

COMMISSIONER OF CENTRAL EXCISE, ALLAHABAD

v.

M/S. HINDUSTAN SAFETY GLASS WORKS LTD.

FEBRUARY 22, 2005

[S.N. VARIAVA, DR. AR. LAKSHMANAN AND S.H. KAPADIA, JJ.]

*Central Excise Act, 1944—Section 4 and 4(4)(d)(i)—Valuation of excisable goods for purposes of levy of excise duty—Glass sheets packed in wooden crates/boxes for marketing purposes by manufacturer—No agreement or arrangement for returning packing material to manufacturer—Costs of packing, if inclusive in assessable value of glass sheets—Held : For the purpose of making glass sheets marketable, it cannot be moved without the special arrangements of packing it in wooden crates—Hence, cost of wooden crates/boxes is includible in the assessable value of glass sheets—Furthermore, costs of wooden crates cannot be excluded by averring that it is for the purposes of protecting the glass but it is only when the goods are capable of being marketed without special packing.*

*Section 4(4)(d)(i) and Explanation to the section—Scope and ambit of—Discussed.*

**Respondent - assessee** are manufacturers of glass sheets. They packed their product - glass sheets in wooden crates/boxes. In Civil Appeal No. 3819 of 1999, Assistant Collector found that the respondents sent glass sheets to their own godown in wooden cases, stored and packed them in wooden cases for delivery in the wholesale trade and also cleared it from their factory gate and through the depots, packed in wooden cases; and as such the cost of wooden crates is includible in the assessable value of glass sheets. Respondents filed appeal. Tribunal relied on its previous order based on finding of fact that barring stray instances glass was delivered to local customers with just a paper packing interleaved with straws, and as such the cost of the wooden cases was not includible in the value of the glass sheets and held in favour of the respondents. Hence the present appeals.

**Appellant - department** contended that the glass sheets being fragile in nature cannot be marketed without special packing or arrangement;

A and that the respondent - assessee had led no evidence to show that the glass sheets were marketable without special packing.

B Respondent - assessee contended that as the previous order passed by the Tribunal clearly established that the glass sheets were marketable without wooden packing, there was no need to lead proof for the same; and that the packing in the nature of wooden crates is not covered in the Explanation to Section 4(4)(d)(i) and, as such its cost would not be includible.

Allowing the appeals, the Court

C HELD : 1.1. Under Section 4(4)(d)(i) of the Central Excise Act, 1944 the cost of packing is to be included in working out the value of the goods, unless the packing is of a durable nature and is returnable by the buyer to the assessee. The burden to show that the costs of packing is not includible is always on the assessee. The Explanation to the section indicates the various types of packing whose costs have to be included. A wrapper and/or a container is packing whose cost has to be included. The words "wrapper" and "container" are wide enough to include all types of wrappers or containers. The further words "any other thing in which or on which the excisable goods are wrapped, contained or wound" also show that the term "packing" has a very wide connotation and includes anything used for wrapping and/or containing the excisable goods. The Explanation is very wide and includes almost all types of packing. It is not possible to give a restricted meaning. It cannot be said that the Explanation makes it clear that the packing in the nature of wooden crates is not covered and, therefore, its cost would not be includible.

F [233-H; 234-A; 245-A]

G 1.2. The question is not for what purpose a particular kind of packing is done. The test is whether a particular packing is done in order to put the goods in the condition in which they are generally sold in the wholesale market at the factory gate, the cost of such packing would be includible in the value of the goods for assessment to excise duty. Another way of testing would be to see whether the goods are capable of reaching the market without the type of packing concerned. Each case would have to be decided on its own facts. [239-E-G]

H *Government of India v. Madras Rubber Factory Ltd.*, (1995) 77 ELT 433 SC, relied on.

1.3. In the instant case, the products of the respondents are large glass sheets which are fragile in nature. Without special protection such glass sheets could not be transported. For short distances they could be transported without wooden crates. However, it is clear that even in such cases special care would have to be taken. The test is not whether in a few stray instances or in a small percentage of cases or by making some other special arrangement the glass sheets can be so transported. The test is whether for the purposes of delivery in the wholesale trade, glass sheets can be moved without special arrangements. The answer is in the negative. In most cases the special arrangement is packing in wooden cases. In such cases the liability to include the costs of the wooden crates in the value of the glass sheets cannot be avoided by claiming that the wooden crates are for purposes of protecting the glass. In such cases, the wooden crates are for purposes of making the glass sheets marketable. The ratio in *Godfrey Philips\** case is not that whenever a packing is done with intention to prevent damage or injury to the goods the cost is to be excluded. It is only in those cases where the goods are capable of being marketed without special packing and the special packing is given only by way of abundant caution to protect the goods in transport that their costs get excluded. Therefore, the reasoning and the conclusion of the Tribunal cannot be upheld. [244-D-G]

*Gurind India P. Ltd. v. Commissioner of Central Excise, Meerut*, (1999) 112 ELT 1020, disapproved.

*Union of India v. Shri Vallabh Glass Work Ltd. and Anr.*, Civil Appeal Nos. 3119-20 of 1980 decided by this Court on 20th July 1995, affirmed.

\**Union of India v. Godfrey Philips India Ltd.*, (1985) 22 ELT 306, explained.

*Government of India v. Madras Rubber Factory Ltd.*, (1995) 77 ELT 433 SC, relied on. [237-F]

*Geep Industrial Syndicate Ltd. v. Union of India*, (1982) 61 ELT 328; *Union of India v. Bombay Tyre International Ltd.*, (1983) 14 ELT 1896; *CCE v. Ponds India Ltd.*, (1989) 44 ELT 185 SC; *Hindustan Polymers v. Collector of C. Ex.*, (1989) 43 ELT 165; *A. K. Roy and Anr. v. Voltas Ltd.*, (1977) 1 ELT (J 177) and *Window Glass Ltd. v. Collector of Central Excise, Calcutta*, (1989) 39 ELT 641, referred to.

A 1.4 In these cases it is not disputed that there is no agreement or arrangement making them returnable. Thus, even though they may be considered to be durable the cost of wooden cases are includible in the value of the glass sheets sold by the respondents. [245-C]

B CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3819 of 1999.

From the Judgment and Order dated 5.3.99 of the Central Excise, Customs and Gold (Control) Appellate Tribunal, New Delhi in F.O. No. 264 of 1999-A in A. No. E/3/96-A.

WITH

C C.A. Nos. 5795, 6117/99, 8254-55/2003 and 1758 of 2004.

R. Venkataramani, G. Umapathy, Ashok Panigrahi, S. Gowtham, P. Parmeswaran and B. Krishna Prasad for the Appellant.

D S.K. Bagaria, Tarun Gulati and Praveen Kumar, Rajesh Kumar, C. Harishankar, N. Jagdish and Ms. Neeru Vaid for the Respondent.

The Judgment of the Court was delivered by

E S.N. VARIAVA, J. These Appeals are against Judgments of the Customs, Excise & Gold (Control) Appellate Tribunal (CEGAT). As the question of law involved in all these Appeals is the same, they are being disposed off by this common Judgment.

F The question for consideration is whether the cost of wooden crates/ boxes in which the Respondents pack their product, i.e., Glass Sheets, is includible in the assessable value of the glass.

G For the sake of convenience, facts in Civil Appeal No. 3819 of 1999 will be referred to. In Civil Appeal No.3819 of 1999 CEGAT has held in favour of the Respondents by following an earlier decision of CEGAT, dated 9th January 1987, in that Respondents' own case. In that case, the Order was based on a finding of fact that barring stray instances glass was delivered to local customers with just a paper packing interleaved with straws. CEGAT had, on those facts, held that the ratio laid down by this Court in the case of *Union of India and Ors. v. Godfrey Philips India Ltd.* reported in (1985) 22 ELT 306 and in the case of *Geep Industrial Syndicate Ltd. v. Union of India*, reported in (1992) 61 ELT 328 applied.

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Before the arguments of the parties are considered, it is essential that the provision of law and the authorities of this Court be first looked at. A

The relevant portion of Section 4 reads 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- B

- (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 : C

xxx	xxx	xxx	
xxx	xxx	xxx	D

- (4) For the purposes of this section, -

xxx	xxx	xxx	
xxx	xxx	xxx	E

- (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. F

*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. G

xxx	xxx	xxx	
xxx	xxx	xxx”	H

Thus under Section 4(4)(d)(i) the cost of packing is to be included in working out the value of the goods, unless the packing is of a durable nature H

A and is returnable by the buyer to the assessee. The Explanation indicates the various types of packing whose costs have to be included. A wrapper and/or a container is packing whose cost has to be included. The words "wrapper" and "container" are wide enough to include all types of wrappers or containers. The further words "any other thing in which or on which the excisable goods are wrapped, contained or wound" also show that the term "Packing" has a very wide connotation and includes anything used for wrapping and/or containing the excisable goods. Even though the statutory provision is clear and unambiguous, a concept of primary and secondary packing was developed by this Court in the case of *Union of India v. Bombay Tyre International Ltd.*, reported in (1983) 14 ELT (1896). In this case, it was recognized that the degree of packing would vary from one class of excisable goods to another. It was held that packing may be of different grades. It was held that the packing may be necessary to make an article marketable. It was held that by including the cost of packing the Legislature has sought to extend levy beyond the manufactured article itself. It was held that thus a strict construction must be put upon the said provision. It was held that only the cost of packing which was required to make the goods marketable would be includible in the value of goods. It was held that if any additional or special packing is provided, which packing is not generally required or provided as a normal feature, then the cost of such packing need not be included in the value of the goods. The test which was laid down was that it is only the cost of packing ordinarily required for selling the goods in the course of wholesale trade to a wholesale buyer which would be includable and not the cost of any additional or special packing.

Thereafter in the case of *Union of India v. Godfrey Philips India Ltd.* the same principles were reiterated. However, divergent conclusions were arrived at on the basis of differing perceptions as to the factual situation in that case. In that case the respondent-assessee was engaged in the manufacture of cigarettes. The cigarettes were packed initially in paper/cardboard packets of ten and twenty. These packets were packed together in paper/cardboard cartons/outers. These cartons/outers were then placed in corrugated fiberboard containers. It is these corrugated fiberboard containers (CFCs) filled with cartons/outers containing the packets of cigarettes of ten and twenty which were delivered by the assessee to the wholesale dealers at their factory gate. So far as the cost of initial packing is concerned, there was no dispute. Similarly, there was no dispute with respect to the cost of paper/cardboard cartons/outers. The dispute, however, centered round the cost of CFCs. H Bhagwati, C.J., [as he then was] held that the fact that the CFCs are used in

order to protect the goods against damage during the course of transportation is no ground to exclude their cost. However, the majority opinion was that CFCs were employed only for purpose of avoiding damage or injury during transit. It was held by the majority that CFCs were not necessary for selling the cigarettes in the wholesale market at the factory gate. On this factual basis the majority held that the costs of CFCs were not includible in the value of the cigarettes. Mr. Bagaria, learned counsel for the Respondents, has placed strong reliance on the following observations from the Judgments of Justice Pathak and Justice A. N. Sen. The portions relied upon read as follows :-

*Pathak, J :*

“The corrugated fiber board containers are employed only for the purpose of avoiding damage or injury during transit. It is perfectly conceivable that the wholesale dealer who takes delivery may have his depot a very short distance only from the factory gate or may have such transport arrangements available that damage or injury to the cigarettes can be avoided. The corrugated fiber board containers are not necessary for selling the cigarettes in the wholesale market at the factory gate.”

*Sen, J :-*

“Cartons of cigarettes are usually further packed in corrugated fiber board containers for facilitating transport in the course of delivery to buyers in the wholesale trade where there is any possibility of the cartons becoming otherwise damaged in course of transit. Naturally in such cases, delivery of the cigarettes in those cartons is effected to the buyers at the factory gate after further packing these cartons in corrugated fiber board containers. The further packing of cartons in which the packets of cigarettes have been packed in the corrugated fiber board containers is not, indeed, in the course of delivery to the buyer in the wholesale trade at the factory gate but is only for the purpose of facilitating the smooth transport of the cartons containing the packets of cigarettes to the buyer in the wholesale trade.”

The qualification laid down by the learned Judges that the costs of such packing was not includible as this packing was merely to prevent damage and injury has been misunderstood by many. As is indicated hereinafter, the ratio is not that in all cases, where the packing is for preventing damage or injury to the goods, the costs of such packing is to be excluded from the value of

A the goods.

B In the case of *Geep Industrial Syndicate Ltd. v. Union of India* (supra), the Appellant-assessee was the manufacturer of batteries and torches. The torches and batteries manufactured by it were first packed in polythene boxes and then these polythene boxes were placed in cardboard cartons. There was no dispute about the inclusion of the value of polythene boxes and cardboard cartons. The dispute was only with respect to the cost of wooden boxes in which the cardboard cartons were placed at the time of delivery at the factory gate. It was held that the principles laid down by the majority in *Godfrey Philips* case (supra) applied. It was held that the cost of such secondary packing in wooden boxes was not includible in the value of batteries and torches.

D In the case of *CCE v. Ponds India Ltd.*, reported in (1989) 44 ELT 185 SC, the Respondent-assessee was the manufacturer of talcum powder and face powder. The Excise authorities noticed that small packing of 15, 18, 20, 30, 40 and 100 gms. powder were first packed in a pack of dozen and then packed in secondary packing for easy transportation to the wholesale buyer. The authorities opined that "the secondary packing were a must for delivery to the wholesale dealer". The Assistant Collector accordingly held that the cost of such secondary packing was liable to be included. This Court after referring to the ratio of *Bombay Tyre International* observed that the principle in *Bombay Tyre International* does not admit of any dispute. It was held that there has been "some divergence of emphasis" with respect to the criteria upon which the inclusion or exclusion of the cost of packing should be determined. It was then held as follows :-

F "In my opinion, the views expressed by the majority of the Judges in Godfrey Philips case were in consonance with the views of this Court in the Bombay Tyre International case. The question is not for what purpose a particular kind of packing is done but the test is whether a particular packing is done in order to put the goods in the condition in which they are generally sold in the wholesale market at the factory gate and if they are generally sold in the wholesale market at the factory gate in certain packed condition, whatever may be the reason for such packing, the cost of such packing would be includible in the value of the goods for assessment to excise duty."

H Reference was then made to the *Geep Industrial Syndicate Ltd.* case and it was held as follows :-



“In my opinion, the correct position seems to be that the cost of that much of packings, be they primary or secondary, which are required to make the articles marketable would be includible in the value. How much packing is necessary to make the goods marketable is a question of fact to be determined by application of the correct approach. Packing, which is primarily done or mainly done for protecting the goods, and not for making the goods marketable should not be included.... The question is not whether these goods *could be so sold*, but the question is whether these goods *are so sold usually and as such used to become marketable in such manner.*”

(emphasis supplied)

In the case of *Hindustan Polymers v. Collector of C. Ex.*, reported in (1989) 43 ELT 165 the Appellant-assessee was engaged in the manufacture and sale of fusel oil. The fusel oil manufactured by it was mainly sold in bulk. A small portion was being supplied to the customers in drums supplied by such customers. It was found that in the wholesale trade these goods were delivered directly into tankers and that delivery in drums was only to facility their transport in small quantities. It was held that the cost of drums was not included in the value of the oil as the material on record established that the goods were not sold in drums generally in the course of the wholesale trade. It was, however, held that if the manufacturer supplied the drums and charged the customers separately therefor, the cost of such drums would have to be included in the value.

In the case of *Government of India v. Madras Rubber Factory Ltd.*, reported in (1995) 77 ELT 433 (SC), this Court considered, amongst other things, whether costs of packing is includible in the cost of the concerned goods. All the above mentioned cases were analyzed and the ratio deductible therefrom was summed up as follows :-

“41. We respectfully record our concurrence with the above observations. In our respectful opinion, the tests evolved by Mukharji, J. and Ranganathan, J., which are the same in essence, are wholly consistent with the test evolved in *Bombay Tyre International*. To repeat : “the question is not for what purpose a particular kind of packing is done but the test is whether a particular packing is done in order to put the goods in the condition in which they are generally sold in the wholesale market at the factory gate and if they are generally sold in the wholesale market at the factory gate in certain packed

A condition, whatever may be the reason for such packing, the cost of such packing would be includible in the value of the goods for assessment to excise duty.”

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B 43. The position emerging from the review of the decisions  
aforesaid may now be summarized : each and every decision has  
accepted and acted upon the law laid down in *Bombay Tyre  
C International*. The test evolved in the said decision has been expressly  
reiterated in all the judgments, though it is a fact that there has been  
some divergence in what may be called ‘emphasis’. Since the said  
D decision lays down that the cost of “that degree of secondary packing  
which is necessary for putting the excisable article in the condition in  
which it is generally sold in the wholesale market at the factory gate”  
is to be included, the Court enquired in *Godfrey Philips* (majority  
E opinion) whether the CFCs were necessary for such delivery. The  
Court found on the facts of that case that they were not so necessary  
and accordingly held that the cost of CFCs is not includible. In *Geep  
F Industrial Syndicate*, the Court adopted the approach of the majority  
in *Godfrey Philips*, on the footing that the wooden boxes were not  
‘necessary’ for delivery at the gate. In *Ponds*, however, both the  
learned Judges constituting the Bench laid down tests consistent with  
the one in *Bombay Tyre International*. Indeed, Ranganathan, J.  
understood the majority decision in *Godfrey Philips* and the decision  
in *Geep Industrial Syndicate* in the same manner as we have done -  
a fact emphasised by us hereinabove, while discussing the ratio of  
Ponds. As pointed out by us hereinabove, it would not be reasonable  
to infer any conflict or deduce any inconsistency between the ratio of  
F *Bombay Tyre International* and the ratio of *Godfrey Philips* for the  
reason that not only both Benches were of coordinate jurisdiction  
(*Bombay Tyre International* was thus binding upon the latter Bench)  
but also because both the decision were rendered by the very same  
Bench. The adage in such matter is : look for harmony, not divergence.  
G It is equally relevant to point out that *Bombay Tyre International* was  
equally binding upon the Bench (of three learned Judges) which  
decided *Geep Industrial Syndicate* and that it would be equally  
unreasonable to suggest that the Bench (deciding *Geep Industrial  
H Syndicate*) would lay down an inconsistent proposition from the one  
in *Bombay Tyre International* without even referring to the decision

or its ratio. The conclusion in these two later cases turned upon the finding as to factual situation obtaining therein whereas the two opinions in Ponds not only follow the test in *Bombay Tyre International* but reiterate it in clear terms. The test laid down in *Bombay Tyre International* has never been departed from in any of the later decisions and must be treated as good and sound. We may as well stress the obvious : in a matter like this, certainty in law is essential. It may be that in applying the principle having regard to the facts of a given case, there may be some divergence in conclusion but so far as the principle - the relevant test to be applied - is concerned, there should be no uncertainty. The test is : whether packing, the cost whereof is sought to be included is the packing in which it is ordinarily sold in the course of a wholesale trade to the wholesale buyer. In other words, whether such packing is necessary for putting the excisable article in the condition in which it is generally sold in the wholesale market at the factory gate. If it is, then its cost is liable to be included in the value of the goods; and if it is not, the cost of such packing has to be excluded. Further, even if the packing is 'necessary' in the above sense, its value will not be included if the packing is of a durable nature and is returnable by the buyer to the assessee. We must also emphasize that whether in a given case the packing is of such a nature as is contemplated by the aforesaid test, or not, is always a question of fact to be decided having regard to the facts and circumstances of a given case."

We are in complete agreement with the above conclusions. The question is not for what purpose the packing is done. The test is whether the packing is done in order to put the goods in a marketable condition. Another way of testing would be to see whether the goods are capable of reaching the market without the type of packing concerned. Each case would have to be decided on its own facts. It must also be remembered that Section 4(4)(d)(i) specifies that the cost of packing is includible when the packing is not of a durable nature and returnable to the buyer. Thus, the burden to show that the costs of packing is not includible is always on the assessee. Also under Section 4(a) the value is to be the normal price at which such goods are ordinarily sold in the course of wholesale trade for delivery at time and place of removal. Thus, at this stage, it would be convenient to refer to the case of *A. K. Roy and Anr. v. Voltas Ltd.*, reported in (1977) 1 ELT (J 177) wherein the concept of wholesale market has been explained in the following terms :-

A “8. We do not think that for a wholesale market to exist, it is necessary that there should be a market in the physical sense of the term where articles of a like kind or quality are or could be sold or that the articles should be sold to so-called independent buyers.

B 9. Even if it is assumed that the latter part of s. 4(a) proceeds on the  
C assumption that the former part will apply only if there is a wholesale  
D market at the place of manufacture for articles of a like kind and  
E quality, the question is what exactly is the concept of wholesale market  
F in the context. A wholesale market does not always mean that there  
should be an actual place where articles are sold and bought on a  
wholesale basis. These words can also mean that potentiality of the  
articles being sold on a wholesale basis. So, even if there was no  
market in the physical sense of the term at or near the place of  
manufacture where the articles of a like kind and quality are or could  
be sold, that would in any way affect the existence of market in the  
proper sense of the term provided the articles themselves could be  
sold wholesale to traders, even though the articles are sold to them  
on the basis of agreements which confer certain commercial advantages  
upon them. In other words, the sales to the wholesale dealers did not  
cease to be wholesale sales merely because the wholesale dealers had  
entered into agreement with the respondent under which certain  
commercial benefits were conferred upon them is consideration of  
their undertaking to do service to the articles sold, or because of the  
fact that no other person could purchase the articles wholesale from  
the respondent. We also think that the application of clause (a) of s.  
4 of the Act does not depend upon any hypothesis to the effect that  
at the time and place of sale, any further articles of like kind and  
quality have been sold. If there is an actual price for the goods  
themselves at the time and the place of sale and if that is a “wholesale  
cash price”, the clause is not inapplicable for want of sale of other  
goods of a like kind and quality.”

G Having seen the statutory provision and the law on the subject, one  
must now see the facts. As stated above, all the Respondents are manufacturers  
of sheet glass. Facts are more or less same. Thus for sake of convenience  
facts in Civil Appeal No. 3819 of 1999 are being referred to.

H In this case, the Assistant Collector had found that the cost of wooden  
crates is recovered by the Respondents from the buyers. It is found that even  
when the goods are sent to their own godown, they are sent in wooden cases

and are stored/packed in wooden cases for delivery in the wholesale trade to the customers. It is found that the goods are generally cleared by the Respondents from their factory gate duly packed in wooden cases and they are sold as such both from the factory gate and through the depots. It has been found that the Respondents had not led any evidence to show that the goods were sold in paper packing as claimed by them.

In other cases facts may vary to some extent but the essential fact is that sheet glass is a very delicate item which is liable to crack or shatter. Mr. Venkatramani has submitted that the fragile nature of glass sheets is sufficient to show that they cannot be marketed without special packing or arrangement. He submitted that Respondents had led no evidence to show that the glass sheets were marketable without special packing.

On the other hand, Mr. Bagaria submitted that the Respondents in Civil Appeal No. 3819 of 1999 had relied upon an earlier Order passed by the Tribunal in their own case. He submitted that Order clearly established that the Respondents' products, namely, glass sheets, were marketable without their being packed in wooden cases. He submitted that the Respondents therefore did not need to lead any further proof to show that the glass sheets were marketable without wooden packing.

Mr. Bagaria also relied upon other decisions of the Tribunal wherein also it has been held, on facts, that glass sheets were marketable without wooden packing. In support of this submission, he relied upon the authority in the case of *Window Glass Ltd. v. Collector of Central Excise, Calcutta*, reported in (1989) 39 ELT 641. In this case, the Appellant Company was manufacturing "figured" and "wired" glass in the form of glass sheets. The question was whether the cost of wooden packing was includible in the value of such glass sheets. The Tribunal has held that the cost of such sheets was not includible in the value of the glass sheets in the following terms :

"7. We shall briefly deal with both these issues. Taking the first issue, the extra item accounting for bulk of the supplementary invoice is the cost of special packing. The appellants declared in the price lists that their ordinary/frame packing cost about 20 paise per sq. mtr. of the goods and that the cost of such packing was already included in the price declared. They further declared that they used special packing at the request of the buyer for avoiding breakage of the goods in transit. The special packing used was wooden crate or wooden box. The Collector found that overwhelming majority of sales of the

A appellants were in special packing, that in some rare cases, the sales to Calcutta buyers were in ordinary packing and that in remaining cases even the Calcutta buyers received the goods in special packing. The Collector held that the special packing was the normal mode of delivery for the appellants' goods, that such packing was necessitated by the fragile nature of the glass-sheets and that in the circumstances the cost of special packing could not be excluded from the assessable value. We find that in arriving at his calculation, the Collector has fallen in error on two counts, first he relied on the minority judgment of the Hon'ble Supreme Court in the case of *Godfrey Phillips (India) Ltd.*, (1985) 22 ELT 306 SC and ignored the majority judgment therein.

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C Second, he went by the simple arithmetic of majority sales versus minority sales. This is wrong. The correct position regarding packing charges has been enunciated by the Hon'ble Supreme Court in their judgments in *Bombay Tyres International Ltd.*, and *Godfrey Phillips (India) Ltd.*, cases aforesaid and further in their judgment in the case of *M/s. MRF Ltd.*, (1987) 27 ELT 553 SC. In regard to special packing, the criterion to judge is whether it is essential for delivery of the goods in wholesale at the factory gate. Secondly, it is not the relative figures of percentages of deliveries in ordinary packing and special packing which determine the issue but the question of principle whether the special packing is necessitated only by the consideration of safety of the goods during long distance transport or it is essential for wholesale deliveries effected even at the factory gate. We have to remember in the present case that the factory of the appellants was situated in a village and their nearest wholesale market at Calcutta was also 45 Kms. away. The local demand being limited, there could not be very large number of local deliveries at the factory gate. Their nearest big wholesale market was at Calcutta which itself was 45 Kms. away from their factory. The appellants explained to us that some of their Calcutta customers who wanted to sell their goods locally at Calcutta preferred to purchase the goods in ordinary packing while some others who proposed to re-sell the goods to outstation buyers in original packing preferred to purchase the goods in special packing. The department admits that the appellants did clear some consignments for delivery at Calcutta in ordinary packing. The number of such consignments may be small but yet they do establish the principle that the goods could be delivered in wholesale at the factory gate in ordinary packing. The ordinary packing consisted of frame packing with straw cushioning and paper inter-leaving between the

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glass-sheets. Such ordinary packing is quite adequate for wholesale deliveries at the factory gate and at the market situated very close to the factory. In some other cases of glass-sheets also which have come for decision before us, we have held the ordinary/frame packing adequate for wholesale deliveries at the factory gate. Following the principle of essentiality, as laid down by the Hon'ble Supreme Court, we hold that the cost of special packing was, in principle, excludible in the case of the present appellants also."

From the facts enumerated, in the paragraph set out hereinabove, it is clear that there was no dispute that the cost of ordinary packing was includible. The Tribunal has mentioned that the ordinary packing consisted of frame packing with straw cushioning and paper inter-leaving between the glass sheets. This indicates that the ordinary packing was of wooden frames. In respect of the wooden frame there was no dispute that the costs were includible in the value of the glass. This case, therefore, far from helping the Respondents is against them. This case also indicates that to make the goods marketable it would be necessary to pack them in wooden cases or to frame pack them.

Mr. Bagaria also relied upon the case of *Gurind India (P.) Ltd. v. Commissioner of Central Excise, Meerut*, reported in (1999) 112 ELT 1020. In this case, the Tribunal held that the cost of wooden packing is not includible in the value of the goods by observing that more than 64% of the goods are delivered at the factory gate without any packing. What the Tribunal has omitted to notice is the facts that the goods were cleared without packing, as there were special arrangements made in trucks for the purposes of ensuring that the goods did not break during transit. This showed that the goods were not marketable without some special arrangements. In all cases it would not be possible to have special trucks. Thus, wooden packing or frame packing would be necessary to make them marketable. In our view, the finding of the Tribunal, on the facts, is erroneous and unsustainable.

That brings us to Mr. Bagaria's submission that in the case of Respondents (in Civil Appeal No. 3819 of 1999) the Tribunal had, by its Order dated 9th January 1987, held that the cost of the wooden cases was not includible in the value of the glass sheets. As we have indicated hereinabove, this Order of the Tribunal was based on a finding of fact that barring stray instances, glass was delivered to the local customers. In that case, the Tribunal has failed to inquire or look into the question as to who were the local customers to whom glass was delivered without wooden packing. From the

- A reply to the show-cause notice given by the Respondents in this matter, it is clear that in Calcutta the majority of the deliveries were to original equipment manufacturers like car companies. It is clear that these companies would take delivery without wooden cases because they have their own special arrangements to see that the glass sheets are transported without breakages.
- B The Calcutta case, therefore, is an identical case to the case of *Gurind India (P.) Ltd.*, reported in (1999) 112 ELT 1020, where the party taking delivery without wooden crates, had made their own special arrangements.

- C At this stage reference must be made to a decision of a three Judge Bench of this Court dated 20th July 1995 in Civil Appeal Nos.3119-20 of 1980 *Union of India v. Shri Vallabh Glass Work Ltd. and Anr.*,. Relying on the ratio in *Madras Rubber Factory Ltd.'s* case (supra) this Court has held that the costs of wooden crates is includible in the value of glass products. For the following reasons we see no reason to take a different view.

- D The products of the Respondents are large glass sheets. Very fairly, it was not denied that the goods are fragile. Without special protection such glass sheets could not be transported. It was submitted that for short distances they could be transported without wooden crates. However, it is clear that even in such cases special care would have to be taken. The test is not whether in a few stray instances or in a small percentage of cases or by making some other special arrangement the glass sheets can be so transported.
- E The test is whether for the purposes of delivery in the wholesale trade, glass sheets can be moved without special arrangements. The answer has to be an obvious 'No'. In most cases the special arrangement is packing in wooden cases. In such cases the liability to include the costs of the wooden crates in the value of the glass sheets cannot be avoided by claiming that the wooden
- F crates are for purposes of protecting the glass. In such cases, the wooden crates are for purposes of making the glass sheets marketable. The ratio in *Godfrey Philips* case is not that whenever a packing is done with intention to prevent damage or injury to the goods the costs is to be excluded. It is only in those cases where the goods are capable of being marketed without special
- G packing and the special packing is given only by way of abundant caution to protect the goods in transport that their costs get excluded. In the above view the reasoning and the conclusion of the Tribunal cannot be supported.

- H Mr. Bagaria next submitted that the Explanation to Section 4(4)(d)(i) shows that only packing which is of the nature of simple wrappers, container, bobbin, pirn, spool, reel or warp beam would become includible. He submitted



that it is only in those cases where the packing gets identified with the goods that the costs of such packing are includible. He submitted that the Explanation makes it clear that packing in the nature of wooden crates is not covered and, therefore, its cost would not be includible. We are unable to accept this submission. As we have already indicated hereinabove, the Explanation is very wide and includes almost all types of packing. It is not possible to give a restricted meaning as is sought to be done by Mr. Bagaria.

It must be mentioned that in these cases it is not disputed that there is no agreement or arrangement making them returnable. Thus even though they may be considered to be durable the cost of wooden cases are includible in the value of the glass sheets sold by the Respondents. It is so held for above reasons.

Accordingly, the Appeals are allowed. The impugned Judgments stand set aside. There will, however, be no order as to costs.

N.J.

Appeals allowed.