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Thus, as per the statutory provision the cost of packing is includible in the value of the goods unless the packing is of the durable nature and is returnable by the buyer to the assessee.

In this case the Appellants filed a price list in which the cost of wooden crates was not included. The Assistant Collector passed orders including the costs of the wooden packing in the assessable value of the glass sheets. The Appeals filed by the Appellants were allowed by the Collector (Appeals) and it was held that the special packing was not necessary for making them marketable and thus the costs is not includible in the value of the glass sheets.

It appears that the Assistant Collector still approved the price list only by including the costs of the wooden crates. The Appellants thus filed a Writ Petition in the Allahabad High Court claiming that the action of the Assistant Collector was in defiance of the Order of the Collector (Appeals) and that the Assistant Collector be directed to exclude the costs of wooden crates.

It must be mentioned that against the Order of the Collector (Appeals) the Department had filed Revisions before the Central Government. With the constitution of the Customs, Excise and Gold (Control) Appellate Tribunal (CEGAT) the Revisions were transferred to CEGAT. CEGAT disposed off these Revisions by concluding that the cost of wooden crates was not to be includible in the assessable value of glass sheets.

However, in the Writ Petition filed by the Appellants the High Court has, by the impugned Judgment, held that the costs of the wooden crates was includible in the value of the glass sheets as it was necessary to put the glass sheets in a condition in which they can be sold in the wholesale trade. The High Court also held that the wooden crates were not durable and returnable. Thus this Appeal.

Two questions arise for consideration by us:

- (i) Whether the costs of wooden crates is includible in the value of glass sheets; and
- (ii) Whether the wooden crates can be said to be "durable and returnable packing".

We have today delivered a Judgment in Civil Appeal No. 3819/1999 and a batch of similar Appeals wherein it has been held that the costs of wooden cases is includible in the value of glass sheets. For the reasons set out in that Judgment we answer the first question against the Appellants and hold that the costs of wooden packing is includible in the value of glass sheets. To this extent the impugned Judgment cannot be faulted.

In support of their contention that the wooden cases are durable and returnable the Appellants rely upon a Clause in their bills/invoices which reads as follows:

"Packing charge:- packing of durable and returnable nature subsequent to initial packing for facilitating safe transport which will be refunded if the same are returned intact @ Rs.140/- per crate."

Reliance is also placed upon the case of Mahalakshmi Glass Works (P) Ltd. v. Collector of Central Excise reported in 1988 (36) E.L.T. 727 (SC) wherein it has been held that under Section 4(4)(d)(i) of the Act the costs of packing which is of durable and returnable nature is to be excluded. It is held that there must be an arrangement between the buyer and the assessee that the packing be returned to the assessee. It is held that it is not the physical capability of the packing to be returned which is the determining factor but the condition that if the buyer chooses to return the packing the seller is obliged to accept it and refund the stipulated amount. It is held that

the question whether the packing is actually returned or not has no relevance.

Reliance was also placed upon the case of Wipro Products Ltd. v. Union of India reported in 1991 (51) ELT 281 (Bombay). In this case Bombay High Court took the view that actual return or the extent of return has no relevance and that all that is required is that there must be an obligation on the seller to accept the packing if the buyer chooses to return it.

In the case of Gobind Glass Industries Ltd. v. Commissioner of Central Excise, Ahmedabad reported in 2002 (150) ELT 293, CEGAT has also taken the same view. In this case CEGAT has held that the costs of wooden crates used for packing glass sheets would be excludible from the value of glass sheets if there was an arrangement under which the seller was obliged to take back the crates and pay the stipulated amount if the buyer chooses to return the crates.

In the impugned Judgment the Allahabad High Court has held that there was no evidence that, even in a single case any wooden crate had been returned to the Appellants. The High Court has held that term "durable" meant that the packing was of such a nature that the manufacturer intended to use it again and again and thus the condition must be one that the buyer must return the packing to the seller. It has been held that the mere theoretical possibility of the crates being returned was not sufficient.

Mr. Venkataramani has supported the view of the High Court and submitted that the cost would only get excluded if the crates are actually returned.

We have considered the submission of the parties. In our view, the law laid down by this Court in Mahalakshmi Glass Works (P) Ltd. (supra) is the correct law. There is no necessity that the crates must be actually returned. So long as there is an obligation on the seller to take back the crates, if the buyer chooses to return them, it is sufficient. The term in the contract, set out above, imposes an obligation on the Appellants to take back the wooden crates and to pay the stipulated amount to the buyer if the buyer chooses to return them. Wooden crates merely consist of planks of wood which are nailed together. Therefore, even if they are dismantled by the buyer and the planks are returned to the Appellants the Appellants would be in a position to use them again. In our view, the High Court was wrong in holding that the wooden crates are not durable or returnable. The answer to the second question therefore has to be in favour of the Appellants. It is held that, in view of the specific term in the bills/invoices, the wooden crates are durable and returnable packing whose costs is not to be included in the value of glass sheets.

In this view, the impugned Judgment is set aside on this point. To this extent the Appeal is allowed. There will be no order as to costs.