M/s Hindustan Polymers

Vs

Collector of Central Excise

M/s Hindustan Polymers, Visakhapatnam

Vs

Collector of Central Excise, Guntur and Others

Civil Appeal Nos. 4339-41 of 1986 and 4176-77 of 1984

(Sabyasachi Mukharji, S. Ranganathan, J. S. Verma JJ)

23.08.1989

JUDGMENT

SABYASACHI MUKHARJI, J. -

1. These appeals under Section 35-L(b) of the Central Excises and Salt Act, 1944 (hereinafter called 'the Act') are against the Orders Nos. 450-452 of 1985-A dated July 4, 1985, 473/184-A and 474/84-A both dated June 21, 1984 passed by the Customs, Excise and Gold (Control) Appellate Tribunal (hereinafter referred to as 'the Tribunal').

2. The appellant is a division of McDowell & Co. Ltd., It has its factory at, inter alia, Visakhapatnam. There it manufactures and sells fuel oil/Styrene monomer falling under tariff item 68 of the First Schedule to the Act. The case of the appellant is that the said fusel oil is a completely manufactured article and after completion of its manufacture, it is stored in storage tanks duly approved for this purpose. It is at this stage that the quantity of fusel oil/Styrene monomer manufactured, according to the appellant, is entered in the RG-1 Register maintained for goods manufactured by the appellant. It is also the case of the appellant that the said fusel oil/styrene monomer manufactured by it is sold in bulk and delivered to the customers at the appellants factory. The fusel oil/styrene monomer is also capable of being supplied in road tankers to customers. The appellant had filed it price lists in respect of the same. In the said price lists, which were duly approved by the Assistant. Collector, the appellant had shown the value of fusel oil/styrene monomer at the rate at which those were sold in wholesale as "Naked ex-Works and in bulk". According to the appellant, the manufacture of fusel oil is complete and it is the fully manufactured fusel oil/styrene monomer which is stored in the storage tank.

3. On July 2, 1983, a notice in respect of a consignment was issued to show cause as to why value of the drums should be included in the value of the goods. There the drums had been supplied by the buyer. Another show cause notice as to why value of the drums should not be included in the assessable value of the goods, was issued to the appellant on the April 5, 1983 pertaining to Gate Pass No. 773 whereunder the appellant had cleared 2.4 kl of fuel oil in drums supplied by the buyer. Replies were duly filed to the said show cause notices by the appellant contending, inter alia, that as the drums were supplied by the buyer, value thereof could not be included in the assessable value.

On the August 11, 1983, two orders were passed by the Assistant Collector - one in relation to each of the aforesaid show cause notice. The Assistant Collector included the value of the drums in the assessable value of the said fusel oil/styrene monomer. Appeals were filed by the assessee. The same were allowed by the Collector (Appeals). He held that the appellant had not collected any amount in excess of the amount indicated in the price lists. Therefore, in addition to this amount, according to the Collector (Appeals), it was not open to the Assistant Collector to inflate the assessable value without establishing the receipt of the additional consideration by the appellant apart from what had been shown in the invoice. There was a further appeal to the Tribunal. The Tribunal held that at the time of removal the goods were delivered from the factory in packed condition and the containers were not returnable by the buyer, therefore, the value has to be included in the assessable value. The Tribunal, therefore, accepted the revenue's contention and restored the order of the Assistant Collector. Aggrieved therefrom, the appellant has come up in these appeals of this Court.

4. On behalf of the appellant, Shri Salve contended that the Tribunal had failed to appreciate the admitted factual position that the fusel oil/styrene monomer manufactured by the appellant is sold in bulk and is capable of being so sold. Hence, according to the appellant, it is not necessary for the said fusel oil/styrene monomer to be supplied to the customers in drums in the aforesaid situation. The Tribunal, therefore, it was urged, ought to have held that the value could not be included in the assessable value of the fusel oil/styrene monomer. It was contended that in any event under the Act and the Rules, the duty of excise is payable by the manufacturer on the manufactured goods. The appellant was not a manufacture of drums. The said drums were supplied by the customers for the purpose of filling the fusel oil/styrene monomer. No duty of excise, therefore, could be collected from the appellant on such drums which were neither manufactured nor purchased by the appellant. It was further urged that on a correct and true interpretation of section 4(4)(d)(i) of the Act, the cost of packing could be included in the assessable value only when the packing is either manufactured by the assessee or is purchased by the assessee. The said sub-section does not contemplate, according to the appellant, the inclusion of the cost of packing in the value of goods when the packing is supplied by a customer to a manufacturer on its own cost.

5. It was contended by Shri Salve, appearing on behalf of the appellant, that on a correct analysis of Section 4(4)(d), the duty being on the activity of manufacture whatever is necessary to bring the goods into existence alone can be taken into account for duty purpose. Reliance was placed by Shri Salve as well as by the learned Attorney General, appearing on behalf of the revenue, on the relevant provisions of the Act and the position as explained by this Court in Union of India and v. Bombay Tyre International Ltd. ((1984) 1 SCC 467 : 1984 SCC (Tax) 17 : (1984) 1 SCR 347)

6. Shri Slave has, however, contended that so far as this Court is concerned, this question is concluded by the decision of this Court in CCE v. Indian Oxygen Ltd.((1984) 4 SCC 139 : 1988 SCC (Tax) 491 : (1988) 36 ELT 730) Learned Attorney General, however, contended that this decision did not deal with the present controversy. The said decision, according to learned Attorney General, was concerned with the rentals of certain oxygen gas cylinders supplied by the assessee. Reference was made to the decision of this Court in K. Radha Krishaiah v. Inspector of Central Excise, Gooty ((1987) 2 SCC 457 : 1987 SCC (Tax) 216 : (1987) 27 ELT 598). Shri Salve referred to and relied on the decision of the High Court of Bombay in the case of Govind Pay Oxygen Ltd. v. Assistant Collector of Central Excise, Panajit ((1986) 23 ELT 394 (Bom)) as also the decision of the Karnataka High Court in Alembic Glass Industries Ltd., v. Union of India ((1986) 24 ELT 23 (Karn)). Learned Attorney General urged before us that the question whether for determining the assessable value of the excisable goods sold by the assessee in drums or containers provided by its customers (the assessee itself provided such drums/containers on payment of price in Civil Appeals

Nos. 4339-41 of 1986) the value of such drums/containers would also have to be included on a correct interpretation of charging sections, namely, Sections 3 and 4 of the Act. It was submitted that while determining the scope and nature of levy, as contemplated under Section 3 of the Act, of Central Excise and the measure of such levy as provided in Section 4 of the Act the principles laid down in Union of India v. Bombay Tyre International Ltd. ((1984) 4 SCC 467 : 1984 SCC (Tax) 17 : (1984) 1 SCR 437), should be followed and reliance was placed on the several decisions of this Court which we will refer to later. Learned Attorney General emphasized that it is a well settled principle of construction that in taxing statutes one has only to look merely at what is clearly stated. There is no room, he contended, for any intendment. There is no equity about a tax, it was submitted. There is no presumption as to tax. Reliance was placed for this proposition by the learned Attorney General on the observations of this Court in Gursahai Saigal v. C.I.T. ((1963) 3 SCR 893, 898 : AIR 1963 SC 1062 : (1963) 48 ITR 1)

7. Learned Attorney General also drew attention to the decision of this Court in A. K. Roy v. Voltas Ltd. ((1973) 2 SCC 503 : 1973 SCC (Tax) 261 : (1973) 2 SCR 1089) and also to Atic Industries Ltd., v. H. H. Dave, Assistant Collector of Central Excise ((1975) 1 SCC 499, 504 : 1975 SCC (Tax) 135 : (1975) 3 SCR 563, 568) to emphasise the point that percentages of sales do not in any manner affect determination of the assessable value of the excisable goods. In this connection, it may be relevant to mention that in Civil Appeal Nos. 4339-41 of 1986, in respect of which show notice was issued as to why value of drums should not be included in the assessable value of fusel oil and styrene monomer, 90 per cent of styrene monomer had been sold directly in tanks and only 10 per cent of styrene monomer had been sold drums and the show cause notice on October 20, 1983 had been issued relating to clearance of fusel oil in 45 drums but the said drums had been supplied by the buyer. The Assistant Collector in those appeals had included the costs of such drums in the value of styrene monomer. Relying on the two decisions referred to herein before, learned Attorney General emphasised that percentages of sales would not in any manner affect determination of the assessable value of the excisable goods. In A. K. Roy case ((1973) 3 SCC 503 : 1973 SCC (Tax) 261 : (1973) 2 SCR 1089) it was held by this Court that though in that case that the fact that the assessee had effected sales to wholesale dealers only to the extent of 5 to 10 per cent of its production and that 90-95 per cent of its production were only retail sales would not affect the question of determination of the assessable value of the excisable goods with reference to its value in the wholesale market. Therefore, the learned Attorney General submitted, the mere fact that the assessee in Civil Appeal No. 4339 of 1986 sold only 10 per cent of the excisable goods to its buyer where the drums were supplied by the buyers themselves and that 90 per cent of the sales were through tankers belonging to the customers would not in any manner affect the question or determination of the assessable value of the excisable goods inasmuch as the 10 per cent of its sales to wholesale buyer were in drums supplied by the buyers at the time of removal. According to the learned Attorney General, the fact that 90 per cent of the goods were supplied in tankers and not in containers had no relevance at all and the 10 per cent represented the entire quantity of excisable goods delivered in packed condition. Learned Attorney general contended that the decision of India Oxygen Ltd., case ((1988) 4 SCC 139 : 1988 SCC (Tax) 491 : (1988) 36 ELT 730) cannot be relied on in view of the facts of this case. In that case, the learned Attorney General contended the only question which arose was whether the rental charges received by the assessee for the gas cylinder lent by it to its customers could be included in the assessable value and whether interest earned on deposits made by the customers for the security of the cylinders supplied by the assessee could also be included in the assessee could also be included in the assessable value of the excisable goods. This Court clarified in the said decision that the said charges could not be included in the value of the goods since these were only ancillary and not incidental to the activities for the manufacture of

gases. Learned Attorney General submitted that this Court had no occasion in that decision to consider the question which arises in the present case, namely, whether the cost of packing materials would have to be included in the assessable value of the goods when goods are delivered in packed conditions. Learned Attorney General submitted that the decisions of the Bombay and Karnataka High Courts were wrong as they are contrary to the decision of this Court in Bombay Tyre International case ((1984) 1 SCC 467 : 1984 SCC (Tax) 17 : (1984) 1 SCR 347).

Reference was made both by the learned Attorney General and Shri Salve to the observations of this Court in Union of India v. Godfrey Philips India Ltd. ((1985) 4 SCC 369 : 1986 SCC (Tax) 11 : 1985 Supp 3 SCR 123)

8. In order to appreciate the controversy in this case, it necessary to refer to the relevant provisions.

9. Section 2(f) of the Act provides the definition of the term "manufacture". It states, inter alia, that manufacture includes any process incidental or ancillary to the completion of manufactured product. It is, therefore, necessary to bear in mind that a process which is ancillary or incidental to the completion of the manufactured product, that is to say, to make the manufacture complete would be "manufacture". It is relevant and important to bear this aspect in mind. Section 3 of the Act provides that there shall be levied and collected in such manner as may be prescribed duties of excise on all excisable goods other than salt which are produced or manufactured in India. "Excisable goods", under Section 2(d) of the Act, means goods specified in the Schedule to the Central Excise Tariff Act, 1985 as being subject to duty of excise and includes salt. Section 4 of the Act provides for the valuation of excisable goods for purposes of charging of duty of excise. The relevant provision of Section 4 of the Act deals with the manner as to how the value is to be computed and Section 4(4)(d) stipulates as follows :

> '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 whatever) 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 purpose 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 exercise 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 or 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."

10. The expression "place of removal" has been defined under Section 4(4)(b) of the Act to mean a factory or any other place or premises of production or manufacture of the excisable goods; or a warehouse or any other place or premises where in the excisable goods have been permitted to be deposited without payment of duty, from where such goods are removed. It is in relation to Section 4(4)(d) that it is contended that except the cost of packing which is of a durable nature and is returnable by the buyer to the assessee to the buyer, in respect of all other costs of packing, the costs should be included in the value of the excisable goods. The explanation to the said sub-section defines the expression "packing" as 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. The provisions of these two sections must be judged in the light of the principles laid down by this Court in Union of India v. Bombay Tyre International ((1984) 1 SCC 467 : 1984 SCC (Tax) 17 : (1984) 1 SCR 347). In that decision, it has been recognized that the measure employed for assessing a tax must be confused with the nature of the tax; while the measure of the tax may be assessed by its own standard to serve as a standard for assessing the levy the legislature need not contour it along lines which spell out the character of the levy itself. Reliance may be placed to the observations of this Court at pp. 365-67 of the Report (SCC pp. 481-82). This Court rejected the contention of the assessee in that case that because the levy of excise is a levy on goods manufactured or produced, the value of an excisable article must be limited to the manufacturing cost plus manufacturing profit. This Court reiterated that Section 4 of the Act provides the measure by reference to which the charge is to be levied. Therefore, the charge is to be determined by the terms of Section 4 of the Act. But it has to be borne in mind that the duty of excise is chargeable with reference to the value of the excisable goods and the value is defined in express terms in that section. Though the learned Attorney General referred to the fact that in taxing status, one must look merely at what is clearly stated, yet such a construction must be made in the context of the entire scheme of the Act. Learned Attorney General emphasised that the language of clause (d) of sub-section (4) of Section 4 of the Act made it clear beyond doubt that in cases where the Act provides for excise duty with reference to value of the excisable goods, while determining the value of such good, the cost of packing where the excisable goods are delivered at the time of removal in packed condition, would have to be included in the assessable value of the excisable goods. According to the learned Attorney General, since the Act provides for only one exception to this measure, namely, non-inclusion of the cost of such packing where the packing is durable in nature and is returnable by the buyer to the assessee, in all other cases the cost of the packing would have to be included in the assessable value of the excisable goods where such goods are delivered at the time of removal in packed condition. According to him, the plain language of the Statute does not permit of any further exceptions beings

read into the Act. To hold otherwise, it was contended, would make the provision of the measure of the levy unworkable inasmuch as in every case the measure would have to differ in the light of the contentions as may be raised by the assessee depending upon the business arrangement of each assessee. It was contended that it is not correct to equate the measure of tax with the levy itself which is the basis of the contentions of the appellant.

11. In my opinion, however, the correct position must be found out bearing in mind the essential nature of excise duty. Excise duty, as has been reiterated and explained, is a duty on the act of manufacture. Manufacture under the excise law, is the process or activity which brings into being articles which are known in the market as goods and to be goods these must be different, identifiable and distinct articles known to the market as such. It is then and then only that manufacture taken place attracting duty. In order to be goods, it was essential that as a result of the activity, goods must come into existence. For articles to be goods, these must be known in the market as such and these must be capable of being sold or being sold in the market as such. See the observations of this Court in Union of India v. Delhi Cloth and General Mills Ltd. (1963 Supp 1 SCR 586 : AIR 1963 SC 791), South Bihar Sugar Mills Ltd., v. Union of India ((1968) 3 SCR 21 : AIR 1968 SC 922) and and Bhor Industries Ltd., Bombay v. C CE ((1989) 1 SCC 602 : 1989 SCC (Tax) 98) In order, therefore, to be manufacture, there must be activity which beings transformation to the article in such a manner that different and distinct article comes into being which is known as such in the market. If in order to be able to put in on the market, a certain amount of packing or user of containers or wrappers or putting them either in drums or containers, are required, then the value or the cost of such wrapper or container or drum must be included in the assessable value and if the price at which the goods are sold does not include that value then it must be so included by the very force of the terms of the section. The question, therefore, that has to be examined in this case is whether these drums, containers or packing, by whatever name they are called, are necessary to make fusel oil or styrene monomer marketable as such or can these goods be sold without the containers or drums or packing In may opinion, the facts established that these could be. The fact that 90 per cent of the goods in Civil Appeal No. 4339 of 1986 were delivered in tankers belonging to the assessee and only 10 per cent of the goods were in packed condition at the time of removal clearly establish that the goods were marketable without being packed or contained in drums of containers. These were in the storage tanks of the assessee and were as such marketable. In this connection, it is necessary to refer to the observations of this Court in CCE v. Indian Oxygen Ltd. ((1988) 4 SCC 139 : 1988 SCC (Tax) 491 : (1988) 36 ELT 730) In that case, as mentioned hereinbefore, the respondent Indian oxygen Ltd., was manufacturer of dissolved acetylene gas and compressed oxygen gas, called therein 'the gases'. The respondent supplied these gases in cylinders at their factory gate. For taking delivery of these gases, some consumers/customers used to bring their own cylinders and take the delivery, while others used to have the deliver in the cylinders supplied by the respondent. For the purpose of such supply of cylinders, certain rentals were charged by the respondent and also to ensure that these cylinders were returned properly, certain amount of deposit used to be taken from the customers. On these deposits, notional interest @ 18 per cent p.a. was calculated. The two amounts with which this Court was concerned were rentals of the cylinders and the notional interest earned on the deposit of cylinders - whether these two amounts were includible in the value under section 4 of the Act was the question. The revenue's case was that the notional value of deposit was rental and hence should be included in computing the assessable value. The respondent, however, disputed this. Analysing the scope of Section 4 of the Act, it was held by this Court that supply of gas cylinders might be ancillary activity to the supply of gases but this was not ancillary or incidental to the manufacture of gases. The goods were manufactured without these cylinders. Therefore, the rental of the same though income of ancillary

activity, was not the value incidental to the manufacture and could not be included in the assessable value. Similarly, in my opinion, drums even though these were ancillary or incidental to the supply of fusel of fusela oil and styrene monomer, these were not necessary to complete the manufacture of fusel oil or styrene monomer; the cost of such drums cannot, therefore, be included in the assessable value thereof. Furthermore, no cost was, in fact, incurred by the assessee. Drums had been supplied by the buyers.

12. This position, in my opinion, was correctly approached in the decision of the Bombay High Court in Govind Pay Oxygen Ltd., v. Assistant Collector of Central Excise, Panaji ((1986) 23 ELT 394 (Bom)) where it was held that Section 4(4)(d)(i) of the Act does not make any provision for including (ED : In the High Court judgment the word used is 'excluding' vide ELT p. 396) the cost of packing which was supplied by the buyer to the assessee for the obvious reason that the assessee did not spend for such packing. It was for this simple reason that the legislature had not though it fit to exempt such packing from the value of excisable goods. In my opinion, that is the correct approach to the problem. Similarly, Karnataka High Court in Alembic Glass Industries v. Union of India ((1986) 24 ELT 23 (Karn)) held that the term "value" defined in Section 4(4)(d)(i) provides for exclusion of cost of packing material which was of durable nature and was returnable by the buyer to the assessee. Hence, there was no logic or reason for not excluding the value of packing material supplied by the buyer himself which is of durable nature and is returnable by the assessee to the buyer. Furthermore, in my opinion, in terms of section, it is not includible. The contention that the value of packing materials including those supplied by the buyer, has to be included in the value of the goods, is repugnant to the very scheme of Section 4. It overlooks the use of the expression "cost" in relation to packing in the clause (i) of Section 4()(d) of the Act. The word "cost" has a definite connotation, and is used generally in contradistinction of the expression "value". Thus, the clear implication of the use of the word "cost" is that only packing cost of which is incurred by the assessee, i.e., the seller, is to be included. The use of the expression "cost" could not obviously be by way of reference to packing for which the cost is incurred by the buyer. It has to be borne in mind that such a provision would make the provision really unworkable, since in making the assessment of the seller, there is no machinery for ascertaining the "cost" of the packing which might be supplied by the buyer. Such a contention further overlooks the scheme of clause (i) whereunder durable packing returnable by the buyer has to be excluded. It would create an absurd situation if durable packing supplied by the assessee and returnable to the assessee is not to be included in the assessable value but a durable packing supplied by the buyer to the assessee and returnable to the buyer is made a part of the assessable value. One has to bear in mind the scheme of clause (d) of Section 4(4) of the Act. The two sub-clause of this clause deal with abatements or deductions in respect of actual burdens, either by way of an expenditure or discount, borne by the assessee. Clause (ii) deals with duties duties of excise, sales tax and other tax, if any, payable on such goods. Here also obviously the reference is not generally to the taxes payable on such goods by either the assessee or the buyer but is obviously to the taxes payable by the assessee. The trade discount is referable to that allowed by the assessee. Therefore, in the same sense, clause (i) would only be referable to the packing in respect to which "cost" is incurred by the assessee. It has to be borne in mind that the scheme of old Section 4 of the Act and new Section 4 is the same as was held by this Court in the case of Bombay Tyre International ((1984) 1 SCC 467 : 1984 SCC (Tax) 17 : (1984) 1 SCR 347) (at pages 376 E-F, 377-H and 378 A-B, H of the report, SCC p. 492, para 25, pp. 493-94, paras 32 and 34). The scheme of the old Section 4 is indisputedly to determine the assessable value of the goods on the basis of the price charged by the assessee, less certain abatements. There was no question of making any additions to the price charged by the assessee. The essential basis of the "assessable value" of old Section 4 was the wholesale cash price charged

by the assessee. To construe new Section 4 as now suggested would amount to departing from this concept and replacing it with the concept of a notional value comprising of the wholesale cash price plus certain notional charges. This would be a radical departure from old Section 4 and cannot be said to be on the same basis. It has to be borne in mind that the measure of excise duty is price and not value. It has been so held by this Court in Bombay Tyre International case ((1984) 1 SCC 467 : 1984 SCC (Tax) 17 : (1984) 1 SCR 347). See in this connection, the observations of this Court in Bombay Tyres case ((1984) 1 SCC 467 : 1984 SCC (Tax) 17 : (1984) 1 SCR 347). at pages 368, 377, 379, 382 and 383 (SCC pp. 484, 493, 495, 496-97) where this Court emphasised that in both the old Section 4 and the new Section 4, the price charged by the manufacturer on a sale by him represents the measure. Price and sale are related concepts and price has a definite connotation. Therefore, it was held that the "value" of the excisable articles has to be computed with reference to the price charged by the manufacturer, the computation being made in accordance with the terms of Section 4. This Court rejected the contention on behalf of the assessee in that case, that Section 4 also levied excise on the basis of a conceptual value which must exclude post-manufacturing expense and post-manufacturing profit by observing that the contention proceeded on the assumption that a conceptual value governed the assessment of the levy. It was reiterated that the old Section 4 and new section 4 determine the value on the basis of price charged or chargeable by the particular assessee. See in this connection, the observations of this Court at p. 388 F & G of the report. (SCC p. 503, para 47).

13. It has also to be borne in mind that in any event insofar as Styrene monomer Oil is concerned, the value of the drums in which it is packed is not includible in the assessable value of the goods. It is not all packing which is liable to be included under Section 4(4)(d)(i) in the assessable value of the goods. It is only that degree of secondary packing which is necessary for assessable articles to be in the condition in which it is generally sold in the wholesale market which can be included at the factory gate which should be included in the value of the article. See the observations of this Court in Bombay Tyre International case ((1984) 1 SCC 467 : 1984 SCC (Tax) 17 : (1984) 1 SCR 347) at page 393 D & E. (SCC p. 508, para 52). In the case of Union of India v. Godfrey Philips Ltd. ((1985) 4 SCC 369 : 1986 SCC (Tax) 11 : 1985 Supp 3 SCR 123), this position was clarified by the majority judgment. In that case, the respondent therein manufactured cigarettes in their factories. The cigarettes so manufactured were packed initially in paper/cardboard packets of 10 and 20 and these packets were then packed together in paper/cardboard cartons/outer. These cartons/outers were then placed in corrugated fiberboard containers and delivered by the respondents to the wholesale dealers at the factory gate. There was no dispute that the cost of primary packing into packets of 10 and 20 and the cost of secondary packing in cartons/outers must be included in determining the value of the cigarettes for the purpose of assessment to excise duty, since such packing would fall under Section 4(4)(d)(i) of the Act. The question that arose was whether the cost of final packing in corrugated fiberboard containers would be liable to be included in the value of the cigarettes for the purpose of assessment to excise duty. The question was answered in negative by a majority of 2:1 of this Court. Chief Justice Bhagwati dissented. It was held by Pathak, J. (as the learned Chief Justice then was) that such cost of corrugated fiberboard containers could not be included in the determination of "value" in Section 4(4)(d)(i) of the Act for the purposes of excise duty. For the purpose of measure of levy on cigarettes, the statute has given an extended meaning to the expression "value" in Section 4(4)(d) of the Act. Plainly, the extension must be strictly construed, for what is being included in the value now is something beyond the value of the manufactured commodity itself. The corrugated fibreboard containers could be regarded as secondary packing. These were not necessary, it was emphasised by the majority of the Judges, for selling the cigarettes in the wholesale market at the factory gate. These were only employed, it was emphasised by the

majority of the Judges, for the purpose of avoiding damage or injury during transit. It was perfectly conceivable that the wholesale dealer who took delivery might have his depot at a very short distance only from the factory gate or might have such transport arrangement available that damage or injury to the cigarettes could be avoided. A.N. Sen, J, who agreed with Pathak, J, observed that on a proper construction of Section 4(4)(d)(i), it was clear that any secondary packing done for the purpose of facilitating transport and smooth transit of the goods to be delivered to the buyer in the wholesale trade could not be included in the value for the purpose of assessment of excise duty. Chief Justice Bhagwati, on the other hand, held that corrugated fibreboard containers in which the cigarettes were contained fell within the definition of 'packing' in the Explanation to Section 4(4)(d)(i) and if these formed part of the packing in which the goods were packed when delivered at the time of removal, then under Section 4(4)(d)(i) read with the Explanation, the cost of such corrugated fibreboard containers would be liable to be included in the value of cigarettes. It is apparent from the wide language, according to the learned Chief Justice, of Explanation to Section 4(4)(d)(i) that every kind of container in which it can be said that the excisable goods are contained would be 'packing' within the meaning of the Explanation. Even secondary packing would be within the terms of the Explanation, because such secondary packing would also constitute a wrapper or a container in which the excisable goods are wrapped or contained. But the test to determine whether the cost of any particular kind of secondary packing is liable to be included in the value of the article is whether a particular kind of 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. If they are generally sold in the wholesale market at the factory gate in a 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. According to learned Chief Justice, it makes no difference to applicability of the definition in Section 4(4)(i) read with Explanation that the packing of the goods ordinarily sold by the manufacturer in the wholesale trade is packing for the purpose of protecting the goods against damage during transportation or in the warehouse. However, if any special secondary packing is provided by the assessee at the instance of a wholesale buyer which is not generally provided as a normal feature of the wholesale trade, the cost of such special packing would not be includible in the value of the goods. It may be necessary in this connection to refer to the observations of the Court in Union of India and Ors. v. Bombay Tyre International Ltd. ((1984) 1 SCC 467 : 1984 SCC (Tax) 17 : (1984) 1 SCR 347), dealing with the aspect of secondary packing, where this Court reiterated that the degrees of secondary packing which is necessary for putting the excisable article in which it is sold in the wholesale market at the factory was the degree of packing where the cost would be included in the value of the goods for the purpose of excise duty. Pathak J., as the Hon'ble Chief Justice was then, asked whether it is necessary for putting the cigarettes in the conditions in which they were sold in the wholesale market or at the factory gate. He answered that it is not. It was found that these corrugated fiberboard containers are employed for the purpose of avoiding these corrugated fibreboard containers are employed for the purpose of avoiding damage or injury during the transit. It was conceivable that the wholesale dealer who takes delivery might have its depot at a very short distance only from the factory gate or may have such transport arrangements available that damage or injury to the cigarettes could be avoided. In those cases, the corrugated fibreboard containers, according to Pathak J. were not necessary for selling the cigarettes in the wholesale market.

14. I am of the opinion on that the views expressed by the majority of the learned Judges were correct and it appears, with respect, that the observations of the learned Chief Justice Bhagwati were not consistent with the judgment of this Court in Bombay Tyres International ((1984) 1 SCC 467 : 1984 SCC (Tax) 17 : (1984) 1 SCR 347) at p. 379. The learned Attorney General sought to suggest

that the decision of this Court in Union of India v. Godfrey Philips Ltd. ((1985) 4 SCC 369 : 1886 SCC (Tax) 11 : 1985 Supp 3 SCR 123), perhaps might require reconsideration. I am unable to accept the suggestion. The ration of the decision in Godfrey Philips case ((1985) 4 SC 369 : 1986 SCC (Tax) 11 : 1985 Supp 3 SCR 123), is in consonance with the decision of Union of India v. Bombay Tyre International ((1984) 1 SCC 467 : 1984 SCC (Tax) 17 : (1984) 1 SCR 347), and farther in consonance with the true basis of excise as explained in several decisions mentioned before. In the premises, on the facts of this case, it is clear that the goods were not sold in drums generally in the course of the wholesale trade. There was evidence that 90 per cent of the goods were delivered at the time of removal without being put in drums. There was no evidence that there was any necessity of pacing or putting these in drums prior to their sale. It was not necessary that the articles were to be placed in drums for these to be able to generally to enter the stream of wholesale trade or to be marketable. On the other hand, there was evidence that in the wholesale trade, these goods were delivered directly in tankers and deliverable as such. But as a matter of fact, delivery in drums was only to facilitate their transport in small quantities. The manufacture of the goods was complete before these were placed in drums. The completely manufactured product was stored in tanks. From these tanks the goods were removed directly and placed in vehicles for their movement - for 90 per cent of the sales the vehicle of removal was tankers and 10 per cent of the sales the vehicle of removals was drums. In the premises, the value of the drums with regard to the fusel oil/styrene monomer irrespective of whether these were supplied by the assessee or not, are not includible in the assessable value of the Styrene monomer.

15. In the aforesaid view of the matter, I am of the opinion that these appeals have to be allowed and the orders of the Tribunal set side. The Tribunal was in error in holding that as at the time of removal, goods were delivered from the factory in packed condition and the containers were not returnable to by (sic) the buyer, the value of the drums is to be included. It is reiterated that in order to be deliverable, it is not necessary that the goods should be delivered in packed condition and that the containers were not necessary to make the goods marketable.

16. In the aforesaid view of the matter, the appeals are allowed and the orders of the Tribunal are set aside. The value of the aforesaid drums should, therefore, be excluded from the assessable value for the purpose of excise duty. In the facts and the circumstances, however, there will be no orders as to costs.

RANGANATHAN, J. (concurring) -

I have perused the judgment proposed to be delivered by my learned brother Sabyasachi Mukharji, J.I agree with the conclusion arrived at by him but I would like to rest it entirely on the language of Section 4(4) (d)(i) of the Central Excise and Salt Act, 1944, without going into the larger questions raised by counsel and dealt with by learned brother.

18. The assessee company is manufacturing and selling fusel oil. It also manufactures and sells another liquid known as styrene monomer. The fusel oil and monomer are supplied generally in tankers sought by the customers. Sometimes it is supplied in drums provided by the customers who are not charged anything for those drums. In the case of styrene monomer, the finding is that the supply is in tankers to the extent of 90 per cent and only 10 per cent of the sales were made in drums. The issue before us is whether the cost of the drums supplied by the customer for which he is not charged should be included in the assessable value of the goods in question : in other words, whether notional amount representing the cost of the drums should be added to the sale price charged by the assessee to its constituents.

19. Shri Harish Salve, arguing for the appellants, contended that the cost of pacing referred to in section 4(4)(d)(i) is such cost incurred by a manufacturer and not the cost of packing borne by the buyer. In the alternative, he contended that, at least so far as styrene monomer sales are concerned, the cost of drums cannot enter into the picture Citing several previous authorities of this Court he contended on the following lines :

> "It is not all packing that is liable to be included under Section 4(4)(d)(i). It is only that degree of secondary packing which is necessary for the assessable article to be placed in the condition in which it is sold in the wholesale market at the factory gate which can be included in the assessable value of the article. On the facts of this case, there is evidence that 90 per cent of the monomer was delivered at the time of removal without being put in drums. There was no evidence that there was any necessity of packing or putting them in drums prior to their sale. Delivery in drums was only to facilitate their transport in small quantities. The manufacture of the monomer was complete when it was stored in tanks. From these tanks, the goods were, to the extent of 90 per cent, removed directly and placed in tankers. In 10 per cent of the sales, the "vehicle" of removal was drums. In the premises, the value of the drums irrespective of whether these were supplied by the assessee or not, is not includible in the assessable value of the goods.

20. The learned Attorney General, on the other hand, contended that the terms of Section 4(4)(d)(i) are very are very clear and specific. He pointed out though "Manufacture" is the taxable event, the measure of the levy need not be and is not to be restricted to the cost of manufacture. So it is open to Parliament to prescribe any measure by reference to which the charge is to be levied and this is what is done under Section 4. In construing Section 4(4)(d)(i), all that has to be seen is whether the goods are delivered in packing condition. If this question is answered in the affirmative, then, in respect of the goods so sold, the cost of packing, whether incurred by the manufacturer or by the supplier, has to be automatically included in the assessable value if necessary, by addition to the sale price, except only where the packing is of durable nature and returnable to the manufacturer. He reminded us of the oft-quoted truism that, in tax matters, one has to look at what is said and that there is no question of any intendment, implication, equity or liberality in constructing the taxing provision. I agree with Mukharji, J. that this contention cannot be accepted. The principle referred to by the learned Attorney General is unexceptionable but the words of a statute have to be read in the context and setting in which they occur. The proper interpretation to be placed on the words of Section 4(4)(d)(i) has been explained in the judgment of my learned brother and I am in full agreement of with him on this point. There is ample internal indication in the statute to show that the cost of packing referred to in the above clause is the cost of packing incurred by the manufacturer and recovered by him from the purchaser whether as part of the sale price or separately. The object and purpose of the levy, the meaning of the expression 'assessable value' as interpreted in the section before its amendment coupled with the now well established position that the amendment intended to make no change in this position, the use of the word "cost" rather than "value", the nature of the other payments referred to in sub-clause (ii) - all these show beyond doubt that, while generally the normal price for which the goods are sold at the factory gate is to be taken as the assessable value, an addition thereto has to be made where, in addition to price, the manufacturer levies a charge for the packing which is intrinsically and inevitably incidental to placing the manufactured goods on the market. It will indeed be anomalous if the cost of packing charged for from the customer is to be excluded form the assessable value where the packing, though durable, is returnable is returnable to the manufacturer but the cost of an item of durable packing supplied by the customer and taken back by him is liable to be included in the assessable

value. This conclusion, in my opinion, is sufficient to dispose of the present appeals.

21. In this view of the matter, I consider it unnecessary to discuss wider questions as to the circumstances in which the cost of packing (primary or secondary) can at all enter into the determination of the assessable valued under Section 4(4)(d)(i) - canvassed by the counsel for the assessee - or as to the correctness or otherwise of the decision of this Court in Union of India v. Godfrey Philips ((1985) 4 SCC 369 : 1986 SCC (Tax) 11 : 1985 Supp 3 SCR 123) canvassed by the learned Attorney General. My conclusion is that the answer to the question whether the cost of the container should be included in the assessable value or not would depend upon whether the goods in question are supplied in a packed condition or not. If the answer is yes, three kinds of situation may arise. Where the manufacture supplies his own container or drum but does not charge the customer therefor, then the price of the goods will also include the cost of the container. There will be no question of separate addition to the sale price nor can the assessee claim a deduction of the cost of packing from the sale price except where the container is a durable one and is returnable to the manufacturer. If the manufacturer supplies the drums and charges the customers separately therefor, then, under Section 4(4)(d)(i), the cost of the drums to the buyer has to be added to the price except where the packing is of durable nature and is to be returned to the manufacturer. If on the other hand, the manufacturer asks the customer to bring his own container and does not charge anything therefor then the cost (or value) of the packing cannot be "nationally" added to, or subtracted form, the price to which the goods have been sold by the manufacturer.

VERMA, J. (concurring) -

I have the benefit of perusing the judgments prepared separated by my learned Brothers Mukharji, J. and Ranganathan, J. Both of whom have arrived at the same conclusion. My conclusion. My conclusion also is the same. However, I append this short note only to emphasize that in my opinion also the view taken by all of us on the construction of Section 4(4)(d)(i) of the Central Excises and Salt Act, 1944 (hereinafter referred to as "the Act") is alone sufficient, in the present matters, to support the conclusion we have reached and it does not appear necessary to consider the wider propositions canvassed by the two side.

23. I agree that the cost of packing envisaged in Section 4(4)(d)(i) of the Act for determining the "value" in relation to any assessable goods is only the "cost of such packing" incurred by the manufacturer and recovered from the buyer except where the packing is of a durable nature and is returnable by the buyer to the manufacture. The "cost of such packing" referred in Section 4(4)(d)(i) does not include within its ambit the cost of packing not incurred by the manufacturer when the packing is supplied by the buyer and the manufacturer. This construction of the expression "cost of such packing" in Section 4(4)(d)(i) of the Act clearly excludes in these matters the question of its addition to the price of goods recovered by the manufacturer for the buyer for determining the "value" in relation to the excisable goods for computing the duly payable on it.

24. In my opinion also, the above conclusion reached on the language of Section 4(4)(d)(i) of the Act is sufficient to allow these appeals. For this reason, I agree with Ranganathan, J. that the wider propositions canvassed by the two sides including the question of correctness of the view relating to secondary packing taken in Union of India v. Godfrey Phillips India Ltd. ((1985) 4 SCC 369 : 1986 SCC (Tax) 11 : 1985 Supp 3 SCR 123), raised by the learned Attorney General need not be considered and decided in these matters.

25. I agree with my learned Brothers that both these appeals be allowed.

</html