

Union Of India & Ors vs Godfrey Philips India Ltd. Etc. Etc on 30 September, 1985

Equivalent citations: 1986 AIR 806, 1985 SCR SUPL. (3) 123

Author: P.N. Bhagwati

Bench: P.N. Bhagwati, R.S. Pathak, Amarendra Nath Sen

PETITIONER:
UNION OF INDIA & ORS.

Vs.

RESPONDENT:
GODFREY PHILIPS INDIA LTD. ETC. ETC.

DATE OF JUDGMENT 30/09/1985

BENCH:
BHAGWATI, P.N. (CJ)
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BHAGWATI, P.N. (CJ)
PATHAK, R.S.
SEN, AMARENDRA NATH (J)

CITATION:
1986 AIR 806 1985 SCR Supl. (3) 123
1985 SCC (4) 369 1985 SCALE (2) 619
CITATOR INFO :
E&D 1987 SC 701 (19)
R 1987 SC 1576 (3)
D 1987 SC 1794 (29)
RF 1987 SC 2414 (23)
R 1988 SC 1531 (46)
R 1989 SC 1933 (28)
 1990 SC 374 (4, 7, 10, 14, 16, 17)
RF 1990 SC 1276 (4)
R 1990 SC 1676 (24)
C&F 1991 SC 14 (11)
D 1991 SC 818 (18)
RF 1992 SC 1075 (3)
RF 1992 SC 2169 (20)

ACT:
Central Excise and Salt Act 1944, Section 4(4) (d) (i)
and Explanation thereto - 'value' - 'in a packed condition'
- Cost of such packing - Whether to be included for excise
duty - Primary packing and secondary packing - Difference

between.

Cigarettes - Manufactured and packed in paper/card board packets and then in cartons - Cartons packed in corrugated fibre board containers - Cost of corrugated fibre board containers Exclusion for levy of excise duty - Whether arises.

Promissory estoppel

Doctrine of promissory estoppel - Applicability of Explained.

Constitution of India 1950, Article 141

Supreme Court - Enunciation of law by a Bench of the Court - Whether Co-ordinate Bench entitled to express disagreement.

Words and Phrases

'Value' - 'in a packed condition' - Meaning of - Central Excise and Salt Act, 1944 Section 4(4)(d)(i).

HEADNOTE:

The respondents in the appeals were manufacturers of cigarettes. They manufactured cigarettes in their factories and the cigarettes so manufactured were packed initially in paper/card board packets of 10 and 20 and these packets were then packed together in paper/card board cartons/outers. These cartons/outers were then placed in corrugated fibre board containers and these corrugated fibre board containers filled with cartons/outers containing packets of cigarettes of 10 and 20 were delivered by the respondents to the Wholesale dealers at the factory gate.

The wholesale price charged by the respondents for the cigarettes sold to the wholesale dealers included not only the

124

cost of primary packing in packets of 10 and 20, but also the cost of secondary packing in cartons/outers and the cost of final packing in corrugated fibre board containers.

On May 19, 1976 the Cigarette Manufacturers Association made a representation to the Central Board of Excise and Customs pointing out that corrugated fibre board containers "are not an Integral or essential requirement for the sale of cigarettes and are used for the sole purpose of protecting cigarettes from any damage that may arise during transportation, and that the cost of such corrugated fibre board containers should not therefore be included in the value of goods for the purpose of excise duty. The Board accepted this plea of the Association and by a letter dated May 24, 1976 intimated to the Association that "Instructions have been issued to the Collectors of Central Excise that the cost of corrugated fibre board containers in question does not form part of the value of cigarettes for the purposes of excise duty". This representation contained in the letter dated May 24, 1976 continued to hold the field

until November 2, 1982 when the Central Board of Excise and Customs addressed a circular to all Collectors of Central Excise, stating that the matter had been re-examined and the earlier advice should be treated as cancelled.

In the appeals by the Revenue to this Court, the question for consideration was whether the cost of packing is includible in the value of the cigarettes for the purpose of assessment to excise duty.

On behalf of the appellant-Revenue it was contended that on a true construction of section 4 (4)(d)(1) read with the Explanation, that whatever be the packing, primary or secondary, in which the cigarettes were packed when delivered to the buyer in the course of wholesale trade at the factory gate, the cost of such packing would be liable to be included in the value of the cigarettes, and that it was a totally unwarranted gloss on the language of section 4 (4)(d)(1) read with the Explanation to make a distinction between primary and secondary packing because that section did not make any such distinction and on the contrary, provided in the clearest terms for inclusion of the cost of the entire packing in which the cigarettes were packed when delivered to the whole-sale buyer at the time of removal.

On behalf of the respondents - companies, it was contended that though section 4(4) (d)(i) read with the Explanation did not make any distinction between the primary packing and secondary

125

packing, the cost of only such secondary packing was liable to be included in the value of the cigarettes as was necessary for sale of the cigarettes in the wholesale trade, and not the cost of secondary packing which was necessitated in order to protect the packed cigarettes and to prevent them, from being damaged during the course of transportation from the factory gate to the godown or warehouse of the wholesale dealer. It was further contended that the cost of corrugated fibre board containers was not includible in the value of the goods because the letter dated 24th May, 1976 constituted an exemption order within the meaning of Rule 8 sub-rule (2) of the Central Excise Rules, 1944 and the respondents were accordingly exempted from payment of excise duty on the cost of corrugated fibre board containers used for packing the cigarettes, and the doctrine of promissory estoppel was invoked against the Government on the basis of the representation contained in the letter dated 24th May, 1976.

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HELD 1.[per Bhagwati, C.J.. Pathak and Sen,j.j] The Central Government and the Central Board of Excise and Customs were clearly bound by promissory estoppel to exclude the cost of corrugated fibre board containers from the value of the goods for the purpose of assessment of excise duty for the period 24th May 1976 to 2nd November 1982. The respondents would be entitled to exclusion of the cost of

corrugated fibre board containers from the value of the cigarettes only during the period 24th May 1976 to 2nd November 1982. [147 B, C]

In the instant case, a representation was undoubtedly made by the Central Board of Excise and Customs and approved and accepted by the Central Government, that the cost of corrugated fibre boards containers would not be includible in the value of the cigarettes for the purpose of assessment to excise duty. The respondents acted upon this representation and continued the use of corrugated fibre containers for packing the cartons/outers of cigarette and did not recover from the wholesale dealers the amount of excise duty attributable to the cost of such corrugated fibre board containers during the period 24th May 1976 to 2nd November 1982. It would be most inequitable to allow the Excise authorities to assess excise duty on the basis that the value of the cigarettes manufactured by the respondents should include the cost of corrugated fibre board containers, when it was clearly represented by the Central Board of Excise and Customs that the cost of corrugated fibre board containers would not be includible in the value of the cigarettes for the purpose of assessment of excise duty. [146 C-F]

126

2. What has been laid down in Motilal Sugar Mills case [1979] 2 S.C.R. 641 represents the correct law in regard to the doctrine of promissory estoppel. The observations in Jeet Ram's case [1980] 3 S.C.R. 689 to the extent that they conflict with the statement of the law in Motilal sugar Mills case and introduce reservations cutting down the full width and amplitude of the propositions of law laid down in that case are dissented from. If the Bench of two Judges in Jeet Ram's case found themselves unable to agree with the law laid down in Motilal sugar Mills case they could have referred Jeet Ram's case to a larger Bench. It was not right on their part to express their disagreement with the enunciation of the law by a co-ordinate Bench of the same Court in Motilal Sugar Mills case. [145 c-e]

3. Union of India v. Bombay International Ltd. [1984] 1 S.C.C. 467 broadly dealt with the question of cost of packing, and it was conceded on behalf of the respondents in that case that the cost of primary packing must be regarded as falling within the terms of s. 4(4)(d)(i) read with the Explanation and it was only the cost of secondary packing which gave rise to dispute between the parties. [131 F; 134 F]

(Per Bhagwati, C.J.)

1. Whenever a question arises whether the cost of any particular kind of secondary packing is liable to be included in the value of the article, the question to be asked is does the packed condition in which the article is generally sold in the wholesale market at the factory gate include such secondary packing? If it does, it would be

liable to be included in the value of the article for the purpose of excise duty. It must therefore follow that if the packed condition in which the cigarettes manufactured by the respondents are generally sold in the wholesale market at the factory gate includes packing in corrugated fibre board containers the cost of such corrugated fibre board containers would be liable to be included in the value of the cigarettes for the purpose of excise duty. [135 B-D]

2. The condition for applicability of the inclusive definition of value in s. 4 (4)(d)(i) is that the goods are delivered at the time of removal "in a packed condition" and where this condition is satisfied, the "value" of the goods would include "the cost of such packings and "such packing" must obviously mean the packing in which the goods are when they are delivered at the time of removal. The question therefore to be

127

asked is - what is the packed condition in which the goods are A when delivered at the time of removal? Whatever is the packing of the goods at the time when they are delivered at the time of removal, the cost of such packing would be liable to be include in the 'value' of the goods. The explanation to s. 4 (4)(d)(i) provides as exclusive definition of the term "packing" and it includes not only outer packing but also what may be called inner packing. 1135 F-G]

3. Ordinarily bobbin, pirl, spool, reel and warp beam on which yarn is wound would not be regarded as packing of such yarn, but brought within the definition of "packing" by the Explanation. The Explanation thus extends the meaning of the word "packing" to cover items which would not ordinarily be regarded as forming part of "packing". The Explanation then proceeds to say that "packing" means wrapper, container or any other thing in which the excisable goods are wrapped or contained. [135H;136B]

4. 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 fortiori corrugated fibre board containers in which the cigarettes are contained. [136 C]

5. The question is not for what purpose a particular kind of packing is done. The test is whether 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 of they are generally sold in the wholesale market at the factory gate in a certain packed condition, whatever may be the reason for such packing, the cost of such packing would be includible in the value of the goods for assessment to excise duty. [137 E-F]

In the instant case, there can therefore be no doubt that corrugated fibre board containers in which the

cigarettes are contained fall within the definition of "packing" in the Explanation and if they form 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 s, 4 (4)(d)(i) read with the Explanation, the cost of such corrugated fibre board containers would be liable to be included is the value of the cigarettes- [136 E-F]

128

6. Rule 8 of the Central Excise Rules, 1944 deals with the power to authorise exemption from duty in special cases. Sub-rule (2) Rule 8 postulates the making of a special order by the Central Board of Excise and Customs in each case exempting from payment of duty any exciseable goods. [139 C,G]

7- The letter dated 24th May 1976 could not possibly be regarded as a special order by the Central Board of Excise and Customs in the case of each of the manufacturers of cigarettes exempting cigarettes from payment of duty to the extent of the cost of packing by way of corrugated fibre board containers. The argument of the respondents based on sub-rule (2) of Rule 8 must be therefore rejected. 1139 G; 140 A]

8. The doctrine of promissory estoppel is well-established in the administrative law of India. It represents a principle evolved by equity to avoid injustice and, though commonly named promissory estoppel, it is neither in the realm of contract nor in the realm of estoppel. The basis of this doctrine is the inter position of equity which has always, true to its form "stepped in to mitigate the rigour of strict law.

9. The doctrine of promissory estoppel is applicable against the Government in the exercise of its governmental, public or executive functions at the doctrine of executive necessity or freedom of future executive action cannot be invoked to defeat the applicability of the doctrine of promissory estoppel. [144 G]

Central London Property Trust Limited v. High Trees House Limited, [1966] 1 ALL E. R. 256, Rederiaktiebolaget Amphitrite v. The King [1921] 3 K.B. 500, Roberston Minister of Pension, [1949] 1 K.B. 227, Union of India v. Indo Afghan Agencies, [1968] 2 S.C.R. 366 and Century Spinning and Manufacturing Company Limited v. Ulhasnagar Council, [1970] 3 S.C.B. 854, referred to.

10. The doctrine of promissory estoppel being an equitable doctrine, must yield the equity so requires, If it can be shown by the Government or public authority that having regard to the facts as they have transpired, it would be inequitable to hold the Government or public authority to the promise or representation made by it. The Court would not raise an equity in favour of the person to whom the promise or representation is made and enforce the promise or representation against the Government or public

authority. The doctrine of promissory

129

estoppel would be displaced in such a case, because on the facts A equity would not require that the Government or public authority should be held bound by the promise or representation made by it. [145 G; 146 A]

(Per Pathak & Sen, JJ. dissenting)

The corrugated fibre board containers are not necessary for selling the cigarettes in the wholesale market at the factory gate. The cost of such packing cannot be included in the 'value' for the purpose of assessment of excise duty. [148 G; 151 B]

(Per R.S. Pathak, J.)

1. Under s. 3 of the Central Excise and Salt Act, 1944 the levy of excise duty is made on manufactured cigarettes, the excisable goods. Section 4 of the Act provides how the 'value' shall be determined. The expression "value" has been extended to include the cost of packing. The packing itself is not the subject of the levy of excise duty. [148 B]

2. For the purpose of computing the measure of the levy, the statute has given an extended meaning to the expression 'value' in clause (d) of sub-s. (4) of sec. 4 of the Act. The expression must be strictly construed. What is being included in the value now is something beyond the value of the manufactured commodity itself. [148 C]

3. The corrugated fibre board containers are employed only for the purpose of avoiding damage or injury during transit. 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. [148 F-G]

4. The position expressed by the Central Board of Excise and Custom in its letter dated May 24, 1976 was right when it declared that the Collector of the Central Excise has been instructed that the cost of corrugated fibre board containers in question does not form part of the value of cigarettes for the purpose of excise duty." [148 H]

Union of India v. Bombay Tyre International Ltd., [1984] 1 S.C.C. 467, referred to.

130

(Per A.N. Sen, J.)

1. Excise duty which is levied on the goods is ultimately passed on to the consumers of the goods and they have ultimately to bear the burden. So far as the consumers are concerned they buy cigarettes, loose or in packets or even in cartons. Cartons packed in corrugated fibre board containers are not purchased by the consumers. So far as the retail sellers are concerned who may buy from wholesalers, they usually buy loose packets of cigarettes or packets of cigarettes packed in cartons. So far as the buyers in the

wholesale trade are concerned, they buy the cartons of cigarettes in which the packets of cigarettes are consigned for their wholesale trade for selling the same to retailers or to their customers. It is only for the sake of convenience in the matter of smooth delivery of cartons in which the packets of cigarettes are packed that the cartons may be further packed in corrugated fibre board containers for facility of transport and smooth transit of the cartons before delivery of the same to the wholesale buyer. [151 B-D]

2. On a proper construction of s.4(4)(d)(i) of the Act read with the Explanation any secondary packing done for the purpose of facilitating transport and smooth transit of the goods to be delivered to the buyer in the wholesale trade cannot be included in the value for the purpose of assessment of excise duty. [150 G-H]

In the instant case, the cost of corrugated fibre board containers in which the cartons containing the packets of cigarettes is packed, cannot be included in the value for the purpose of assessment of excise duty. [151 A]

Union of India v. Bombay Type International Ltd. [1984] S.C.C. 467, referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1136 of 1977.

From the Judgment and Order dated 29.4.1976 of the Bombay High Court in Misc. Petn. No. 548 of 1974.

AND Civil Appeal No. 1244 of 1977.

From the Judgment and Order dated 15.12.1975 of the Bombay High Court in Spl. Misc. Petition No. 293 of 1974.

AND Civil Appeal Nos. 55-61 of 1979.

From the Judgment and Order dated 18.8.1977 of the Andhra Pradesh High Court in Writ Appeals Nos. 252, 435, 550, 553 and 560 of 1976 and Writ Petition Nos. 3114 and 6044 of 1975.

K. Parasaran, Solicitor General, N.C. Talukdar, Suraj Udai Singh, Dalveer Bhandari, C.V. Subba Rao and R.N. Poddar for the Appellants.

N.A. Palkhiwala, J.C. Bhatt, D.B. Engineer, B.H. Antia, Ravinder Narain, O.C. Mathur, Kamal Mehta, Talat Ansari, Mrs. A.K. Verma, Ashok Sagar, Sukumaran, D.N. Mishra, Kamal Mehta and Ms. Rainu Walia for the appearing Respondents. D S. Roy Chowdhury, Jatin Ghosh, D.N. Gupta, S. Ramsubramaniam, D.N. Gupta and S.K. Nandy for the Intervener.

The following Judgments were delivered BHAGWATI, C.J. These appeals by special leave raise a number of questions relating to excise duty leviable on cigarettes manufactured by the respondents. Barring one, all the other questions are now settled as a result of the decision of this Court in *Union of India v. Bombay Tyre International Ltd.* [1984] 1 S.C.C. 467, and all that is required is to direct the assessing authorities to assess the excise duty leviable on the respondents on the basis of the law laid down in *Bombay Tyre International case* (supra). The only question which remains to be considered is in regard to cost of packing includible in the value of the cigarettes for the purpose of assessment to excise duty.

The respondents in these appeals are manufacturers of cigarettes. They manufacture cigarettes in their factories and the cigarettes so manufactured are packed initially in paper/card board packets of 10 and 20 and these packets are then packed together in paper/card board cartons/outers. These cartons/outers are then placed in corrugated fibre board containers and it is these corrugated fibre board containers filled with cartons/outers containing packets of cigarettes of 10 and 20 which are delivered by the respondents to the whole sale dealers at the factory gate. It was common ground between the parties that the whole-sale price charged by the respondents for the cigarettes sold to the whole-sale dealers includes not only the cost of primary packing in packets of 10 and 20, but also the cost of secondary packing in cartons/outers and the cost of final packing in corrugated fibre board containers. So far as the two items of cost, namely cost of primary packing into packets of 10 and 20 and the cost of secondary packing in cartons/outers, are concerned, there was no dispute between the parties that these two items of cost must be included in determining the value of the cigarettes for the purpose of assessment to excise duty, since such packing would admittedly fall within the terms of section 4(4)(d)(i) of the Central Excises and Salt Act, 1944 (hereinafter referred to as the Act) read with the Explanation to that provision. But the question whether the cost of final packing in corrugated fibre board containers would be liable to be included in the value of the cigarettes for the purpose of assessment to excise duty raised a serious controversy between the parties. The appellant contended that on a true construction of Section 4(4)(d)(i) read with the Explanation, whatever be the packing, primary or secondary, in which the cigarettes were packed when delivered to the buyer in the course of whole- sale trade at the factory gate, the cost of such packing would be liable to be included in the value of the cigarettes. The argument of the appellant was that It was a totally unwarranted gloss on the language of Section 4(4)(d)(i) read with the Explanation to make a distinction between primary and secondary packing because that section did not make any such distinction and on the contrary, provided in the clearest terms for inclusion of the cost of the entire packing in which the cigarettes were packed when delivered to the whole-sale buyer at the time of removal. The respondents on the other hand urged that though it was true that Section 4(4)(d)(i) read with the Explanation did not make any distinction between primary packing and secondary packing, the cost of only such secondary packing was liable to be included in the value of the cigarettes as was necessary for sale of the cigarettes in the whole sale trade and not the cost of secondary packing which was necessitated in order to protect the packed cigarettes and to prevent them from being damaged during the course of transportation from the factory gate to the godown or warehouse of the whole-sale dealer. The packing in corrugated fibre board containers, contended the respondents, was not necessary or essential for the purpose of sale of the cigarettes to the whole-sale dealer at the factory gate but it was done only A with a view to facilitating transportation of the cigarettes from the factory gate to the godown or warehouse of the whole-sale

dealer and protecting the cigarettes against damage during such transportation and therefore the cost of such packing was not liable to be included in the value of the cigarettes. These were the rival contentions urged on behalf of the parties and we shall now proceed to examine them.

We have broadly dealt with the question of cost of packing in the Judgment delivered by us in Bombay Tyre International case (supra) and it would be convenient at this stage to reproduce what we have said in that Judgment in regard to the cost of packing:

"The case in respect of the cost of packing is somewhat complex. The new Section 4(4)(d)(i) has made express provision for including the cost of packing in the determination of "value" for the purpose of excise duty. Inasmuch as the case of the parties is that the new Section 4 substantially reflects the position obtaining under the unamended Act, we shall proceed on the basis that the position in regard to the cost of packing is the same under the Act, both before and after the amendment of the Act. Section 4(4)(d)(i) reads :

x x x x x It is relevant to note that the packing, of which the cost is included, is the packing in which the goods are wrapped, contained or wound when the goods are delivered at the time of removal. In other words, it is the packing in which it is ordinarily sold in the course of wholesale trade to the wholesale buyer. The degree of packing in which the excisable article is contained will vary from one class of articles to another. From the particulars detailed before us by the assessee, it is apparent that the cost of primary packing, that is to say, the packing in which the article is contained and in which it is made marketable for the ordinary consumer, for example a tube of toothpaste or a bottle of tablets in a card-board carton, or biscuits in a paper wrapper or in a tin container, must be regarded as falling within A section 4(4)(d)(i). That is indeed conceded by learned counsel for the assessee. It is the cost of secondary packing which has raised serious dispute. Secondary packing is of different grades. There is the secondary packing which consists of larger cartons in which a standard number of primary cartons (in the sense mentioned earlier) are packed. The large cartons may be packed into even larger cartons for facilitating the easier transport of the goods by the wholesale dealer. 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" ? 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."

It will be noticed that so far as primary packing is concerned, it was conceded on behalf of the respondents in that case that the cost of primary packing must be regarded as falling within the terms of section 4(4)(d)(i) read with the Explanation and it was only the cost of secondary packing which gave rise to dispute between the parties. But we did not proceed to decide whether the cost of every degree of secondary packing would be liable to be included in the value of the goods or whether a distinction could be drawn between one degree of secondary packing and another. We posed the question: Is all the packing, no matter to what degree, in which the whole-sale 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?" 'We did not answer this question specifically, leaving it to a later date when this question would directly come up for consideration on the facts of a Particular case. We however laid down the general proposition 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 whole- sale market at the factory gate is the degree of packing whose cost can be included in the 'value of the article for the purpose of the excise duty . Where therefore a question arises whether the cost of any particular kind of secondary packing is liable to be included in the value of article, we would have to ask does the packed condition in which the article is generally sold in the whole-sale market at the factory gate include such secondary packing? If it does, it would be liable to be included in the value of the article for the purpose of excise duty. On this reasoning it must follow that if the packed condition in which the cigarettes manufactured by the respondents are generally sold in the whole-sale market at the factory gate includes packing in corrugated fibre board containers, the cost of such corrugated fibre board containers would be liable to be included in the value of the cigarettes for the purpose of excise duty.

We may leave aside for the moment the above observations made by us in the Judgment in Bombay Tyre International case (supra) and turn to examine the language of Section 4(4)(d)(i) read with the Explanation. Section 4(4) (d) (i) enacts an inclusive definition of value" and provides that E "value" in relation to and 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 condition for applicability of this inclusive definition of 'value' is that the goods are delivered at the time of removal in a packed conditions and where this condition is satisfied, the value" of the goods would include "the cost of such packing"

and "such packing" must obviously mean the packing in which the goods are when they are delivered at the time of removal. The question which has to be asked is: what is the packed condition in which the goods are when delivered at the time of removal? Whatever is the packing of the goods at the time when they are delivered at the time of removal, the cost of such packing would be liable to be included in the 'value' of the goods. The Explanation to Section 4(4)(d)(i) provides an exclusive definition of the term "packing" and it includes not only outer packing but also what may be called inner packing. Ordinarily bobbin, pirl, spool, reel and warp beam on which yarn is wound would not be regarded as packing of such yarn, but they are brought within the definition of "packing" by the Explanation. The Explanation thus extends the meaning of the word 'packing" to cover items which would not ordinarily be regarded as forming part of packing. The Explanation then proceeds to say that

"packing means wrapper, container or any other thing in which the excisable goods are wrapped or contained. 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. When Bombay Tyre International case was argued before us, it was at one stage sought to be contended, though rather faintly, that it is only the immediate packing in which the excisable goods are contained, that is primary packing alone, which would be liable to be regarded as 'packing within the meaning of the Explanation. But this argument was given up when it was pointed out that even secondary packing would be within the terms of the Explanation, because such secondary packing would also constitute a wrapper or a container in which the excisable goods are wrapped or contained. That is why we held in the Judgment in Bombay Tyre International case (supra) that secondary packing is also included within the term "packing in the Explanation. There can therefore be no doubt that corrugated fibre board containers in which the cigarettes are contained fall within the definition of packing" in the Explanation and if they form 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 containers would be liable to be included in value of the cigarettes.

But then it was contended on behalf of the respondents that it is not the cost of every kind of secondary packing which is includible in the value of the excisable goods. Whether the cost of secondary packing is includible or not must depend upon the necessity or essentiality of such secondary packing for sale of the excisable goods at the factory gate in the course of wholesale trade. The argument was that where the secondary packing is necessitated in order to protect the packed excisable goods from damage during the course of transportation from the factory gate to the godown or warehouse of the wholesale dealer, the cost of such secondary packing cannot be included in the value of the goods. The respondents thus sought to draw a distinction between secondary packing necessary for the purpose A of selling the goods at the factory gate in the course of wholesale trade and the secondary packing used in order to protect the goods against damage during the course of transportation so that they may safely reach the consumer in proper condition. We find it difficult to appreciate this distinction so far as assessment to excise duty is concerned. Obviously every wholesale dealer would like to take delivery of the goods from the manufacturer in such packing that he can safely transport the goods to his godown or warehouse and sell the same to the retailer or consumer in marketable condition. The wholesale dealer would therefore insist that the goods purchased by him in wholesale should be properly packed so that they do not get damaged during transportation or even storage. The manufacturer would accordingly have to deliver the goods at the factory gate in such packed condition as demanded by the wholesale dealer. It is apparent that unless the goods are in such packed condition the wholesale dealer would not

ordinarily take delivery of the goods and necessarily therefore such would be the packed condition in which the goods are generally sold in the wholesale market at the factory gate. It makes no difference to the applicability of the definition in Section 4(4)(d)(i) read with Explanation that the packing of the goods ordinarily sold by the manufacturer in the wholesale trade is packing for the purpose of protecting the goods against damage during transportation or in the warehouse. The question is not for what purpose a particular kind 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 goods for assessment to excise duty. Of course, as pointed out by us in the judgment in Bombay Tyre International case if any special secondary packing is provided by the assessee at the instance of a wholesale buyer which is not generally provided as a normal feature of the wholesale trade, the cost of such `special packing would not be includible in the value of the goods and would have to be deducted from the wholesale cash price.

That takes us to the next contention of the respondents based on the letter dated 24th May 1976 addressed by the Under Secretary, Central Board of Excise and Customs to the Cigarette Manufacturers' Association. It is necessary, in order to appreciate the contention based on this letter, to state a few facts. On 19th May 1976 the Cigarette Manufacturer's Association made a representation to the Central Board of Excise and customs pointing out that corrugated fibre board containers are not an integral or essential requirement for the sale of cigarettes and are used for the sole purpose of protecting cigarettes from any damage that may arise during transportation and that the cost of such corrugated fibre board containers should not therefore be included in the value of the goods for the purpose of excise duty. The Central Board of Excise and Customs after examining this question accepted the plea of the Cigarette Manufacturers' Association and by a letter dated 24th May 1976 intimated to the Cigarette Manufacturers' Association that "instructions have been issued to the Collector of Central Excise that the cost of corrugated fibre board containers in question does not form part of the value of cigarettes for the purposes of excise duty . The respondents and other manufacturers of cigarettes, acting upon this representation made by the Central Board of Excise and Customs, proceeded on the basis that the cost of corrugated fibre board containers was not liable to be included in the value of cigarettes for the purpose of assessment to excise duty and did not recover from the wholesale dealers to whom they sold the cigarettes, any amount by way of excise duty attributable to the cost of such corrugated fibre board containers. This representation contained in the letter dated 24th May 1976 continued to hold the field until 2nd November, 1982 when the Central Board of Excise and Customs addressed a circular letter to all the Collectors of Central Excise stating that the matter had been re-examined in consultation with the Ministry of Law and in view of the provisions of Section 4, the cost of packing "whether initial or secondary in which

the excisable goods are packed at the time of the removal may form part of the assessable value of such goods" and the earlier advice inconsistent with this position should be treated as cancelled. The question which was raised on behalf of the respondents on this set of facts was as to whether during the period between 24th May 1976 and 2nd November 1982 the respondents were liable to pay excise duty on the basis that the cost of corrugated fibre board containers was includible in the value of the goods. It was contended on behalf of the respondents that the cost of corrugated fibre board containers was not includible in the value of the goods and there were two arguments urged in support of this contention. The first argument was that the letter dated 24th May 1976 constituted an exemption order within the meaning of Rule 8 sub-rule (2) of the Central Excise Rules, 1944 and the respondents were accordingly exempt from payment of excise duty on the cost of corrugated A fibre board containers used for packing the cigarettes. The second argument invoked the doctrine of promissory estoppel against the Government on the basis of the representation contained in the letter dated 24th May 1976. The first argument is in our opinion not well-founded but so far as the second argument is concerned, we find that there is considerable force in it. Our reasons are as follows.

Rule 8 of the Central Excise Rules, 1944 deals with the power to authorise exemption from duty in special cases and it reads as follows:-

"Rule 8. Power to authorise exemption from duty in Special cases (1) The Central Government may from time to time, by notification in the Official Gazette, exempt (subject to such conditions as may be specified in the notification) any excisable goods from the whole or any part of duty leviable on such goods. (2) The Central Board of Excise and Customs may by special order in each case exempt from the payment of duty, under circumstances of an exceptional nature, any excisable goods.

The respondents obviously could not invoke the aid of Rule 8 sub-rule (1) since the letter dated 24th May 1976 was a communication addressed by the Central Board of Excise and Customs and could not even by the farthest stretch of imagination be construed as a notification by the Central Government. The respondents were therefore constrained to place reliance on Rule 8 sub-rule (2) because that sub-rule confers power on the Central Board of Excise and Customs to grant exemption and if at all, the letter dated 24th May 1976 could be justified only under that sub-rule. But we fail to see how Rule 8 sub-rule (2) can possibly avail the respondents. That sub-rule postulates the making of a special order by the Central Board of Excise and Customs in each case exempting from payment of duty any excisable goods. The letter dated 24th May 1976 could not possibly be regarded as a special order by the Central Board of Excise and Customs in the case of each of the manufacturers of cigarettes exempting cigarettes from payment of duty to the extent of the cost of packing by way of corrugated fibre board containers. We do not think the letter dated 24th May 1976 could be brought within the terms of sub-rule (2) of Rule 8 and the argument of the respondents based on that sub-rule must be rejected.

The respondents are however on firmer ground in their plea of promissory estoppel against the Central Board of Excise and Customs and the Central Government. The representation contained in the letter dated 24th May, 1976 was undoubtedly made by the Central Board of Excise and Customs but we may safely assume, and for this assumption there is clear warrant in the proceedings in special Civil Application No. 787 of 1976 in the Gujarat High Court, that this representation was made with the approval of the Central Government and it was accepted by the Central Government as correctly representing the stand of the Revenue. It is significant to note that when the petitioners in Special Civil Application No. 787 of 1976 in the Gujarat High Court contended that the value of corrugated fibre board containers was not includible in the value of the goods manufactured by the petitioners, it was conceded on behalf of the Union of India and the Excise Authorities both in the affidavit in reply filed in the case as also in the course of the arguments that the cost of corrugated fibre board containers used for packing by the petitioners would not form part of the value of the goods for assessment of excise duty. The representation contained in the letter dated 24th May 1976 could therefore legitimately be regarded by the respondents as a representation of the Central Government. The respondents could reasonably assume that such a representation could never have been made by the Central Board of Excise and Customs without the approval of the Central Government and if it did not have the approval of the Central Government, it would have been immediately objected to and the Central Government would have promptly directed the Central Board of Excise and Customs to withdraw it. The question is whether this representation made by the Central Board of Excise and Customs and approved and accepted by the Central Government could validly found the plea of promissory estoppel.

Now the doctrine of promissory estoppel is well-established in the administrative law of India. It represents a principle evolved by equity to avoid injustice and, though commonly named promissory estoppel, it is neither in the realm of contract nor in the realm of estoppel. The basis of this doctrine is the interposition of equity which has always, true to its form, stepped in to mitigate the rigour of strict law. This doctrine, though of ancient vintage, was rescued from obscurity by the decision of Mr. Justice Denning as he then was, in his celebrated judgment in *Central London Property Trust Limited v. High Trees House Limited*, (1956) 1 All E. R. 256-. The true principle of promissory estoppel is that where one party has by his word or conduct made to the other a clear and unequivocal promise or representation which is intended to create legal relations or affect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise or representation is made and it is in fact so acted upon by the other party, the promise or representation would be binding on the party making it and he would not be entitled to go back upon it, if it would be inequitable to allow him to do so, having regard to the dealings which have taken place between the parties. It has often been said in England that the doctrine of promissory estoppel cannot itself be the basis of an action: it can only be a shield and not a sword: but the law in India has gone far ahead of the narrow position adopted in England and as a result of the decision of this Court in *Motilal Sugar Mills v. State of Uttar Pradesh*, [1979] 2 S.C.R. 641, it is now well-settled that the doctrine of promissory estoppel is not limited in its application only to defence but it can also found a cause of action. The decision of this Court in *Motilal Sugar Mills* case (supra) contains an exhaustive discussion of the doctrine of promissory estoppel and we find ourselves wholly in agreement with the various parameters of this doctrine outlined in that decision.

More importantly, it is necessary to point out that the decision in Motilal Sugar Mills case (supra) marks a significant development in the law relating to the doctrine of promissory estoppel. The principal question debated in that case was as to whether and if so, to what extent, is the doctrine of promissory estoppel applicable against the Government. It was contended on behalf of the State of Uttar Pradesh that the plea of promissory estoppel is not available against the exercise of executive functions of the State, for the State cannot bind itself, so as to fetter its future executive action. There is contention was sought to be supported by relying on the observations of Rowlatt J. in an early decision in *Roderiaktiebolaget Amphitrite v. The King* (1921) 3 K.B. 500. But this Court observed in *Motilal Sugar mills case* (supra) that what Rowlatt J. said in that case did not represent the correct law on the subject and pointed out that the doctrine of executive necessity propounded by Rowlatt J. was disapproved by Denning, J. as he then was, in *Roberston v. Minister of Pensions* (1949) 1 K.B. 227. Denning, J. categorically expressed the view in *Roberston's case* (supra) that the crown cannot escape its obligation under the doctrine of promissory estoppel by praying in aid the doctrine of executive necessity. This Court also in *Union of India v. Indo Afgan Agencies* [1968] 2 S.C.R. 366, exploded the doctrine of executive necessity. Shah, J. speaking on behalf of the Court negative the argument urged on behalf of the Government that it is not competent for the Government to fetter its future executive action which may necessarily be determined by the needs of the community when the question arises and no promise or undertaking can be held to be binding on the Government so as to hamper its freedom of executive action and observed at page 376 of the Report:

We are unable to accede to the contention that the executive necessity releases the Government from honouring its solemn promises relying on which citizens have acted to their detriment. Under our constitutional set-up no person may be deprived of his right or liberty except in due course of and by authority of law; if a member of the Executive seeks to deprive a citizen of his right or liberty otherwise than in exercise of power derived from the law common or statute- the Courts will be competent to and indeed would be bound to protect the rights of the aggrieved citizens.

The learned judge also after examining the decisions cited before him summed up the position in the following words:

Under our jurisprudence the Government is not exempt from liability to carry out the representation made by it as to its future conduct and it cannot on some undefined and undisclosed ground of necessity or expediency fail to carry out the promise solemnly made by it, nor claim to be the Judge of its own obligation to the citizen on an ex-parte appraisalment of the circumstances in which the obligation has arisen.

The defence of executive necessity was thus clearly negated by this Court and it was pointed out that it did not release the Government from its obligation to honour the promise made by it, if the citizen, acting in reliance on the promise, had altered his position. The doctrine of promissory estoppel was in such a case applicable against the Government and it could not be defeated by invoking the defence of executive

necessity. This Court in Motilal Sugar Mills case (supra) also negated the argument that if the Government were held bound by every representation made by it regarding its intention, the result would be that the Government would be bound by a contractual obligation even though no formal contract in the manner required by Article 299 of the Constitution was executed. It was held by this Court that a party who has, acting in reliance on a promise or representation made by the Government, altered his position, is entitled to enforce the promise or the representation against the Government, even though the promise or representation is not in the form of a formal contract as required by Article 299 and that Article does not militate against the applicability of the doctrine of promissory estoppel against the Government.

The resultant position summarised by this Court in Motilal Sugar Mills case (supra) in the following words: The law may therefore now be taken to be settled as a result of this decision that where the Government makes a promise knowing or intending that it would be acted on by the promisees and, in fact, the promisee, acting in reliance on it, alters his position the Government would be held bound by the promise and the promise would be enforceable against the Government at the instance of the promisees, notwithstanding that there is no consideration for the promise and the promise is not recorded in the form of a formal contract as required by Article 299 of the Constitution. It is elementary that in a Republic governed by the rule of law, on one, however high or low, is above the law. Everyone is subject to the law as fully and completely as any other and the Government is no exception. It is indeed the pride of constitutional democracy and rule of law that the government stands on the same footing as a private individual so far as the obligation of the law is concerned: the former is equally bound as the latter. It is indeed difficult to see on what principle can a government, committed to the rule of law, claim immunity from the doctrine of promissory estoppel. Can the government say that it is under no obligation to act in a manner i.e. fair and just or that it is not bound by the considerations of honesty and good faith? Why should the government not be held to a high standard of rectangular rectitude while dealing with its citizens? There was a time when the doctrine of executive necessity was regarded as sufficient justification for the government to repudiate even its contractual obligations, but let it be said to the eternal glory of this court, this doctrine was emphatically negated in the Indo-Afghan agencies case and the supremacy of the rule of law was established. It was laid down by this court that the government cannot claim to be immune from the applicability of the rule of promissory estoppel and repudiate a promise made by it on the ground that such promise may fetter its future executive action.

The doctrine of promissory estoppel as explained above was also held to be applicable against public authorities as pointed out in Motilal Sugar Mills case. This court in Motilal Sugar Mills case quoted with approval the observations of Shah, J. in Century Spinning and Manufacturing Company limited v. Ulhasnagar Municipal Council [1970] 3 S.C.R. 854, where the learned Judge said: Public bodies are as much bound as private individuals to carry out representations of facts and premises made by

them, relying on which other persons have altered their position to their prejudice.

If our nascent democracy is to thrive different standards of conduct for the people and the public bodies cannot ordinarily be permitted. A public body is, in our judgment, not exempt from liability to carry out , its obligation arising out of representations made by it relying upon which a citizen has altered his position to his prejudice."

The Court refused to make a distinction between a private individual and a public body so far as the doctrine of promissory estoppel is concerned.

There can therefore be no doubt that the doctrine of promissory estoppel is applicable against the Government in the exercise of its governmental, public or executive functions and the doctrine of executive necessity or freedom of future executive action cannot be invoked to defeat the applicability of the doctrine of promissory estoppel. We must concede that the subsequent decision of this Court in *Jeet Ran v. State of Haryana* [1980] 3 S.C.R. 689, takes a slightly different view and holds that the doctrine of promissory estoppel is not available against the exercise of executive functions of the State and the State cannot be prevented from exercising its functions under the law. This decision also expresses its disagreement with the observation made in *Motilal Sugar Mills* case that the doctrine of promissory estoppel cannot be defeated by invoking the defence of executive necessity, suggesting by necessary implication that the doctrine of executive necessity is available to the Government to escape its obligation under the doctrine of promissory estoppel. We find it difficult to understand how a Bench of two Judges in *Jeet Ram's* case could possibly overturn or disagree with what was said by another Bench of two Judges in *Motilal Sugar Mills* Case. If the Bench of two Judges in *Jeet Ram's* case found themselves unable to agree with the law laid down in *Motilal Sugar Mills* case, they could have referred *Jeet Ram's* case to a larger Bench, but we do not think it was right on their part to express their disagreement with the enunciation of the law by a coordinate Bench of the same Court in *Motilal sugar Mills* case. We have carefully considered both the decision in *Motilal Sugar Mills* and *Jeet Ram's* case and we are clearly of the view that what has been laid down in *Motilal sugar Mills* case represents the correct law in regard to the doctrine of promissory estoppel and we express our disagreement with the observations in *Jeet Ram's* case to the extent that they conflict with the statement of the law in *Motilal Sugar Mills* case and introduce reservations cutting down the full width and amplitude of the prepositions of law laid down in that case.

Of course we must make it clear and that is also laid down in *Motilal Sugar Mills* case (*supra*), that there can be no promissory estoppel against the legislature in the exercise of its legislative functions nor can the Government or public authority be debarred by promissory estoppel from enforcing a statutory prohibition. It is equally true that promissory estoppel cannot be used to compel the Government or a public

authority to carry out a representation or promise which is contrary to law or which was outside the authority or power of the officer of the Government or of the public authority to make. We may also point out that the doctrine of promissory estoppel being an equitable doctrine it must yield when the equity so requires, if it can be shown by the Government or public authority that having regard to the facts as they have transpired, it would be inequitable to hold the Government or public authority to the promise or representation made by it, the Court would not raise an equity in favour of the person to whom the promise or representation is made and enforce the promise or representation against the Government or public authority. The doctrine of promissory estoppel would be displaced in such a case, because on the facts, equity would not require that the Government or public authority should be held bound by the promise or representation made by it. This aspect has been dealt with fully in *Motilal Sugar Mills case* (supra) and we find ourselves wholly in agreement with what has been said in that decision on this point.

We may now turn to examine the facts in the light of the law discussed by us. Here a representation was undoubtedly made by the Central Board of Excise and Customs and approved and accepted by the Central Government, that the cost of corrugated fibre boards containers would not be includible in the value of the cigarettes for the purpose of assessment to excise duty. The respondents acted upon this representation and continued the use of corrugated fibre board containers for packing the cartons / outers of cigarettes and did not recover from the wholesale dealers the amount of excise duty attributable to the cost of such corrugated fibre board containers during the period 24th May 1976 to 2nd November, 1982. It would be most inequitable to allow the Excise Authorities to assess excise duty on the basis that the value of the cigarettes manufactured by the respondents should include the cost of corrugated fibre board containers, when it was clearly represented by the Central Board of Excise and Customs in response to the submission made by the Cigarette Manufacturers' Association

- and this representation was approved and accepted by the Central Government that the cost of corrugated fibre board containers would not be includible in the value of the cigarettes for the purpose of assessment of excise duty. Of course, this representation could operate to create promissory estoppel only if it was within the competence of the Central Board of Excise and Customs and the Central Government to make good such representation and the exclusion of the cost of corrugated fibre board containers from the value of the cigarettes was not contrary to law. We think that the Central Government had power under Rule 8 sub-rule (1) of the Rules to issue a notification excluding fibre board containers from the value of the cigarettes and thereby exempting the cigarettes from that part of the excise duty which would be attributable to the cost of corrugated fibre board containers. So also the Central Board of Excise and Customs had power under Rule 8 sub-rule (2) to make a special order in the case of each of the respondents granting the game exemption, because it could legitimately be said that, having regard to the representation made by the

Cigarette Manufacturers' Association, there were circumstances of an exceptional nature which required the exercise of the power under sub- rule (2) of Rule 8. The Central Government and the Central Board of Excise and Customs were therefore clearly bound by promissory estoppel to exclude the cost of corrugated fibre board containers from the value of the B goods for the purpose of assessment of excise duty for the period 24th May 1976 to 2nd November 1982.

The respondents would therefore be entitled to exclusion of the cost of corrugated fibre board containers from the value of the cigarettes only during the period 24th May 1976 to 2nd November 1982. Save and except in respect of this period, the cost of the corrugated fibre board containers would be liable to be included in the value of the cigarettes for the purpose of assessment of excise duty. I would therefore pass an order in these appeals in terms of the format order which has been evolved by consent of parties in the, Bombay Tyre International case (supra) and I would direct that the Assessing Authorities shall assess the excise duty under the format order in the light of the observations contained in this Judgment. There will be no order as to costs.

PATHAK, J. I have perused the judgment proposed by the learned Chief Justice in these appeals and while I find myself in agreement with his views on the question of promissory estoppel, I am unable, with regret, to subscribe to the view expressed by him on the question of secondary packing. I propose, therefore, to set down my own view in the matter.

In Union of India v. Bombay Tyre International Ltd. [1984] 1 S.C.C. 467, while construing sub-cl. (i) of cl.(d) of sub-s. (4) of 8. 4 of the Central Excises and & It Act, 1944, which provides for including the cost of packing in the determination of value for the purpose of excise duty, we observed that the cost of primary packing as well as of secondary packing in the sense explained in that case would be included within the meaning of the expression value . In the present case the cigarettes are manufactured and packed in cardboard packets, each containing 10 to 20 cigarettes. Those packets constitute primary packing. Those packets are thereafter packed in cartons or "outers" for delivery to the buyer. Finally, the cartons or outers are themselves packed in corrugated fibre board containers, evidently to ensure the cartons against injury or damage during transport. The question is whether the corrugated fibre board containers can be regarded as secondary packing, the cost of which can permissibly be included in the determination of value n for the purpose of excise duty.

Now it is apparent that under 8. 3 of the Act the levy of excise duty is made on manufactured cigarettes, which after all are the excisable goods. And 8. 4 provides how the value of manufactured cigarettes shall be determined. The expression values has been extended to include the cost of packing. The packing itself is not the subject of the levy of excise duty. The manufactured cigarettes are the subject of the levy,

because excise duty is here charged on the manufactured commodity, that is to say, cigarettes. For the purpose of computing the measure of the levy, however, the statute has given an extended meaning to the expression value in clause (d) of sub-s.4 of 8. 4 of the Act. Plainly, the extension must be strictly construed, for what is being included in the value now is something beyond the value of the Manufactured commodity itself. In *Union of India v. Bombay Tyre International Ltd.* (supra), we observed :- 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."

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? In my opinion, it is not. The corrugate 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.

I think the position expressed by the Central Board of Excise and Custom in its letter dated May 24, 1976 was perfectly right when it declared that the Collector of the Central Excise has been instructed that the cost of corrugated fibre board containers in question does not form part of the value of cigarettes for the purpose of excise duty.

The assessing authorities will now proceed to make an assessment in accordance with the opinion expressed in this judgment .

AMARENDRA NATH SEN, J. I have read the judgment proposed to be delivered by the Learned Chief Justice in this appeal. After giving my anxious and careful consideration, I find with regret that I cannot persuade myself to agree with the view expressed by the Learned Chief Justice on the question of secondary packing. On the other question, namely the question of promissory estoppel, I am in entire agreement with his views.

The Learned Chief Justice in his judgment has set out all the material facts and circumstances. He has noted the respective contentions put forward on behalf of the parties. He has also adverted to the earlier decision of this Court in *Union of India v. Bombay Tyre International Ltd*; [1984] 1 S.C.C. 467. It does not, therefore, become necessary for me to refer to the facts and circumstances of this case or to any of these aspect in my judgment.

The cigarettes after manufacture are usually placed in paper/card board packets, each packet containing 10 or 20 cigarettes. These packets before delivery to the wholesale buyer are packed together in paper/card board/cartons/outers, each of such cartons containing a number of packets of cigarettes with 10 or 20 cigarettes in each packet. I agree with the Learned Chief Justice that the cost of packing cigarettes in packets of 10 or 20 cigarettes each and thereafter in cartons/outers for delivery to the buyer in the course of whole-sale trade at the factory gate must necessarily be included in the value for the purpose of levy of excise duty. I however, find it difficult to agree with the view expressed by the learned Chief Justice that when a number of these cartons are put in corrugated fibre board containers for delivery, the cost of the further packing incurred for putting cartons/outers in the corrugated fibre board containers must also be included in the value for the purpose of assessment of excise duty.

When tobacco is rolled up in paper following the appropriate process of manufacturing cigarettes, cigarettes come into existence. The paper in which cigarettes are rolled is indeed a part of the manufactured product itself. The paper in which a cigarette is rolled forms no part of the packing and is indeed a part of the cigarette itself. When the cigarettes, after their manufacture, are put in packets, each packet usually containing 10 or 20 cigarettes, the packets in which the cigarettes are packed indeed constitute the primary packing for the purpose of delivery and there can be no question that the cost of this packing must necessarily be included in the value for the purpose of assessment of excise duty. A number of packets, containing cigarettes either 10 or 20 in number in each packet are then put in larger cartons according to the requirements of the buyer in the whole-sale trade. Packing a number of packets of cigarettes in a larger carton for delivery to the buyer in the whole-sale trade according to his requirement constitutes secondary packing but the cost of this packing on a true construction of 8. 4(4) (d)(i) of the Act read with explanation to the clause but also be included in the value for the purpose of levy of excise duty. Packets of cigarettes in the larger cartons are to be delivered to the buyer in the whole-sale trade to enable the buyers in the whole-sale trade to sell to the retail sellers in the same condition or by removing the packets from the cartons. Packets of cigarettes so packed in cartons can easily be delivered to the buyers in the course of whole-sale trade at the factory gate without any further packing. If the buyer who is to take delivery in the course of the whole-sale trade at the factory gate, carries on business within a reasonable distance from the factory premises, the whole-sale buyer will very likely not want to have cartons of cigarettes further packed in corrugated fibre board containers. Cartons of cigarettes are usually further packed in corrugated fibre containers for facilitating transport in the course of delivery to buyers in the whole-sale 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 buyer 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 whole-sale trade at the factory gate but is only for the purpose of facilitating the 8 month transport of the cartons containing the packets of cigarettes to the buyer in the whole-sale trade. On a proper construction of S. 4(4)(d)(i) of the Act read with the explanation, I am of the opinion that any secondary packing done for the purpose of facilitating transport and 8 month transit of the goods to be delivered to the buyer in the whole-sale trade cannot be included in the value for the purpose of assessment of excise duty. I, therefore, hold that the cost of corrugated fibre board containers which the cartons containing the packets of cigarettes is packed, cannot be included in the value for the purpose of assessment of excise A duty. It is to be borne in mind that the excise duty which is levied on the goods is ultimately passed on to the consumers of the goods and they have ultimately to bear the burden. So far as the consumers are concerned they buy cigarettes loose or in packets or even in cartons. Cartons packed in corrugated fibre board containers are not purchased by the consumers. So far as the retail sellers are concerned who may buy from whole-sellers, they usually buy loose packets of cigarettes or packets of cigarettes packed in cartons. So far as the buyers in the whole-sale trade are concerned, they buy the cartons of cigarettes in which the packets of cigarettes are packed in the course of their whole-sale trade for selling the same to retailers or to their customers. It is only for the sake of convenience in the matter of smooth delivery of cartons in which the packets of cigarettes are packed that the cartons may be further packed in corrugated fibre board containers for facility of transport and smooth transit of the cartons before delivery of the same to the whole-sale buyer.

The letter dated 4th May, 1976 addressed by the Under Secretary, Central Board of Excise and Customs to the Cigarette Manufacturers Association which has been referred to and considered at length in the judgment of the Learned Chief Justice, clearly supports, in my opinion, the view I have taken.

For reasons briefly indicated above, I have to record my dissent with the view expressed by the Learned Chief Justice on this question of secondary packing.

On the other question, namely, the question of promissory estoppel I am in entire agreement with the views expressed by the learned Chief Justice for reasons recorded by him in his judgment and I have nothing to add.

I accordingly hold that the cost of the further packing of the cartons in which the packets of cigarettes are packed in the corrugated fibre board containers cannot be included in the value for the purpose of assessment of excise duty.

I agree with the Learned Chief Justice that in the light of the judgment and decision delivered by us, the Assessing Authorities will now proceed to make the assessment.

N.V.K.