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**IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION**

J.B. PARDIWALA; J., SANDEEP MEHTA; J.

CIVIL APPEAL NOS. 856-857 OF 2011; 10th November, 2025

LIPI BOILERS LTD. *versus* THE COMMISSIONER OF CENTRAL EXCISE, AURANGABAD

Central Excise Act, 1944 – Distinction between 'Levy' (Section 3) and 'Measure of Tax' (Section 4)– Valuation cannot determine Excisability- Held, Section 3 creates the charge and defines the nature of the levy (manufacture of excisable goods), whereas Section 4 provides the measure (value) for the levy- The Revenue Court erred by conflating the two- The "transaction value" under Section 4 is relevant only after the taxable event (manufacture of excisable goods) is established- The measure of tax cannot be invoked to prove that what has been produced is excisable. [Relied on *Union of India v. Bombay Tyre International Ltd.*, (1984) 1 SCC 467; Paras 39-43]

Central Excise Act, 1944 – Section 2(d) – Excisability – Test of Movability – Erection and Installation of Plant- Supreme Court held that a steam generating plant/boiler, assembled and erected at site using civil engineering materials (concrete, grouting, etc.), which cannot be dismantled without substantial damage, is "immovable property" and not "goods."- Therefore, it is not excisable- The mere size and weight of the boiler made it impossible to assemble before erection- The final product (steam generating plant) emerging at the site is immovable; hence, the contract price cannot be treated as the assessable value for excise purposes. [Relied on *Quality Steel Tubes (P) Ltd. v. Collector of Central Excise*, (1995) 2 SCC 372; *Mittal Engineering Works (P) Ltd. v. Collector of Central Excise*, (1997) 1 SCC 203; *Sirpur Paper Mills Ltd v. Collector of Central Excise*, (1998) 1 SCC 400; Paras 59-64]

Valuation – Inclusion of Bought-out Items – bought-out items delivered directly to site not includable- Held that the final product (erected boiler) is immovable and not excisable, the Court held that the value of duty-paid bought-out items (delivered directly to the buyer's site and not brought to the assessee's factory) cannot be included in the assessable value of the boiler parts cleared in CKD condition- The base value for duty cannot be equated with the total contract price. [Paras 64, 82]

Central Excise Act, 1944- Section 11D – Excess Collection of Duty – Does not confer Excisability- Rejected the Revenue's argument that because the assessee allegedly collected excise duty on the total value from the buyer, the goods are excisable- If excess duty was collected, the Revenue should have invoked Section 11D for recovery of that amount, but such collection does not render an immovable product excisable. [Paras 72-73]

Central Excise Act, 1944 – Section 11A(1) Proviso – Extended Period of Limitation – Suppression of Facts- Supreme Court set aside the invocation of the extended period of limitation (5 years)- It held that mere failure to declare does not amount to wilful suppression- There must be a positive act with an intent to evade payment of duty. Since the assessee held a bona fide belief regarding non-inclusion and had filed returns, no suppression was established- Appeals allowed. [Relied on *Pahwa Chemicals Private Limited v. Commissioner of Central Excise*, (2009) 4 SCC 658; *Continental Foundation Joint Venture Holding v. CCE*, (2007) 10 SCC 337; Paras 74-80]

For Appellant(s): Mr. Prakash Shah, Sr. Adv. Mr. Jasdeep Singh Dhillon, Adv. Mr. Rahul Gupta, AOR

For Respondent(s): Mr. Raghavendra P. Shankar, ASG Mr. Gurmeet Singh Makker, AOR

J U D G M E N T

J.B. PARDIWALA, J.

For the convenience of exposition, this judgment is divided into the following parts:

INDEX

A. FACTUAL MATRIX	3
B. THE IMPUGNED ORDER.....	4
C. SUBMISSIONS ON BEHALF OF THE PARTIES	5
(I). Submissions on behalf of the appellant/assessee	5
(II). Submissions on behalf of the respondent/revenue	7
D. ISSUES TO BE DETERMINED	8
E. ANALYSIS	9
(I). Whether the value of the duty paid bought out items delivered directly at the buyer's site is liable to be included in the value of the boiler cleared by the assessee from its factory in completely knocked down (CKD) condition, for the assessment of central excise duty?.....	9
(i). Understanding the nature of Central Excise Duty, in light of the charging provision and valuation of quantum provision under the Central Excise Act, 1944:.....	9
(ii). Whether the resultant final product of the contract would fall within the ambit of "Excisable Goods"?	15
(iii). Erroneous reliance on Tariff Classification	24
(iv). Inapplicability of the "Utility Test" and the 'part' v. 'accessory' debate .	24
(v). Excess collection of excise duty from buyer is no proof of excisability. 	24
(II). Whether the show cause notice is legal and valid under the extended limitation period as provided under the proviso to Section 11A(1) of the Central Excise Act, 1944?	26
(i). Was there any wilful suppression of facts with an intention to evade payment of duty by the appellant/assessee?.....	26
F. CONCLUSION.....	28

1. Since the issues raised in both the captioned appeals are the same, the challenge in both the appeals are also to the self same order passed by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench, Mumbai (hereinafter, "**the CESTAT**")

and the parties are also the same, those were taken up for hearing analogously and are being disposed of by this common judgment and order.

2. These statutory appeals under Section 35L(1)(b) of the Central Excise Act, 1944 (hereinafter, "**the Act, 1944**"), are at the instance of an assessee and are directed against the common final order dated 23.09.2010 (hereinafter, "**the impugned order**") passed by the CESTAT in Appeal No. E/1377/07-Mum and Cross Objection No. E/CO/13/08, respectively by which the CESTAT reversed the concurrent findings of the two lower authorities, allowed the appeal filed by the revenue/respondent herein and dismissed the cross objections filed by the assessee/appellant herein. The CESTAT in the impugned order held that the value of the bought out items received directly at the buyer's site and used in the erection of the boiler are essential parts of the boiler and therefore, the value of such bought out items has to be included in the assessable value of the boiler for the purpose of assessing the payable central excise duty. Accordingly, the demand of duty along with interest was upheld by the CESTAT in the impugned order.

A. FACTUAL MATRIX

3. The appellant/assessee/Lipi Boilers Ltd. is a holder of Central Excise Registration for manufacture of boiler and boiler parts falling under Chapter Heading nos. 8402.10 and 8402.90 of the Central Excise Tariff Act, 1985 (hereinafter, "**the Act, 1985**"), respectively.

4. The assessee entered into an agreement with one Shri Maroli Vibhag Khand Udyog Sahakari Mandali Ltd. (hereinafter, "**the buyer**"), on 29.01.2001, for designing, procuring, manufacturing and supplying machinery and equipments for one 'no. 50 TPH MCR Capacity and 45 Kg/cm²(g) working pressure bagasse fired boiler' so that a steam generating plant could be commissioned by 31.10.2001 (hereinafter, "**the contract**").

5. On 28.04.2005, the Assistant Commissioner of Central Excise and Customs, Aurangabad, (hereinafter, "**the Assistant Commissioner**") issued a showcause-cum-demand notice (Sr. No. 4/2005/CEX/dated 2005) (hereinafter, "**the show cause notice**") to the assessee, alleging that the assessee cleared the final product boilers in completely knocked down condition (hereinafter, "**CKD condition**") during the period from 01.04.2000 to 30.06.2000 by paying central excise duty without adding or taking into account the cost of 'essential' bought out 'parts' delivered directly at the site of the buyer. According to the show cause notice, the non-inclusion of the cost of 'essential' bought out 'parts' worth ₹14,02,344/- (Rupees Fourteen Lakhs Two Thousand Three Hundred and Forty-Four only) in the value of the final product boiler resulted in undervaluation of the excisable item and a resultant shortfall to the tune of ₹2,24,375/- (Rupees Two Lakhs Twenty Four Thousand Three Hundred and Seventy-Five only) in the quantum of central excise duty payable by the assessee. The show cause notice stated that as per the amended Section 4(1) of the Act, 1944, (w.e.f. 01.07.2000), the excise duty was payable with reference to the transaction value of the goods sold to an unrelated buyer and the price charged has to be the sole consideration for sale. According to the show cause notice, since the transaction value as per the contract included the cost of the 'essential' bought out 'parts' that were delivered directly at the site of the buyer, the central excise duty payable by the assessee should take those into account.

6. The show cause notice invoked the extended period of limitation of 5 years provided under the *proviso* to Section 11A(1) of the Act, 1944, on the ground that the assessee had not paid central excise duty on the bought out items and had wilfully suppressed the facts from the knowledge of the respondent department with an intention to evade duty. The show cause notice sought a response from the assessee within a period of 30 days from

its receipt, failing which, the central excise duty amounting to ₹2,24,375/- (Rupees Two Lakhs Twenty Four Thousand Three Hundred and Seventy-Five only) was to be recovered from it under the erstwhile Section 11A(1) of the Act, 1944, read with Rule 9(2) of the Central Excise Rules, 1944, along with interest under Section 11AB of the Act, 1944 and penalty under Section 11AC of the Act, 1944 read with Rule 173Q and Rule 57(1)(5) of the Central Excise Rules, 1944 and Rule 13 of CENVAT Credit Rules, 2001, respectively.

7. On 13.06.2005, the assessee replied to the show cause notice referred to above, denying contravention of any applicable provision and stated that the boilers in CKD condition were cleared from its factory after duly paying the central excise duty leviable thereon, whereas the bought out items were cleared by their respective vendors upon payment of applicable central excise duty and transported directly to the site of erection. The assessee pointed out that there was no evidence on record to establish that the boiler was first assembled at the site before it was permanently installed as an 'immovable property'. Rather, the assessee, emphatically stated that the mere size and weight of the boiler make it impossible to assemble the boiler before erection. The process of erection itself involves civil and mechanical engineering, utilising concrete, steel reinforcements, and grouting in a manner that ensures the boiler is in a functioning condition and in an immovable form upon completion. The assessee also stated that such an installed boiler cannot be readily dismantled by removing nuts and bolts and reassembled at another site. The same may cause extensive damage to the boiler to such an extent that its value may be reduced to a mere scrap. Based on such reasoning, the assessee stated that since the boiler erected at the site and attached to the earth is not 'goods', the same would not be excisable. The assessee also stated that it had not availed any CENVAT credit on the bought out items and that there was no documentary evidence on record to substantiate such allegation.

8. Upon due consideration of the reply of the assessee, the Assistant Commissioner *vide* Order-in-Original dated 07.12.2005, accepted that the demand of central excise duty on the value of the bought out items was not sustainable. The Assistant Commissioner dropped the demands made in the show cause notice based on the findings which read thus:

"It is well settled law that value of bought out items cleared at site by the vendors without bringing the same into the factory premises is not liable to be included in the assessable value of the finished product. It is also well settled law that the boilers erected at site and attached to earth are not 'goods' and hence not excisable. I find that the ratio of the judgments in the case of Mittal Engineering Pvt Works Vs C.C.E. Meerut 1996 (88) ELT 622(SC); Tungabhadra Steel Products Ltd Vs Union of India reported in 1998 (98) ELT 334 (HC Karnataka); Alpha Laval (I) Ltd Vs C.C.E. Pune reported in 1998 (99) ELT 649 (Tribunal) etc are quite applicable in this case. Therefore I am inclined to accept the assessee's contention that the demand of duty on the value of bought out items is not sustainable."

9. Aggrieved by the Assistant Commissioner's Order-in-Original dated 07.12.2005, the revenue preferred an appeal before the Commissioner of Central Excise & Customs (Appeals), Aurangabad, [hereinafter, "**the Commissioner (Appeals)**"]. *Vide* Order-in-Appeal dated 13.07.2007 the Commissioner (Appeals), dismissed the appeal preferred by the revenue and thereby affirmed the Assistant Commissioner's order quashing the show cause notice.

B. THE IMPUGNED ORDER

10. Being dissatisfied with the Order-in-Appeal dated 13.07.2007, referred to above, the revenue preferred Appeal No. E/1377/07-Mum, whereas the assessee filed Cross

Objection no. E/CO/13/08 before the CESTAT. *Vide* the common order dated 23.09.2010, the CESTAT reversed the concurrent findings of the two lower authorities, allowed the appeal filed by the revenue and dismissed the cross objection filed by the assessee, thereby holding that the value of the essential bought out items received at the buyer's site and used in the erection of the boiler is to be included in the assessable value of the boiler for the purpose of determining the payable central excise duty.

11. The CESTAT based its ruling on two counts:

a. First, it found no merit in the contention that the boiler had been permanently imbedded and is non-excisable, on the ground that such plea had not been raised before the lower authorities. Further, the CESTAT was of the opinion that the immovability argument did not warrant any merit because the boiler was manufactured in the factory and it was merely for ease of transportation that the same had been cleared in CKD condition.

b. Secondly, the CESTAT observed that since the subject bought out items, supplied directly to the buyer's site, were essential parts of the boiler, those were therefore to be included in the assessable value of the boiler.

12. The relevant observations made by the CESTAT in the impugned order are reproduced as follows: -

"3. We find no merits in the contention of the respondent that the boiler has been permanently imbedded and is non-excisable as this plea was not taken before the lower authorities. Further the respondents are paying duty at the time of clearance of boiler from the factory, meaning thereby the boiler is manufactured in the factory and only ease of transportation, the same has been cleared in CKD condition. In these circumstances, we find no merits in this contention.

4. From the facts of the present case the respondent received an order for supply of boiler. The respondent manufactured boiler in the factory and cleared in CKD condition but certain parts were purchased from the market, which were directly supplied at site. These parts are essential parts of the boiler, which are not in dispute, therefore, the decision of the Tribunal in the case of Thermax Babcock & Wilcox Ltd., (supra) held that the value of bought out items received at site and used in the erection of boiler includable in the assessable value of the boiler. The respondent relies upon the decision of the Tribunal in the case of Silson India Pvt Ltd., (supra). We find the facts of the case are different from the facts of present case. In the case of Silson India Pvt Ltd., (supra) there was no evidence on record to show that full boiler has come into existence in the factory of manufactured and the manufacturer cleared only parts of the boiler. In the present case the respondents are clearing the boiler in CKD condition. Therefore, the respondents are manufacturing boiler and clearing the same and as boilers bought out items are essential parts, therefore, they are includable in the assessable value of the boiler. The impugned order is set aside and the appeal filed by the revenue is allowed. Cross objection filed by the respondent is also disposed of accordingly."

13. Thus observing, the CESTAT set aside the order of the Commissioner (Appeals), allowed the appeal by the revenue and dismissed the cross-objection filed by the assessee.

14. Being aggrieved by the impugned order, the assessee is here before us with two appeals under Section 35L(1)(b) of the Act, 1944.

C. SUBMISSIONS ON BEHALF OF THE PARTIES

(I). Submissions on behalf of the appellant/assessee

15. Mr. Prakash Shah, the learned Senior Counsel appearing on behalf of the assessee, submitted that the contract was for designing, procuring, manufacturing and supplying of

machinery and equipment for a steam generating plant and to do other works mentioned therein such as painting, first filling of lubricant, transformer oil, packing and forwarding charges, and handling and loading charges at the place of supply.

16. The learned Senior Counsel submitted that owing to the huge size of the boiler, it had to be cleared from the assessee's factory in CKD condition to the site of the buyer. He submitted that the assessee had no contractual obligation to erect or install the goods supplied by it. As per the contract, the erection, installation and commissioning of the steam generating plant was to be undertaken by the buyer's engineer.

17. The learned Senior Counsel submitted that the assessee had manufactured some of the equipments/machineries of the steam generating plant at its factory and cleared those in CKD condition upon payment of appropriate central excise duty. He further submitted that the assessee had purchased some items such as feed water pumps, fans, safety valves, level gauges, etc., from the open market, and supplied those duty-paid bought out items directly to the buyer, without bringing those into the assessee's factory. He submitted that the assessee merely supplied those bought out items and did not undertake any processing of those either at the site of erection or elsewhere.

18. On the aspect of whether the bought out items were essential parts of the boiler or not, the learned Senior Counsel argued that even at the site of erection, the bought out items did not form part of the boiler, but were fitted onto other machinery/equipments at the site. He argued that such other machinery/equipment on which the bought out parts are fitted onto, are not classifiable under Heading no. 84.02 as boiler but classifiable under Heading no. 84.04 as auxiliary plant for use with boilers, under the Act, 1985. Thus, according to the learned Senior Counsel, these bought out items are neither parts nor accessories of the boiler and hence could not have been included in the assessable value of the boilers. He went on to argue that the CESTAT failed to appreciate that there was no material on record to arrive at the finding that the bought out items were essential parts of the boiler, or that their function, value and description were provided to justify their essentiality. He submitted that the finding of the CESTAT, that the bought out items were essential parts of the final product manufactured by the assessee, was not supported by any evidence or material on record. He argued that, rather, the CESTAT's findings that the entire boiler was manufactured in the assessee's factory and cleared in CKD condition merely for ease of transportation, is self-contradictory to its own finding that the bought out items, delivered directly to the buyer's site were essential parts of the boiler.

19. He also submitted that the assessee had not claimed any CENVAT Credit of the central excise duty paid on bought out goods. He placed reliance on Rule 3 of the CENVAT Credit Rules, 2004 to submit that CENVAT credit can be taken only after inputs are received in the factory of the manufacturers and highlighted that the bought out items were never brought into the factory of the assessee or worked upon even elsewhere by the assessee.

20. He submitted that the final product i.e. the boiler came into existence at the site of the buyer as an immovable property and hence is not 'goods' and therefore, not excisable.

21. He argued that the revenue is seeking to recover tax on sale of goods in the guise of excise duty. He argued that the learned A.S.G.'s contention that Section 4 of the Central Excise Act, 1944 permits inclusion of the value of bought out goods in the assessable value of the goods manufactured by the Appellant is contrary to the law declared by this Court in **Commissioner of Central Excise, Pondicherry v. Acer India Ltd.** reported in **2004(8) SCC173** and **Commissioner of Central Excise, Lucknow, U.P. v. Chhata**

Sugar Co. Ltd. reported in **2004(3) SCC 466**, whereby this Court had held that Section 4 of the Act, 1944 is a machinery provision and subject to Section 3 of the Act, 1944 which is a charging section. He submitted that it is trite law that levy of duty of excise is on the manufacture or production and not on sale of goods.

22. The learned Senior Counsel vehemently contended that the CESTAT erred in holding that the assessee had not raised the contention regarding the boiler being non-excisable on account of its permanent embedding on erection at site, before the lower authorities. He submitted that the CESTAT had failed to appreciate that the assessee, in its reply dated 13.06.2005 to the show cause notice dated 28.04.2005, had specifically raised the contention that the boiler on commissioning became immovable property. Further, the said contention was accepted by the Assistant Commissioner and the same is reflected in the form of findings recorded in the Order-in-Original dated 07.12.2005/13.01.2006, wherein the Assistant Commissioner held that the boilers erected at site and attached to earth are not goods and hence not excisable.

23. The learned Senior Counsel argued that the CESTAT's reliance on the order of the CESTAT in **Commissioner of C. Ex. v. Thermax Babcock & Wilcox Ltd.** reported in **2005 (182) ELT 336 (Tri.- Mumbai)** (hereinafter referred to as "**Thermax CESTAT**") is erroneous because in case of **Thermax CESTAT (supra)**, when the order was challenged before this Court in **M/s. Thermax Babcock & Wilcox Ltd. v. Commnr. of Central Excise, Pune** in **Civil Appeal No(s). 3042-3043/2005** (hereinafter referred to as "**Thermax SC**"), the learned counsel for the Commissioner of Central Excise, Pune had pointed out that, while computing the demands which were raised in the show cause notice, no excise duty was demanded on the bought out items in that matter.

24. Lastly, he contended that the CESTAT committed a serious error in law in not remanding the proceedings to the two lower authorities to examine the question of whether the show cause notice was time barred. He highlighted that since the Assistant Commissioner and the Commissioner (Appeals) had dropped the demand on merits, the CESTAT did not find it necessary to address itself on the show cause notice being time barred.

(II). Submissions on behalf of the respondent/revenue

25. Mr. Raghavendra P Shankar, the learned A.S.G. appearing on behalf of the revenue, on the other hand submitted that in the present case, the taxable event of 'manufacture' occurred when the parts brought from the appellant's factory in CKD condition and the bought out 'parts' were assembled at the buyer's site to form the functional boiler, in discharge of its obligation as per Clause 2.1 of the contract. He submitted that even assuming without conceding that the boiler ceased to be 'goods' once it was affixed to the earth, the dutiable event ('manufacture' of the boiler) had already occurred at a point in time prior to its affixation to the earth and thus excise duty was payable on it.

26. He argued that the taxable event of 'manufacture' under Section 3 of the Act, 1944, having occurred in the present case at the buyer's site which is the 'place of removal', what remains thereafter is only determination of the correct valuation of the payable excise duty on the said taxable event.

27. He submitted that as per the amended Section 4(1) of the Act, 1944 (w.e.f. 01.07.2000), the central excise duty is payable with reference to the transaction value of the goods sold to a buyer, where price charged is the sole consideration for the sale. He submitted that as per the said amended Section 4(1) read with Section 4(3)(d) of the

Act, 1944, the “transaction value” means the price actually paid or payable for the goods, when sold, which in the present dispute, would be the total contract price. He pointed out that as per Clause 3.1(iii) of the contract, the total contract price was inclusive, *inter alia*, of the “*cost of all other items which are necessary for completing supply of the steam generating plant as per scope of supply*”. He submitted that the assessee was clearing goods as per the contract value agreed with the buyer, which included the cost right from drawing and designing of the goods to freight, installation and commissioning of the boilers at the site and also cost of its essential bought out parts. He therefore argued that since the transaction under the contract was completed after successful commissioning of the boiler, the value of the bought out items would form part of the transaction value as per Section 4(1)(a) of the Act, 1944.

28. He also argued that the cost of the bought out items was recovered by the assessee from the buyer and that the assessee had availed CENVAT Credit of duty by including the duty paid on the bought out items under the head ‘Reimbursement of duty’ and had recovered the same from the buyer.

29. He further argued that the CESTAT was correct in holding that the bought out items are essential parts of the boiler that was manufactured. The learned A.S.G placed reliance on the distinction drawn by this Court in ***M/s. Quippo Energy Ltd. v. Commissioner of Central Excise, Ahmedabad-II*** reported in **2025 INSC 1130**, between a ‘part’ and an ‘accessory’, and the observation that a part is an integral/constituent component which renders the article complete and functional, i.e. the article would not be able to fulfill its primary function without this component. On the basis of this, he argued that the bought out items were ‘parts’ of the boiler and not merely its accessories, and that from a functional perspective, the bought out items cannot be said to be external to the transaction under the contract for supply of a functional boiler. He argued that any artificial vivisection of the transaction (and therefore the transaction value) under the contract to exclude the value of the ‘bought out’ parts that were nevertheless essential parts of the boiler is alien to the contract and also to the Act, 1944.

30. In the context of ***Thermax CESTAT(supra)***, the learned A.S.G. argued that the law laid down by the CESTAT in ***Thermax CESTAT(supra)*** had not been interfered with by this Court in appeal in ***Thermax SC(supra)***, but was dismissed based on the observation that there was, “*no need to go into the issue raised by the appellant in this appeal as the decision of this appeal, either ways would not affect the appellant if the duty itself is not demanded thereupon*”, without raising any doubts regarding the correctness of the CESTAT’s order.

31. In such circumstances referred to above, the learned A.S.G. prayed that there being no merit in the appeals, those be dismissed.

D. ISSUES TO BE DETERMINED

32. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the following questions fall for our consideration:

(I). Whether the value of the duty paid bought out items delivered directly at the buyer’s site is liable to be included in the value of the boiler cleared by the assessee from its factory in completely knocked down (CKD) condition, for the assessment of central excise duty?

(II). Whether the show cause notice is legal and valid under the extended limitation period as provided under the proviso to Section 11A(1) of the Central Excise Act, 1944?

E. ANALYSIS

(I). Whether the value of the duty paid bought out items delivered directly at the buyer's site is liable to be included in the value of the boiler cleared by the assessee from its factory in completely knocked down (CKD) condition, for the assessment of central excise duty?

(i). Understanding the nature of Central Excise Duty, in light of the charging provision and valuation of quantum provision under the Central Excise Act, 1944:

33. The present matter before us strikes at the very root of the concept of exigibility of central excise duty. Hence, at the outset, it is necessary to recall certain foundational principles governing the levy of central excise duty under the Act, 1944.

34. It is pertinent to note that central excise duty is a duty on manufacture of goods. A Three-judge Bench of this Court in **Union of India and Others v. Bombay Tyre International Ltd. and Others** reported in (1984) 1 SCC 467, while discussing the concept of a duty of excise highlighted upon the nature of the tax and observed as follows:

*“12. We think it is appropriate that at the very beginning we should briefly indicate the concept of a duty of excise[...]. The observations show that while the nature of an excise is indicated by the fact that it is imposed in respect of the manufacture or production of an article, the point at which it is collected is not determined by the point of time when its manufacture is completed but will rest on considerations of administrative convenience, and that generally it is collected when the article leaves the factory for the first time. In other words, the circumstance that the article becomes the object of assessment when it is sold by the manufacturer does not detract from its true nature, that it is a levy on fact of manufacture. In a subsequent case, *Governor-General-in-Council v. Province of Madras* (AIR 1945 FC 98) the Privy Council referred to both Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938 and *Province of Madras v. Boddu Paidanna and Sons* and affirmed that when excise was levied on a manufacturer at the point of the first sale by him “that may be because the taxation authority imposing a duty of excise finds it convenient to impose the duty at the moment when the excisable article leaves the factory or workshop for the first time on the occasion of its sale. But that method of collecting the tax is an accident of administration; it is not of the essence of the duty of excise, which is attracted by the manufacture itself [...]”*

13. We think that we have shown sufficiently that while levy is on the manufacture or production of goods, the stage of collection need not in point of time synchronize with the completion of the manufacturing process. While the levy in our country has the status of a constitutional concept, the point of collection is location where the statute declares it will be [...]

(Emphasis supplied)

35. Another aspect discussed by this Court in **Bombay Tyre** (*supra*) which is of utmost relevance to the matter before us is understanding the nature of Section 3 and Section 4 of the Act, 1944 respectively. Hence, before delving into the explanation regarding the nature of the two provisions as highlighted by this Court in **Bombay Tyre** (*supra*), it is pertinent to reproduce the provisions as it existed at the time of the taxable event in contention, i.e. assembling of the boiler parts in CKD condition with the bought out items at the site of erection.

36. Section 3 of the Act, 1944, that was in force at the time of the taxable event in contention, read as follows:

“SECTION 3. Duties specified in First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 to be levied.-

(1) There shall be levied and collected in such manner as may be prescribed,-

(a) a duty of excise to be called the Central Value Added Tax (CENVAT) on all excisable goods which are produced or manufactured in India as, and at the rates, set forth in the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986);

(b) a special duty of excise, in addition to the duty of excise specified in clause (a) above, on excisable goods specified in the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) which are produced or manufactured in India, as, and at the rates, set forth in the said Second Schedule.

Provided that the duties of excise which shall be levied and collected on any excisable goods which are produced or manufactured,

(i) in a free trade zone or a special economic zone and brought to any other place in India; or

(ii) by a hundred per cent export-oriented undertaking and brought to any other place in India, shall be an amount equal to the aggregate of the duties of customs which would be leviable under the Customs Act, 1962 (52 of 1962) or any other law for the time being in force, on like goods produced or manufactured outside India if imported into India, and where the said duties of customs are chargeable by reference to their value; the value of such excisable goods shall, notwithstanding anything contained in any other provision of this Act, be determined in accordance with the provisions of the Customs Act, 1962 (52 of 1962) and the Customs Tariff Act, 1975 (51 of 1975).

Explanation 1. - Where in respect of any such like goods, any duty of customs leviable for the time being in force is leviable at different rates, then, such duty shall, for the purposes of this proviso, be deemed to be leviable at the highest of those rates.

Explanation 2. - In this proviso,-

(i) "free trade zone" means the Kandla Free Trade Zone and the Santa Cruz Electronics Export Processing Zone and includes any other free trade zone which the Central Government may, by notification in the Official Gazette, specify in this behalf;

(ii) "hundred per cent export-oriented undertaking" means an undertaking which has been approved as a hundred per cent export- oriented undertaking by the Board appointed in this behalf by the Central Government in exercise of the powers conferred by section 14 of the Industries (Development and Regulation) Act, 1951 (65 of 1951), and the rules made under that Act.;

(iii) "special economic zone" means a zone which the Central Government may, by notification in the Official Gazette, specify in this behalf.

(1A) The provisions 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.

(2) The Central Government may, by notification in the Official Gazette, fix, for the purpose of levying the said duties, tariff values of any articles enumerated, either specifically or under general headings, in the First Schedule and the Second Schedule] to the Central Excise Tariff Act, 1985 (5 of 1986) as chargeable with duty ad valorem and may alter any tariff values for the time being in force.

(3) Different tariff values may be fixed –

(a) for different classes or descriptions of the same excisable goods; or

- (b) for excisable goods of the same class or description-
- (i) produced or manufactured by different classes of producers or manufacturers; or
- (ii) sold to different classes of buyers:

Provided that in fixing different tariff values in respect of excisable goods falling under sub-clause (i) or sub-clause (ii), regard shall be had to the sale prices charged by the different classes of producers or manufacturers or, as the case may be, the normal practice of the wholesale trade in such goods."

37. Section 4 of the Act, 1944, (as amended w.e.f. 01.07.2000) that was in force at the time of the taxable event in contention, read as follows:

"SECTION 4. Valuation of excisable goods for purposes of charging of duty of excise.-

(1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to their value, then, on each removal of the goods, such value shall -

(a) in a case where the goods are sold by the assessee, for delivery at the time and place of the removal, the assessee and the buyer of the goods are not related and the price is the sole consideration for the sale, be the transaction value;

(b) in any other case, including the case where the goods are not sold, be the value determined in such manner as may be prescribed.

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

(3) For the purpose of this section,-

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

(b) persons shall be deemed to be "related" if –

(i) they are inter-connected undertakings;

(ii) they are relatives;

(iii) amongst them the buyer is a relative and a distributor of the assessee, or a sub-distributor of such distributor; or

(iv) they are so associated that they have interest, directly or indirectly, in the business of each other.

Explanation. - In this clause-

(i) "inter-connected undertakings" shall have the meaning assigned to it in clause (g) of section 2 of the Monopolies and Restrictive Trade Practices Act, 1969 (64 of 1969); and

(ii) "relative" shall have the meaning assigned to it in clause (41) of section 2 of the Companies Act, 1956 (1 of 1956);

(c) "place of removal" means

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

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

(d) "transaction value" means the price actually paid or payable for the goods, when sold, and includes in addition to the amount charged as price, any amount that the buyer is liable to pay to, or on behalf of, the assessee, by reason of, or in connection with the sale, whether payable at the time of the sale or at any other time, including, but not limited to, any amount charged for, or to make provision for, advertising or publicity, marketing and selling organization expenses, storage, outward handling, servicing, warranty, commission or any other matter; but does not include the amount of duty of excise, sales tax and other taxes, if any, actually paid or actually payable on such goods."

38. Since the observations of this Court in **Bombay Tyre** (*supra*) which are central to our discussion are with reference to Section 4 of the Act, 1944 which was in force prior to the amendment of 01.07.2000, and the revenue's argument focuses on the amendment, the erstwhile Section 4 of the Act, 1944 which existed at the time of **Bombay Tyre** (*supra*) is being reproduced here for the sake of clarity, and it read as follows:

"SECTION 4. Valuation of excisable goods for purposes of charging of duty of excise. –

(1) *Where under this Act, the duty of excise is chargeable on any excisable goods with reference to value, such value, shall, subject to the other provisions of this section, be deemed to be -*

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

Provided that

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

(ia) *where the price at which such goods are ordinarily sold by the assessee is different for different places of removal, each such price shall, subject to the existence of other circumstances specified in clause (a), be deemed to be the normal price of such goods in relation to each such place of removal;*

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

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

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

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

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

(4) For the purposes of this section,

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

(b) "place of removal" means

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

(ii) a warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty; (iii) a depot, premises of a consignment agent or any other place or premises from where the excisable goods are to be sold after their clearance from the factory and, from where such goods are removed;

(ba) "time of removal", in respect of goods removed from the place of removal referred to in sub-clause (iii) of clause (b), shall be deemed to be the time at which such goods are cleared from the factory;

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

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

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

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

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

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

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

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

(b) the aggregate of the effective duties of excise payable under other Central Acts, if any, providing for the levy of duties of excise on such goods, and the effective duty of excise on such goods under each Act referred to in clause (a) or clause (b) shall be, -

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

other case, the duty of excise computed with reference to the rate specified in such Act in respect of such goods.

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

39. Having read the erstwhile Section 3 and Section 4 of the Act, 1944, respectively, we come back to this Court’s observation in **Bombay Tyre (supra)**. This Court in **Bombay Tyre (supra)** observed that while Section 3 provides for the levy of the duty of excise, Section 4 provides the measure by reference to which the charge is to be levied. It was categorically emphasised upon, that the duty of excise is chargeable with reference to the value of the excisable goods, but the measure employed for assessing a tax must not be confused with the nature of the tax itself. The relevant observation of this Court in **Bombay Tyre (supra)**, reads as follows:

*“14. We move on now to a different dimension, to the conceptual consideration of the measure of the tax. Section 3 of the Central Excises and Salt Act provides for the levy of the duty of excise. It creates the charge, and defines the nature of the charge. That it is a levy on excisable goods, produced or manufactured in India, is mentioned in terms in the section itself. Section 4 of the Act provides the measure by reference to which the charge is to be levied. The duty of excise is chargeable with reference to the value of the excisable goods, and the value is defined in express terms by that section. It has long been recognised that **the measure employed for assessing a tax must not be confused with the nature of the tax...**In other words, the measure adopted could not be identified with the nature of the tax.”*

(Emphasis supplied)

40. This Court in **Bombay Tyre (supra)** also referred to this Court’s judgment in **D.G. Gouse and Co. v. State of Kerala** reported in **(1980) 2 SCC 410** which in turn had referred to a passage from **Seervai’s Constitutional Law of India**, to further explain the distinction between the subject of a tax and a measure of a tax. The relevant observation of this Court in **Bombay Tyre (supra)**, reads thus:

“14. [...]The point was considered by this Court again in D.G. Gouse and Co. v. State of Kerala [(1980) 2 SCC 410] where reference was made to the measure adopted for the purpose of the levy of tax on buildings under the Kerala Building Tax Act. The Court examined the different modes available to the Legislature for measuring the levy with the annual value of the building and prescribing a uniform formula for determining its capital value and for calculating the tax. In the course of its judgment, the Court cited with approval a passage from Seervai’s Constitutional Law of India [Second Edn. Vol.2 at p. 1258]:

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

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

41. It is clear from the above-quoted observations of this Court in **Bombay Tyre (supra)** that Section 3 of the Act, 1944 specifies the subject-matter on which the excise duty is to be levied, whereas Section 4 of the Act, 1944 prescribes the measure of such excise duty. Unfortunately, in the case on hand, the revenue lost sight of this crucial distinction in the nature of these two statutory provisions. The revenue erred in its application of the amended Section 4 of the Act, 1944 (w.e.f. 01.07.2000) by conflating the two distinct

stages of excise duty assessment, i.e. (i) levy under Section 3 and (ii) computation of the quantum of levy under Section 4 of the Act, 1944, into one. Although Section 4 was amended (w.e.f. 01.07.2000) to modify the valuation methodology, yet such amendment did not alter the essential character of the provision and it continues to remain a provision for prescribing the measure of the tax and not a charging provision in itself.

42. In other words, the 'transaction value' becomes relevant only after the taxable event, i.e. manufacture of excisable goods, is first established. The measure of tax cannot be invoked to prove that what has been produced is excisable. The revenue has, erroneously relied upon the 'transaction value' derived from the 'contract price' to argue that the excise duty on the boiler has to be computed on the basis of the contract price. However, for the revenue to contend that the contract price would become the basis of the 'transaction value' for the purpose of determination of the payable excise duty, it has to first establish that the final product of the contract itself is excisable.

43. Applying the foundational principles set out hereinabove, it is clear that the 'transaction value' under Section 4 of the Act, 1944, merely serves as the basis for computing the quantum of excise duty payable, but cannot determine excisability. It must necessarily be borne in mind that valuation is a consequence of levy, not its determinant. Accordingly, the correct sequence of central excise duty assessment under the Act, 1944 is as follows:

- i. First, determining the applicability of the charging provision under Section 3, i.e. whether the process results in the manufacture of excisable goods; and
- ii. Secondly, (if the first condition is satisfied), computing the quantum of excise duty payable under the valuation provisions, such as Section 4 (or Section 4A, although Section 4A is not relevant to this present matter before us).

44. Thus, it is necessary to first examine whether the resultant product that emerges at the buyer's site by assembling the parts brought in CKD condition along with the bought out items, qualifies as an "excisable good" under the Act, 1944. Only if such product which emerges as a result of the contract qualifies as excisable goods can the next step of evaluation be undertaken, i.e. to see whether or not the contract price can be treated as the 'transaction value' under Section 4, for computing the quantum of payable excise duty. Consequently, if upon such examination it is found that the contract price could validly be taken as the 'transaction value' under Section 4, a show cause notice may be issued seeking why the value of the bought out items should not be added to the value of the boiler. In other words, if upon examination it is found that the resultant product of the contract is not excisable goods, then the contract price cannot be considered as the 'transaction value' for the purpose of determining the payable central excise duty on the boiler, which in turn would also mean that the value of the bought out goods is not liable to be included in the value of the boiler for computing central excise duty.

(ii). Whether the resultant final product of the contract would fall within the ambit of "Excisable Goods"?

45. The term "excisable goods" defined under Section 2(d) of the Act, 1944, as it existed at the time of the taxable event in question read as follows:

"SECTION 2. Definitions.- *In this Act, unless there is anything repugnant in the subject or context,-*

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(d) “excisable goods” means goods specified in the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as being subject to a duty of excise and includes salt;”

46. The term “goods” has not been defined in the Act, 1944. However, through a catena of judgments of this Court, it is now a settled position of law that excise duty is leviable only on ‘goods’ and that the test of *movability* is the decisive factor in ascertaining whether an article qualifies as “goods” for the purpose of central excise duty. A Coordinate Bench of this Court in a judgment in **M/s Bharti Airtel Ltd. v. The Commissioner of Central Excise, Pune** reported in **2024 INSC 880**, undertook an extensive examination of the expression “goods” under the Act, 1944. After a close examination of the meaning of “goods” under Section 2(7) of the Sale of Goods Act, 1930, Section 2(52) of the Central Goods and Services Tax Act, 2017, Section 2(d) of the Central Sales Tax Act, 1956, Section 2(22) of the Customs Act, 1962, Section 2(i) of the Competition Act, 2002, Section 2(13) of the Motor Vehicles Act, 1988, Section 2(f) of the Micro, Small and Medium Enterprises Development Act, 2006, Section 2(14) of the Bureau of Indian Standards Act, 2016 and Section 2(21) of the Consumer Protection Act, 2019, respectively, this Court concluded that the definition of “goods” under the Sale of Goods Act, 1930 seems to be the basis of the term “goods” in other Statutes. Therefore, this Court observed that for the meaning of the term “goods”, the definition given in the Sale of Goods Act, 1930 would be primarily relied upon. The relevant observation of this Court in **Bharti Airtel (supra)** is as follows:

“11.2.5 “Goods” has not been defined in the Central Excise Act, 1944. We, therefore, look into other statutes. The term “goods” has been defined under various statutes some of which may be mentioned as below.

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11.2.6 From the above, it appears that the definition of “goods” under the Sales of Goods Act, 1930 seems to be the basis of the term “goods” in other Statutes. Hence, we would primarily rely on the definition given in the Sale of Goods Act.”

47. This Court in **Bharti Airtel (supra)** went further to observe that since the items in consideration before it, were neither actionable claim nor money, nor falling within the inclusive clause of the definition, viz., stocks, shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under contract of sale, the test of movability would determine whether those items would be “goods”. However, this Court observed that in order to determine whether an item is movable or immovable, the enquiry has to go beyond a simpliciter application of the definitions of the terms “movable goods” and “immovable goods” under Section 3(36) of the General Clauses Act, 1897 and Section 3(26) of the General Clauses Act, 1897 read with Section 3 of the Transfer of Properties Act, 1882, respectively. The relevant observation of this Court in **Bharti Airtel (supra)** reads as under:

“11.2.7 The items in consideration viz., towers and prefabricated buildings are neither actionable claim nor money, nor do they come within the inclusive clause of the definition, viz., stocks, shares, growing crops, grass, and things attached to forming part of the land which are agreed to be severed before sale or under contract of sale.

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11.3 Thus, the focus of our inquiry now will be to ascertain whether these items namely, towers, its parts thereof and prefabricated buildings are movable or immovable properties.

11.3.1 As to what is a movable property has been defined and can be understood from the expansive meaning assigned to it under Section 3(36) of the General Clauses Act, 1897 which states that, “movable property shall mean property of every description except immovable property”.

11.3.2 The aforesaid definition categorically indicates that movable and immovable properties are mutually exclusive. Thus, if it is found that these items are not immovable properties, these invariably can be treated as movable properties under Section 3(36) of the General Clause Act and thus will be “goods” within the meaning of Section 2(7) of the Sale of Goods Act, 1930 and hence may qualify as “capital goods” within the meaning of Rule 2(a)(A) subject to fulfilling other conditions mentioned therein.

11.3.3 As to what is immovable property has been explained under Section 3 of the Transfer of Property Act, 1882 which specifies that “immovable property does not include standing timber, growing crops or grass”.

11.3.4 It has been also defined under Section 3(26) of the General Clauses Act, though not exhaustively, but in an inclusive manner by providing that “immovable property” shall include “land, benefits to arise out of land and things attached to the earth, or permanently fastened to anything attached to the earth”.

11.3.5 Therefore, we have to consider whether these items are attached to the earth or are permanently fastened to anything attached to the earth, for if these are found to be so, these will be immovable properties and hence cannot be “goods” and consequently, cannot be “capital goods” within the scope of the CENVAT Rules.

11.4 As to what amounts to “attached to earth” as mentioned under Section 3(26) of the General Clauses Act, has been explained under Section 3 of the Transfer of Property Act, 1882 to mean as rooted in the earth, as in the case of trees and shrubs; imbedded in the earth, as in the case of walls or buildings; or attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached.

11.5 For easy reference, the aforesaid definition clauses of the Transfer of Property Act, 1882 and the General Clauses Act, 1897 as may be relevant are reproduced below.

Section 3(36) of the General Clauses Act.

“movable property” shall mean property of every description, except immovable property;

Section 3(26) of the General Clauses Act.

“immovable property” shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth.

Section 3 of the Transfer of Property Act.

“immovable property” does not include standing timber, growing crops or grass.

Under Section 3 of the Transfer of Properties Act, “attached to the earth” means:

- (a) rooted in the earth, as in the case of trees and shrubs;
- (b) imbedded in the earth, as in the case of walls or buildings; or
- (c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached.

11.6 From the above, it is now clear that if these items, namely towers and parts thereof and prefabricated buildings/shelters are considered to be “goods”, these cannot be immovable properties. **Conversely, if these are not rooted in the earth, nor imbedded in the earth nor attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached, these cannot be immovable properties and can qualify to be movable properties and hence, “goods”.**

11.6.1 Since, towers and parts thereof and prefabricated buildings/shelters apparently appear to be fixed on the earth or building, these seem to be immovable properties at the first blush. However, the first appearance may not be decisive to indicate the real character of these items, whether these are immovable or movable properties, as demonstrated by the conflicting views of the two High Courts on this issue. Hence, we need to delve further to arrive at the correct position in law on this issue.

11.7 In order to determine whether any property is movable or immovable, this Court, in the light of the statutory provisions has applied certain principles. It has also been noted that such determination may be done not based on a single test but after applying several criteria on the facts of each case."

(Emphasis supplied)

48. We should now look into a few landmark judgments to help us understand when an article would be considered as movable or immovable for the purpose of levying excise duty under the Act, 1944.

49. This Court in **Quality Steel Tubes (P) Ltd. v. Collector of Central Excise, U.P.** reported in **(1995) 2 SCC 372** dealt with the question whether the tube mill and welding head erected and installed by the assessee for manufacture of tubes and pipes out of duty-paid raw materials amounted to "excisable good" assessable to duty under the Act, 1944. This Court observed that, the basic test of levying duty under the Act, 1944 is two fold: One, that any article must be a good and second, that the same should be marketable or capable of being brought to market. Goods which are attached to the earth and thus become immovable do not satisfy the test of being goods within the meaning of the Act, nor can it be said to be capable of being brought to the market for being bought and sold. It was held that the subject tube mill or welding head having been erected and installed in the premises and embedded to earth, ceased to be goods within the meaning of Section 3 of the Act, 1944. This Court categorically observed that erection and installation of a plant cannot be held to be excisable goods. This Court's observation in **Quality Steel** (*supra*) reads thus:

"4. Levy and collection of duty is provided by Section 3 of the Act on all 'excisable goods other than salt which are produced or manufactured'. The power, therefore, to levy and collect the duty under the charging Section arises when excisable goods are produced or manufactured. What is an 'excisable good' is defined by Sub-section (d) of Section 2 to mean 'goods specified in the Schedule to the Central Excise Tariff Act, 1985 as being subject to a duty of excise and includes salt'. The words 'excisable good', therefore, has a connotation of its own.

5. In several decisions rendered by this Court commencing from *Union of India and Anr., v. Delhi Cloth and General Mills Co. Ltd.* MANU/SC/0245/1962 : to *Indian Cable Co. Ltd. v. Collector of Central Excise, Calcutta* MANU/SC/0012/1995 : 1994ECR20(SC) the twin test of exigibility of an article to duty under Excise Act are that it must be a good mentioned either in the Schedule or under Item 68 and must be marketable. In *Delhi Cloth Mills* (*supra*) it having been held that the word 'good' applies to those goods which can be brought to market for being bought and sold it is implied that it applies to such goods as are moveable. The requirement of the goods being brought to the market for being brought and sold has become known as the test of marketability which has been reiterated by this Court in *Collector of Central Excise v. Ambalal Sarabhai Enterprises* MANU/SC/0012/1990 : The Court has held in *Union Carbide India Ltd. v. Union of India and Ors.* MANU/SC/0306/1986 : that even if a good was capable of being brought to market, it would satisfy the test of marketability. The basic test, therefore, of levying duty under the Act is two fold. One, that any article must be a good and second, that it should be marketable or capable of being brought to market. Goods which are attached to the earth and thus become Immovable do not satisfy the test of being goods within the meaning of the Act nor it can be said to be capable of being brought to the market for being brought and sold. Therefore, both the tests, as explained

by this Court, were not satisfied in the case of appellant as the tube mill or welding head having been erected and installed in the premises and embedded to earth they ceased to be goods within meaning of Section 3 of the Act.

6. Learned Counsel for the revenue urged that even if the goods were capable of being brought to the market it would attract levy. True, but **erection and installation of a plant cannot be held to be excisable goods.** If such wide meaning is assigned it would result in bringing in its ambit structures, erections and installations. That surely would not be in consonance with accepted meaning of excisable goods and its exigibility to duty.

(Emphasis supplied)

50. This Court in **Mittal Engineering Works (P) Ltd. v. Collector of Central Excise, Meerut** reported in (1997) 1 SCC 203, expressed its agreement with the observation in **Quality Steel** (*supra*) that erection and installation of a plant cannot be held to be an excisable good. This Court in **Mittal Engineering** (*supra*) observed as follows:

"9. Upon the material placed upon record and referred to above, we are in no doubt that the mono vertical crystalliser has to be assembled, erected and attached to the earth by a foundation at the site of the sugar factory. It is not capable of being sold as it is, without anything more. As was stated by this Court in the case of Quality Steel Tubes (P) Ltd. the erection and installation of a plant is not excisable. To so hold would, impermissibly, bring into the net of excise duty all manner of plants and installations.

(Emphasis supplied)

51. The issue of movability was once again discussed by this Court in **Sirpur Paper Mills Ltd v. Collector of Central Excise, Hyderabad** reported in (1998) 1 SCC 400, whereby this Court clarified through an analogy that merely attaching of an item to the earth would not make it immovable property for the purpose of the Act, 1944. This Court considered the movability test from the perspective of its marketability in dismantled form and agreed with the Tribunal's view in that case that the the subject machine had been attached to the concrete base to prevent its wobbling but if somebody wanted to purchase the whole machinery, it could be dismantled and sold to him in parts. The relevant observation of this Court in **Sirpur Paper Mills** (*supra*) is as follows:

"3 [...] The Tribunal held that the machine was attached to earth for operational efficiency. The whole purpose behind attaching the machine to a concrete base was to prevent wobbling of the machine and to secure maximum operational efficiency and also for safety. The Tribunal further held that the paper- making machine was saleable and observed "if somebody wants to purchase, the whole machinery could be dismantled and sold to him in parts".

4. In view of this finding of fact, it is not possible to hold that the machinery assembled and erected by the appellant at its factory site was immovable property as something attached to earth like a building or a tree. The Tribunal has pointed out that it was for the operational efficiency of the machine that it was attached to earth. If the appellant wanted to sell the paper-making machine it could always remove it from its base and sell it.

5. Apart from this finding of fact made by the Tribunal, the point advanced on behalf of the appellant, that whatever is embedded in earth must be treated as immovable property is basically not sound. **For example, a factory owner or a householder may purchase a water pump and fix it on a cement base for operational efficiency and also for security. That will not make the water pump an item of immovable property.** Some of the components of the water pump may even be assembled on site. That too will not make any difference to the principle. The test is whether the paper-making machine can be sold in the market. The Tribunal has found as a fact that it can be sold. In view of that finding, we are unable to uphold the contention of the appellant that the machine must be treated as a part of the immovable property of the Company. **Just because a**

plant and machinery are fixed in the earth for better functioning, it does not automatically become an immovable property.

6. A further argument was made that the entire machinery as it is cannot be bought and sold because the machinery will have to be dismantled before being sold. The Tribunal has pointed out that the appellant had himself bought several items and completed the machinery. It had purchased a large number of components and fabricated a few and manufactured the paper-making machine at site. If it is sold it has to be dismantled and reassembled at another site. We do not find any fault with the reasoning of the Tribunal on this aspect of the matter.

(Emphasis supplied)

52. Thus, as per this Court's observation in **Sirpur Paper Mills** (*supra*), it can be inferred that if an item can be dismantled and reassembled at another site, such an item would still be considered as movable 'goods' under the Act, 1944. However, the test of dismantling was qualified by a subsequent Circular (no. 58/1/2002-CX) dated 15.01.2002, issued by the Central Board of Excise and Custom (hereinafter, "**CBEC**"), Department of Revenue, Ministry of Finance, Government of India, in which it was mentioned under Clause (e) that if an item that is assembled or erected at site cannot be dismantled without substantial damage to its components and thus cannot be reassembled, then such items would not be considered as 'movable', and will, therefore, not be excisable goods. The CBEC Circular dated 15.01.2022 reads as follows:

"(e) If items assembled or erected at site and attached by foundation to earth cannot be dismantled without substantial damage to its components and thus cannot be reassembled, then the items would not be considered as movable and will, therefore, not be excisable goods."

53. Having regard to the case law discussed above, it becomes imperative to determine whether the steam generating plant, as erected and commissioned at the site retains the character of "goods" as understood under the Act, 1944, in terms of being a movable property. For this, we must look into few relevant clauses of the contract to discern the object of the contract and the resultant item that emerges out of it.

54. Clause 1(b) of the contract reads as follows:

"1. DEFINITIONS:

*[...] b) **STEAM GENERATING PLANT:** It shall mean the plant & machinery and equipment for Boiler as specified in Annexure I to VI attached herewith and forming part of the agreement."*

55. Clause 2.1 of the contract reads as follows:

"2. Scope of Supply:

*2.1 The Seller shall design, procure, manufacture, supply of the machinery and equipments **for one no. 50 TPH MCR Capacity and 45 Kg./cm²(g) working pressure, bagasse fired boiler** as detailed in Annexure I to V annexed to and forming part of this Agreement conformity with the specifications including clarifications and elucidations laid down therein and according to the progressive delivery schedules to be drawn up by the Seller and to be approved by the Purchaser and their authorised inspection agency, so that the plant shall be ready for commissioning within the time provided in clause 4.1 of the Agreement.*

(Emphasis supplied)

56. Clause 3.1 of the contract reads as follows:

"3. CONTRACT PRICE:

*3.1 **The Sellers agree to design, procure, manufacture, supply of the machinery and equipment for Steam Generating plant and do other work herein mentioned** as specified in Annexure I to V annexed to and forming part of the Agreement at a **Total Price of Rs.360.00 lacs***

(Rupee Three Crores Sixty Lacs only) hereinafter referred to as Contract Price subject to terms and conditions as hereinafter provided as per the break-up given below:

- i) Ex-works: (Ex-Sellers or their sub-contractors workshop or place of supply) price of machinery and equipment for Steam Generating plant according to specification and details given in Annexure I to V is Rs.350.00 lacs (Rupees Three Crores Fifty lacs Only)
- ii) Price of materials required for following necessary facilities in respect of 3.1 (i) above.
 - a) Paints required for final painting. It shall include primer and paints as per colour scheme to be given by Purchaser.
 - b) First filling of lubricants. It shall include oil and grease.
 - c) First filling of transformer oil, if any.
 - d) Packing and Forwarding charges.
 - e) Freight Charges upto the site.
 - f) Handling and loading at the place of supply.
 - g) Total cost of above items (a) to (f) - Rs. 10.00 lacs (Rupees Ten lacs only.)
- iii) Total Contract Price Rs. 360.00 lacs - (Rupees Three Crores Sixty lacs only.)

It is to be clearly understood that the total Contract Price is inclusive of the cost of the following:

- a) Cost of all other items which are necessary for completing supply of the Steam Generating plant as per scope of supply.
- b) All taxes, duties and octroi paid by the Seller or their sub- contractors on raw materials and other materials for their own manufacture of finished equipment or parts of finished equipment. c) Custom duty on imported raw-materials.”

(Emphasis supplied)

57. Clause 10(j) of the contract reads as follows:

“Boiler Refractory Work: The Sellers have to provide all necessary refractories both ordinary and special inclusive of standard and special **fire bricks, fire cement, fire clay, asbestos ropes, asbestos sheets** etc. for wherever they are required including hot air duct. The ducting between the boiler and the chimney and the **entire boiler brick work** will also be the Sellers responsibilities. Red bricks and port land cement, sand and lime shall be provided by the Purchasers.”

(Emphasis supplied)

58. Clause 13.1.3(b) of the contract reads as follows:

“13. TERMS OF PAYMENT:

13. 1. The Purchasers shall pay the contract price in the following manner free of interest.

xxx xxx xxx

13. 1.3. 7.5% (Seven & half Percent) of the contract price of machinery and equipments (mentioned against 3.1 (i) necessary facilities contained in 3.1 (ii) (a) to (f) of the Agreement, i.e. Rs. 27,00,000/- (Rupees Twenty seven Lacs Only.) within 3 (three) months of signing of the Agreement and on fulfilling all the following contractual obligation by the Sellers:

[...] b) Placing order, releasing advances and furnishing the order acceptance copies from the concerned vendors for following **critical bought out items:**

- Boiler quality plates for steam and mud-drum

- *High pressure valves and fittings including safety valves.*
- *ID, FD and SA fans.*
- *Drives for above fans including panels.*
- *Wet Scrubber.*
- *Instrumentation.*
- *Furnace grate.*
- *Feed pumps, transfer pumps and their drives.*
- *All Bagasse Carrier Chain and Drives.*
- *Economizer and Air Pre-heaters.*
- *Soot Blowers*

AND

- **Supply of Boiler structural material.**

(Emphasis supplied)

59. A close reading of Clause 2.1, and Clause 3.1 of the contract, respectively, indicates that the scope of the contract was design, procurement, manufacture and supply of the machinery and equipment for a steam generating plant. The poorly drafted definition of “*Steam Generating Plant*” under Clause 1(b) of the contract causes an overlap between the terms ‘boiler’ and ‘steam generating plant’. However when the definition of “*Steam Generating Plant*” to mean “*the plant & machinery and equipment for Boiler*” is read in light of the scheme of the contract as a whole, we find that the object of the contract was that the boiler parts manufactured by the assessee and transported to the site of erection in CKD condition would be assembled at the site of delivery along with the bought out parts which were directly delivered there, in order to form a steam generating plant. The steam generating plant comes into existence as a composite system comprising various components- some manufactured by the assessee (such as the boiler in CKD condition) and other components such as the bought out items. When these are assembled and erected together at the buyer’s site, the process results in a steam generating plant that is permanently affixed to the earth and hence becomes an immovable property.

60. The revenue seeks to suggest that the mere act of assembling the boiler parts cleared in CKD condition from the assessee’s factory, together with the dutypaid bought out items delivered directly at the site of erection, simpliciter brings into existence excisable goods in the form of a boiler. In other words, the revenue’s contention is that the boiler in CKD condition and the bought out items first coalesce into a movable boiler before being affixed to the ground, and that it is at this intermediate stage that excise duty is to be levied. The revenue’s proposition would hold good only if it were established that such a movable boiler, distinct from the immovable steam generating plant, does in fact come into existence as a result of the assembling of the CKD parts and bought out items. However, such a proposition as suggested by the revenue is both impractical and improbable when examined in light of the nature, volume and magnitude of the boiler in question, as indicated by Clause 2.1 of the contract, which provides its specifications as being a ‘50 TPH MCR Capacity and 45 Kg./cm²(g) working pressure, bagasse fired boiler’.

61. While referring to Clause 10(j), read with Clause 13.1.3(b) of the contract, we find that the assembly involves civil engineering using fire bricks, fire cement, portland cement,

fire clay, asbestos ropes, asbestos sheets and other materials indicating that civil engineering work had to be undertaken in the course of assembling the boiler. The erection and assembly of a '50 TPH MCR Capacity and 45 Kg./cm²(g) working pressure, bagasse fired boiler' cannot possibly be akin to assembling movable equipment or machinery that can exist independently as 'goods'. It is not akin to, for example, affixing a water pump on a residential building with cement, which can be removed without damage. Rather, the process of assembling would involve the integration of massive structures, and piping systems that are aligned, welded, and permanently embedded into the foundation at the buyer's premises. Such process of assembly, erection and installation involving construction materials like bricks, clay, sand, cement, etc. clearly indicate that the resultant product cannot be dismantled into its constituent parts without being substantially damaged.

62. Thus, we find merit in the arguments raised by the assessee that the mere size and weight of the boiler make it impossible to assemble the boiler before erection, and that the process of erection itself involves civil and mechanical engineering with the use of concrete, steel reinforcements, and grouting in such a manner that the coming into existence of the boiler in a functioning condition is in an immovable form. The assembly and erection of the boiler is essentially intertwined in such a manner that we also find merit in the assessee's argument that such an installed boiler cannot be readily dismantled by merely removing nuts and bolts and reassembled at another site without causing extensive damage to the boiler to an extent so as to reduce its value to mere scrap.

63. The object of the contract therefore is about erection and installation of an immovable plant. As noted by this Court in **Quality Steel** (*supra*) and unequivocally affirmed by another Co-ordinate Bench of this Court in **Mittal Engineering** (*supra*), "*erection and installation of a plant cannot be held to be excisable goods*" and therefore, the steam generating plant that emerges as a result of the contract cannot be held to be an excisable good. Consequently, the base value of the boiler on which excise duty is to be levied, cannot be equated with the total contract price which is inclusive of the price of the bought out items.

64. Applying the above principles to the facts of the present case, we arrive at the finding that the final product that emerges as a result of performing the obligations under the contract, does not constitute excisable goods under the Act, 1944. Consequently, the base value of the boiler on which excise duty is to be levied, cannot be equated with the total contract price. Therefore, the price of the bought out parts cannot be included in the value of the boiler for the purpose of computing central excise duty under the Act, 1944.

65. Before proceeding further, we find it necessary and crucial to highlight that the CESTAT committed a glaring error when it declined to consider the immovability plea by the assessee, on the ground that the said plea was not taken before the lower authorities. Contrary to the CESTAT's findings in the impugned order, the documents on record clearly indicate that the said plea was taken by the assessee right from the earliest stage of its reply to the show cause notice itself. We find that the facts on record support the assessee's contention that in its reply dated 13.06.2005 to the show cause notice dated 28.04.2005, it had specifically raised the contention that the boiler on commissioning became immovable property. Materials on record also indicate that the said contention regarding immovability was accepted by the Assistant Commissioner and the same reflects in the finding recorded in the Order-in-Original dated 07.12.2005/13.01.2006 that boilers erected at site and attached to earth are not goods and hence not excisable.

Therefore, for the CESTAT to ignore the most central issue, going to the root of the entire dispute, on an erroneous finding of fact, is an egregious flaw in the impugned order.

(iii). Erroneous reliance on Tariff Classification

66. At this stage, it is also important to address this issue from one another angle and provide a cautionary note in this respect. The revenue appears to have been swayed by the fact that ‘boilers’ and ‘boiler parts’ are listed under Chapter 84 of the Tariff Act, 1985, and therefore seem to have proceeded on the erroneous assumption that all boilers, irrespective of form or configuration, attract central excise duty. However, the revenue should have kept in mind that the mere presence of a product in the Tariff Schedule does not determine its excisability. The first and primary enquiry must be whether the item satisfies the conditions of the charging section under Section 3 of the Act, 1944, an essential condition of which is that the subject matter is a movable good.

67. A significant observation made by a Three-judge Bench of this Court in **Moti Laminates (P) Ltd. v. CCE** reported in (1995) 3 SCC 23 that succinctly drives home this cautionary note reads as follows:

“11. [...] The Tariff Schedule by placing the goods in specific and general category does not alter the basic character of leviability. The duty is attracted not because an article is covered in any of the items or it falls in residuary category but it must further have been produced or manufactured and it is capable of being bought and sold.”

(iv). Inapplicability of the “Utility Test” and the ‘part’ v. ‘accessory’ debate

68. Further, it is relevant to note that both the revenue and the CESTAT have erroneously resorted to focusing on whether the bought out parts were essential to the functioning of the assembled boiler or not. The determination of the question, whether or not the bought out items were ‘parts’ or ‘accessories’, in terms of this Court’s observation in **Quippo (supra)**, would have been of some relevance in the present matter only if the resultant product of the contract would fall within excisable goods. In other words, the question of utility would have been relevant to the determination of payable excise duty, if a movable boiler had resulted from integrating the CKD parts with the bought out items.

69. However, as observed above, in the present case, the final product, i.e. the steam generating plant, emerges in the form of an immovable product in the course of integrating the CKD parts with the bought out items. Therefore, the resultant product of the contract not being excisable goods, it is wholly inconsequential whether or not the bought out items are parts or accessories of it.

(v). Excess collection of excise duty from buyer is no proof of excisability

70. It is also necessary to address the contention raised by the revenue that the assessee availed CENVAT Credit of duty paid on the bought out items and recovered the same from the buyer. The revenue has placed reliance on this to bolster its argument that the value of the bought out items should be included in the dutiable value shown at the time of clearance of the boiler.

71. Irrespective of the fact whether the assessee had denied the allegation in its Section 14 statement under the Act, 1944, it is necessary to point out the error committed by the revenue in making such an argument.

72. Even if there is any substance in the allegation that excise duty on the value of the bought out items was collected by the assessee from the buyer, that by itself would not lead to the conclusion that the value of the bought out items must be included in the value

of the final product for the purpose of computing payable excise duty. Rather, if the revenue indeed believed that the assessee had collected excise duty from the buyer on the value of the boiler by including the price of the bought out items, the correct course of action for the revenue should have been to invoke the provisions of Section 11D of the Act, 1944, which specifically provides a mechanism for recovery of any amount collected by an assessee from a buyer, by representing as excise duty in excess of what is payable as such. Section 11D of the Act, 1944 reads as such:

“SECTION 11D. Duties of excise collected from the buyer to be deposited with the Central Government. –

(1) Notwithstanding anything to the contrary contained in any order or direction of the Appellate Tribunal or any Court or in any other provision of this Act or the rules made thereunder, every person who is liable to pay duty under this Act or the rules made thereunder, and has collected any amount in excess of the duty assessed or determined and paid on any excisable goods under this Act or the rules made thereunder from the buyer of such goods in any manner as representing duty of excise, shall forthwith pay the amount so collected to the credit of the Central Government.

(2) Where any amount is required to be paid to the credit of the Central Government under sub-section (1) and which has not been so paid, the Central Excise Officer may serve, on the person liable to pay such amount, a notice requiring him to show cause why the said amount, as specified in the notice, should not be paid by him to the credit of the Central Government.

(3) The Central Excise Officer shall, after considering the representation, if any, made by the person on whom the notice is served under sub-section (2), determine the amount due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined.

(4) The amount paid to the credit of the Central Government under sub-section (1) or sub-section (3) shall be adjusted against the duty of excise payable by the person on finalisation of assessment or any other proceeding for determination of the duty of excise relating to the excisable goods referred to in sub-section (1).

(5) Where any surplus is left after the adjustment under sub-section (4), the amount of such surplus shall either be credited to the Fund or, as the case may be, refunded to the person who has borne the incidence of such amount, in accordance with the provisions of section 11B and such person may make an application under that section in such cases within six months from the date of the public notice to be issued by the Assistant Commissioner of Central Excise for the refund of such surplus amount.”

(Emphasis supplied)

73. Upon a bare reading of Section 11D of the Act, 1944 it is clear that the failure of the revenue to resort to the statutory recourse available under Section 11D, and instead to seek to justify inclusion of the value of the bought out items in the assessable value of the boiler, reflects an error in application of the law. The invocation of Section 11D would be justified in a case where an assessee has collected any sum purporting to be the excise duty without the authority of law. Consequently, even assuming in arguendo that any excess amount was collected from the buyer under the garb of excise duty, such collection cannot confer excisability on the final product which emerges as an immovable property. The liability of the assessee to pay duty must be determined strictly in accordance with the charging provisions under the law and not on the basis of any purported recovery from the buyer.

(II). Whether the show cause notice is legal and valid under the extended limitation period as provided under the proviso to Section 11A(1) of the Central Excise Act, 1944?

(i). Was there any wilful suppression of facts with an intention to evade payment of duty by the appellant/assessee?

74. In the present case, the extended period of limitation of five years under the *proviso* to Section 11A(1) of the Act, 1944 was invoked by the revenue on the ground that the assessee had wilfully suppressed the fact that it had not paid duty on the bought out items, with the intention to evade Central Excise duty. The relevant paragraph from the show cause notice invoking the extended limitation period reads thus:

*“[...]It further appears that the extended period of limitation as provided under proviso to **Sect 11A(1) of Central Excise Act 1944 is invokable in the present case because the noticee has not paid duty on bought out items and also not paid duty on clearance of the bought out items with intention to evade Central Excise duty, the noticee appears to have wilfully suppressed the facts from the knowledge of the Department regarding incorrect valuation of the goods** and clearance of the bought out items without payment of duty, without filing of the declaration required under provisions of Rule 57 A of erstwhile C. Excise Rules 1944, without declaring the clearance of the bought out items in their RT-12 returns [...]”*

(Emphasis supplied)

75. The assessee has raised the contention that the conditions for invoking the extended period of limitation under the *proviso* to Section 11A having not been met, the show cause notice and the consequent proceedings based on it were not maintainable. In order to examine the issue of limitation, let us first refer to the provision itself. Section 11A of the Act, 1944, which was in force at the time of the issuance of the show cause notice reads as follows:

“SECTION 11A. Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded. - (1) When any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, whether or not such non-levy or non-payment, short-levy or short payment or erroneous refund, as the case may be, was on the basis of any approval, acceptance or assessment relating to the rate of duty on or valuation of excisable goods under any other provisions of this Act or the rules made thereunder, a Central Excise Officer may, within one year from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice :

*Provided that where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded **by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty,** by such person or his agent, the provisions of this sub- section shall have effect, as if, for the words one year, the words “five years” were substituted.”*

(Emphasis supplied)

76. A bare reading of Section 11A(1) along with its *proviso* would indicate that ordinarily, notice has to be issued within one year, however the *proviso* stipulates that the notice can be issued within five years from the relevant date if , the non-levy, short-levy, or erroneous refund has occurred on account of either of the following – fraud, collusion, wilful misstatement or suppression of facts, or contravention of any of the provisions of the Act, 1944 or rules thereunder, with an intent to evade payment of duty. The *proviso* employs

selective choice of words which contemplate a state of mind, whereby the noticee has knowingly and deliberately done something or omitted to do something which has resulted in non-levy, short-levy or erroneous refund of duty. In contrast, for the normal period of one year, there is no requirement of any state of mind, and the fact of non-levy, short-levy or erroneous refund of duty by itself would be sufficient to invoke the provisions of Section 11A(1) of the Act, 1944.

77. In the context of invoking the extended period of limitation under Section 11A of the Act, 1944, this Court in ***Pahwa Chemicals Private Limited v. Commissioner of Central Excise, Delhi*** reported in (2009) 4 SCC 658, observed that mere failure does not amount to wilful misdeclaration or wilful suppression and that there must be some positive act on the part of an assessee to bring the case within the mischief of wilful misdeclaration or wilful suppression, as the case may be. This Court in ***Pahwa Chemicals*** (*supra*) observed as follows:

“6. It is settled law that mere failure to declare does not amount to wilful misdeclaration or wilful suppression. There must be some positive act on the part of the party to establish either wilful misdeclaration or wilful suppression. When all facts are before the Department and a party in the belief that affixing of a label makes no difference does not make a declaration, then there would be no wilful misdeclaration or wilful suppression. If the Department felt that the party was not entitled to the benefit of the notification, it was for the Department to immediately take up the contention that the benefit of the notification was lost.”

(Emphasis supplied)

78. The allegation levelled against the assessee in the present matter before us is of wilful suppression with an intention to evade central excise duty. Therefore, the following observation of this Court in ***Continental Foundation Joint Venture Holding v. CCE*** reported in (2007) 10 SCC 337 is required to be referred to:

“12. The expression 'suppression' has been used in the proviso to Section 11-A of the Act accompanied by very strong words as 'fraud' or 'collusion' and, therefore, has to be construed strictly. Mere omission to give correct information is not suppression of facts unless it was deliberate to stop (sic evade) the payment of duty. Suppression means failure to disclose full information with the intent to evade payment of duty. When the facts are known to both the parties, omission by one party to do what he might have done would not render it suppression. When the Revenue invokes the extended period of limitation under Section 11-A the burden is cast upon it to prove suppression of fact. An incorrect statement cannot be equated with a wilful misstatement. The latter implies making of an incorrect statement with the knowledge that the statement was not correct.”

(Emphasis supplied)

79. Judged by these principles laid down by this Court on the application of the *proviso* to Section 11A(1) of the Act, 1944, we find that the assessee is justified to contend that the extended period of limitation could not have been invoked in the present case since the assessee bona fide believed that the bought out items are not to be included in the assessable value of the boiler. A perusal of the show cause notice would show that the revenue itself admits that the assessee had filed the RT-12 returns with the revenue, which means that the revenue had the material particulars on record which it could have acted upon within the normal one year period. There is nothing on record to indicate that any material information had been suppressed by the assessee with any intention to evade payment of central excise duty.

80. Therefore, in the absence of any deliberate act on the part of the assessee with an intention to evade being established by the revenue, the essential precondition of wilful

suppression with intent to evade duty is not satisfied. Consequently, the invocation of the extended period of limitation under the proviso to Section 11A(1) is held to be not tenable in law.

81. The show cause notice being held to be invalid, the proceedings leading up to this present appeal are also liable to be quashed, and accordingly the impugned order is set aside.

F. CONCLUSION

82. We hereby conclude that the value of the duty paid bought out items which were delivered directly at the buyer's site is not liable to be included in the value of the boiler cleared by the assessee from its factory in CKD condition, for the purpose of assessment of excise duty.

83. We also hold that the show cause notice issued under the *proviso* to Section 11A(1) of the Act, 1944 is not legal and hence invalid.

84. Therefore, for all the foregoing reasons, the appeals succeed and are hereby allowed.

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