Govt. Of India And Ors. Etc vs Madras Rubber Factory Ltd. Etc on 3 May, 1995

Author: B. P. Jeevan Reddy

Bench: B.P. Jeevan Reddy, Suhas C. Sen, G.T. Nanavati

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           CASE NO.:
Appeal (civil)  3195 of 1979

PETITIONER:
GOVT. OF INDIA AND ORS. ETC.

RESPONDENT:
MADRAS RUBBER FACTORY LTD. ETC.

DATE OF JUDGMENT: 03/05/1995

BENCH:
B.P. JEEVAN REDDY & SUHAS C. SEN & G.T. NANAVATI

JUDGMENT:
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JUDGMENT 1995 (3) SCR 1143 The Judgment of the Court was delivered by B. P. JEEVAN REDDY, J. Leave granted in S.L.P. (C) Nos. 10108 of 1980 and 4041 of 1981.

Having enunciated the principles governing the interpretation of Section 4 of the Central Excise and Salt Act, as it stood before and after the Amendment Act XXII of 1973 in Union of India & Ors. v. Bombay Tyre International Ltd. & Ors., [1984] 1 S.C.R. 347, this Court (the bench comprising P.N. Bhagwati, R.S. Pathak and A.N. Sen, JJ.) took up individual cases for disposal on May 3, 1984. The appeals and petitions were allowed under what are called 'format orders' and the matters remitted to assessing authorities with a direction to quantify and re-determine the permissible deductions in accordance with the law enunciated by them in their opinion in Bombay Tyre International as clarified in Union of India & Ors. v. Bombay Tyre International Pvt. Ltd., [1984] 17 E.L.T. 329. Certain other directions were also given with respect to the manner in which the assessing authorities were to proceed in the matter of determining the value to which it is not necessary to refer at this stage. The Assistant Collectors (Central Excise) accordingly passed orders allowing certain claims for deductions and rejecting certain others. In terms of the format orders, the assessing authorities forwarded the orders of assessment made by them to this court along with the objections filed by the assessees in each cash. The Revenue too filed certain objections. The matters were posted before a Bench of this Court comprising P.N. Bhagwati, C.J. and V. Khalid, J. for finally determining and deciding several issues arising between the parties. By their judgment dated December 20, 1986, the Bench disposed of the appeals, Assistant Collector of Central Excise & Ors. v. Madras Rubber Factory Limited & Ors., (1987) 2 S.L.T. 553. Contending that the said judgment is not in accord with the judgment in Bombay Tyre International, the Revenue filed review petitions,

which came to be allowed by a bench comprising R. S. Pathak, C.J. and L.M. Sharma, J. on May 1, 1989 reported in 1989 (2) S.C.R. 817. By this order, the judgment and order dated December 20, 1986 was recalled and the appeals restored to their original number. It was directed that the appeals be listed again for fresh consideration. It is pursuant to the order dated May 1, 1989 that these appeals have now come up before us for final disposal.

SECTION 4 AS IT STOOD BEFORE THE AMENDMENT ACT XXII OF 1973 AND AS IT STANDS NOW:

> Prior to the Amendment Act XXII of 1973, which came into force with effect from October 1, 1975, Section 4 read thus:
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> "4. Determination of value for the purposes of duty, - Where under this Act, any article is chargeable with duty at a rate dependent on the value of the article, such value be deemed to be
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> (a) the whole sale cash price for which an article of the like kind and quality is sold or is capable of being sold at the time of the removal of the article chargeable with duty from the factory or any other premises, of manufacture or production for delivery at the place of manufacture or production, or if a wholesale market does not exist for such article at such place, at the nearest place where such market exists, or
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> (b) where such price is not ascertainable, the price at which an article of the like kind and quality sold or is capable of being sold by the manufacturer or producer, or his agent, at the time of the removal of the article chargeable with duty from such factory or other premises for delivery at the place of manufacture or production or if such article is not sold or is not capable of being sold at such place, at any other place nearest thereto.

Explanation - In determining the price of any article under this section no abatement or deduction shall be allowed except in respect of trade discount or amount of duty payable at the time of the removal of the article chargeable with duty from the factory or other premises aforesaid."

This section was practically a re-production of Section 30 of the Sea Customs Act, 1878 which was the subject matter of two decisions of the Privy Council in Vacuum Oil Company v. Secretary of State for India in council, (L.R. 59 I.A. 258) and Ford Motor Company of India Limited v. Secretary of State for India in Council, (65 I.A. 32). Section 4 itself was the subject matter of two decisions of this Court in A.K. Roy &Anr. v. Voltas Limited, [1973] 2 S.C.R. 1089 and Atic Industries Limited v. H.H. Dove, Assistant Collector of Central Excise & Ors., [1975] 3 S.C.R. 563. The Government of India felt that the operation of Section 4 (old) presented certain practical difficulties some of which, according to it, were high-lighted in the decision of this Court in Voltas Limited. With a view to overcome the said difficulties in the working of the section, it felt it necessary to suitably revise the provisions contained in Section 4. Accordingly, it introduced a Bill in the Parliament seeking to substitute the existing, Section 4 altogether. The Statement of Objects and Reasons appended to the Bill (which

later became the Amendment Act XXII of 1973) stated under inter alia: "in order the overcome the various difficulties experienced in the working of the section it is proposed to suitably revised the valuation provision contained in section 4 of the Act, providing, as far as practicable, for assessment of excisable goods at the transaction value, except in areas where there may be scope for manipulation (such as sales to or through related persons) and making specific stipulations with respect of situations frequently encountered in the sphere of valuation". Section 4, as substituted by the said Amendment Act, reads thus:

> "4. Valuation of excisable goods for purposes of charging of duty of excise :- (1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to value, such value shall, subject to the other provisions of this section, be deemed to be-(a) the normal price thereof, that is to say, the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal, where the buyer is not a related person and the price is the sole consideration for the sale :
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> Provided that -
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> (i) where, in accordance with the normal practice of the wholesale trade in such goods, such goods are sold by the assessee at different prices to different classes of buyers (not being related persons) each such price shall, subject to the existence of the other circumstances specified in clause (a), be deemed to be the normal price of such goods in relation to each such class of buyers;
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> (ii) where such goods are sold by the assessee in the course of wholesale trade for delivery at the time and place of removal at a price fixed under any law for the time being in force or at a price, being the maximum, fixed under any such law, then, notwithstanding anything contained in clause
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> (iii) of this proviso, the price or the maximum price, as the case may be, so fixed shall in relation to the goods so sold, be deemed to be the normal price thereof;
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> (iii) Where the assessee so arranges that the goods are generally not sold by him in the course of wholesale trade except to or through a related person, the normal price of the goods sold by the assessee to or through such related person shall be deemed to be the price at which they are ordinarily sold by the related person in the course of wholesale trade at the time of removal, to dealers (not being related persons) or where such goods are not sold to such dealer, to dealers (being related persons) who sell such goods in retail;
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> (b) where the normal price of such goods is not ascertainable for the reason, that such goods are not sold or for any other reason, the nearest ascertainable equivalent thereof determined in such manner as may be prescribed.

(2) Where, in relation to any excisable goods the price thereof for delivery at the place of removal is not known and the value thereof is determined with reference to the price for delivery at a place other than the place of removal, the cost of transportation from the place of removal to the place of delivery shall be excluded from such price
(3) The provisions of this section shall not apply in respect of any excisable gods for which a tariff value has been fixed under sub-section (2) of Sec. 3.

(4) For the purpose of this Section,--

(a) "assessee" means the person who is liable to pay the duty of excise under this Act and includes his agent;

(b) "place of removal" means --

(i) a factory or any other place or premises of production or manufacture of the excisable goods; or

(ii) A warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty, from where goods are removed;

(c) "related person" means a person who is so associated with the assessee that they have interest, directly or indirectly, in the business of each other and includes a holding company, a subsidiary company, a relative and a distributor of the assessee, and any sub-distributor of such distributor.

Explanation. - In this clause "holding company, "subsidiary company and "relative" have the same meanings as in the Companies Act 1956 (1 of 1956);

(d) "value", in relation to any excisable goods, --

(i) where the goods are delivered at the time of removal in a packed condition, includes the cost of such packing except the cost of the packing which is of a durable nature and is returnable by the buyer to the assessee.

Explanation. - In this sub-clause, "packing" means the wrapper, container, bobbin, pirn, spool, reel and 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 whatsoever) allowed in accordance with the normal practice of the wholesale trade at the tune of removal in respect of such goods sold or contracted for sale;

[Explanation added by Finance Act, 1982 omitted as not necessary for the purposes of this case,]

(e) "wholesale trade" means sales to dealers, industrial consumers, Government, local authorities and other buyers, who or which purchase their requirements other wise than in retail."

A reading of Section 4 lends itself to the following analysis:

> Where the duty of excise is chargeable on excisable goods with reference to their value, the normal price at which such goods are sold shall be deemed to be the value of such goods subject to other provisions of Section 4.
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> "Normal price" means the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal. If, however, the buyer is a "related persons" and the priced is not the sole consideration for the sale, the price cannot be treated as the "normal price". In the case of sale to or through "related person", normal price shall be determined as provided in proviso (iii) to Section 4(1).
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> It is, however, not necessary that there should be one uniform normal price for all the goods sold by an assessee. There may be cases where the goods are sold by the assessee at different prices to different classes of buyer (not being, of course, related persons). In such a case, the price charged to each class of buyers shall be deemed to be the normal price of such good in relation to each such class of buyers, subject, of course, to the existence of other circumstances specified in clause (a).
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> Where, however, the goods are sold in the course of wholesale trade for delivery at the time and place of removal at a price fixed under any law in force or where the law has specified the maximum price, the price so fixed or the maximum price so specified, as the case may be, shall be deemed to be the normal price of such goods.
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> Where, however, the assessee generally sells his goods in the course of wholesale trade only to or through a related person, the normal price shall be deemed to be the price at which such related persons sells the said goods in the course of wholesale trade at the time of removal to the dealers (not being related persons). [Since this Rule is not relevant for our purposes, we are not stating the Rule fully.] If the normal price of excisable goods is not ascertainable for the reason that the goods are not sold or for any other reason, the value of such excisable goods (i.e., the nearest ascertainable equivalent) shall be determined in the manner prescribed by rules (Valuation Rules).
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> Where the price of any excisable goods at the place of removal is not known and, therefore, the value of such goods is determined with reference to the price charged at a place other than the place of removal, the cost of transportation from the place of removal to the place of delivery shall be excluded from such price.

The provisions of Section 4 do not, however, apply in respect of any excisable goods for which tariff values are fixed under sub-section (2) of Section 3.

"Place of removal" means (i) a factory or any other place or premises where the excisable goods are produced or manufactured; (ii) a warehouse or any other place or premises where any excisable goods have been permitted to be deposited without payment of duty according to rules and from where such goods are removed.

"Value" includes the cost of packing where the goods are delivered at the time of removal in a packed condition, "value" does not, however, include the cost of packing which is of a durable nature and is returnable by the buyer to the assessee. "Packing" shall be understood as defined in the explanation to Section "Value" does not include the amount of duty of excise, sales tax and other taxes, if any, payable on such goods.

"Value" does not also include, subject to such rules as may be made, trade discount allowed in accordance with the normal practice of the wholesale trade at the time of removal of such goods. To qualify as a trade discount, the discount should not be refundable on any account whatsoever,"Wholesale trade" means sales to dealers, industrial consumers, government, local authorities and other buyers who purchase their requirements otherwise than in retail.

Inasmuch as it is agreed before us by all the parties - with which submission we are in agreement - that the law enunciated by this Court in Bombay Tyre International represents the correct interpretation of Section 4, both old and new, we do not think it necessary either to refer to the decisions of the Privy Council or of this Court referred to above. Indeed all the relevant decisions rendered till then have been considered in the said decision. We shall, therefore, proceed to ascertain the principles enunciated in the said decision.

The main issue, referred to as "central issue", in that case was "whether the value of an article for the purposes of the excise levy must be determined by reference exclusively to the manufacturing cost and the manufacturing profit of the manufacturer or should be represented by the entire wholesale charged by the manufacture." This question arose in the context of the fact that "the wholesale price actually charged by the manufacturer consists of not merely his manufacturing cost and his manufacturing profit but includes, in addition, a whole range of expenses and an element of profit (conveniently referred to as "post-manufacturing expenses" and "post-manufacturing profit") arising between the completion of the manufacturing process and the point of sale by the manufacturer."

The contention of Sri N.A. Palkhivala, learned counsel for the assessees was that the duty of excise has three essential characterstics, viz., (1) it is a tax on manufacture or production and not on any thing else; (ii) uniformity of incidence is a basic characterstic of the duty of excise; and

(iii) exclusion of post manufacturing expenses and post-manufacturing profits is necessarily involved in the first principle and helps to achieve the second. On the other hand, the contention of Sri K. Parasaran, learned Solicitor General/Attorney General of India, who appeared for the Union of India, was that "the value of. an excisable article for the purposes of the levy must be taken at the price charged by the manufacturer on a wholesale transaction, the computation being made strictly in terms of the express provisions of the statute.....(and that) there is no warrant for confining the value to the assessee's manufacturing cost plus manufacturing profit". According to him, "though the duty of excise is a levy on the manufacture of goods, it was open to Parliament to adopt any basis for determining the value of an excisable article, that the measure for assessing the levy need not correspond completely to the nature of the levy and (that) no fault can be found with the measure so long as it bears a nexus with the charge."

In the course of their judgment, the learned Judges laid down the following principles:

> (a) In enacting new Section 4, Parliament did not intend to bring into existence a scheme of valuation different from that embodied in the old Section 4. The object and purpose remained the same as also the central principle at the heart of the scheme. The new Section 4 embodies a much more comprehensive and clearly enunciated scheme for the determination of the real value of an excisable article.
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> (b) While the levy in our country has the status of a constitutional concept, the point of collection is located where the statute declares it will be. The measure adopted cannot be identified with the nature of the tax. The measure employed for assessing a tax must not be confused with the nature of the tax. While the levy of a tax is defined by its nature, the measure of the tax may be assessed by its own standard. While the measure of the levy may indicate the nature of the tax, it does not necessarily determine it. Hence, the Legislature, while enacting a measure to serve as a standard for assessing the levy need not contour it along the lines which spell out the character of the levy itself.
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> (c) The contention that the duty of excise can be and must be levied only on manufacturing cost and manufacturing profit is unacceptable. "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 concept and price has a definite connotation. The 'value' of the excisable article 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."
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> (d) The normal price mentioned in new Section 4(l)(a) is the priced at which the goods are ordinarily sold by the assessee in the course of wholesale trade. It is the wholesale price charged by him. This is also the scheme underlying old Section 4.
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> (e) The value of excisable goods determined under new Section 4(l)(a) may very according to certain circumstances, a fact evident from the three clauses in the

proviso appended to clause (a) of sub-section (1).

(f) The phrase "that is to say" following the expression "normal price" in new Section 4(l)(a) make it clear that normal price is the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal where the buyer is not a related person and the price is the sole consideration for the sale.

(g) The deductions specifically mentioned in Section 4 may not be exhaustive. The question "whether any further deductions can be claimed beyond those already mentioned in the statute will depend on the nature of those claims in the case of a particular assessee."

It would be appropriate to set out the purpose of Section 4, both old and new, as summarised in the judgment :

"(i) The price at which the excisable goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal as defined in sub-section (4)(b) of Section 4 is the basis for determination of excisable value provided, of course, the buyer is not a related person within the meaning of sub-section (4)(c) of section 4 and the price is the sole consideration for the sale. This proposition is subject to the terms of three provisos to sub-section (l)(a) of section 4;

(ii) Where the price of excisable goods in the course of wholesale trade for delivery at the time and place of removal cannot be ascertained for the reason that such goods are not sold or for any other reason, the nearest ascertainable equivalent thereof deter-mined in the manner prescribed by the Central Excises (Valuation) Rules, 1975 should be taken as representing the excisable value of the goods;

(iii) Where wholesale price of any excisable goods for delivery at the place of removal is not known and the value thereof is deter-mined with reference to the wholesale price for delivery at a place other than the place of removal, the cost of transportation from the place of removal to the place of delivery should be excluded from such price;

(iv) Of course, these principles cannot apply where the tariff value has been fixed in respect of any excisable goods under sub-section (2) of Section 3."

(While setting out the summary, we have omitted the paras relating to the meaning of the expression 'related person', since it is not necessary for the purpose of the present appeals.) The Court then took up the question whether any post-manufacturing expenses are deductible from the price while determining the value of an excisable article. Since this aspect is crucial to the issues arising herein, it is necessary to examine this portion of the judgment with great care. Pathak, J. observed in the first instance, that while old Section 4 provided by its Explanation that in determining the price of any article under that section, no abatement or deduction would be allowed

except, in respect of trade discount and the amount of duty payable at the time of the removal of the article chargeable with duty from the factory or other premises aforesaid, the new Section 4 specifically provides for certain deductions. The learned Judge mentioned the deductions claimed by the assessees in those matters as :

> (1) Storage charges.
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> (2) Freight or other transport charges, whether specific or equalised.
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> (3) Outward handling charges, whether specific or equalised.
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> (4) Interest on inventories (stocks carried by the manufacturer after clearance.) (5) Charges for other services after delivery to the buyer.
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> (6) Insurance after the goods have left the factory gate.
>
> (7) Packing charges.
>
> (8) Marketing and Selling Organisation expenses, including advertisement and Publicity expenses."

The learned Judge then mentioned the "two broad bases" put forward by the learned counsel on the basis of which the said deductions were claimed, viz., (a) that in determining the value of an excisable article, all expenses must be excluded which do not enter into the formula of manufacturing cost plus manufacturing profit (an echo of the main contention of Sri Palkhivala, which was rejected by the Court) and (b) that the price at the factory gate and the price at the depot outside the factory gate are identical. The learned Judge then made the following observations which are of particular relevance to the issues arising herein :

> "Now, the price of an article is related to its value (using this 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 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 cannot be deducted. It will be noted that advertisement expenses, marketing and selling organisation expenses and after-sales service promote the marketability of the article 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 expanses incurred by

> the assessee upto the date of delivery under the aforesaid heads cannot, on the same grounds, be deducted. But the assessee will be entitled to a deduction on account of the cost of transportation of the excisable article from the factory gate to the place or places where it is sold. The cost of transportation will include the cost of insurance on the freight for transportation of the goods from the factory gate to the place or places of delivery."

(Emphasis supplied) The learned Judge added:

> "Where freight is averaged and the averaged freight is included in the wholesale cash price so that the wholesale cash price at any place or places outside the factory gate is the same as the wholesale cash price at the factory gate, the averaged freight included in such wholesale cash price has to be deducted in order to arrive at the real wholesale cash price at the factory gate and no excise duty can be charged on it."

The learned Judge then took up the issue of packing. After referring to sub-clause (i) of clause (d) of sub-section (4) and the explanation appended to the said sub-clause, the learned Judge observed, "the packing of which the cost is included is the packing of which the goods are wrapped, contained or wound when the goods are delivered at the time of removal. In other words it is the packing in which it is ordinarily sold in the course of wholesale trade to the wholesale buyer." (Emphasis added) The learned Judge referred to the fact that the degree of packing will vary from one class of articles to another and to the concept of primary and secondary packings and observed:

> "We 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 manufactured article itself. It seems to us that the degree of secondary packing which is necessary for putting the excisable article in the condition in which it is generally sold in the wholesale market the factory gate is the degree of packing whose cost can be included in the "value" of the article for the purposes of the excise levy. To that extent, the cost of secondary packing cannot be deducted from the wholesale cash price of the excisable article at the factory gate."

(Emphasis supplied) The learned Judge appended a clarificatory note to the above statement to the effect, "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 packing shall be deducted from the wholesale cash price". Towards the end, the learned Judge made it clear that the position explained by him in regard to the cost of packing under the Act is the same both before and after the Amendment of Section 4.

On November 14/15, 1983, the very same Bench made the following clarifications with respect to certain claims for deductions. It would be appropriate to set out the entire order [except paragraph (6) which contains a direction regarding posting the matters]:

> "7. Trade Discounts. - Discounts allowed in the trade (by whatever name such discount is described) should be allowed to be deducted from the sale price having regard to the nature of the goods, if established under agreements or under terms of sale or by established practice, the allowance and the nature of the discount being known at or prior to the removal of the goods. Such Trade Discounts shall not be disallowed only because they are not payable at the time of each invoice or deducted from the invoice price.

2. Taxes, - Additional Sales Tax, Surcharge on Sale Tax and Turnover tax should be allowed to be deducted from the sale price in order to arrive at the assessable value, and also octroi where payable/paid by the manufacturer. These taxes if proved to have been paid, should be allowed even if they are paid periodically to the relevant taxing authorities in accordance with the relevant provisions of taxing statutes/rules.

3. It is clarified that the cost of insurance mentioned in the judgment as part of the cost of transportation which is to be included as a deduction is the transit transport insurance covering transportation of the goods from the factory gate to the place or places of delivery.

4. Where a company has more than one factory located at different places and the prices at the depots is the same irrespective of the lack of identification of the goods from a particular factory of production, the deductions as set out in this judgment and as explained in this order shall be computed and allowed on the basis of such price.

5. This order shall be by way of clarification of the judgment delivered on 7th October, 1983."

(Emphasis in the original) Thereafter, individual appeals were taken up and disposed of under 'minutes of the orders' ('format orders') signed by counsel for both the sides. Pursuant to format orders, the concerned Assistant Collectors of Excise passed orders after an elaborate enquiry and hearing. In terms of the format orders, the assessment orders along with the objections filed against them came up for hearing before a Bench comprising P.N. Bhagwati, C.J. and V. Khalid, J. as stated hereinbefore. By their judgment and order dated December 20, 1986, the learned Judgment dealt with each of the deductions claimed and recorded their opinion therein. The said judgment, however, has been recalled by another bench on May 1, 1989. The order dated May 1, 1989 directs that the cases be restored to their original number and be listed against for fresh consideration.

We may mention at this juncture that though the objections filed by the State to the orders of assessment made by the Assistant Collectors were confined to two deductions only, viz., DAC/TAC/warranty discount and special secondary packing, the Revenue was allowed to raise objections with respect to other deductions (allowed by the Assistant Collectors) also before the Bench of P.N. Bhagwati, C.J. and V. Khalid, J. We too are of the opinion that this is a matter where we should not feel inhibited by such technicalities. Further because the Review Order states that the appeals be listed for fresh hearing and also because the aforesaid technical objection may not be available in all the matters now before us, we have permitted the learned counsel for the assessees and the Revenue to make their submissions on all the issues arising from the orders of the Assistant

Collectors in the matters before us.

Before we proceed further, it is appropriate to correct a certain phraseological inexactitude: the principles enunciated in Bombay Tyre International do establish that the expression "post manufacturing expenses" is not only legally inaccurate but is also likely to lead to some con-fusion. The said expression is associated with and an extension of the concept of manufacturing cost and manufacturing profit espoused by the learned counsel for the assesses in the said case but rejected by the Court. The expression "post-removal expenses" may be more apt expression but even this expression may not be quite a correct expression. As pointed out specifically in Bombay Tyre International, there are quite a few "charges for other services after delivery to the buyer, viz., after-sales service and marketing and selling organisation expenses including advertisement expenses" which though incurred after the removal of the goods from the place of removal, cannot yet be deducted from the price. Therefore, wherever the expression "post-removal expenses" occurs hereinafter, it must be understood only as a convenient expression rather than a precise expression with a definite connotation.

It is obvious that the value of excisable goods for the purpose of sub- section (l) of Section 4 is ordinarily determined with reference to the normal price at which such goods are sold, i.e., under clause (a) of sub- section (1) of Section 4. Only where the goods are not sold and, therefore, the price of such goods is not ascertainable or in a situation where the normal price of such goods is not ascertainable for some other reason that clause (b) is attracted, whereunder the nearest ascertainable equivalent price is ascertained in accordance with the rules framed in that behalf. Clause (b) is in the nature of a residuary clause which should be resorted to where the normal price cannot be ascertained for the reasons mentioned therein. In other words, where the normal price is available or is ascertainable, resort to clause (b) is not permissible.

PART - II We may now proceed to deal with each of the deductions in issue in these matters keeping in mind the provisions of Section 4 and the principles enunciated by this Court in Bombay Tyre International. The first deduction which happens to be the principle claim made by the Madras Rubber Factory - and urged strongly by Sri F.S. Nariman - is the deduction of the expenses incurred by the assessee upon the maintenance of the depots from where the goods manufactured by it is delivered in the course of wholesale trade. It is explained that the Madras Rubber Factory sells all the tyres and other goods manufactured by it (except those sold to the government) only through its depots. Only the sales to the government are at the place of removal, i.e., at the gate. Except the sales to government, there are no sales at the gate. The goods manufactured are first taken to several depots spread all over the country and sold from such depots in the course of wholesale trade. This is done both in the business interest of the assessee as also to provide convenient delivery points to the buyers. The value under Section 4(1), says the learned counsel, has to be deter-mined with reference to the place or removal, i.e., at the gate. The price charged at the depots includes the charges incurred for transporting the goods from the place of removal to the depots concerned as also the expenses incurred in maintaining the depot. It also includes the insurance charges incurred for insuring the goods while in transit and also while the goods are stored at the depots. Storage charges and several other charges are also incurred at the depots. All these charges are incurred, says Sri Nariman, subsequent to the removal of goods, i.e., removal from the gate. Since they are all

post-removal expenses, learned counsel says, they must necessarily be deducted from the price charged at the depot for ascertaining the price charged at the place of removal in the course of wholesale trade. Sri Nariman has an alternate, and a simpler, solution. He suggests that all the aforesaid exercise can be avoided if the department accepts the price at which the assessee sells its goods to the government at the gate as the normal price of all the goods sold for the purpose of Section 4(l)(a). He submits that it is not the case of Revenue that the sales to the government are not normal or genuine transactions. It is also not suggested, he says, that the price at which the goods are sold to the government is not the normal price in the course of wholesale trade. In such a situation, the most convenient - convenient form the point of view of the Revenue as well as the assessee - course would be to treat the price at which the goods are sold to the government as the normal price within the meaning of Section 4(l)(a). In fact, the learned counsel says, that should be the only method. However, if for some reason, the Revenue is not prepared to adopt this course then, he says, the Revenue has to deduct all the aforesaid expenses and not merely the transportation charges as specifically provided by sub- section (2) of Section 4. Sri Nariman relies upon the holding in Bombay Tyre International that deductions other than those specifically mentioned in Section 4 are permissible in law, depending no doubt upon the character of the deduction claimed. On the other hand, Sri Chandrasekheran, learned Additional Solicitor General, submits that sub-section (2) of Section 4 does specifically envisage and provide for the situation concerned herein. It. provides expressly that where the price of any excisable goods is not known at the place of removal and the value of such goods is deter-mined with reference to the price charged at the time of their delivery from a place other than the place of removal, the transportation charges incurred for transporting the goods from the place of removal to the place of such delivery shall be excluded. The learned Additional Solicitor General says that since the Act has provided only for one specific deduction, it is reasonable to presume that it does not permit any other deduction. Both counsel rely upon certain observations in Bombay Tyre International in support of their respective contentions which we may quote hereinbelow :

> having set out the several deductions which were in issue before them, Pathak, J. proceeded to deal with them. Inasmuch as Sri Nariman says that the said observations have to be understood in the light of and in the context of certain preceding observations, we set out the relevant paragraph along with the preceding paragraph :
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> "At the outset, we must make it clear that the contentions in this regard on behalf of the assessees proceeds on two broad bases. The first is that to determine the value of an excisable article, all expenses must be excluded which do not enter into the formula of manufacturing cost plus manufacturing profit. This follows from the principal plank of the assessees' case that the "value" must be confined to the manufacturing cost, and the manufacturing profit. For, it is said, that if the deductions claimed are allowed, the price would be brought down to the conceptual value. All post manufacturing expenses are claimed from that perspective and within that context. The other basis on which the claim proceeds, is that the price at the factory gate and the price at a depot outside the factory gate are identical.

> We shall now examine, the claim. It is apparent that for the purpose of determining the "value", broadly speaking both the old s.4(a) and the new s.4(l)(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 the new s.4(l)(a) is not ascertainable, the price is determined under the old s.4(b) or the new s.4(l)(b). Now, the price of an article is related to its value (using this 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 the factory gate, expenses incurred by the assessee up to 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 cannot be deducted. It will be noted that advertisement expenses, marketing and selling organisation expenses and after sales service promote the marketability of the article 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. But the assessee will be entitled to a deduction on account of the cost of transportation of the excisable article from the factory gate to the place or places where it is sold. The cost of transportation will include the cost of insurance on the freight for transportation of the goods from the factory gate to the place or places of delivery."

(Emphasis added).

We may also set out the paragraph immediately succeeding the above paras:

> "Where freight is averaged and the averaged freight is included in the wholesale cash price so that the wholesale cash price at any place or places outside the factory gate is the same as the wholesale cash price at the factory gate, the averaged freight included in such wholesale cash price has to be deducted in order to arrive at the real wholesale cash price at the factory gate and no excise duty can be charged on it."

The relevant paragraph states two propositions relevant in this be-half, viz., (i) where the sale is effected at the factory gate, the several expenses mentioned including "charges for other services after delivery to the buyer, viz., after-sales service and marketing and selling organisation expenses cannot be deducted" from the price and (ii) where the sale is effected through the assessee's sales organisation at a place or places outside the factory gate, even there the aforesaid expenses cannot be deducted. The assessee, however, will be entitled in such a case to deduct the cost of transportation (including the cost of insurance on the freight) incurred for transporting the goods

from the gate to the place of delivery.

The contention of Sri Chandrasekharan is that in view of the aforesaid emphatic statement, the expenses claimed by the assessee on account of the maintenance of the depots cannot be allowed. Sri Nariman, however, contends that the said observations must be understood in the light of the two "bases" set out in the proceedings paragraph and particularly the second of them which reads: "(T)he other basis on which the claim proceeds is that the price at the factory gate and the price at a depot outside the factory gate are identical". Learned counsel contends that only where the price at the factory gate and price at the depot outside the factory gate is identical that the statement aforesaid applies and not otherwise. We find it difficult to agree with this explanation or under-standing, as it may be called. We may elaborate. If the selling price at the factory gate and the depot outside the factory gate) are identical, question of deducting the transportation charges from the price charged at the depots does not arise. If the price at the depot is known, there is no occasion for going further and indulging in the exercise provided by sub-section (2) of Section 4. Only whether the price at the gate (at the place of removal) is not known that one is put to the necessity of making the aforesaid deduction from the price charged at the depot; this deduction is made precisely for the purpose of ascertaining the price at the gate. It may also be noted that the first of two bases (referred to in the first paragraph in the above extract) is admittedly inapplicable, having been roundly rejected in Bombay Tyre International. Then how is it that the second basis alone is applicable. The very idea is a contradiction in terms. We, cannot, therefore, understand the aforesaid statement of law in Bombay Tyre International as premised on the basis urged by Sri Nariman. The reasoning of Sri Nariman does appear to be logical and attractive exfacie but it flies directly in the face of the clear holding in Bombay Tyre International and cannot, therefore, be accepted.

It is brought to our notice that this claim was accepted by the Bench comprising Bhagwati, C.J. and Khalid, J. in their judgment dated December 20, 1986 in Assistant Collector of Central Excise & Ors v. Madras Rubber Factory Ltd. & Anr, (1987) 27 E.L.T. 553 - the judgment since reviewed and recalled. Paragraph (17) of the Judgment reads :

> "The next head which was urged for our consideration relates to the cost of distribution incurred at the duty paid sales depots, in the judgment in Union of India and Others v. Duphar Interfran Ltd., (Civil Appeal No. 569 of 1981) reported in 1984 Excise and Customs Reporter at page 1443, we have held that the cost of distribution is not to be included in the assessable value in case the wholesale dealers take delivery of the goods from outside duty paid godown. The wholesale dealers having taken delivery of the goods manufactured by MRF Ltd. and there being a removal of the goods from the factory gate, the cost of distribution at duty paid sales depots cannot be taken into account for the purpose of determining the assessable value of the goods."

Apart from the fact that this judgment was recalled at the instance of Revenue on the ground that "prima facie.....in respect of certain items an inconsistency is present in the impugned judgment when regard is had to the law laid down by this Court in Union of India v. Bombay Tyre

International" (as per the Order in Review Petition), the above holding appears to be mainly influenced by what is said to have been decided in Union of India & Ors v. Duphar Interfran Limited, (1987) 27 E.L.T. 599. The order in Duphar Interfran Limited, however, does not appear to bear it out. The entire order comprises only one short paragraph which reads as follows:

> "The only question that arises in this appeal relates to the five per cent extra charge which is made by the respondent to the wholesale dealers in respect of packing and distribution costs, this charge of five per cent does not represent the cost of unit packing but merely represents the cost of additional packing if it is so desired by the wholesale dealers and moreover in such case the wholesale dealers take delivery of the goods manufactured by the respondent from the duty-paid warehouse situated outside the factory premises. Since these averments made by the respondent in the Writ Petition have not been controverted on behalf of the appellants, we must hold that 5 per cent extra charge cannot be taken into account by the authorities for the purpose of determining the assessable value of the goods for excise duty. The High Court was in the circumstances right in excluding 5 per cent extra charge from the assessable value and the appeal must, therefore, fall and be dismissed with no order as to costs."

(Emphasis added) A reading of the Order makes it clear that the extra five percent charge, which was allowed, represented the cost of additional packing desired by the buyer. The further observation to the effect, "and moreover in such case the wholesale dealers take delivery of the goods manufactured by the respondent from the duty-paid warehouse situated outside the factory premises" does not mean that any portion of five percent extra charge represented the expenses incurred on maintaining and running the depots outside the place of removal. The order appears to have turned more on the ground of absence of denial of assessee's averments by the Revenue. In any event, it is not possible to read the said Order as laying down a proposition contrary to the considered and specific holding in the decision in Bombay Tyre International. It is also not reasonable to read any inconsistency between both the orders, inasmuch as the Bench which made the order in Duphar Interfran Limited is the very same bench which delivered the judgment in Bombay Tyre International. The learned Judges could not have certainty laid down a contrary proposition in Duphar Interfran Limited to the .one specifically laid down in Bombay Tyre International. In this behalf, it is relevant to note that sub- section (2) of Section 4 which envisages a situation where the goods are not sold at the place of removal but are sold at a place other than the place of removal, provides for deduction of the cost of transportation from the place of removal to the place of delivery. It would be reasonable to presume that the only deduction permissible in such a situation is the one expressly provided by the sub-section and no other. So far as insurance charges on the freight transported from the place of removal to the selling points allowed in Bombay Tyre International are concerned, they were allowed evidently because they form an adjunct of the transportation charges and are incidental thereto. We are also of the opinion that the holding in Bombay Tyre International that deductions other than those specifically mentioned in Section 4 can yet be conceived of may not be available to the assessee herein in view of the express enunciation of law in the very decision on the issue now in question. We may add here that where the freight is averaged and the average freight is included in the wholesale cash price so that the wholesale cash

price at any place or places outside the factory gate is the same as the wholesale cash price at the factory gate, the averaged freight included in such wholesale cash price has to be deducted in order to arrive at the real wholesale cash price at the factory gate and no excise duty can be charged on such averaged freight, as clarified in Bombay Tyre International (paragraph quoted supra).

We agree that it is for each assessee to decide where to sell his goods. He can choose to sell his goods at the gate, at the place of removal or he may choose to sell his goods through his selling organisation, as in the case of Madras Rubber Factory. Where the goods are sold in the course of wholesale trade through depots outside the place of removal, the assessee does no doubt incur expenses not only for transporting the goods from the place of removal to the depots but also on maintenance and running of depots but these, expenses, according to Bombay Tyre International are on the same par as after-sale service charges and advertisement charges and hence cannot be deducted. Where, however, the freight charges are equalised in the manner indicated in the preceding paragraph, such charges can be deducted from the normal price; it is obvious that such deduction will be common to the price at the gate and at the depots outside the gate-because of the equalisation, the price will equally be uniform at the gate as well as at the depots. This aspect will become clearer once we deal with the permissibility of the deductions claimed.

With respect to the alternative argument of Sri Nariman, we must say that no direction can be given to the authorities to adopt the price at which the assessee sells its goods to the government as the price in respect of its total sales. Firstly, by virtue of proviso (i) to Section 4(l)(a), the government would be a class by itself and the price charged to it would be relevant only to the goods sold to it. So far as depot sales are concerned, they are to a different class or classes of buyers and in respect of the goods sold to them, the price charged to each of such class of buyers would be the normal price. The price charged to one class of buyer cannot, therefore, be directed to be adopted as the price in respect of all the classes of buyers. Since the position under the old Section 4 and new Section 4 is held to be the same, this holding holds good for both periods.

For the above reasons, we are unable to give effect to the submission of Sri Nariman. We hold that in cases where the goods are sold in the course of wholesale trade at place or places outside the place of removal, i.e., at depots, as in the case of Madras Rubber Factory, the expenses incurred in maintaining and running the said depots cannot be deducted from the price but the cost of transportation along with the cost of insurance on freight can be deducted as held in Bombay Tyre International. This holding does not, of course, prevent the assesses from representing their case to the government if they are so advised in this behalf and it is for the government to consider the same in the light of all relevant circumstances.

PART-III We may now take up the issue relating to packing charges. Sub-clause (i) of clause (d) of sub-section (4) of Section 4 says that "value in relation to any excisable-goods, 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". The Explanation to the sub-clause defines what does "packing" mean in the said sub-clause. The provision in the sub-clause is a plain one and does not admit of any ambiguity. What it says is that where the goods are delivered in a packed condition, at the time of removal, the cost of such packing

shall be included and that only where such packing is of a durable nature and is returnable by the buyer to the assessee, should the cost of such packing be not included in the value of the goods. The concept of primary and secondary packing has, however, been urged by the assessees and recognised to some extent in the decisions of this Court including Bombay Tyre International. While it may not be possible for us to wish away the said distinction, we cannot but remind ourselves that this is a refinement not borne but by the express language of the enactment and must, therefore, be resorted to with care and circumspection. Be that as it may, we shall now turn to the law on the subject as enunciated in Bombay Tyre International.

After referring to the sub-clause and the explanation aforesaid, Pathak, J. stated that the cost of packing contemplated by the said sub-clause as included in the value of the goods packed is the cost of "packing in which it is ordinarily sold in the course of wholesale trade to the wholesale buyer." The learned Judge recognised that the degree of packing will vary from one class of excisable goods to another and observed that while there is no controversy about what may be called the 'primary packing' (examples of which were given by him), serious dispute has arisen with respect to the cost of secondary packing. Observing that secondary packing may be of different grades, the learned Judge posed the questions "is all the packing, no matter to what 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?" and answered them in the following words:

> "We 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 manufactured article itself. It seems to us that the degree of secondary packing which is necessary for putting the excisable article in the condition in which it is generally sold in the wholesale market at the factory gate is the degree of packing whose cost can be included in the "value" of the article for the purpose of the excise levy. To that extent, the cost of secondary packing cannot be deducted from the wholesale cash price of the excisable article at the factory gate."

(Emphasis added) The learned Judge added that if any case special secondary packing is provided by the assessee at the instance of the 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 basic test evolved by the learned Judge is the one which we have under-lined/ emphasised in the preceding paragraph. The test, to repeat, is: that packing in which it is ordinarily sold in the course of wholesale trade to the wholesale buyer, which test was elaborated to mean that 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. It is the cost of such packing that has to be included in the value of the excisable goods unless the packing is of a durable nature and is returnable by the buyer to the assessee. This holding in Bombay Tyre International has been uniformly accepted and applied in the subsequent decisions of this Court though there has been some divergence in emphasis in some of them, to which it is necessary to refer in view of the contentions urged by Sri Harish Salve, learned Counsel for the assessee in one of the appeals.

The decision of this Court in Union of India & Ors. v. Godfrey Philips India Limited Etc. Etc., [1985] Supp. 3 S.C.R. 123 was heard by the very same Bench of three learned Judges that decided Bombay Tyre International. All the three learned Judges uniformly reiterated the principles and the test evolved in Bombay Tyre International but arrived at divergent conclusions (the majority comprising Pathak and Sen, JJ. taking one view and Bhagwati, C.J., the other) on the basis of differing perceptions as to the factual situation in that case. The relevant facts as set out in the opinion of Bhagwati, C.J. are : the respondent-assessee was engaged in the manufacture of cigarettes. The cigarettes were packing initially in paper/cardboard packets of ten and twenty. These packets were packed together in paper/cardboard cartons/outers. These cartons/outers were then placed in corrugated fibreboard containers. It is these corrugated fibreboard containers (CFCs) filled with cartons/outer containing the packets of cigarettes of ten and twenty which were delivered by the assessee to the wholesale dealers at their factory gate. So far as the cost of initial packing is concerned, there was no dispute. Similarly, there was no dispute with respect to the cost of paper/cardboard cartons/outers. The dispute, however, centred round the cost of CFCs. Bhagwati, C.J., referred to the holding in Bombay Tyre International, to the provisions of Section 4(4)(d)(i) and the explanation thereto and opined:

> "It is apparent from the wide language of the Explanation 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 and this would necessarily include a fortiorari corrugated fibre board containers in which the cigarettes are contained.....corrugated fibre board containers in which the cigarettes are contained fall within the definition of 'packing' in the Explanation and if they from part of the packing in which the goods are packed when delivered at the time of removal, it is difficult to resist the conclusion that under Section 4(4)(d)(i) read with the Explanation, the cost of such corrugated fibre board container's would be liable to be included in the value of the cigarettes."

The learned Chief Justice then evolved the test of "necessity or essentiality of such secondary packing" for sale of the excisable goods at the factory gate in the course of wholesale trade and held that the fact that the CFCs are used in order to protect the goods against damage during the course of transportation is no ground to exclude their cost. The learned Chief Justice observed:

> "The question is not for what purpose a particular land of packing is done. The test 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 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 gods for assessment to excise duty."

The learned Chief Justice next considered the question of promissory estoppel and on that ground held in favour of the assessee for a particular specified period. In respect of other periods, he held against the assessee.

In his separate opinion, Pathak, J. reiterated the holding in Bombay Tyre International that inasmuch as the definition of the expression "value" in Section 4(4)(d)(i) has been extended to include the cost of packing and because packing itself is not the subject of the levy of excise duty, the extension must be strictly construed. The learned Judge then posed the question, "is the packing in corrugated fibre board containers necessary for putting the cigarettes in the condition in which they are generally sold in the wholesale market at the factory gate?"* and answered it in the negative. The learned Judge observed:

> "The corrugated fibre board containers are employed only for the purpose of avoiding damage or injury during transit. It is perfectly conceivable that the wholesale dealer who takes delivery may have his depot a very short distance only from the factory gate or may have such transport arrangements available that damage or injury to the cigarettes can be avoided. The corrugated fibre board containers are not necessary for selling the cigarettes in the wholesale market at the factory gate".

It is thus clear that the learned Judge held the cost of CFCs not includible in the wholesale cash price in view of his finding - factual finding - that the CFCs were not necessary for delivering the excisable goods at the gate. The approach of A.N. Sen, J. is similar to the one adopted by Pathak, J., viz., the test of necessity of such packing. The learned Judge observed:

> "Cartons of cigarettes are usually further packed in corrugated fibre containers for facilitating transport in the course of delivery to buyers in the wholesale trade where there is any possibility of the cartons becoming otherwise damaged in course of transit. Naturally, in such cases, delivery of the cigarettes in those cartons is effected to the buyers at the factory gate after further packing these cartons in corrugated fibre board containers. The further packing of cartons in which the packets of cigarettes have been packed in the corrugated fibre board containers is not, indeed, in the course of delivery to the buyer in the wholesale trade at the factory gate but is only for the purpose of facilitating the smooth transport of the cartons containing the packets of cigarettes to the buyer in the whole-sale trade". (Emphasis added) * "Note the uniformity of the test adopted both by the learned Chief Justice and Pathak. J. viz., the lest of necessity, a reiteration of test evolved in Bombay Tyre.
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> On the above factual position, the learned Judge held, the cost of CFCs cannot be included in the value of cigarettes.
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> It is thus clear that the differing conclusions arrived at by the majority and minority was not on account of their adopting a different test or principle but only on account of their differing perceptions of the factual situation. So far as the test applicable is concerned, all the three learned Judges were at one. It is, therefore, idle to contend that this decision has laid down a principle or a test different from the one in Bombay Tyre International.

The next decision is in Geep Industrial Syndicate Ltd. v. Union of India, [1992] 61 E.L.T. 328. (This decision was actually rendered on April 2, 1986 though reported in 1992.) The decision was rendered by a Bench comprising Bhagwati, C.J., V. Khalid and G.L. Oza, JJ. The appellant-assessee was the manufacture of batteries and torches. The torches and batteries manufactured by it were first packed in polythene boxes and then these polythene boxes were placed in cardboard cartons. There was no dispute about the inclusion of the value of polythene boxes and cardboard cartons. The dispute was only with respect to the cost of wooden boxes in which the cardboard cartons were placed at the time of delivery at the factory gate. There was a dispute between the parties whether the cardboard cartons were packed in wooden boxes in all the cases or not. It was suggested by the assessee that they were placed in wooden boxes at the time of delivery at the gate only where the delivery was taken by wholesale dealers outside the city of Allahabad. The Bench, however, was of the opinion that it was unnecessary for them to go into this disputed question of fact on the ground that, "even if the Cardboard Cartons are packed in wooden boxes in all cases, it is clear that the cost of such secondary packing in wooden boxes is not includible in determination of the value of batteries and torches", as per the decision of the majority in Godfrey Philips. The Bench referred to the holding in Godfrey Philips in the following words: "This court took the view by a majority of two against one that corrugated fibre board 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 fibre board 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 Bench held that the same reasoning must apply in the case before them and accordingly allowed the assessee's appeal. It is thus implicitly clear that the factual position in this case perceived to be the same as in Godfrey Philips (majority opinion) to wit, wooden boxes were not necessary for putting the torches and batteries in the condition in which they are generally sold in the wholesale market at the gate and on that basis it was held that the cost of such wooden boxes cannot be included.

We may now refer to the decision in Collector of Central Excise v. M/s. Ponds India Limited, [1989] 4 S.C.C. 759, a decision rendered by a Bench comprising Sabyasachi Mukharji and S. Ranganathan, JJ. The main opinion was delivered by Mukharji, J., while Ranganathan, J. delivered a separate but concurring opinion. The relevant facts are : the respondent-assessee was the manufacturer of talcum powder and face powder. The excise authorities noticed that small packings of 15,18,20,30,40 and 100 gms. powder were first packed in dozen and then packed in secondary packings for easy transportation to the wholesale buyer. They found that "the secondary packings were a must for delivery to the wholesale dealers". The Assistant Collector accordingly held that the cost of such secondary packing was liable to be included. Mukharji, J. referred to the ratio of Bombay Tyre International and observed that though the principle in Bombay Tyre International does not admit of any dispute

"there has been some divergence of emphasis" with respect to the criteria upon which the inclusion or exclusion of the cost of packing should be determined. The learned Judge referred to the decision in Godfrey Philips India Limited and Hindustan Polymers v. Collector of Central Excise, [1989] 3 S.C.R. 974 and observed:

"In my opinion , the views expressed by the majority of the judges in Godfrey Philips case were in consonance with the views of this Court in the Bombay Tyre International case. The question is not for what purpose a particular kind of packing is done but the test is whether a particular packing is done in order to put the goods in the condition in which they are generally sold in the wholesale market at the factory gate and if they are generally sold in the wholesale market at the factory gate in certain packed condition whatever may be the reason for such packing, the cost of such packing would be includible in the value of the goods for assessment to excise duty."

(Emphasis added) The learned Judge then referred to the decision in Geep Industrial Syndicate Limited and held finally:

* "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 value. However 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.....The question is 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."

(Emphasis in original) We are in entire and respectful agreement with the test evolved and the position of law stated by the learned Judge. It is wholly in tune with the test in Bombay Tyre International - indeed a reiteration of it.

In his concurring opinion, Ranganathan, J. referred to the ratio in Bombay Tyre International and pointed out: "the reference in Bombay Tyre International to secondary packing 'which is necessary' led to a further refinement in Godfrey Philips and Geep Industrial Syndicate." After refer- ring to the holding in the said two decisions and in Hindustan Polymers, the learned Judge opined :

"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.....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 necessary for placing the goods for sale in the wholesale market at the factory gate. In Godfrey Philips and Geep, this Court was

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* Emphasis supplied.

> 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 authorities 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 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."

(Emphasis supplied) We respectfully record our concurrence with the above observations. In our respectful opinion, the tests evolved by Mukharji, J. and Ranganathan, J., which are the same in essence, are wholly consistent with the test evolved in Bombay Tyre International. To repeat, "the question is not for what purpose, a particular kind of packing is done but the test is whether a particular packing is done in order to put the goods in the condition in which they are generally sold in the wholesale market at the factory gate and if they are generally sold in the wholesale market at the factory gate in certain packed condition, whatever may be the reason for such packing, the cost of such packing would be includible in the value of the goods for assessment of excise duty, (per Mukharji, J.)" We are also in complete agreement with the understanding of Ranganathan, J. of the majority opinion in Godfrey Philips and of the opinion in Geep Industrial syndicate.

Reference may also be made to the decision in Hindustan Polymers rendered by a Bench comprising Sabyasachi Mukharji, S. Ranganathan and J.S. Verma, JJ. The facts of this case, however, are markedly different. The appellant assessee was engaged in the manufacture and sale of fusel oil. Its case was that the fusel oil manufactured by it was mainly sold in bulk and that only a small portion was being supplied to the customers in drums supplied by such customers. It was contended that the cost of the drums cannot be included in the value of the oil so sold. Mukharji, J. held that inasmuch as the material on record established that the goods were not sold in drums generally in the course of wholesale trade, that in the wholesale trade these goods were delivered directly into tankers and that delivery in drums was only to facilitate their transport in small quantities. In view of the said material, the learned Judge held, the cost of the drums is not includible. Ranganathan, J. agreed with the conclusion arrived at by Mukharji, J. but on a wholly different basis. The learned Judge held that according to Section 4(4)(d)(i), where the manufacturer supplies the drums and charges the customers separately therefore, the cost of such drums has to be included in the value except where the packing is of a durable nature and is to be returned to the manufacturer. But if, on

the other hand, the manufacturer asks the customer to bring his own container and does not charge anything therefore, then the cost of such packing cannot be nationally added to the price charged for the goods. Verma, J. agreed with the reasoning of Ranganathan, J. and held that since the drums were supplied by the buyer and were not supplied by the manufacturer, their cost cannot be included. The decision in this case thus turned upon the particular facts of the case, viz., the drums being supplied by the buyer and not by the assessee. The position emerging from the review of the decisions aforesaid may now be summarised: each and every decision has accepted and acted upon the law laid down in Bombay Tyre International. The test evolved in the said decision has been expressly reiterated in all the judgments, though it is a fact that there has been some divergence in what may be called 'emphasis'. Since the said decision lays down that the cost of "that 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 to be included, the court enquired in Godfrey Philips (majority opinion) whether the CFCs were necessary for such delivery. The court found on the facts of that case that they were not so necessary and accordingly held that the cost of CFCs is not includible. In Geep Industrial Syndicate, the court adopted the approach of the majority in Godfrey Philips on the footing that the wooden boxes were not "necessary" for delivery at the gate. In Ponds, however, both the learned Judges constituting the Bench laid down tests consistent with the one in Bombay Tyre International. Indeed, Ranganathan, J. understood the majority decision in Godfrey Philips and the decision in Geep Industrial Syndicate in the same manner as we have done - a fact emphasised by us hereinabove while discussing the ratio of Ponds. As pointed out by us hereinabove, it would not be reasonable to infer any conflict or deduce any inconsistency between the ratio of Bombay Tyre International and the ratio of Godfrey Philips for the reason that not only both Benches were of coordinate jurisdiction (Bombay Tyre International was thus binding upon the latter Bench) but also because both the decisions were rendered by the very same Bench. The adage in such matters is: look for harmony, not divergence. It is equally relevant to point out that Bombay Tyre International was equally binding upon the Bench (of three learned Judges) which decided Geep Industrial Syndicate and that it would be equally un-reasonable to suggest that the Bench (deciding Geep Industrial Syndicate) would lay down an inconsistent proposition from the one in Bombay Tyre International without even referring to the decision or its ratio. The conclusion in these two later cases turned upon the finding as to factual situation obtaining therein whereas the two opinions in Ponds not only follow the test in Bombay Tyre International but reiterate it in clear terms. The test laid down in Bombay Tyre International has never been departed from in any of the later decisions and must be treated as good and sound. We may as well stress the obvious: in a matter like this, certainty in law is essential. It may be that in applying the principle having regard to the facts of a given case, there may be some divergence in conclusion but so far as the principle - the relevant test to be applied - is concerned, there should be no uncertainty. The test is: whether packing, the cost whereof is sought to be included is the packing in which it is ordinarily sold in the course of a wholesale trade to the wholesale buyer. In other words, whether such packing is necessary for putting the excisable article in the condition in which it is generally sold in the wholesale market at the factory gate. If it is, then its cost is liable to be included in the value of the goods; and if it is not, the cost of such packing has to be excluded. Further, even if the packing is "necessary" in the above sense, its value will not be included if the packing is of a durable nature and is returnable by the buyer to the assessee. We must also emphasis that whether in a given case the packing is of such a nature as is contemplated by the aforesaid test, or not, is always a question of

fact to be decided having regard to the facts and circumstances of a given case.

Keeping the above principle in mind, we shall now turn to the facts in Civil Appeal No. 5375/95 of 1995 arising out of S.L.P. (C) 4041 of 1981 (Union of India v. Hindustan Lever) because it is in this case that the issue of cost of packing has been argued by Sri Harish Salve. The assessee claims deduction of the cost of 'outer packing'. The Assistant Collector who examined the claim pursuant to the 'format order' rejected the claim. He has stated in his order that in the first instance, the assessee claimed that the said packages are of a durable nature and have a ready resale value all over the country and that to avoid transportation cost, the trade (buyers), instead of sending the packages back to the company, resell the same. The assessee conceded that though it is possible to pack the produce for sale in the ordinary packings they are also packed in special outer packings for the sake of uniformity. At a later stage of hearing, the assessee adopted a different stand. It contended that the cost of only the primary packing, viz., the packing which is in physical contact with the soap and is wrapped around the soap, is includible and that the cost of cartons and cardboard boxes in which the soaps are then packed in outer packing has to be excluded. The Assistant Collector rejected both the contentions on the following reasoning : (a) in the instant case, the company has not adduced any evidence to show that there are any agreements or contracts between it and its buyers for return of such packings; (b) as a matter of fact, the goods in question are invariably delivered to their customers packed in cartons/cardboard boxes; (c) the unit of sale for the said goods for which the company files its price lists from time to tune is a wholesale package comprising of a dozen or gross pieces; (d) the packing of such goods in cartons/cardboard boxes is indispensable, as in the absence of the same, they cannot be conveniently delivered to the customers; (e) not a single instance could be shown where the assessee ever delivered the goods without the above packing and (f) the assessee conceded that its buyers are not returning such packages to it on account of the cost of transportation. We are of the opinion that on the above findings recorded by the Assistant Collector, the only conclusion that can follow is that the cost of the cartons/cardboard boxes cannot be excluded from the value of the goods. If, however, the assessee wishes to challenge the correctness of the findings of fact recorded by the Assistant Collector, the proper course is to file an appeal as provided by law.

PART - IV We may now take up for consideration the several claims of deduction relating to trade discounts. But what does the expression "discount" mean? According to the Concise Oxford Dictionary, it means "a deduction from the bill or amount due given especially in consideration of prompt or advance payment or to a special class of buyers". Now, according to the latter part of sub-clause (ii) of Section 4(4) (d) such trade discounts, as are not refundable under any circumstances, and are allowed in accordance with the normal practice of the wholesale trade at the time of removal of such goods, are to be excluded from the value of the goods. According to the "List of dates and events" filed by Sri Nariman, the following claims of deductions have been allowed by the Assistant Collector, Kottayam (by his Orders dated October 16, 1984, January 17, 1985, April 29, 1985 and July 11, 1985):

"1. Cost of Transportation

2. Additional Sales Tax,

3. Octroi,

4. TAC/Warranty Discount,

5. 1% Turnover Discount,

6. Discount to Government and other Deptts.

7. Year Ending Discount,

8. Prompt Payment Discount,

9. Special Secondary Packing and Tread Rubber."

Out of the above items, Items (1) to (3) and (6) are not disputed by the Revenue before us. Only Items (4), (5), (7), (8) and (9) are in dispute.

The deductions disallowed by the Assistant Collector, Kottayam are the following:

"1. Overriding Commission to H.P.C. (Hindustan Petroleum Corporation.)

2. 17% interest Discount to R.C.S. (Recurring Credit Scheme) Dealers.

3. Tax oh processed Tyre cord.

4. Product Discount.

5. Cost of Distribution.

6. Interest on Finished Goods.

7. Interest on receivables."

Out of these seven items, Sri Nariman did not press Items (1), (2) and (4). Item (3) has already been given up by the assessee in Kirloskar Brothers Limited v. Union of India, [1992] 59 E.L.T. 3. The only items, therefore, now in issue are Items (5), (6) and (7). Incidentally, it may be mentioned, these Items [(5), (6) and (7)] were allowed by this court's order dated December 20, 1986 (Assistant Collector of Central Excise v. Madras Rubber Factory).

We shall now take up each of the claims individually. TAC/Warranty discount:

The claim of the Assessee-Madras Rubber Factory is to the following effect:

the expression TAC" means 'Tyre Adjustment Committee". The TAC discount originated in the year 1943. It was a voluntary body set up by the four tyre manufacturing companies in the country then in existence, viz., Goodyear, Dunlop, Firestone and India Super. The committee was composed of District Managers and Service Engineers of the Tyre Companies. At present, each manufacturer has constituted its own TAC, be-cause, it is stated, the M.R.T.P. Commission objected to the common committee. The duty of the committee is to examine the tyres brought back by the purchaser for defects discovered during the course of user. The committee deals with only latent defects, i.e., defects which were not apparent or evident at the time of sale but which were discovered during the course of user of the tyre. Where such tyre is brought to the company by the customer, the company refers the matter to the committee to determine whether there was any manufacturing defect in the tyre and if so, the amount of remission the customer is entitled to. Instead of paying the said amount in cash to the customer, it is explained, the company supplied a new tyre (at the price obtaining on the date of sale of such new tyre) but deducts the said amount refundable to the customer from out of the price of the new tyre. The assessee's case is that this is a case of discount and that it is a discount which is given in accordance with the normal practice of the trade. It is submitted that even at the time of the sale of the first tyre - for that matter, every tyre - it is known and understood that if any manufacturing defect is discovered during the course of user, the assessee shall make it good in the above manner. It is claimed that it is deductible in terms of Section 4(4)(d)(ii) of the Act. The Assistant Collector allowed this claim holding that it is a discount granted according to established practice and that the nature of the allowance is also known at the time of removal of goods. The new tyre which is sold by way of replacement to the customer in lieu of the defective tyre is only a case of removal for replacement of a defective one with a fresh one, at a reduced rate. Hence, the deduction claimed is allowable subject to the condition that the total admissible TAC/warranty discount claimed by all the units of Madras Rubber Factory together should not exceed the amount specified in Annexure-I. (Certain further directions were also given with respect to the manner in which the deduction has to be worked out which it is not necessary to mention here).

The learned Additional Solicitor General submits that this deduction cannot be allowed according to law. He refers to Rule 96 of the Central Excise Rules which provides that where a manufacturer desires that certain tyres which are damaged during the curse of manufacture should be assessed at a lesser value than the standard selling price, he should declare in writing on the application for clearance of such goods that such damage has been sustained and that each of such tyre shall be clearly and legibly embossed or indelibly stamped with the words "second", "clearance" or "defective". He submits that the claim in question does not fall under Rule 96 and that there is no other rule or provision under which it can be granted. According to him, it is not a case of trade discount within the meaning of Section 4(4)(d)(ii). Learned counsel pointed out that the sale of first tyre has taken place at full value and so has sale of second tyre and the mere fact that the amount refundable

to the buyer on account of the manufacturing defect in the first tyre is set off against the price of the new tyre does not mean that the new tyre is being sold at a discount - nor can it be suggested that the discount is being given out of the price of the old tyre. The learned Additional Solicitor General brought to our notice that in the judgment dated December 20, 1986 this court has disallowed the said claim and that the assessee has not chosen to question the same by way of a review petition. On the other hand, Sri Nariman, learned counsel for the assessee submits that this is a discount clearly within the meaning and contemplation of Section 4(4)(d)(ii). The evidence adduced by the assessee, which has been accepted by the Assistant Collector, shows that this discount is being made in accordance with an established practice arid understanding, prevalent over more than fifty years and there can be no doubt about its genuineness. Learned counsel submits that certain defects in the manufacture are not apparent at the time of their removal or sale but come to light only later in the course of user. In such cases, the customer is entitled to proportionate remission attributable to the manufacturing defect. In recognition of the said claim and also in the business interest of the assessee, says the learned counsel, the assessee honours the said claim provided it is certified by the TAC. Instead of refunding the money in cash, the assessee replaces the old tyre with a new tyre. In other words, the assessee takes back the defective tyre sold earlier and supplies a new tyre and from the price of the new tyre, the amount which has been found remittable to the customer, is deducted. The assessee collects only the balance price. Sri Nariman brought to our notice that the claims on this account did never exceed 2-3 percent in any year over the last several years.

In the clarificatory Order in Bombay Tyre International (dated 14/15th November, 1983) this court has held: "discounts allowed in the Trade (by whatever name such discount is described) should be allowed to be deducted from the sale price having regard to the nature of the goods, if established under agreements or under terms of sale or by established practice, the allowance and the nature of the discount being known at or prior to the removal of the goods. Such Trade Discount shall not be disallowed only because they are not payable at the time of each invoice or deducted from the invoice price".

The question is whether the claim, put forward as TAC/Warranty discount is a trade discount within the meaning of Section 4(4)(d)(ii)? We think not. It is only a claim for refund by the buyer for the manufacturing defect in the tyre sold by the assessee, which is being honoured by the assessee in a manner acceptable to both the parties. In a given case, a buyer may well insist that he must be reimbursed in cash and not in kind. In such a case, the assessee cannot certainly refuse such a claim; it would have to pay cash. The nature and character of the amount so being refunded is certainly not a trade discount contemplated by Section 4(4)(d)(ii), whether the claim is honoured by paying cash or by deducting it from the price of the new tyre. As rightly pointed out by Bhagwati, C.J. in the Order dated December 20, 1986, "what is really relevant is the nature of the transaction". The learned Chief Justice pointed out

further that "the warranty is not a discount on the tyre already sold, but relate to the goods which are being subsequently sold to the same customers. It cannot be strictly called as discount on the tyre being sold. It is in the nature of a benefit given to the customers by way of compensation for the loss suffered by them in the previous sale." He characterised it as "a compensation in the nature of warranty allowance on a defective tyre". We express our respectful concurrence with the said observations.

This claim of the assessee is accordingly rejected. One Percent Turn Over Discount:

The assessee's case in this behalf is this: this is a discount granted to all dealers operating under Recurring Credit Scheme (RCS) with effect from April 1, 1980. The discount is being given on a half-yearly basis depending upon the volume of purchases made by each such dealer. Out of the total Madras Rubber Factory dealers, about eighty percent are said to be RCS dealers and out of the total sales effected by the Madras Rubber Factory, over sixty percent sales are made by these RCS dealers (as per the figures relating to the year 1981-82). The discount is being granted by issuing credit notes to dealers and though the said discount is not shown on the face of each invoice, it is known to all the Madras Rubber Factory dealers. The discount cannot indeed be shown in the invoice for the simple reason that the discount is known only at the end of the half year.

The Assistant Collector allowed the said claim on the finding that this discount is given with a view to encourage the turn over of the sales and that having regard to the objects underlying the Recurring Credit Scheme, this deduction is liable to be allowed. He found that in the ultimate analysis the dealer pays one percent less then the catalogue price and that the said claim is also consistent with the clarificatory order of this court in Bombay Tyre International.

The learned Additional Solicitor General, however, contended that this discount, not being known or paid at the time of removal/sale, cannot be allowed.

In the light of the findings recorded by the Assistant Collector, it must be held that this is a discount which is known and understood at the time of removal of the goods though it is quantified later. The Assistant Collector has also recorded a finding, "I also find that such system of grant of discount is not uncommon in the trade". Keeping in view the clarificatory Order of this Court in Bombay Tyre International, this claim must be held to have been rightly allowed by the Assistant Collector.

Year Ending Discount and Prompt Payment Discount:

What is called 'Year-ending discount' is really a bonus given by Madras Rubber Factory to its dealers @ Rupees fifty per tyre in respect of a particular type of tyres. This discount is payable only where the payments are actually received within forty five days from the date of the invoice. Under this scheme, it appears that a

declaration is to be received dealer- wise and thereafter provision is to be made at the head office of MRF for the bonus. The Assistant Collector has found that this discount was allowed by the assessee not out of any extra-commercial considerations but that they were meant only to boost the sales particularly in the year 1981-82 in respect of Leader Tyre in order to achieve the target of sales for that year. He has recorded a finding that "such a system of grant of discount is prevalent in normal trade practice and the only difference may be that MRF limited have granted the discount only at the end of the year and not at the time of actual sales". The learned Additional Solicitor General disputed the correctness of the basis on which the Assistant Collector has allowed this deduction. He commended for our acceptance the reasoning in Para 13(ii) of the judgment dated December 20, 1986 (Assistant Collector of Central Excise v. Madras Rubber Factory.) The reasoning in the said order runs thus:

"The allowance of the discount is not known at or prior to the removal of the goods. The calculations are made at the end of the year and the Bonus at the said rate is granted only to a particular class of Dealers. This is computed after taking stock of the ac-counts between MRF and its dealers. It is not in the nature of a discount but is in the nature of a Bonus or an incentive much after the invoice is raised and the removal of the goods is complete. In the circumstances, we are of the opinion that MRF is not entitled to deduction under this head."

We are, however, of the respectful opinion that the said reasoning cannot be accepted in view of the clear finding recorded by the Assistant Collector that this system of discount is prevalent in the industry and is known and understood at the time of removal of particular goods, though the amount is quantified later. In view of the said finding and in the light of the clarificatory Order in Bombay Tyre International, we hold that this claim has been rightly allowed by the Assistant Collector.

So far as the prompt payment discount is concerned, it is payable under a scheme called 'prompt payment discount scheme' which is applicable only to up-country non-RCS dealers (except, of course, the government and DGS&D accounts). The discount is @ 0.75% on the total value of the invoice including sales tax, surcharge etc. provided the bill is cleared/paid within 26 days from the date of invoice. The case of the Union of India is that this discount is limited only to certain varieties of products as explained in the scheme document and is valid only for a limited period. The Assistant Collector, however, dealt with this discount along with the year ending discount and allowed it on the same reasoning as is applicable to the year ending discount.

In view of the findings recorded by the Assistant Collector and the clarificatory order in Bombay Tyre International this claim too must be held to have been rightly allowed by the Assistant Collector.

Special Secondary Packing and Tread Rubber:

So far as this claim is concerned, we are of the opinion that the decision in Para-19 of the judgment dated December 20, 1986 (Assistant Collector of Central Excise v. Madras Rubber Factory) is the correct one and needs no departure. In the said judgment, this court referred to the judgment of Bharucha, J. in Miscellaneous Petition No. 1534 of 1979 decided on January 7, 1986 wherein the learned Judge had set out the factual situation and the reasons for rejecting the claim at some length. In the absence of any other material placed before us to take a different view, it would be appropriate to set out the relevant portion of Para-19 including the conclusion, which we respectfully adopt:

"It has been brought to our notice that in a Judgment delivered by the Bombay High Court in Misc. Petition No. 1534 of 1979 (Judgment dated 7th January 1986) Bharucha, J. of Bombay High Court in Bombay Tyres International Ltd. v. Union of India & Ors., has considered the Judgment in Godfrey Phillips India Ltd. (supra) with specific reference to the question of secondary packaging for tread rubber. It has been brought to our notice that such packaging consists of cardboard cartons or wooden cases. In that case the tread rubber as packed was produced before Bharucha, J. He has described that the tread rubber is a strip of rubber approximately 6" wide and about 1" thick which is tightly wound into a roll. Each roll weighs between 15 Kgs and 40 Kgs. The roll is not held together by any means. The roll is inserted into a loose and open polythene bag. That bag also cannot hold the roll together. The bag is placed in a cardboard carton or a wooden case. The cardboard carton is held together by rubber bands. The wooden case is nailed together. Though, it was contended that the cardboard cartons and wooden cases were in the nature of secondary packaging whose cost was not includible in the value of tread rubber, Bharucha, J. held that a roll of tread rubber cannot be sold without the cardboard carton or the wooden case. It is further stated that the secondary packing in which tread rubber is sold is in the course of wholesale trade. The secondary packing is not employed merely for the purpose of facilitating transport or smooth transit and is necessary for selling the tread rubber in the wholesale trade. Bharucha, J. refused to remand the matter to the authorities as the tread rubber as packed had been produced before him and he was of the firm view that the cardboard cartons and the wooden cases are not such secondary packing materials can be excluded in computing the assessable value of the Petitioner's tread rubber. In the circumstances that this very issue has been decided on a visual personal inspection of Bharucha, J. in the case of Bombay Tyre International Ltd. (supra), pronounced after the decision in Godfrey Phillips India Ltd., (supra) we are of the view that the cost of cardboard cartons and wooden cases or any other special secondary packing charges incurred by the MRG on tread rubber should not be excluded from the assessable value. Tread rubber is a product which if even slightly damaged becomes unfit or un- usable. The vital element "cushion compound" which is applied to the bottom of the tread rubber and which helps the tread rubber to stick to the buffed surface of the old tyre which is to be retreaded is

very delicate. A polythene sheet is put over the layer of the compound before the same is rolled and put into another polythene bag to avoid sticking to the outer side of the tread rubber and getting contaminated by dust. It is stated that such production cannot be marketed without the polythene bags and/or cardboard boxes. These are the findings of the Assistant Collector, Goa and in the light of the cumulative decisions of the Assistant Collector, Goa and of the Bombay High Court, we are of the view that the secondary special packing charges for tread rubber cannot be deducted from the assessable value of tread rubber."

We may now take up the deduction which have been disallowed by the Assistant Collectors and are now in issue before us. They are: cost of distribution, interest on finished goods and interest on receivables. So far as cost of distribution is concerned, we have already dealt with it herein-before. We may now take up "interest on finished goods".

Interest On Finished Goods:

The claim pertains to the interest on value of finished goods from the date the stocks are cleared from the gate till the date of sale through the depots. The contention of the assessee is that inasmuch as this is an expense incurred subsequent to the removal of the goods from the gate they are post-removal expenses and, therefore, qualify for deduction. The learned counsel for the assessee commended for our acceptance the reasoning in Para- 14 of the judgment dated December 20, 1986 on this count. We are, however, unable to agree with the said submission. We have already held, following Bombay Tyre International, that expenditure incurred on sales organisation cannot be deducted. The claim herein is in reality "expenses incurred by the assessee upto the date of delivery on account of storage charges" held not excludible in Bombay Tyre International, even where the "wholesale trade is effected by the assessee through its sales organisation at a place or places outside the factory gate".

Interest on receivables:

The case of the assessee (Madras Rubber Factory) is that where the goods are sold to up-country wholesale buyers and payments are received quite sometime later, it is indeed a case of sale on credit and, therefore, the interest charged from the date of delivery of goods till the date of realisation of the price thereof should be deducted from the value of the goods. The interest charged, it is submitted, is only in lieu of the time taken in making the payment by the up-country wholesale buyer. Since this is the amount received subsequent to the sale from the depots and does not fall within the ambit of any of the expenses held includible in Bombay Tyre International, it is clearly excludible. The claim for this deduction is, therefore, allowed.

PART - V The last issue urged before us relates to the method of computation of assessable value in a cum-duty price. The issue is whether the excise duty should be first deducted or the permissible deductions should be first deducted from the selling price? After some discussion, the learned counsel for the assessees agreed that the decision in Para-22 of the judgment dated December 20, 1986 (Assistant Collector of Central Excise v. Madras Rubber Factory) represents the correct view. We also find ourselves in respectful agreement with the said holding. Accordingly, we direct that the method of computation of assessable value shall be the one indicated in Para-22 of the said judgment which we re-produce hereinbelow for the reason that the judgment has since been reviewed and recalled. The paragraph runs as follows:

"22. The last important issue relates to the method of computation of assessable value in a cum-duty price at a factory gate sale. The issue is whether Excise Duty should be first deducted or the permissible deduction should be first deducted from the selling price for the re-assessments before the Assistant Collectors. The assessment of excise duty both in relation to Section 4 and in relation to the Valuation Rules is now subject to the definition contained in Section 4(4) (d) of the Excise Act. The value as defined thereunder is to be arrived at after the cost of packaging of a durable nature or a returnable nature as also amounts of duty of excise, sales tax and other taxes and trade discount allowed in, accordance with the normal practice of wholesale trade is deter-mined. It is thus implicit that no excise duty is payable on an element of excise duty in the price. The value as contemplated under Section 4 cannot include a component of excise duty. In the circumstances, where the computation of an assessable value has to be made from the factory gate sale price which is a cum-duty price, the first question which will have to be addressed is what are the exclusions and permissible deductions from such a sale price. The petitioners have contended that their cum-duty price was arrived at after calculating and adding excise duty payable, i.e., before actual duty was paid. They contend that their price lists for several articles is approved much in advance of the removal from the factory. They contend that when the assessable value is to be arrived at, the same amount of excise duty which was pre-determined and added to the factory price is naturally to be deducted first and only thereafter the permissible deductions should be deducted to arrive at the value. For the purposes of argument, MRF submitted the following example for consideration:

They suggest that their selling price should be considered (cum-duty selling price) as Rs. 3200. They further submitted that the permissible deductions whether on account of trade discount or on account of cost of secondary packaging or sales tax or other taxes packaging or sales tax or other taxes should hypothetically be considered at Rs. 200. The rate of excise duty chargeable is 60% ad valorem for automatic tyres. Assuming for the same of argument that the value of the product is actually Rs. 2075. In accordance with the provisions of Section 4(4)(d) permissible deductions are made. The assessable value would be Rs. 1875 being the difference of Rs. 2075 and Rs. 200. The excise duty at the rate of 60% would thereafter be computed on the sum

of Rs. 1875 and would aggregate Rs. 1125. The selling price which is a cum-duty price would be the sum total of the assessable value, the permissible deductions and the excise duty. Putting this as a mathematical formula the selling price (cum-duty price) is equal to assessable value plus permissible deductions plus excise duty. Cum-duty Paid Selling Price = Assessable value + Excise Duty + Permissible deductions. Again Excise duty is a computed as a ratio of the assessable value where duty is ad valorem. For the purposes of ascertaining of the assessable value, if three of the components namely the cum-duty selling price, the quantum of permissible deductions and the rate of excise duty are known, the proper and appropriate method of determining the assessable value would be the following formula:-

Assessable value = cum-duty selling price

- permissible deductions

- (1 + Rate of excise duty) Thus in the instant case working backward, if the cum-duty selling price is known to be Rs. 3200 and the permissible deductions are known to be Rs. 200 and the rate of excise duty is known to. be 60%, the assessable value is computed as under:

Selling price - permissible deductions = 3200 - Rs. 200 = Rs. 3000.

Assessable value is equal to difference in selling price and permissible deductions divided by 1 plus 60/1000 which is equal to 3000/1.6 which is equal to Rs. 1875.

The excise duty at 60% ad valorem rate would be Rs. 1125 on the assessable value of Rs. 1875.

The mathematical formula enumerated above balances. For example, if the cum-duty paid selling price is equal to Rs. 3200, the assessable value is Rs. 1875 excise duty is Rs. 1125 and permissible deductions is Rs. 200, the aggregate of the asses-sable value, the permissible deduction and the excise duty is equal to the selling price (cum-duty paid).

Any other method of computation of excise duty or assessable value is erroneous. The Petitioner's basis that the assessable value is to be arrived at by taking into consideration the same amount of excise duty which is hypothetically pre-determined and added to the factory price and that this element in an attempt to compute the assessable value should naturally be deducted first, is putting the cart before the horse. The excise duty is only known as a ratio of the assessable value when an ad valorem duty is included in the cum-duty paid selling price. The quantum of excise duty cannot be pre-deducted or pre-determined till the assessable value is known. It is only the permissible deductions in concrete monetary terms and amount which are known. The cum duty paid sale price being available for computation and a known

> value of deductions permitted being also known, the assessable value and the excise duty as a ratio of the assessable value can be only decided by first deducting the permissible deductions, from the cum-duty paid selling price and thereafter computing the value in accordance with the equation mentioned above. This has both a legal and a mathematical basis. If the pre-determined amount of excise duty as per the illustration given by MRF Ltd. is first deducted, the equation will not tally. For example, if from a hypothetical cum-duty price of Rs. 150 (comprised of the value of the product at Rs. 100 and ad valorem excise duty @ 50% at Rs. 50) if the excise duty of Rs. 50 is first deducted, the assessable value arrived at would be Rs. 95. The rate of excise duty is 50% and the excise duty @50% of the assessable value of Rs. 95 would be Rs. 47.50 and not Rs. 50 as earlier deducted. There would be a constant difference of Rs. 2.50 in the computation. It is, therefore, an incorrect method of evaluating the assessable value in instances of cum-duty selling price. This interpretation is borne out by the definition contained in Section 4(4)(d) of the Excise Act. MRF's contention that the excise duty should be deducted first and then the permissible deductions is incorrect.

In ordinary cases where the factory price is not a cum-duty price, the first step in arriving at the assessable value is to deduct the permissible deductions and thereafter to compute the excise on an ad valorem basis. The excise duty cannot be computed unless the permissible deductions are first made. The assessable value is arrived at only after the permissible deductions are made. Excise duty is a ratio of the assessable value. Ad valorem excise duty is computed only on assessable value after arriving at such assessable value by making proper permissible deductions. Excise duty cannot be computed without proper determination of the assessable value, namely assessable value exclusive of permissible deductions. Even in the cum-duty sale price, the same principle must be followed to arrive at the assessable value. To compute an excise duty as a pre-determined amount without making the permissible deductions for reducing the cum-duty selling price is a fallacy both legally and mathematically as demonstrated above. The ad valorem excise duty can only be computed after reducing the assessable value by permissible deductions and then applying the tariff rate to the assessable value. To reverse this sequence is to misinterpret the scheme and mode of levy of excise duty on the assessable value."

CIVIL APPEAL NO. 1097 OF 1981 (UNION OF INDIA v. TATA CHEMICALS LTD.) This appeal is preferred by the Union of India against the judgment of a learned Single judge of the Bombay High Court dated September 19, 1979 in Miscellaneous Petition No. 451 of 1971. The question at issue is whether the cost of containers, i.e., bags of jute and/or of polythene and the drums are durable and returnable within the meaning of Section 4(4)(d)(i) of the Act. The appeal was filed directly in this Court against the judgment of the learned Single Judge evidently because at that time the law on the subject was not supposed to be clearly settled. Now that the principles have all been properly enunciated and also because the question whether the packing is durable and returnable by the buyer to the assessee is essentially a question of fact the proper course would be to remit the matter to the excise authorities for determination of the said question of fact. The matter will, therefore, go back to the Assistant Collector of Central Excise concerned who shall decide the said question in accordance with law and on the basis of the material that may be placed before him. Similar

direction should follow in Civil Appeal No. 1807 of 1977 (Synthetic & Polymer Industries v. Union of India & Ors. where too the dispute is whether the packing is durable and returnable. The matter shall go back to the concerned Assistant Collector of Central Excise who shall decide the said question in accordance with law and on the basis of the material placed before him.

PART - VI Accordingly, Civil Appeal No. 3195 of 1979 (Union of India & Ors. v. Madras Rubber Factory), Civil Appeal Nos. 4731- 32 of 1984 (the Superintendent of Central Excise, Kottayam & Ors. v. Madras Rubber Factory Limited, Civil Appeal No. 793 of 1984 (Madras Rubber Factory Limited v. Collector of Central Excise, Madras), Civil Appeal No. 5373 of 1995 arising out of Special Leave Petition (C) No. 10108 of 1980 (Union of India & Ors. v. Madras Rubber Factory) are allowed in part in the above terms. Civil Appeal No. 5375 of 1995 arising out of S.L.P.(C) No. 4041 of 1981 (Union of India v. Hindustan Lever) is allowed for the reasons recorded herein-before. There shall be no orders as to costs.

We have pronounced upon various submissions urged before us. It is obvious that if in any individual case, any other claim for deduction arises, its admissibility has to be decided keeping in view the principles contained herein.

The individual appeals listed before us shall be posted immediately after vacation for disposal in the light of this judgment.

Appeals partly allowed.