise it and that such a measure need not necessarily have any relation whatsoever to the impost levied under the charging section. We are, therefore, not impressed by the arguments advanced by Mr. Vakil that what is assessable u/s 4 in case of a "related person" does not partake of sales-tax, that, if it partakes of sales-tax, it is only an incidental encroachment and is cured by the doctrine of pith and substance and that the measure of a tax need not necessarily have any link with the impost itself.

64. Mr. Vakil has then argued that the reason which prompts the Legislature to make a particular provision does not necessarily show the reason of its legislative competence. It may be so. Yet while examining the legislative competence of a Legislature in the context of a particular enactment, it is open to the Court to take all reasons into account and to find out the source of power under which it has enacted a particular legislation. If the Court finds that the Legislature which has enacted a particular legislation has entrenched upon the forbidden field, the Court is bound to strike it down.

65. In a possible attempt to escape the rigour of the principles laid down by the Supreme Court in its several decisions, Mr. Vakil would not call Section 4 the machinery section or the assessment section but he would call it a valuation section. We do not propose to quarrel with mere nomenclature even where it departs from settled expressions. We are required to test it on the anvil of Parliament's legislative competence. We are of the view that, in a given case, it can be tested on the anvil of constitutional competence if it entrenches upon the constitutionally forbidden field. A federal Constitution which provides for distribution of powers between the Centre and the States eschews unlimited power for the Centre and sets limits to the powers of the Centre as well as States. In no form whatsoever, one can entrench or trespass upon the field exclusively reserved for another. Therefore, the valuation section can be

challenged on the ground of legislative competence independently of the charging section if it tries to overreach a constitutional provision.

66. Mr. Vakil has next tried to argue that the measure of tax need not be identical with the impost nor should it have any relation to the stage of its levy. According to him, the stage of levy unrelated to manufacture or production of the excisable goods, cannot identify the nature and character of the duty or impost. All these are very good general propositions which can be conveniently called to one's aid. But, under their guise, something which is not within the legislative competence of Parliament cannot be rendered valid. According to him, whatever measure, rational in the opinion of Parliament, has been laid down by law must be accepted by the Court because it is a matter of Parliamentary discretion. As long as it does not entrench upon the forbidden field, the Court does not interfere with it. However, when the machinery section entrenches upon the forbidden field, the Court has got to step in and strike it down.

67. Mr. Vakil has next argued that, assuming that the compulsory impost levied by Section 3 read with the First Schedule to the Excise Act and Section 4 is not an excise duty within the meaning of Entry 84 in the Union List it is also not a tax on sale or purchase of goods within the meaning of Entry 54 in the State List. This argument is not available to Mr. Vakil because in the decisions after decisions to which we have referred, it has been held that the Excise Act has been enacted under Entry 84 in the Union List or under the corresponding Entry in the federal legislative List in the Government of India Act, 1935. Mr. Vakil has raised this argument in order to enable him to argue that what has been done by Parliament by amending Section 4 is constitutionally valid under Entry 97 in the Union List-- the residuary entry. We are separately dealing with this aspect.

68. These are all the arguments which Mr. Vakil has raised to defend the constitutionality of amended Section 4 which has been called in question. For the reasons which we have stated, we are not impressed by any of the arguments which he has raised.

69. Mr. Vakil has next tried to justify the constitutionality of Section 4 by relying upon Entry 92A in the Union List. This argument has been advanced because Mr. J.C. Bhatt, learned Counsel for the petitioner, has argued that, under amended Section 4, the Parliament has been directing the Central Excise authorities to collect, in the name of excise duty, a sales-tax. Indeed, a part of the excise duty assessed u/s 4 is in our opinion a sales-tax. Mr. Vakil has tried to argue that if it is a sales-tax, it is saved under Entry 92A. Entry 92A of the Union List reads thus:

Taxes of the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce.

Mr. Vakil has tried to inject force in his argument by stating that the sales to "related persons" may take place at the factory gate and that the Parliament may provide a measure which not only brings in the excise duty levied u/s 3 but also a sales-tax leviable under Entry 92A. We are not impressed by this argument

because the Central Sales-tax Act, 1956 is on the statute book. If we accept the argument raised by Mr. Vakil, we will be imputing to Parliament an intention to impose inter-State sales tax under two different statutes. Firstly, we do not think that the Parliament has done so by amending Section 4. Secondly, the preamble to the Excise Act states that it has been enacted to consolidate and amend the law relating to Central duties of excise on goods manufacture or produced in India. It does not say that it has been enacted for the purpose of levying inter-state sales-tax. The scheme of Sees. 3, 4, 5 and 6 in the Central Sales-tax Act, 1956 shows that the Central sales-tax on inter-state transactions or inter-State trade or commerce is levied under it. Section 3 provides that a sale or purchase of goods shall be deemed to take place in the course of inter-State trade or commerce if the sale or purchase (a) occasions the movement of goods from one State to another ; or (b) is effected by a transfer of documents of title to the goods during their movement from one State to another. In this connection, we may usefully refer to Bil No. 37 of 1973 which was introduced in the LOK SABHA on 2nd May 1973 in pursuance of which, inter alia, Section 4 of the Excise Act was amended. That Bill was called "a Bill further to amend the Central Excises and Salt Act, 1944". The Bill shows that the Parliament was not enacting a new levy apart from the excise duty but was strengthening machinery for assessment and collection of the levy imposed u/s 3 of the Excise Act. Financial Memorandum to the Bill, inter alia, stated as follows:

Though the staff required for the enforcement and administration of the Act is already in position, the proposed provision when brought into operation may require some marginal augmentation of staff with a view to strengthening the valuation machinery in the Central Excise Collectorates and intensified training programme will have to be arranged for the staff with a view to making the valuation processes more effective.

It does not show that either the whole of it or a part of it was intended to be distributed amongst the States unlike Central Sales-tax Act, 1956. The preamble to the Central Sales-tax Act, 1956 reads thus:

An Act to formulate principles for determining when a sale or purchase of goods takes place in the course of inter-State trade or commerce or outside a State or in the course of import into or export from India, to provide for the levy, collection and distribution of taxes on sales of goods in the course of inter-State trade or commerce and to declare certain goods to be of special importance in inter-State trade or commerce and specify the restrictions and conditions to which State laws imposing taxes on the sale or purchase of such goods of special importance shall be subject.

It is, therefore, clear that whereas one of the objects of the Central Sales-tax Act is to distribute at least a part of the collection amongst the States, there is no intention to distribute amongst the States the tax assessed and collected u/s 4 of the Excise Act. It is clear, therefore, that, by amending Section 4, the Parliament was not expanding the scope of levy under Section 3. Parliament was

not thinking in terms of levying sales-tax under this Act. Parliament was thinking of strengthening the assessment machinery in order to make it effective. Therefore, though the Parliament could have provided any machinery for realizing the impost levied u/s 3, while doing so, it could not have entrenched upon the State List which is the forbidden field for it. The character of central sales-tax is very much different from the character of the excise duty.

70. Mr. Vakil has next tried, to argue that Entry 54 in the State List is subject to Entry 92A in the Union List. The argument which he has advanced is absolutely correct. But, in the context in which he has advanced it, he cannot receive support from Entry 92A in the Union List because, as observed above, the Parliament has not provided, under amended Section 4, for the collection of inter-State sales-tax. The scheme of Sees. 4, 5 and 6 lends support to what has been provided in Section 3. We are, therefore, unable to hold that the amended Section 4 of the Excise Act can be constitutionally justified under Entry 92A. In fact, the expression "... in the course of wholesale trade for delivery at the time and place of removal, ..." used in Clause (a) of Sub-section (1) of Section 4 clearly militates against the concept of inter-State sales-tax. The argument advanced by Mr. Vakil on the strength of Entry 92A is also negative by the fact that Section 3 which is the charging section does not provide for two levies and that, therefore, the question of placing reliance upon Entry 92A in the Union List does not arise. We are unable to hold, therefore, that, the constitutional vice from which, amended Section 4 suffers is cured by Entry 92A in, the Union List.

71. Mr. Vakil has further tried to argue that Section 4 in its entirety is constitutionally valid under, Entry 84 read with Entry 97 in the Union List Entry 97 reads thus:

Any other matter not enumerated in List II or List III including any tax not mentioned in either, of those Lists.

The question which has, therefore, arisen for our consideration is whether amended Section 4 can be held valid under Entry 84 read with Entry 97 in the Union List. 72. The first decision to which reference has been made by Mr. Vakil is in *Jullunder Rubber Goods Manufacturers' Association Vs. The Union of India (UOI)* and Another, . It was a case under the Rubber Act, 1947 Section 12(1) of the Rubber Act imposed a new rubber cess to be collected from the rubber estates. Sub-section (1) of Section 12 imposed the levy in the following terms:

With effect from such date as the Central Government may, by notification in the Official Gazette, appoint, there shall be levied as a cess for the purposes of this Act, a duty of excise on all rubber produced in India at such rate, not exceeding fifty naya paise per kilogram of rubber so produced, as the Central Government may fix.

The contentions which were raised were as follows. The duty sought to be imposed u/s 12 of the Rubber Act as amended was outside the ambit of Entry 84 in the Union List and, therefore, beyond the legislative competence of the

Parliament. Section 12(2) suffered from the vice of excessive delegation. We are concerned in this Case with the answer which the Supreme Court gave to the first "contention raised in that case. The Supreme Court referred with approval to the observations of Gwyer, C.J. in the Central Provinces case (supra) and held that the said impost did not fall within Entry 84 in the Union List. That position was not challenged by counsel who appeared for the appellant in that case. Therefore, the Supreme Court upheld the levy under Entry 97 because it was a kind of nondescript tax which was given the nomenclature of the duty of excise. Firstly, it was not a case of levy partly of excise duty and partly of something else. Secondly, it was conceded in that case that it was not an excise duty. Thirdly, the question whether the impost, levied by Section 12(1) of the Rubber Act entrenched upon the State List did not arise in that case. Under these circumstances, the Supreme Court held that it was a non-descript tax which the Parliament could levy in exercise of its residuary power.

73. Reliance was placed by Mr. Vakil on *Second Gift Tax Officer, Mangalore etc. v. D. H. Hazareth etc.* AIR 1970 S.C. 999. In that case, the constitutionality of the Gift Tax Act, 1958 was challenged. The Supreme Court held that it did not fall under Entry 49 in the State List nor did it fall under any other Entry in the Union List. They, therefore, held that it fell under Entry 97 in the Union List. This decision does not help Mr. Vakil in advancing his argument further because the impost levied under Section 3 indisputably falls under Entry 84 of the Union List and a component of the excise duty assessed and collected under s. 4 entrenches upon Entry 54 in the State List. However, in the course of his arguments, Mr. Vakil in express terms stated that if the impost in question fell under Entry 84, it could not be justified under Entry 97.

74. The next argument which he has raised is that the Parliament has the legislative competence to impose a levy if the subject-matter of the levy does not fall under State List because the Parliament can legislate upon subjects specified in Union List as well as in the Concurrent List and also because the residuary power has been assigned by the Constitution to the Parliament.

Mr. J.C. Bhatt, in his turn, has tried to advance the proposition that where the source of power is definitely traceable to a particular Entry in the Union List, no resort can be had to residuary power of Parliament under Entry 97. Our attention has been invited in this behalf to the decision of the Supreme Court in *Union of India v. Harbhajan Singh Dhillon*, (1972) 83 ITR 582 (SC). It was a case in which the constitutional validity of Section 24 of the Finance Act, 1969 was challenged. By that section, certain provisions of the Wealth Tax Act were amended with the object of including capital value of agricultural land for computing net wealth. On consideration of several factors, the view which has been expressed in that case "is that the Act impugned therein fell entirely within Entry 97 in the Union List. It has been further observed in that case that the Supreme Court had never held earlier that the original Wealth Tax Act fell under Entry 86 in the Union List and that it only assumed that the original wealth Tax

Act fell within Entry 86 in the Union List. It has been further observed that on that assumption Entry 86 was analysed and contrasted with Entry 48 in the, State List. Therefore the final conclusion which the Supreme Court recorded in that behalf was that no part of the impugned legislation fell within Entry 86 in the Union List (vide paragraph 77 of the report). Therefore, that decision is not an authority for the proposition that the constitutionality of an impugned legislation can be defended both under a specific Entry and under the residuary Entry. It appears that the controversy has been set at rest by the Supreme Court in *His Holiness Kesavananda Bharati Sripadagalvaru Vs. State of Kerala*, . It appears that seven learned Judges out of thirteen who constituted the Bench have taken the view that if the subject of legislation was prominently present to the minds of the framers of the Constitution, they would not have left it to be found by recourse to the residuary power. Therefore, where an impugned legislation falls under a specific Entry, it cannot be justified under Entry 97-the residuary Entry. This is how we read the observations made by seven learned Judges in that decision (vide paragraph 635-Per Hegde and Mukherjea, JJ; paragraph 1239--Per Palekar J., Paragraph 1364--Per Khanna J., paragraph 1597--Per Mathew J., Paragraph 1886 Per Dwivedi J., and Paragraph 2053--Per Chandrachud J.).

75. Reference has also been made to the decision of the Supreme Court in *H.H. Prince Azam Jha Bahadur (Dead) through LRs Vs. Expenditure Tax Officer*, . In that case, the constitutional challenge to the Expenditure Tax Act, 1957 was that it fell within Entry 62 in the State List and that, therefore, it was beyond the legislative competence of Parliament. The Supreme Court held that it did not fall under Entry 62 or any other Entry in the State List. Therefore, its validity was upheld under Entry 97 in the Union List. The question of supporting the legislative enactment by simultaneously invoking a specific entry and the residuary entry did not arise in that case.

76. Mr. Vakil has also invited our attention to certain observations made by this Court in *The Anant Mills Co. Ltd. and Ors. v. State of Gujarat and Ors.* 14 GLR 826 . The observations upon which Mr. Vakil has placed reliance show that nothing turns upon the nomenclature and that the Court has to find out what is the subject-matter in respect of which Parliament or the Legislature, as the case may be, has passed the impugned enactment. We may state that this decision has been overruled in *The Anant Mills Co. Ltd. Vs. State of Gujarat and Others*, . In any case, we are not deciding this case by following the mere nomenclature. If we do we would uphold the constitutional validity of the amended Section 4 because the nomenclature suggests that it is all Excise duty. We have gone into its substance and discovered, on a meticulous and penetrating analysis, that in the name of Excise duty, sales-tax is also collected. We have therefore followed the guideline which Mr. Vakil was at pains to point out to us.

77. Having been confronted with a series of decisions bearing on the subject, Mr. Vakil has unsuccessfully tried to persuade this Court to hold that all these

decision contain loose observations made by the Supreme Court and that they do not lay down ratio decidendi or even obiter dicta. Mr. Vakil who appears for the Union of India ought not to have advanced this shocking argument and ought not to have taken a lot of our time by citing decision after decision before us to show what is ratio decidendi, what is obiter dictum and what is a loose observation. At the High Court bar, such an attempt ought not to be made by the Central Government counsel before senior Judges of the Court. He could have safely assumed that we know the distinction between ratio decidendi, obiter dictum and loose observation. It is not necessary for us to deal with each of those decisions again in order to find out whether they lay down ratio decidendi, obiter dictum or are merely loose observation. All of them lay down, in our opinion, ratio decidendi, much less obiter dicta or loose observation. The decisions showing the distinction between ratio decidendi, obiter dictum and a loose observation to which he has referred are as follows and are merely noted in this judgments out of sheer respect for him and for no other reason.

- (1) Mohandas Issardas v. A.N. Sattanathan 56 Bom. L.R. 1156.
- (2) Ranchhoddas Atmaram Vs. The Union of India (UOI), .
- (3) Zoolfikar Ali Currimbhoy Ebrahim v. The Official Trustee of Maharashtra 69 Bom. L.R. 326.
- (4) State of Maharastra v. Vali Mohammad Jan Mohammad 71 Bom. L.R. 1
- (5) The State of Orissa Vs. Sudhansu Sekhar Misra and Others,
- (6) Nag Raj Patodia Vs. R.K. Birla and Others, .
- (7) S. Sundarajan Vs. Union of India and Others,
- (8) Indian Rayon Corporation Ltd. Vs. Veraval Patan Joint Municipality and Another, , and
- (1978) (9) ELT 597 Guj.

78. The next contention which Mr. Bhatt has raised is that amended Section 4 goes beyond the scope of Section 3. And that therefore, it is ultravires Section 3. It must, therefore, be confined to Section 3. It is strictly not necessary for us to deal with this contention because, our conclusion on the first contention is capable of bringing to an end the controversy relating to amended Section 4. We have already reproduced amended Section 4. Let us see what Section 3 provides. It has not been amended even though Section 4 has been amended. It, Inter alia, provides as follows:

3. Duties specified in the First Schedule to be levied-(1) There shall be levied and collected in such manner as may be prescribed duties of excise on all excisable goods other than salt which are produced or manufactured in India and a duty on salt manufactured in, or imported by land into, any part of India as, and at the rates, set forth in the first schedule.

(1A) The provision of Sub-section (1) shall apply in respect of all excisable goods other than salt which are produced or manufactured in India by, or on behalf of Government as they apply in respect of goods which are not produced or manufactured by Government.

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It is clear, therefore, that Section 3 which is the charging section levies excise duty and nothing else. Section 4 provides for the machinery to determine and collect excise duty levied u/s 3. in *Wallance Brothers and Co. Ltd. v. Commissioner of Income Tax. Bombay Suburban District* (1948) 16 ITR 242, the Privy Council has laid down the principle that the liability to pay tax arises by virtue of the charging section alone. This principle has been affirmed by the Supreme Court in *Kalwa Devadattam and Others Vs. The Union of India (UOI) and Others*, and by the Gujarat High Court in *Commissioner of Wealth Tax Vs. Raipur Manufacturing Co. Ltd.*, . It appears that there are three machinery sections the Excise Act, Sections 3(2), 4(1) and 4(2).

79. Mr. Vakil has argued in the context of amended Section 4 that the plea that a particular section is ultra vires another section of the same legislation cannot be raised. In other words, according to him, if the machinery section goes beyond the ambit of the charging section, it must be held that the machinery section modifies the charging section protanto but it cannot be held that the machinery section is ultra vires the charging section. He has in that context invited our attention to the decision of the Supreme Court in the *Commissioner of Income Tax, Bombay City-1 Vs. Godavari Sugar Mills Ltd.*, , where the doctrine of partial implied repeal was brought into play. The question of partial implied repeal or modification of Section 3 does not arise in the instant case. Our attention has been invited to two decisions of the Bombay High Court in *State Vs. Ardeshir Hormusji Bhiwandiwalla*, and in Special Civil Application No. 1066 of 1972 decided by Mr. Justice Shah and Mr. Justice Pendse on 15th November 1976 and 27th November 1976. We do not propose to make any reference to those decision because, in our opinion, the question which we are called upon to decide can be decided effectively on the basis of several decisions of the Supreme Court to which we have referred and which are binding upon us.

80. However, we may refer to one under-ported decision of a learned single Judge of the Kerala High Court. In that decision, amended Section 4 was challenged on the ground that it was ultra vires Section 3 because it casts its sweep wider than what Section 3 provides. That decision is in *Madras Rubber Factory, Madras v. Assistant Collector of Central Excise and Ors.* O.P. No. 4578 of decided by Mr. Justice V. Khalid on 25th August 1978. The fir t contention which was framed for the consideration of the learned Jndge in that case was whether Section 4 was ultra vires Section 3 of the Excise Act. The learned Judge after having reviewed a large number of decisions on the subject has observed as follows:

The amendment to Section 4 of the Act was perhaps necessitated because of the *Voltas*, case. The section had to be changed to overcome the hurdle created by the Supreme Court decision. Therefore, the new section has to be properly analysed before applying the judgments mentioned above. To say that the matter is concluded is to forget that the section has been amended. I am emboldened to make this statement for the reason that Mathew J. has observed in the *Voltas*" case that "the section makes it clear that excise is levied only on the amount representing the manufacturing cost plus the manufacturing profit and excludes post-manufacturing cost and the profit arising from post-manufacturing operation, namely, selling profit," referring to the old section. Therefore, even if the law is settled that duty of excise for the purpose of Section 4 as it then stood can take in only the manufacturing cost and manufacturing profit, it cannot be said to be the law for the purpose of interpreting the new Section 4 also. It is against this background that I propose to consider the new section and its impact on the determination of the value for excise duty.

(Emphasis supplied).

In that case an argument based on Entry 97 of the Union List was advanced. The learned Judge did not examine that argument because, according to him, the Supreme Court had viewed with disfavour the indiscriminate resort to Entry 97 in cases where a party is kept at bay with reference to a particular Entry and secondly because, in his view, Section 3 did not define "duty of excise" to take in only the manufacturing costs and manufacturing profits. While making this observation, the learned Judge appears to have overlooked that the width and amplitude of the expression "duty of excise" was laid down by the Supreme Court in the context of Entry 84 in the Union List. Therefore, it is applicable both to Section 3 and to Section 4. Next, the observations which we have underlined in the extract reproduced above show that the learned Judge has summarily brushed aside the principles laid down by the Supreme Court in its several decisions--albeit in the context of Entry 84 in the Union List and Section 4 as it was prior to its amendment. We are of the opinion that it could not have been done. Basic principles bearing upon constitutional interpretation laid down by the highest Court of the country cannot, we say with respect, be so summarily brushed aside and shelved. They do not become irrelevant and inapplicable with the amendments which may be made to the statutes. On the contrary, they furnish the touchstone for testing the constitutional validity of amended statutes. They may become irrelevant or inapplicable if the Constitution itself is amended:

81 Next, we are also unable to agree with the following observation made by the learned Judge.

There are indications in the Judgments of the Federal Court and the Privy Council referred above that their Lordships laboured under a handicap for want of a definition of the expression "duty of excise."

We do not think Their Lordships laboured under any such handicap. Assuming

that they did, Section 4 does not now remove that handicap because Section 4 cannot define the expression "duty of excise" used in Entry, 84 in the Union List. No parliamentary legislation excepting a constitutional amendment can amend a constitutional provision. If we did not have a written Constitution with distribution of powers between the Centre and the States, then it could have been said with some justification that Section 4 defined the expression "Duty of excise" used in Section 3; Therefore, the observation made by the learned Judge of Kerala High Court is, with respect, too wide and too loose to merit any serious consideration or examination. The connotation and amplitude of Entry 84, enunciated by the Supreme Court, is final and binding on all the High Courts as long as Entry 84 itself is not amended. Next, we are unable to agree with the learned Judge that the charging section does not control the machinery section. Charging section, in our opinion, always controls the machinery section. The learned Judge has made an erroneous assumption that Parliament can do anything in the machinery section even though the charging section and the appropriate legislative Entry in the Union List have remained unamended. We reproduce with interest a few more observations from his judgment:

The excise duty forms part of the cost structure which the manufacturer or the dealer passes on to the consumer and it is he who bears the burden. The real object appears to be to inflate the post-manufacturing expenses detailed above and thereby swell the pockets of the manufacturer. Not without justification, is it suggested by the department that the post-manufacturing expenses like selling and administrative expenses, salaries, wages paid to the selling staff, advertising expenses, godown charges, freight and distribution expenses are so grossly exaggerated only to benefit the manufacturers so that they can make undue profits".

With respect, this is an erroneous approach. What the mischief-mongers were doing and what difficulties the department was facing under the old law and what remedies have been provided by Parliament by amending the legislation to overcome such a situation are not so much relevant considerations as the constitutional competence of the Parliament to do so when vires of the amended legislation are challenged. We, therefore, do not subscribe to the approach made by the learned Judge.

82. The last contention which has been raised before us is that the manufacturer and the buyer are not "related persons". We have already quoted in the foregoing parts of this judgment the definition of "related person" given in Section 4. There are two ingredients in the definition. If any one of them is satisfied, the buyer can be said to be a "related person". Firstly, the manufacturer and the buyer must "have interest, directly or indirectly, in the business of each other." Mr. Bhatt has argued that the words in quotation unflinchingly show that there must be mutuality of interest or mutuality of business interest between the two. In the instant case, the manufacturer manufactures the goods and the buyer buys them. Therefore, there is only one-way business

between them. In other words, the element of mutuality of business interest between them is significantly absent. There is no dispute about this character of business transactions between the two. We think the argument advanced by Mr. Bhatt is well-founded. The particular words "in the business of each other" used in the definition are capable of no other meaning than that there must exist mutuality of business interest between the two. If the nature of business transacted between the two shows that the one only manufactures and the other only buys from him there is no mutuality of business interest between them. Merely because there is an agreement between the two on this subject, it cannot be said that there is mutuality of business interest between them. In order to establish mutuality of business interest between the two, the manufacturer must, in his own interest, promote the business of the buyer and the buyer, in his own interest, promote the business of the manufacturer. The agreements between the two do not enable us to take such a view of business between the two. In the context of Section 4 as it was prior to its amendment such a question arose before this Court in Special Civil Application No. 1324 of 1976 decided by Obul Reddi C.J. and D.P. Desai J. on June 29, 1977. In order to find out whether there was mutuality of business interest between the manufacturer and the buyer, this Court examined the agreement between the two and also the agreement under which the Swiss company allowed the manufacturer to affix its trade mark. After having examined them, the contention that the price paid by the buyer to the manufacturer could not be taken as the assessable value for the purpose of excise duty was turned down. In other words, they were business agreements pure and simple. They did not show any mutuality of business interest between the two. Mutuality of business interest between two persons cannot be established by merely showing that they have business dealings between them. It must be further shown that one has special interest in the promotion or development of the business of another. Such interest may be direct or indirect. Between the manufacturer and the buyer, this element is lacking. The agreements which were examined by this Court in the case above referred to are still in force. In the affidavits filed on behalf of the department, nothing has been alleged against the agreements between the buyer and the manufacturer or between the buyer, the manufacturer and the Swiss company.

83. Let us now examine the second part of the definition of "related person". The question which arises in this context is this ; is the buyer a holding company, a subsidiary company or a relative of the manufacturer ? Now, Explanation appended to the definition of "related person" expressly states that the expressions "holding company", "subsidiary company" and "relative" bear the same meanings as are assigned to them under the Companies Act, 1956. "Holding company" has been defined by Section 2(19) of the Companies Act, 1956 as follows:

Holding company" means a holding company within the meaning of Section 4.

"Subsidiary company" has been defined by Section 2(47) as follows:

"Subsidiary company" or "subsidiary" means a subsidiary company within the meaning of Section 4.

Both these definitions take us to Section 4 which provides as follows:

4(1) For the purposes of this Act, a company shall, subject to the provisions of Sub-section (3), be deemed to be a subsidiary of another if, but only if,--

(a) that other controls the composition or its Board of directors ; or

(b) that other--

(i) Where the first-mentioned company is an existing company in respect of which the holders of preference shares issued before the commencement of this Act have the same voting rights in all respects as the holders of equity shares, exercises or controls more than half of the total voting power of such company:

(ii) Where the first-mentioned company is any other company, holds more than half in nominal value of its equity share capital ; or

(c) the first mentioned company is a subsidiary of any company which is that other's subsidiary.

ILLUSTRATION

Company B is a subsidiary of Company A and Company C is a subsidiary of Company B. Company C is a subsidiary of Company A, by virtue of Clause (c) above. If company D is a subsidiary of Company C, Company D will be a subsidiary of Company B and consequently also of Company A by virtue of Clause (c) above; and so on.

(2) For the purposes of Sub-section (1), the composition of a company's Board of directors shall be deemed to be controlled by another company if, but only if, that other company by the exercise of some power exercisable by it at its discretion without the consent or concurrence of any other person, can appoint or remove the holders of all or a majority of the directorships ; but for the purposes of this provision that other company shall be deemed to have power to appoint to a directorship with respect to which any of the following conditions is satisfied, that is to say--

(a) that a person cannot be appointed thereto without the exercise in his favour by that other company of such a power as afore said ;

(b) that a person's appointment thereto follows necessarily from his appointment as director, managing agent, secretaries and treasurers, or manager of, or to any other office or employment in, that other company ; or

(c) that the directorship is held by an individual nominated by that other company or a subsidiary thereof.

(3) In determining whether one company is a subsidiary of another--

(a) any shares held or power exercisable by that other company in a fiduciary capacity shall be treated as not held or exercisable by it ;

(b) subject to the provisions of Clauses (c) and (d), any shares held or power exercisable--

(i) by any person as a nominee for that other company (except where that other is concerned only in a fiduciary capacity) ; or

(ii) by, or by a nominee for, a subsidiary of that other company, not being a subsidiary which is concerned only in a fiduciary capacity ;

shall be treated as held or exercisable by that other company ;

(c) any shares held or power exercisable by any person by virtue of the provisions of any debentures of the first mentioned company or of a trust deed for securing any issue of such debentures shall be disregarded ;

(d) any shares held or power exercisable by, or by a nominee for, that other or its subsidiary [not being held or exercisable as mentioned in Clause (c)] shall be treated as not held or exercisable by that other, if the ordinary business of that other or its subsidiary, as the case may be, includes the lending of money and the shares are held or the power is exercisable as aforesaid by way of security only for the purposes of a transaction entered into in the ordinary course of that business.

(4) For the purposes of this Act, a company shall be deemed to be the holding company of another if, but only if, that other is its subsidiary.

(5) In this section, the expression "company" includes any body corporate, and the expression "equity share capital" has the same meaning as in Sub-section (8) of Section 85.

(6) In the case of a body corporate which is incorporated in a country outside India, a subsidiary or holding company of the body corporate under the law of such country shall be deemed to be a subsidiary or holding company of the body corporate within the meaning and for the purposes of this Act also, whether the requirements of this section are fulfilled or not.

(7) A private company, being a subsidiary of a body corporate incorporated outside India, which, if incorporated in India, would be a public company within the meaning of this Act, shall be deemed for the purposes of this Act, to be a subsidiary of a public company if the entire share capital in that private company is not held by that body corporate whether alone or together with one or more other bodies corporate incorporated outside India.

84. Clause (a) of Sub-section (1) provides that a company which controls the composition of the Board of Directors of another company is a holding company. In other words, the controlling company is the holding company and the controlled company is the subsidiary company. Sub-section (2) lays down the

manner in which such control can be exercised. If a company has power to appoint or remove all or majority of the directors of another company, the former is the holding company. In the instant case, there is no allegation that the buyer has such power under the Articles of Association of the manufacturer nor is there an allegation that the manufacturer has such power under the Articles of Association of the buyer. Therefore, Clause (a) does not come into play in this case.

85. Clause (b) of Sub-section (1) provides that a company which holds preference shares of another company with the same voting rights as the holders of equity shares exercise and exercises or controls more than half of the total voting power of such company is a holding company. Clause (b) of Sub-section (1) further provides that if a company holds more than half in nominal value of the equity share capital of another company, it is a holding company. So far as share holding is concerned, the buyer holds only 5% of the manufacturer's shares. So far as the buyer is concerned, 65% of its shares are held by the Swiss company. The manufacturer holds no shares of the buyer. Therefore, requirements of Clause (b) of Sub-section (1) of Section 4 are not satisfied. So far as the requirement of Clause (c) is concerned, it is also not satisfied because there is no evidence to show that the buyer is a subsidiary of any other company- in this case, Swiss company of which the manufacturer is also a subsidiary. Therefore, such a three-cornered relationship is also absent in this case.

Section 2(41) of the Companies Act, 1956 defines "relative" as follows:

"relative" means, with reference to any person, any one who is related to such person in any of the ways specified in Section 6, and no others."

Section 6 provides as follows ;

A person shall be deemed to be a relative of another if, and only if, -

- (a) they are members of a Hindu undivided family; or
- (b) they are husband and wife; or
- (c) the one is related to the other in the manner indicated in Schedule 1A.

Schedule 1A gives the list of relatives. Section 6 read with Section 1A clearly shows that it applies to human beings and not to impersonal legal entities such as companies. It is clear, therefore, that there is no relationship of holding company and subsidiary company between the buyer and manufacturer. Therefore, in our opinion, they are not "related persons" within the meaning of that expression given in the Excise Act.

86. The concept of "related person" has been examined by Allahabad High Court in *Hind Lamps Ltd. v. The Union of India* and Ors. Civil Miscellaneous Writ No. 179 of 1976. decided on 16th December, 1976. In that case, M/s. Hind Lamps Ltd. was the petitioner assessee. There were only five share holders of the

petitioners company. They were:

- (1) Bajaj Electricals Ltd. Bombay.
- (2) Crompton Parkinson Ltd. London.
- (3) N. V. Philips, Rnlhoven (Holland).
- (4) General Electricals Co. London.
- (5) Mazda Lamp Co. Ltd. Liecester, England.

Bajaj Electricals Ltd. Bombay, held 1,80,000 shares of M/s. Hind Lamps Ltd. The other four companies held the remaining 1,80,000 shares. Bajaj Electricals Ltd. Bombay were called "A" share holders. The other were called "B" share holders. M/s. Hind Lamps Ltd. was engaged in manufacturing electric lamps, fluorescent lamps and miniature lamps. It sold its entire production exclusively to the following five companies viz.

- (a) Bajaj Electricals Ltd.
- (b) Philips India Ltd.
- (c) Crompton Greaves Ltd.
- (d) General Electric Co. of India Ltd.
- (d) Mazda Lamps Co. Ltd.

The question which arose before the Allahabad High Court was whether the prices which M/s. Hind Lamps Ltd. charged its customer companies for its products or whether the prices which its customer companies charged their buyers should be taken into account for assessing the excise duty u/s 4 of the Excise Act. Allahabad High Court examined the scheme of Sections 2, 3 and Section 4 (as amended) and also examined some decisions of the Privy Council and the Supreme Court. The controversy which arose was whether the five customer companies were "related persons" of M/s. Hind Lamps Ltd. within the meaning of the definition of that expression given in Section 4. The High Court held that the first ingredient which is necessary to be established for being a "related person" in that the assessee company (M/s. Hind Lamps Ltd.) and its customer company must "have interest, directly or indirectly, in the business of each other." In the opinion of the High Court, such of the customer companies which held shares of the assessee company (M/s. Hind Lamps Ltd.) can be said to have interest in the business of the assessee company. But, since the converse was not established, there was no mutuality of business interest between them. We are in respectful agreement with the principle laid down in that decision. It supports the view which we have taken. So far as holding of shares was concerned only Bajaj Electricals Ltd., Bombay, held shares of the assessee company. The remaining four customer companies did not hold any shares of the assessee company. In other words, they were different companies though their names were similar of the assessee company. It was also

contended on behalf of the Union of India in that case that four customer companies were respectively associated companies of the four foreign companies which held shares of the assessee company and that, therefore the said four customer companies must be held to have interest indirectly, if not directly, in the business of the assessee company. That argument was turned down.

87. The department has treated the manufacturer and the buyer as "related persons" because of the declaration made under the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act) stating that they are "inter-connected undertakings" as defined by Section 2(g) of that Act. In the affidavits filed on behalf of the department "inter connected undertakings" has been transferred into "interrelated undertakings"--an altogether new and unknown expression. From "inter related undertakings", the department has jumped to "related persons" conveniently overlooking the Statutory definition of "related person" given in the Excise Act. This state of affairs reflects loose thinking. Now definition of an expression given in one Act cannot be used for the purpose of another Act. In our opinion, the argument raised by Mr. Bhatt in that behalf is well founded. The definition given in one statute is for effectuating the provisions of that statute and not for effectuating the provisions of another statute. It is, therefore, risky to rely upon the definition given in one Act for the purpose of applying the provisions of another Act.

88. In *Pandit Ram Narain Vs. The State of Uttar Pradesh and Others*, , it has been laid down by the Supreme Court; ""it is not a sound principle of construction to interpret expressions used in one Act with reference to their use in another Act. The meanings of words and expressions used in an Act must take their colour from the context in which they appear."

89. In *Lilavati Bai Vs. The State of Bombay*, , the Supreme Court observed; "...observations made by a Court with reference to the construction of one statute cannot be applied with reference to the provisions of another statute which is not in parimateria with the statute which forms the subject matter of the previous decision."

90. In *Commissioner of Sales Tax, Madhya Pradesh Vs. Jaswant Singh Charan Singh*, , it has been observed : "It is a well-settled principle that in construing a word in an Act caution is necessary in adopting a meaning described in that word in other statutes, "(paragraph 8 of the report).

91. In *The Director, Enforcement Directorate Cabinet Secretariat Deptt. Personnel and A.R. Government of India and Others Vs. Saroj Kumar Bhotika and Another*, , Calcutta High Court has laid down a similar principle. In our opinion, therefore, the declaration made under the MRTP Act that the manufacturer and the buyer were "inter-connected undertakings" could not have been taken into account by central excise authorities for deciding the case under the Excise Act.

92. The next proposition which Mr. Bhatt had tried to make out is that the impugned order could not have been supported on the grounds other than those

which were stated in the orders themselves. The two orders Annexures "J" and "J/1" state certain ground for holding that the manufacturer and the buyer are "related persons." Those grounds are sought to be reinforced by certain facts in the affidavits filed on behalf of the department. The orders made by the central excise authorities in the proceedings under the Excise Act are proceedings of a quasi-judicial character. Therefore, the support for what has been stated in the impugned order must be found from the order itself. It cannot later on be found from outside the impugned orders to cloak them with the garb of validity. Mr. Bhatt has, in this context, invited our attention to the observations made by the Supreme Court in *Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others*, . They were made in the context of the Representation of the People Act, 1951 and are as follows:

When a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise.

In absence of this principle, an order, bad in the beginning, may by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out. The proceedings under the Representation of the People Act are really a different type of proceeding because they affect several persons. Secondly, an election petition cannot be withdrawn by the petitioner unless public notice of the intended withdrawal has been given and none else comes forward to prosecute it. We are, therefore, disinclined to extend this principle to order made under the Excise Act. However, even without taking help of *Mohinder Singh's* case (*supra*), we are of the opinion that since the proceedings before the central excise authorities are quasi judicial in character they can be supported only on the materials stated in the impugned orders and not on any other grounds.

93. In answer to the second contention raised by Mr. J. C. Bhatt on behalf of the petitioner, Mr. Vakil has given no reply on merits either in his oral arguments or in his written arguments. All that he has stated is that the revision application filed by the petitioner before the Central Government is pending and that, therefore, this Court should not decide this contention on merits. We are unable to accede to this request made by Mr. Vakil, firstly, because we are not prepared to drive the petitioner to file another writ petition, if need arises, after the Central Government has decided the revision application and secondly because the petitioner has pleaded sufficient facts to enable us to come to the final conclusion. The respondents have hardly controverted them except to the extent stated in this judgment. Thirdly, even though the buyer has been paying the manufacturer the fully commercial price, the manufacturer is required to pay excise duty on the price with the buyer changes his buyer merely because the buyer and the manufacturer are regarded as "related persons". We have struck down the concept of "related person" because it is ultra vires the legislative competence of Parliament under Act. 246 read with Entry 84 in the Union List

and Entry 54 in the State List. Merely because the buyer and the manufacturer are "related person", assuming that it is so though we have decided otherwise, the central excise authorities have no jurisdiction to assess excise duty on the second price and to ignore the first price. It, therefore, raises a jurisdictional question. We have, therefore, decided the second contention.

94. In the result, we hold that the expression "where the buyer is not a related person" used in Section 4(1)(a) of the Excise Act is ultra vires Act. 246 read with Entry 84 in the Union List and that the manufacturer and the buyer are on facts also not "related persons" Therefore, the petitioner is liable to pay excise duty in respect of its products on the first price which it charges the buyer. In that view of the matter, we allow the petition and issue a writ of mandamus directing the respondents to cancel their orders at Annexures "J" and "J/1" and refund to the petitioner the sum of Rs. 28, 79, 093-35p. which they have collected on the basis that excise duty is leviable on second price which the buyer charges his buyer. It will be open to the respondents to refund this amount to the petitioner within six months from to-day. This amount shall be refunded with interest at the rate of 6% per annum from the date on which different payments constituting the entire sum were made until the date of refund.

95. The respondents are further directed to pay to the petitioner the costs of Bank guarantee incurred by them in pursuance of the interim order made by this Court in this petition on 29th February 1976. So far as the expiry of the Bank guarantee specified in the interim order of this Court dated 29th February 1976 is concerned, we direct that the Bank guarantee shall expire only on 30th June 1979.

96. The respondents are further directed to finalise, in light of the findings recorded in this judgment, on or before 31st July 1979 calculations in regard to the excess payment of excise duty recovered by them from the petitioner during the pendency of this petition and to refund to the petitioner on or before 31st October 1979 the whole or such part thereof as has not been included in the sum of 70 Rs. 28,3-35 p. which we have ordered to be refunded. The amount so worked out shall also bear interest at the rate of 6% per annum from the date on which different payments were made by the petitioner till the date of refund.

97. Rule is made absolute accordingly. The respondents shall pay to the petitioner the cost of the petition.

98. Mr. Vakil applies for certificate of fitness under Article 132 and Article 133(1) of the Constitution for appealing against this decision to the Supreme Court. In our opinion, this is a fit case for granting the certificate under Article 133(1) because it raises a substantial question of law which, in our opinion, is required to be decided by the Supreme Court. The substantial question of law which arises in this case is whether a part of the amended Section 4 of the Excise Act is ultra vires the legislative competence of Parliament. This question is a substantial question of law of general importance because it pertains to the realm of central

excise which is levied throughout the country. We also certify this case as fit for appeal to the Supreme Court under Article 132 because it involves the interpretation of Entries 84, 92A and 97 in the Union List and Entry 54 in the State List. Though we have relied upon the Supreme Court decisions for recording the conclusions which we have done, we think it is necessary to finally lay down the cumulative effect of all these Entries on amended Section 4.

99. Mr. Vakil applies for time to approach the Supreme Court for obtaining necessary interim orders in this case and therefore, prays for staying the operation of the writ which we have issued. We order that the operation of the writ issued herein shall, in the first instance, be stayed for a period of two months from today.