COLLECTOR OF CENTRAL EXCISE

v.

POND'S INDIA LTD.

OCTOBER 19, 1989

[SABYASACHI MUKHARJI AND S. RANGANATHAN, JJ.]

Central Excises and Salt Act 1944: Section 4(4)(d)(i)—Cost of packing—Whether includible in value of goods for purposes of assessment to excise duty.

The Respondent—assessee used to manufacture talcum powder and face powder and were clearing the same on payment of excise duty. The assessee claimed deduction of cost of packing for transportation in respect of small packings of powder ranging from 0.27 paise to 9.76 paise per dozen packings and the same was first approved by the Department but later the Department having noticed that the small packs were first packed in dozen, and thereafter packed in secondary packings for easy transportation to the wholesale dealer, disallowed the claim of deduction.

The Assistant Collector in view of this Court's decision in post-manufacturing expenses cases took the view that the amount claimed by the Respondent was not deductible and accordingly issued a show cause notice to the Respondent raising a demand on the respondent to pay the differential duty on the cost of secondary packings which was stated to be Rs.3,46,151.92 P. for the period from 2.12.85 to 31.5.1986. The Asstt Collector by his order dated 27.2.87 disallowed the Respondent's claim for exclusion of the cost of packing for transportation and thus rejected the claim.

The Respondent preferred an appeal to the Collector of Customs but did not succeed and thus appealed to the Customs, Excise and Gold (Control) Tribunal. The Respondent relied on the decision of this Court in *Union of India* v. *Godfrey Philips India Ltd.*, [1985] 3 Suppl SCR 123 and contended that in view of the decision of this Court, the cost of third stage packing, the outer cartons, intended for transport could be included in the assessable value only if packing was necessary for the sale of goods in the wholesale market. The Tribunal however relying on the decision of this Court in *Union of India & Ors.* v. *Bombay Tyre International Ltd.*, [1984] 1 SCR 347 held that the Cost of outer or bigger cartons in which the smaller cartons containing powder tins are

A packed is not includible in the assessable value as the delivery of the goods can be taken in smaller cartons at the factory gate by a buyer in the course of wholesale trade.

Being aggrieved by that decision the Revenue came up in appeal to this Court under Section 35L(b) of the Act.

B

Allowing the appeal and remanding the case to the Tribunal with directions, this Court,

HELD: *(Per Sabyasachi Mukharji, J.)*

C What is to be included in the value has to be determined in terms of Section 4(4)(d)(i) of the Act. [485F]

The question is not for what purpose a particular kind of packing is done but the test is whether a particular packing is one in order to put the goods in the condition in which they are generally sold in the D wholesale market at the factory gate and 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. [490B-C]

E In the present case, it has been factually found by the Collector that the talcum powder and face powder are packed either in metal containers or in plastic containers, and thereafter they are put in dozen packing also of cardboard packings, which are inner cartons, and contain one dozen. The same are then put in the master carton for purpose of delivery to wholesale dealers. [490C-D]

F

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 G is primarily done or mainly done for protecting the goods, and not for making the goods marketable should not be included. [491H; 492A]

The Tribunal was in error in approaching the problem before it by looking at the question whether the goods packed in the smaller cartons could be sold in a wholesale market in the course of wholesale H trade at the factory gate without the outer cartons in which the smaller

cartons are packed. 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.* **[492B-C]** A

(Per S. Ranganathan, J.)

Section 4(4)(d)(i) of the Act lays down that where goods are delivered by the factory gate in a packed condition, the cost of the packing should be included in the assessable value. The clause makes no distinction between primary and secondary packing or further subsequent packing. [492G] B

There is therefore, much to be said for the view that, 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. [493H; 494A]** C

M/s. Hindustan Polymers **v.** *The Collector of Central Excise,* **[1989] 3 SCR 974 case, referred to.** D

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2043 (NM) of 1989.

From the Judgment and Order dated 28.11.1988 of the Customs. Excise and Gold (Control) Appellate Tribunal, New Delhi in Appeal No. E.A. No. 3302/87A in Order No. 558/88-A. E

K. Parasaran, Attorney General, A.K. Ganguli and P. Parmeshwaran for the Appellant.

F

Soli J. Sorabji, S. Ganesh, R. Narain, P.K. Ram and D.N. Mishra for the Respondent.

The following Judgments of the Court were delivered

SABYASACHI MUKHARJI, J. This is an appeal under section 35L(b) of the Central Excises & Salt Act, 1944 (hereinafter called 'the Act') from the judgment and order of the Customs, Excise & Gold (Control) Appellate Tribunal, New Delhi, (hereinafter called 'the Tribunal') date 28th November, 1988. G

M/s. Ponds India Ltd., (hereinafter referred to as 'the respon- H

A dent') used to manufacture telcum powder and face powder falling under tariff item 14F of the Central Excise Tariff, which are now under sub-heading No. 3304.00 and were clearing the same on payment of duty. The assessee claimed deduction of cost of packing for transportation in respect of small packings of 15, 18, 20, 30, 40 & 100 gms. powder ranging from 0.27 paise to 0.76 paise per dozen packings and B the same was approved provisionally by the office of the Asstt. Collector of Central Excise, Pondicherry. The said approval was by an order dated 10th December, 1985. It is alleged that it was later noticed that the small packs were first packed in dozen and then packed in secondary packings for easy transportation to the wholesale dealer, and it was found that the *secondary packings were a must for delivery to* C *the wholesale dealers,* (emphasis indicated). The Asstt. Collector came to the conclusion that the amount as claimed by the respondent was not deductible as per this Court's decisions in respect of post-manufacturing expenses. In the premises, a show-cause notice was issued to the respondent on October 30, 1986 and a demand was made for the differential duty on the cost of secondary packings which was D stated to be Rs.3,46,151.92 for the period from December 2, 1985 to May 31, 1986. The Asstt. Collector by his order dated February 27, 1987 disallowed the respondent's claim for exclusion of the cost of packing of transportation and thus rejected its claim. He *inter alia,* observed as follows:

> E "Therefore, I consider that the cost of secondary packings viz, card board cartons are rightly includible in the assessable value of items mentioned in PL No. 405/ 85-86 and 406/85-86 dated 10.12.85 under Section 4(4)(d)(i) of the Central Excises and Salt Act, 1944, and the provisional assessments are to be finalised accordingly. The assessees F are also liable for payment of differential duty of Rs.3,46,151.92 as demanded in the show cause notice cited under Section 11A of the Central Excises and Salt Act read with rule 9B of the Central Excise Rules, 1944."

There was an appeal to the Collector of Customs which was G disposed of by an order dated 15th September, 1987. It is necessary to set out the said observations of the Collector, in view of the contentions sought to be raised in these matters. He, *inter alia,* observed as follows:

> H "I have carefully considered the submission of the appellants made in their grounds of appeal and repeated during

personal hearing. I find that the appellant's claim is solely based on the judgment of the Hon'ble Supreme Court in the case of Godfrey Philips and which has been followed by different High Courts also from time to time. First of all, it is necessary to consider whether the goods sold by the appellants viz. talcum powder and face powder required an outer carton packing for purpose of safety in transit, which was the case before the Hon'ble Supreme Court in case of M/s Godfrey Philips. It cannot be disputed that talcum powder and face powder are packed either in metal containers or in plastic packing also of cardboard packings, which are inner cartons and contain one dozen. The same are then put in the master carton for purpose of delivery to wholesale dealers. In the Hon'ble Supreme Court's judgment, it is stated that the corrugated fibre board containers are employed only for purpose of avoiding damage or injury during transit. But that is not as in the case of the appellants. There is no likelihood of any damage or injury to the tins or the plastic containers employed as a primary packing even if the goods are transported without the outer packing. Unlike cigarettes, even dampness is not going to affect the goods because they are hermetically sealed when put in the primary packing. Therefore, the ratio of the judgment of Hon'ble Justice Pathak which is quoted by the appellants is not available in the case of different goods which are not perishable as cigarettes are. The second point is that cigarettes are sold by carton of 200 cigarettes each, even in wholesale trade. That is not the case in the appellant's wholesale trade where the goods are sold by number of dozens and in some cases by numbers of tins or other packings which are primary packing (this was seen from the invoice produced during personal hearing). Therefore, it cannot be said that the outer cartons are employed only for the purpose of avoiding damage or injury to the goods during transit. In view thereof, the Hon'ble Supreme Court's decision in the case of MRF becomes applicable. In case of talcum powder and face powder, it is necessary to put the dozen cartons inside the outer cartons, for giving delivery whether at the factory gate, or at a place of delivery other than the factory gate, because it is not convenient for the wholesale dealers to collect the goods in dozens' packing. Wholesale trade is not generally in quantities less than a dozen. Therefore, even while giving

A delivery by the wholesale dealers, to other dealers, the outer carton is necessary as otherwise it will become difficult for him to give such delivery of 50 dozens or 100 dozens of the goods. It is not disputed that the outer carton packing is the packing in which the goods are cleared from the factory, and are put into the stream of wholesale trade

B ..... the ratio of the Godfrey Philips case is not applicable in the appellant's case. I find that the talcum powder and face powder are cleared in the master carton packing in the factory and it is in that packing the same are put in the stream of wholesale trade. Further, I do not find that the master cartons are employed solely for purpose of protecting the goods during transit. But the same are used for

C giving delivery in wholesale trade by the appellants. Therefore, the order of the Asstt. Collector, including the cost of master cartons in assessable value of the goods is correct and proper and needs no interference. That being the only point for determination in appeal, the appeal is rejected."

D

There was an appeal to the Tribunal. It was contended on behalf of the respondent herein before the Tribunal that the only question for determination was, whether the cost of third stage packing, the outer carton, intended for transport can be included in the assessable value. It was pleaded that all goods were cleared from the factory in the outer

E cartons with the smaller carton containing dozen containers of powder. It was further contended that the facts of this case were same as in the case of cigarettes dealt with by this Court in *Union of India & Ors.* v. *Godfrey Philips India Ltd.*, [1985] 3 Suppl SCR 123. It is contended that in view of the said decision of this Court, cost of cartons was included only *if packing was necessary for the sale of goods*

F *in the wholesale market.* It is submitted that it was not so necessary for sale. The Tribunal noted that the question of inclusion of cost of secondary packing in Section 4(4)(d)(i) of the Act, be it at the first stage, second or third stage of packing, has to be decided in each case depending upon the facts applicable. The Tribunal found that so far as the smaller carton is concerned, the inclusion of the cost of the same in

G the assessable value was not in dispute and the appellants have conceded that the value is includible following the ratio of the judgment of this Court. It also noted that it was nobody's case that the number of tins contained in the smaller carton constitute retail packing rather than wholesale packing. The Tribunal felt that the only question to be decided was, whether the goods packed in the smaller cartons could be

H sold to the wholesale buyer in the course of wholesale trade at the

factory gate without the outer carton in which the number of smaller cartons were packed. It is important to emphasise this question in view of the contentions raised in this appeal. The case of the revenue was that since the goods were sold in lots packed in the bigger outer cartons, the value of the same should be included for the purpose of assessment. According to the Tribunal, there was however, no plea raised by the revenue as to the capability or otherwise of the sale of powder tins in the wholesale market in the smaller cartons described as the inner-outer. The Tribunal noted that in the facts of the instant case, the talcum powder packed in tin containers is in no danger so far as the contamination of the powder is concerned and the packing, it was pleaded before them, was required for the purpose of preventing damage to the tin containers which were sophisticated in nature taking into account the product being marketed, and it recorded that inner cartons contain 12 tins or so which is a wholesale packing and it was not made out that the smaller carton was not sufficient to protect the tins or that the sale could be made in the course of wholesale trade at the factory gate. There was no plea on record that the smaller carton is flimsy and not sufficient for the purpose of marketing the tins and their storage in the course of wholesale trade. the Tribunal referred to the observations of this Court in *Union of India & Ors.* v. *Bombay Tyre International Ltd.*, [1984] 1 SCR 347, and following the same came to the conclusion that the cost of outer or bigger cartons in which the smaller cartons containing powder tins are packed, is not includible in the assessable value as the delivery of the goods can be taken in smaller cartons at the factory gate by a buyer in the course of wholesale trade. The outer cartons were held to be for the purpose of transport of the goods and were not required for the sale of the goods at the factory gate. The revenue seeks to challenge this basis.

What is to be included in the value, has to be determined in terms of section 4(4)(d)(i) of the Act. The question has been examined from all points of views by this Court.

The question of secondary packing was examined by this Court in Bombay Tyres International's case (supra). There, this Court observed that for the purpose of determining the 'value', broadly speaking both old s. 4(a) and the new s. 4(1)(a) speak of the price for sale in the course of wholesale trade of an article for delivery at the time and place of removal, namely, the factory gate. Where the price contemplated under the old s. 4(a) or under new s. 4(1)(a) is not ascertainable, the price is determined under the old s. 4(b) or the new s. 4(1)(b). Now, the price of an article is related to its value (using this

A term in a general sense) and into that value have poured several components, including those which have enriched its value and given to the article its marketability in the trade. Therefore, the expenses incurred on account of the several factors which have contributed to its value upto the date of sale, which apparently would be the date of delivery, are liable to be included. Consequently, where the sale is effected at B the factory gate, expenses incurred by the assessee upto the date of delivery on account of storage charges, outward handling charges, interest on inventories (stocks carried by the manufacturer after clearance), charges for other services after delivery to the buyer, namely, after-sales service and marketing and selling organisation expenses including advertisement expenses marketing and selling organisation expenses and after-sales service promote the marketability of the arti- C cle and enter into its value in the trade. Where the sale in the course of wholesale trade is effected by the assessee through its sales organisation at a place or places outside the factory gate, the expenses incurred by the assessee upto the date of delivery under the aforesaid heads cannot, on the same grounds, be deducted. This Court further D observed that the new s. 4(4)(d)(i) of the Act has made express provision for including the cost of packing in the determination of 'value' for the purpose of excise duty. *The packing, of which the cost is included, is the packing in which the goods are wrapped, contained or wound when the goods are delivered at the time of removal,* (emphasis supplied). Therefore, the cost which is incurred for making the goods E available in the wholesale market and in which the goods are generally available in such market, would be the 'value' which is includible under s. 4(4)(d)(i) of the Act. There is no dispute that the cost of primary packing, that is to say, the packing in which the article is contained and in which it is made marketable for the ordinary consumer, must be regarded as falling within s. 4(4)(d)(i) of the Act. F There is often, as in this case, secondary packing which consists of larger cartons in which a standard number of primary cartons (in the sense mentioned earlier) are packed. The large cartons may be packed into even larger cartons for facilitating the easier transport of the goods by the wholesale dealer. The question with which this Court was concerned in that case was: is all the packing, no matter to what G degree, in which the wholesale dealer takes delivery of the goods to be considered for including the cost thereof in the 'value'? Or does the law require a line to be drawn somewhere? This Court observed that one must remember that while packing is necessary to make the excisable article, marketable, the statutory provision calls for strict construction because the levy is sought to be extended beyond the H manufactured article itself. Therefore, this Court observed 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 duty. To that extent, this Court observed, the cost of secondary packing cannot be deducted from the wholesale cash price of the excisable article at the factory gate. It was further held therein that *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 the such packing shall be deducted from the wholesale cash price. Therefore, it is clear by virtue of that decision that the cost of 'packing which is necessary to make the excisable article martketable, that is to say, in which it is generally sold in the wholesale market at the factory gate', is to be included. Therefore, according to the said decision and by virtue of the terms of the section, the cost of that much of secondary packing, which is necessary only to put the excisable good in condition in which it is generally sold in wholesale market is the degree of packing which cost can be included and not beyond that.

In the application of this principle, about which there is no dispute, there has been some divergence of the emphasis put on by what criterion that cost should be determined. This question came up for consideration in *Union of India* v. *Godfrey Philips India Ltd.,* [1985] Supp. 3 SCR 123. There, Chief Justice Bhagwati observed that whenever a question arises whether the cost of any particular kind of secondary packing is liable to be included in the value of the article, the question to be asked is does the packed condition in which the article is generally sold in the wholesale market at the factory gate include such secondary packing? The learned Chief Justice observed that if it does, it would be liable to be included in the value of the article for the purpose of excise duty. It, therefore, followed that if the packed condition in which the cigarettes manufactured by the respondents were generally sold in that case in the wholesale market at the factory gate included packing in corrugated fibre board containers, the cost of such corrugated fibre board containers was liable to be included in the value of the cigarettes for the purpose of excise duty. The learned Chief Justice further observed that the condition for applicability of the inclusive definition of "value" in s. 4(4)(d)(i) of the act is that the goods are delivered at the time of removal "in a packed condition" and where this condition is satisfied, the "value" of the goods would include "the cost of such packing" and "such packing" must obviously mean the packing in which the goods are when they are

A delivered at the time of removal. Therefore, according to the learned Chief Justice, the question to be asked is—what is the packed condition in which the goods are when delivered at the time of removal? Whatever is the packing of the goods at the time when they are delivered at the time of removal, the cost of such packing would be liable to be included in the 'value' of the goods. The Explanation to B s. 4(4)(d)(i) of the Act provides an exclusive definition of the term "packing" and it includes not only outer packing but also what may be called inner packing. The question that the Chief Justice posed was not for what purpose a particular kind of packing was done. The test was whether a particular kind of packing was done in order to put the goods in the condition in which these were generally sold in the wholesale market at the factory gate and if these were generally sold in C 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. Pathak, J. (as the learned Chief Justice was then) and Sen, J. gave separate judgments in the aforesaid case. Setting out the passage D from the *Bombay Tyres International's* case (supra), which is referred to hereinbefore, Pathak, J. posed the question: is the packing necessary for putting the cigarettes in the condition in which they are generally sold in the wholesale market at the factory gate? And answering that question, Pathak, J. held it is not. It is true that there is a divergence between the views of Bhagwati CJ, Pathak, J and Sen, J. But in E my opinion, there is a unanimity in the test that is to be applied, that is to say, that much of the cost would be included only which is necessary for putting the article in the condition in which it is generally sold in the wholesale market. The principle behind this is—in order for manufacture to be taxable, article must become goods. In order to become goods, these must come to the market or be capable of coming F to the market as definite and identifiable goods. So whatever expenses are necessary for making that possible, that much of the cost would be included in the "value". But what is subsequent to that, that is to say, any cost merely facilitating transport or merely ensuring security in transit are costs which are post-manufacture, i.e. after articles have become goods as a result of manufacture and are capable of becoming G manufactured and thereafter dealt with. This, in my opinion, is the true test and read in that light, I do not find that there is really any divergence of opinion between Bhagwati, CJ, Pathak, J. and Sen, J. of course, there is divergence of emphasis in the approach in which the question has to be looked into. This aspect of the matter was also dealt with by this Court in *M/s Hindustan Polymers* v. *The Collector of Central* H *Excise*, [1989] 3 SCR 974 (Civil Appeals Nos. 4339-41 of 1986)—judgment in

which was delivered on 23rd August, 1989, where one of us (Sabyasachi Mukharji, J) after analysing these several cases of this Court observed that:

> "In order, therefore, to be manufacture, there must be activity which brings 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 it in 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."

Therefore, in all cases, according to that decision, the question must be examined whether packing, and if so, what packing is necessary to make the article marketable as such or could these goods be sold without the containers, drums or packing? This Court in that case took into account the fact that 90% of the goods were delivered in tankers belonging to the assessee and only 10% of the goods were in packed condition at the time of removal. This was taken as an indicia of in what condition of packing the goods are sold. As mentioned hereinbefore, that principle has been clearly laid down in the *Bombay Tyres International's* case (supra) in the sense that only that degree of secondary packing which is necessary for putting the assessable article in the condition in which it is generally sold in the wholesale market should be included in the 'value' of the article. The majority judgment in *Godfrey Philips'* case (supra) also clarified this position. It is true that Pathak, J. and Sen, J. made it clear that secondary packing does for the purpose of "facilitating transport and smooth transit of the goods to be delivered to the buyer in the wholesale trade would not be included in the value". Chief Justice Bhagwati held in the said case that the fibre board containers in which the cigarettes were packed fell within the definition of 'packing' in the Explanation to s. 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 such cost of corrugated fibre board containers would be liable to be included in the value of cigarettes. But Chief Justice emphasised that 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

A are generally sold in the wholesale market at the factory gate. In my opinion, the views expressed by the majority of the Judges in *Godfrey Philips'* case (supra) were in consonance with the view of the this Court in the *Bombay Tyres International's* case (supra). 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 B 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.

C In the present case, it has been factually found as indicated hereinbefore, by the Collector that the telcum powder and face powder are packed either in metal containers or in plastic containers, and thereafter they are put in dozen packing also of cardboard packings, which are inner cartons, and contain one dozen. The same are then put in the master carton for purpose of delivery to wholesale D dealers. But in *Godfrey Philips'* case (supra), the corrugated fibreboard containers were employed for the purpose of avoiding damage or injury during transit. On the other hand, in this case, it was found that there was no damage or injury to the tins or plastic containers employed as a primary packing even if the goods are transported without the outer packing. The second point is that cigarettes are sold in E cartons of 200 cigarettes each, even in wholesale trade. That is not the case in the appellants' wholesale trade herein where the goods are sold by number of dozens and in some cases by numbers of tins or other packings which are primary packing. Therefore, it cannot be said that the outer cartons are employed only for the purpose of avoiding damage or injury to the goods during transit. But it may be indicative F of the fact that the goods are so sold.

It may be mentioned in this connection that our attention was drawn to the unanimous order of three-Judge Bench presided over by the Chief Justice Bhagwati of this Court in Civil Appeals Nos. 642-45 of 1982 in *Geep Industrial Syndicate Ltd.* v. *The Union of India & Ors.* G There, the question that arose for determination was whether the cost of secondary packing in wooden boxes was liable to be added in determination of the value of batteries and torches for the purpose of excise duty. The torches and batteries manufactured by the appellants were first packed in polythene boxes and then these polythene boxes were placed in cardboard cartons. There were certain varieties of H batteries which were packed directly in cardboard cartons. There was

no doubt that packing in polythene bags and cardboard cartons was includible in the determination of the value of batteries and torches for the purpose of levy of excise duty. The question was whether the wooden boxes in which the cardboard cartons were placed at the time of delivery at the factory gate was to be includible in the value. There was some dispute between the parties whether the cardboard cartons were packed in wooden boxes in all cases. It was stated that when they were delivered in the course of the wholesale trade at the factory gate, they were not packed in wooden boxes as a matter of course but they were packed in wooden boxes only in those cases where delivery was taken by wholesale dealers outside the city of Allahabad in that case. This Court found that it was not necessary to determine the disputed question of fact. It was held that even if the cardboard cartons were packed in wooden boxes in all cases, it was clear that the cost of such secondary packing in wooden boxes was not includible in determination of the value of batteries and torches. This Court agreed with the *Godfrey Philips's* case (supra) that corrugated fibreboard containers were used as secondary packing only in order *to ensure cartons or outers against injury or damage during transport and that it was not necessary for putting the cigarettes in the corrugated* fibreboard containers for their sale in the wholesale market at the factory gate and the cost of such secondary packing was therefore not liable to be included in determination of the value of the cigarettes for the purpose of excise duty.

The Tribunal in the instant case observed as under:

> "We observe that in the facts of the present case, the rationale of the judgment of the Hon'ble Supreme Court above is squarely applicable. We hold following with respect to the ratio of the decision above that the cost of the outer or bigger carton in which the small cartons containing the powder tins are packed, is not includable in the assessable value as the delivery of the goods *can be taken in smaller cartons at the factory gate by a buyer in the course of wholesale trade.* The outer carton have to be held to be for the purpose of transport of the goods and are not required for the sale of the goods at the factory gate."
>
> (emphasis supplied).

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

A 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. In the instant case, therefore, could the powder be sold in smaller cartons at the wholesale market? The fact that these were B usually sold in the wholesale market would be a good pointer for this question. Having considered the order of the Tribunal, which I have set out hereinbefore, I am of the opinion that the Tribunal was in error in approaching the problem before it by looking at the question whether the goods packed in the smaller cartons could be sold in a wholesale market in the course of wholesale trade at the factory gate C without the outer cartons in which the smaller cartons are packed. 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.* In my opinion, there has been a misdirection by the Tribunal on this aspect of the matter. If the above be the true test, then the judgment and the order of the Tribunal must be set D aside and the appeal must be allowed and the matter remanded back to the Tribunal to determine afresh this question from the stand point indicated above.

I accordingly allow the appeal, set aside the judgment and order of the Tribunal and remand the matter back to the Tribunal to E decide it in accordance with the aforesaid directions. In the facts and the circumstances of the case, there will be no orders as to costs.

RANGANATHAN, J. I agree. But, as it has been contended by Sri Soli Sorabjee that the Tribunal's conclusion in this case has to be upheld straightaway in view of the decision of this Court in *Godfrey* F *Philips*, [1985] Suppl. 3 S.C.R. 123 and *Geep*, (C.A. Nos. 642-45 of 1982, I should like to add a few words.

S. 4(4)(d)(i) of the Act lays down that where goods are delivered at the factory gate in a packed condition, the cost of the packing should be included in the assessable value. The clause makes no dis- G tinction between primary packing and secondary or further subsequent packing. However, a restriction was read into the wide language of the clause by this Court in the *Bombay Tyre International case*, [1984] 1 S.C.R. 347. Posing the question whether the cost of all packing, no matter to what degree, in which the wholesale dealer takes delivery of the goods, should be included in determining the assessable value or a H line should be drawn somewhere, the Court indicated that while the

cost of primary packing was indisputably includible, the position would be different in regard to secondary packing. The Court observed 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. "If any special secondary packing is provided by the assessee", the Court observed, "at the instance of a wholesale buyer *which is not generally provided as a normal feature of the wholesale trade,* the cost of such packing shall be deducted from the wholesale cash price." The exclusion indicated by these words is very limited and clearly does not extend to the cost of any packing in which the goods are generally sold by the manufacturer in the wholesale market.

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However, the reference in *Bombay Tyres*, (supra) to secondary packing "which is necessary" led to a further refinement in *Godfrey Philips* and *Geep*. In these cases, the conclusion of the Court was that the cost of packing of the goods in "corrugated fibre containers" and "wooden boxes" respectively was not includible in arriving at the assessable value. Had the matter been free from authority, one might have been inclined to agree with the reasoning of Bhagwati, C.J., that the condition of packing in which the goods are usually placed in the wholesale market would be conclusive of the issue and that, the condition in which the goods are generally placed in the wholesale market notwithstanding, a theoretical enquiry by the excise authorities into the purpose of such packing or as to whether such packing was "necessary" or not would be totally uncalled for. Indeed, this was the test applied by one of us (Mukharji, J.) in Hindustan Polymers for holding that the cost of drums for packing fusel oil was not includible in the assessable value because the goods viz. fusel oil was generally sold in the wholesale market in the raw state, without any packing whatever, leaving it to the wholesale consumer to draw it from the manufacturer's tanks into his trucks, containers or drums. It will be appreciated that if this position were not to be accepted and an enquiry were to be made as to whether such general packing is "necessary" or not, such an investigation might operate both ways. For example, on that basis, it could be argued, in the *Hindustan Polymers* case, that though the goods were actually sold wholesale in a free condition, a container is "necessary" from a theoretical stand point to place the fluid goods on the market and that, therefore, the cost of the drums would have to be included in the assessable value. But this was not the view taken by this Court. There is, therefore, much to be said for the view that, in judging the condition of packing whose cost is to be included in the

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A 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.

It is, however, urged for the respondent that such an enquiry has been held necessary by *Godfrey Philips*. But, as pointed out by my B learned brother, even the majority decision in that case does not go to the length suggested on behalf of the appellant and justify an investigation as to the state of packing in which the goods *could be* placed in the market. That would only be an exercise in theoretical speculation. On that basis, for instance, in the present case, it could be said, for the same reasons as have been given by the Tribunal, that the goods could C be collected from the factory even in units of tin containers, leaving it free to the purchasers to make their own arrangements to pack them in cardboard cartons to convey them to their place of business. This would render even the cost of the first outer packing of cardboard containers irrelevant in the determination of the assessable value. That was not the contention even of the respondents and indeed, if carried to D its logical conclusion, would render the cost of all packing, other than primary packing, excludible from the assessable value. It seems to me, therefore, that what is to be really seen is 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 E necessary for placing the goods for sale in the wholesale market at the factory gate. In *Godfrey Philips* 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 on the market. Indeed, in *Godfrey Philips*, this was a factual position that had been accepted by the departmental authori- F ties earlier for a period of a little over six years which they later wanted to go back upon. Can the same be said of the goods and the packing with which we are concerned here is a question to be decided on the facts, as the appellate controller did and not as a proposition of law settled by, or the automatic consequence of the decision in, the *Godfrey Philips* case, as seems to have been done by the Tribunal and G as is being argued for the respondents. I would, therefore, agree that the matter should be remanded to be reconsidered in the light of our observations.

Y. Lal Appeals allowed.