

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 3403 OF 2003

NATIONAL LEATHER CLOTH
MANUFACTURING CO.

... APPELLANT

VERSUS

UNION OF INDIA & ANR.

... RESPONDENTS

J U D G M E N T

D.K. JAIN, J.

1. This appeal, by special leave, is directed against the judgment and order dated 10th July 2002, passed by the High Court of Judicature at Bombay, whereby the High Court has dismissed the writ petition filed by the appellant (for short “the assessee”) and affirmed the order passed by the Assistant Commissioner of Central Excise, Bombay-II (“the Adjudicating Authority” for short), rejecting the claim preferred by the assessee for refund of the excess amount of excise duty paid by them as time barred

as also on merits on account of disallowance of post manufacturing expenses for the purpose of valuation of the goods in terms of Section 4 of the Central Excise Act, 1944 (for short “the Act”) as it existed at the relevant time.

2. The background facts, giving rise to this appeal, are as follows:

The assessee was engaged in the manufacture of coated fabrics. The price of goods declared by the assessee in the price list, as required under Rule 173C of the Central Excise Rules, 1944 (for short “the Rules”), was approved by the Revenue from time to time. However, for the first time, in the two revised price lists, both dated 12th November 1980, the assessee indicated that prices declared by them earlier contained certain post manufacturing expenses, which had to be excluded while computing the value of the fabric for the purpose of assessment to excise duty. The claim was rejected by the Adjudicating Authority vide order dated 7th January 1981. Thereafter, the assessee, vide their letter dated 7th July 1981, made a claim of consolidated refund, amounting to Rs.40,18,805.60, for the period from 13th November 1977 to 12th November 1980, representing differential excess duty paid by them on various elements of post manufacturing expenses. One of the deductions so claimed, with which we are concerned

in this appeal, was on account of cost of material used for packing the final product. Having failed to get any response, the assessee filed a Writ Petition (No.1001 of 1981) in the Bombay High Court seeking appropriate directions for refund along with interest thereon. On 8th February 1982, the assessee revised their refund claim to Rs.40,59,856.40/-. During the pendency of the petition, certain interim orders regarding deposit of the said amount by the revenue and submission of documentary evidence by the assessee before the Adjudicating Authority were passed by the High Court. Eventually, upon consideration of the evidence adduced by the assessee, vide order dated 12th April 1984, the Adjudicating Authority rejected their claim for excluding the cost of polythene bags, printed as well as plain, and hessian cloth used for packing the fabrics. The Adjudicating Authority was of the view that the packing of coated fabrics in polythene bags for delivery to the customers located in Bombay as also packing of three such rolls in hessian cloth and stitching them into one bundle for dispatch to up-country customers was in the normal course of trade and, therefore, there was nothing special about such packing so as to exclude its cost from the value of the fabric. The Adjudicating Authority also held that the refund claim was barred by time.

3. On rejection of the claim, the assessee amended the writ petition in order to challenge the validity of order dated 12th April 1984. As stated above, the order of the Adjudicating Authority has been affirmed by the High Court. Rejecting the plea of the assessee that additional packing of three rolls of fabric in hessian cloth was done at the specific request of the up-country customers in order to protect the packed fabric from damage during the course of transportation and, therefore, at least the cost of such secondary packing should be excluded from the assessable value, the High Court held as follows:

“...in view of the clear finding given by the adjudicating authority to the effect that the Assessee has been uniformly using hessian cloth for all the delivery to the up-country customers, irrespective of any specific request, the use of hessian cloth as secondary packing has to be held to be normal packing which are offered to the wholesalers at the factory gate. In view of the clear finding given by the Adjudicating Authority and in the light of decision of the Apex Court in the case of Union of India Vs. MRF reported in 1995 (77) ELT 433, the cost of the secondary packaging in which the goods are ordinarily sold to the wholesalers is liable to be included in the assessable value. In this view of the matter denial of deduction on account of secondary packaging from the assessable value as post manufacturing expenses is justified. Apart from that, it is not the case of the assessee that the secondary packing is of a durable nature and is returned by the buyer to the assessee. Therefore, the cost of such packing has to be included in the assessable value.”

4. The High Court also held that the refund claim was beyond the period prescribed under the Act. Aggrieved, the assessee is before us in this appeal.
5. Vide order dated 31st March 2003, leave was granted limited to the question “whether the cost of secondary packing is to be included in the assessable value of the appellant’s goods?”
6. We have heard learned counsel for the parties.
7. In support of the appeal, Mr. Jay Savla, learned counsel appearing for the appellant, submitted that the High Court as well as the Adjudicating Authority failed to appreciate the distinction between the primary and the secondary packing, as enunciated by this Court in ***Union of India & Ors. Vs. Bombay Tyre International Ltd. & Ors.***¹. Learned counsel contended that admittedly the rolls of coated fabric were packed in polythene bags for sale at the factory gate in the course of wholesale trade and the bundling of three such rolls in hessian cloth was an additional packing done at the request of up-country customers in order to protect the goods from damage and, therefore, the cost of such packing could not be included in the value of the cloth. In support of the plea that

¹ (1984) 1 SCC 467

additional packing according to the requirement of the buyer constitutes secondary packing and, therefore, its cost cannot be included in the value of the fabric, reliance was placed on the decisions of this Court in *Commissioner of Central Excise, Allahabad & Ors. Vs. Hindustan Safety Glass Works Ltd. & Ors.*² and *Commissioner of Central Excise, Calcutta Vs. Hindustan National Glass & Industries Ltd.*³

8. Per contra, Mr. R.P. Bhat, learned senior counsel appearing for the revenue, while supporting the decision of the High Court, submitted that in view of the finding by the Adjudicating Authority, affirmed by the High Court to the effect that hessian cloth was the standard packing for the fabric for sale in the wholesale market, its cost was includible in the value of the goods in terms of Section 4 of the Act.
9. The short question arising for consideration is whether the cost of packing of fabric in hessian cloth, which, according to the assessee, is not required for sale of their goods at the factory gate and is necessitated to protect the fabric from damage during the course of transportation to up-country customers is includible in the assessable value of the coated

² (2005) 3 SCC 468

³ (2005) 3 SCC 489

fabric manufactured by the assessee for the purpose of levy of excise duty?

10. Section 4 of the Act, in so far as it is relevant for our purpose, reads as follows :

“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:

....

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

....

(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;”

11.The Section provides as to how the value of excisable goods is to be determined. The expression “value” has been extended to include the cost of packing. As per Section 4(4)(d)(i) of the Act, 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. Explanation thereto enumerates various types of packing, of which cost has to be included in the value of the goods. It is evident that by including the cost of packing in the value of goods, the legislature has sought to extend the levy beyond the manufactured article itself and, therefore, the provision has to be strictly construed.

12.Although the provision is clear and unambiguous, yet the concept of “primary packing” and “secondary packing” was evolved by this Court in ***Bombay Tyre International Ltd.*** (supra). In that case, while observing that the degree of packing would vary from one class of excisable goods to another and the packing may be of different grades, which may be necessary to make an article marketable, it was held “that the 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 the degree of packing whose cost can be included in the

“value” of the article for the purpose of the excise levy.” Thus, the test 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 at the factory gate which would be includible in the value of the goods and not the cost of any additional or special packing.

13.In *Union of India & Ors. Vs. Godfrey Philips India Ltd.*⁴, a question arose as to whether the cigarettes manufactured and packed in cardboard packets, each containing 10 to 20 cigarettes and those packets were packed in corrugated fibreboard cartons/containers, the cost of corrugated fibreboard containers was liable to be included in determination of the value of the cigarettes for the purpose of excise duty. The majority view was that since the corrugated cartons were employed as secondary packing only for the purpose of avoiding damage or injury during transit and were not necessary for selling the cigarettes in the wholesale market at the factory gate, their cost was not to be included in the value of the cigarettes for the purpose of levy of excise duty.

14.In *Geep Industrial Syndicate Ltd. Vs. Union of India*⁵, the assessee was manufacturing batteries and torches. The torches and batteries

⁴ (1985) 4 SCC 369

⁵ 1992 (61) E.L.T. 328 (S.C.)

manufactured by them were first packed in polythene bags and then these polythene bags were placed in cardboard cartons. The cardboard cartons were placed in the wooden boxes at the time of delivery at the factory gate. Though there was no dispute about the inclusion of cost of polythene bags and cardboard cartons, the dispute was whether the cost of wooden boxes, in which the cardboard boxes were packed, was to be included in the value of batteries and torches. It was held by a bench of three Judges of this Court that the wooden boxes were in the nature of secondary packing and, therefore, their cost was not includible in the value of batteries and torches.

15.In *Hindustan Safety Glass Works Ltd.* (supra) referring to the ratio of decisions in *Bombay Tyre International Ltd.* (supra) and *Geep Industrial Syndicate Ltd.* (supra), again a bench of three learned Judges summed up the test on the issue, as follows :-

“14...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 cost 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 the time and place of removal.”

16. Having examined the facts of the instant case on the touchstone of the test laid down in the aforementioned cases, we are of the opinion that since admittedly the fabric manufactured by the assessee was sold by the assessee to the wholesalers at the factory gate only in polythene bags, the further packing of three rolls in hessian cloth was not in the course of normal delivery to the customers in the wholesale trade at the factory gate and was, therefore, not required to make the product marketable. The additional packing in the nature of a secondary packing was done for the purpose of convenience of the up-country customers in the transportation of the goods manufactured by the assessee. We, therefore, hold that the cost of secondary packing in hessian cloth cannot be included in the value of the goods in terms of Section 4(4)(d)(i) of the Act for the purpose of assessment of excise duty.

17. In so far as the question of limitation is concerned, as already stated, leave was granted only on the afore-noted limited issue and, therefore, we express no opinion on that aspect.

18. We, accordingly, allow the appeal partly and set aside the impugned order to the extent indicated above, leaving the parties to bear their own costs.

.....J.
(D.K. JAIN)

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

**NEW DELHI;
JULY 23, 2010.**