

PETITIONER:
GEEP INDUSTRIAL SYNDICATE LTD. ETC.

Vs.

RESPONDENT:
COLLECTOR OF CENTRAL EXCISE, ALLAHABAD ETC.

DATE OF JUDGMENT: 04/02/1997

BENCH:
B.P. JEEVAN REDDY, K.S. PARIPOORNAN

ACT:

HEADNOTE:

JUDGMENT:
THE 4TH DAY OF FEBRUARY, 1997

Present:

Hon'ble Mr. Justice B.P. Jeevan Reddy
Hon'ble Mr. Justice K.S. Paripoornan
Soli J. Sorabjee, Sr. Adv., V.Lakshmikumaran, V.
Balachandran and Ms. Nisha Bagchi, Advs. with him for the
appellants in C.A.Nos. 4608-12 and 4960/96 and Respondent in
C.A. No. 14407/96.
M. Gaurishankar Murthi, G. Prakash and V.K. Verma, Advs. for
the Respondents in C.A.No. 4608-12/96, 4960/96 and
Appellants in C.A. No. 14407/96

J U D G M E N T

The following Judgment of the Court was delivered:

J U D G M E N T

B.P. JEEVAN REDDY, J.

These appeals are preferred against the orders of Central Excise and Gold [Control] Appellate Tribunal. Civil Appeals Nos. 4608-4612 of 1996 and 4960 of 1996 are preferred by the assessee, Geep Industrial Syndicate Limited, while Civil Appeal No.14407 of 1996 is preferred by the Revenue. Though preferred against different orders, the issue is one and the same. The assessee is engaged in the manufacture of batteries and torches. These goods are initially packed in small boxes. These small boxes are packed in medium size cartons. The medium size carton are in turn packed in larger corrugated cartons, called "7-ply corrugated cartons". The assessee does not dispute that the value of small boxes and medium size cartons is liable to be included in the value of the goods packed. The dispute is only with respect to the inclusion of the value of 7-ply corrugated cartons. Differing views have been expressed by different Benches of the Tribunal on this question in the case of this very assessee, as would be evident from the fact that while against some orders, the assessee has filed appeals, certain other orders have been appealed against by the Revenue.

Sri Soli J. Sorabjee, learned counsel appearing for the assessee, submitted that the factual and legal situation in the present appeals is the same as was considered by this Court in Geep Industrial Syndicate Limited v. Union of India

[(1992) 61 E.L.T. 328]. Learned counsel submitted that the said decision rendered by a three-Judge Bench between the same parties is binding and conclusive on the question at issue. Sri Sorabjee submitted further that even according to the principles enunciated in *Union of India v. Bombay Tyre International* [1984 (1) S.C.C.467] and *Government of India v. Madras Rubber Factory Limited* [1995 (4) S.C.C.349], the assessee is entitled to succeed. Sri Gauri Shankar Murthy, learned counsel appearing for the Revenue, however, submitted that according to the principles affirmed by this Court in *Madras Rubber Factory* after a full consideration of all the earlier decisions, the value of 7-ply corrugated cartons is also liable to be included in the value of the goods packed.

Inasmuch as differing interpretations are placed upon the principles affirmed in *Madras Rubber Factory*, it is necessary to ascertain, in the first instance, the precise principle enunciated in the said decision. After referring to the definition of "value" in Section 4(4)(d)(i), this court observed in Para-24:

"The provision in the sub-clause is a plain one and does not admit of any ambiguity. What it says is that where the goods are delivered in a packed condition, at the time of removal, the cost of such packing shall be included and that only where such packing is of a durable nature and is returnable by the buyer to the assessee, should the cost of such packing be not included in the value of the goods. The concept of primary and secondary packing has, however, been urged by the assessee and recognised to some extent in the decisions of this Court including *Bombay Tyre International*. While it may not be possible for us to wish away the said distinction, we cannot but remind ourselves that this is a refinement not borne out by the express language of the enactment and must, therefore, be resorted to with care and circumspection."

In Para 25, the Court referred to the holding in *Bombay Tyre International* on this aspect to the effect: "(I)t seems to us 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." Reference was then made to the decision of this Court in *Union of India v. Godfrey Phillips India Limited* [1985 (4) S.C.C. 369]. It was pointed out that the said decision was rendered by the very same Bench which decided *Bombay Tyre International*. It was also pointed out that the test evolved by the majority [R.S.Pathak and A.N.Sen, JJ.] and minority [P.N.Bhagwati, CJ.] was identical and that the different conclusions arrived at by them was mainly attributable to the difference in perception of the factual situation [see Para 30]. The Court then referred to the decision in *Geep Industrial Syndicate Limited* and pointed out again that the factual position in this case too

was perceived to be the same as in Godfrey Phillips, viz., that the wooden boxes were not necessary for putting the torches and batteries in the conditions in which they are generally sold in the wholesale market at the factory gate. It was stressed that so far as the test applicable is concerned, there was no departure from the one enunciated in Bombay Tyre International.

The decision in Madras Rubber Factory next referred to the opinions of Sabyasachi Mukharji, J. and S. Ranganathan, J. in C.C.E. v. Ponds (India) Limited [1989 94) S.C.C.759] and expressed its entire and respectful agreement with the test evolved by Mukharji, J. which reads:

"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.....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."

The Bench also expressed its respectful concurrence with the opinion of Ranganathan, J. where the learned Judge pointed out that the words "which is necessary" in the test evolved in Bombay Tyre International has led to certain further refinement in Godfrey Phillips and Geep industrial Syndicate and then observed:

".....in judging the condition of packing whose cost is to be included in the assessable value, one should go by the conduct of the parties and the nature of the packing in which the goods generally are - not, can be - placed in the wholesale market.....what is to be really seen in this: What is the condition of packing considered by the manufacturers, having regard to the nature of the business, the type of goods concerned, the unit of sale in the wholesale market and other relevant considerations, to be generally necessary for placing the goods for sale in the wholesale market at the factory gate. In Godfrey Phillips and Geep, this Court was concerned with a special

type of packing which seemed intended more to protect the packed goods against injury or damage rather than to enable it being placed in the market. Indeed, in Godfrey Phillips, this was a factual position that had been accepted by the departmental authorities earlier for a period of a little over six years which they later wanted to go back upon."

After considering some other cases, the decision in Madras Rubber Factory stated the test in the following words:

"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."

Sri Sorabjee placed a good amount of emphasis upon the word "necessary" occurring in the above test. It appeared as if the learned counsel was emphasising the said expression to the exclusion of all others in the said test. The test, as stated by this Court in Madras Rubber Factory, is "whether packing, the cost of where of 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". The same was reiterated employing the words in Bombay Tyre International, to wit: "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". We think it appropriate to point out that the test evolved by this Court in Madras Rubber Factory should be read and understood in the context of the preceding discussion including the express and repeated affirmance of the test evolved by Mukharji and Ranganathan, JJ. in Ponds India Limited which is, in truth, nearer to the definition of the word "value" in Section 4(4)(d)(i) of the Act. The word "necessary" in the test evolved by Bombay Tyre International and as reiterated in Madras Rubber Factory need not be over-emphasised. According to Madras Rubber Factory, the true test is in terms of the one evolved by Mukharji and Ranganathan, JJ. in Ponds India Limited, viz., "whether packing, the cost whereof is sought to be included is the packing in which it is ordinarily sold in the course of wholesale trade to the wholesale buyer". While judging the necessity of the packing, what one must see is whether it is necessary for putting the excisable article in the condition in which they are generally sold in the wholesale market at the factory gate and this must be judged from the conduct of the manufacturer himself. Ordinarily speaking, no manufacturer would provide a packing which is not necessary for putting the excisable articles in the condition in which they are sold in the wholesale market at the factory gate. [Where a special kind of packing is

provided by the manufacturer at the specific request of a buyer, the situation would be different but that is not the situation herein.] Therefore, one can proceed on the footing that whatever packing is provided at the time of delivery of the goods at the gate is the packing necessary for the purpose of putting the excisable articles in the condition in which they are generally sold in the wholesale market at the factory gate. Unless the manufacturer establishes that a particular packing, provided at the time of such delivery, was not really necessary for that purpose, the value of the packing cannot be excluded. In our respectful opinion, the above is the correct understanding of the principle and the ratio of Madras Rubber Factory.

Now coming to the facts of the case before us, we find that the factual situation considered by this Court in 1986 in Geep Industrial Syndicates [this very assessee] and the factual situation now obtaining is no different. It was held by this Court in the said decision that packing in wooden boxes was not necessary for putting the articles in the condition in which they are generally sold in the wholesale market at the factory gate and that it was done only for the purpose of protecting them from damage during the course of transport, i.e., transport after delivery. The 7-ply corrugated cartons have now taken the place of wooden boxes. But for this, there is no change in the factual situation since 1986. In such a factual situation, it would not be permissible for us to arrive at a different conclusion than the one arrived at in 1986*. On this

* The decision in Geep Industrial Syndicate was actually rendered on April 2, 1986 though reported in Excise Law Times in the year 1992.

ground alone, we hold in favour of the assessee.

For the reasons recorded hereinabove, Civil appeals Nos. 4608-4612 of 1996 and 4960 of 1996 [preferred by the assessee] are allowed and Civil Appeal No. 14407 of 1996 [preferred by the Revenue] is dismissed. There shall be no order as to costs.