

(1989) 09 BOM CK 0048
In the Bombay High Court
Case No : Writ Petition No. 884 of 1980

Britannia Industries Ltd.

APPELLANT

Vs

Union Bank of India

RESPONDENT

Date of Decision : 12-09-1989

Acts Referred:

Central Excise Rules, 1944 — Rule 52

Central Excises and Salt Act, 1944 — Section 3, 35F, 4, 4(1), 4(2)

Citation : (1990) ECR 131 : (1989) 44 ELT 630

Hon'ble Judges : Chittatosh Mukerjee, C.J.; M.P. Kenia, J

Bench : Division Bench

Judgement

Mukerjee, C.J.—The Petitioner Company carries on business as manufacturers of biscuits. It has a factory at Reay Road, Mazagaon, Bombay. The biscuits manufactured at the said factory were excisable goods and they were liable to ad valorem excise duty at the relevant time under the Tariff Item 1C of the First Schedule to the Central Excises and Salt Act, 1944.

2. On 27th October 1980 the Petitioners moved the present Writ Petition, inter alia, challenging the varies of Section 4 of the Central Excises and Salt Act, 1944, which was substituted for the original Section 4 by Act 22 of 1973. They had also prayed for issue of appropriate writs against the Respondents for withdrawing and/or canceling the orders refusing their prayer for refund of the excess excise duty paid from 1-10-1975, for approving the price lists submitted by the Petitioner Company on 6th August 1980 and to all the Petitioner Company to clear its goods after payment of the excise duty on the basis of the assessable values as declared in the price lists submitted by the Petitioner Company. The Petitioners also prayed for refund of the sum of Rs. 68,29,214.81 p. which, according to the Petitioner Company, had been illegally collected by the Respondents from 1st October 1975 to 31st March 1980 by including in the value of the Petitioner's products post-manufacturing costs, expenses and profits. A learned Single Judge of this Court was pleased to issue Rule in terms of prayers (a) to (c) and on the Petitioners through their Advocates undertaking to this

Court that in the event of this Petition being dismissed they will pay to the Respondents the differential excise duty in respect of goods cleared by them thereafter on the basis adopted by the Respondents and the amount actually paid within four weeks from the dismissal of the Petition with interest on the differential amount of 17 per cent per annum from the due date and on the Petitioners executing a bond without security in favour of the Respondents to the aforesaid effect, granted interim order in terms of prayer (d) of the Petition.

3. In their original Writ Petition the Petitioners had purported to rely mainly upon the decision of the Supreme Court in the case of A.K. Roy and Another Vs. Voltas Limited, and the other reported decisions which followed the same and had contended that in order to arrive at the assessable value of the Petitioner Company's products, deduction ought to be made of post-manufacturing expenses like sales and distribution establishment expenses, interest on deposits from distributors, product advertisements and sales promotion expenses, freight and insurance charges, general administrative expenses for sales and also post-manufacturing profits etc.

4. While the present Writ Petition was pending, the Supreme Court decided the case of Union of India (UOI) and Others Vs. Bombay Tyre International Ltd. and Others, . R. S. Pathak, J. (as he then was) for himself and on behalf of P. N. Bhagwati, J. (as he then was) and A. N. Sen, J. set forth the legal position in respect of various aspects of the levy of excise duty under the Central Excises and Salt Act, 1944, both before its amendment by the Central Excises and Salt (Amendment) Act, 1973 (Act 22 of 1973) and after such amendment. In the case of Union of India v. Bombay Tyre International Ltd. (supra) the Court explained the true scope of its earlier decisions in A.K. Roy and Another Vs. Voltas Limited, and in the case of Atic Industries Ltd. Vs. H.H. Dewa, Asstt. Collector of Central Excise and Others, , both of which dealt with certain aspects of previous Section 4 of the Central Excises and Salt Act. The Court held that in every case fundamental criteria for computing the value of an excisable article was the price at which the excisable article or an article of the like kind and quality was sold or was capable of being sold by the manufacturer and it was not the mere manufacturing cost and manufacturing profit which constituted the basis for determining such value. (Paragraph 30). Having discussed various other cases under the previous Section 4 of the Central Excises and Salt Act, the Court had answered in the negative the question whether the value of an article for the purposes of excise duty must be confined to the manufacturing cost and manufacturing profit in respect of an excisable article. The Supreme Court further held that in enacting the new Section 4 in supersession of the previous Section no material departure was intended from the basis scheme of determining the value of an excisable article. In paragraph 48 of their judgment in the case of Union of India v. Bombay Tyre International Ltd. (supra) the true position under the Central Excises and Salt Act, 1944, as amended by Act 22 of 1973 was set forth. The proposition (i) was that 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 the excisable value, provided a buyer is not related person and the price is the sole consideration for the sale. The proposition (iii) was where wholesale price of any excisable goods for delivery at a place of removal is not known and the value thereof is determined 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 sale. In *Bombay Tyre International Ltd.*'s case (supra) the Supreme Court in paragraph 51 of its judgment (A.I.R. report) had, inter alia, observed :

"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 up to 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. 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."

Thus, the test laid down in the case of *Union of India v. Bombay Tyre International Ltd.* (supra) was that expenses of elements or constituents which enriched its value and marketability are to be included for determining the value of an excisable article. In other words, not only manufacturing expenses but also post-manufacturing expenses which contribute to the marketability must be considered to be part of the wholesale price at the place of removal. By the same logic the assessee will be entitled to deduction on account of the cost of transportation of the excisable articles from the factory gate to the place or places where its products are sold. According to the Supreme Court, the cost of transportation will include the cost of insurance of the freight for transportation of the goods from the factory gate to the place or places of delivery. In paragraph 52 of its judgment in *Bombay Tyre International Ltd.*'s case (supra) the Supreme Court had referred to cases where freight is average and the average freight is included in the wholesale case price in order to have same wholesale cash price at the factory gate and elsewhere. In paragraph 53 of its judgment in *Bombay Tyre international Ltd.*'s case (supra) the Supreme Court had interpreted Section 4(4)(d)(i) by holding that the packing of which the cost is included in the value of excisable goods was that packing in which goods are ordinarily sold in the course of wholesale trade to the wholesale buyer, i.e. the

packing in which the article is made marketable without being ordinarily consumed. With reference to secondary packing in *Bombay Tyre International Ltd.*'s case (*supra*) the Supreme Court had observed that when secondary packing is necessary for putting excisable article in the condition in which it is generally sold in the wholesale market at the factory gate, cost of the same is to be included in the value for the purposes of excise duty. "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 packaging shall be deducted from the wholesale cash price." Vide paragraph 54 of the judgment in the case of *union of India v. Bombay Tyre International Ltd.* (A.I.R. report).

5. On December 5, 1983, the present Writ Petition came up before Pendse, J. The learned Judge, in accordance with the directions given by the Supreme Court on November 25, 1983, passed an interim order in the following terms. In paragraph 3 of his order Pendse, J. made it clear that the Petitioners were no longer entitled to relief in terms of prayer (a) and were also not entitled to claim deduction of post-manufacturing expenses mentioned by him. Pendse, J. ordered the assessing authorities to permit the assessee to submit their statement of deductions/amendments in respect of the price list already filed for proper determination of excise duty liability in respect of the deductions claimed under the headings (i) interest on deposit from distributors and (ii) freight of and insurance charges together with further claims, deductions or heads of expenditure beyond those dealt with in the judgment of the Supreme Court, if otherwise admissible. Such statements were to be filed with the authorities within the time mentioned by the learned Judge.

6. The second direction of Pendse, J. was upon the Petitioners filing the revised price lists within January 9, 1984, the authorities were to finalise the price lists within six weeks thereafter, after giving opportunity to the assessee. The assessments were to be finalised on the basis of the determination made by the authorities and the quantum of the final assessed figures would be indicated in the decision of the assessing authority. The amounts admittedly payable by the petitioners on the basis of the revised statements were to be paid by the assessee together with interest at the rate of 17 per cent subject to the assessee's right to approach the High Court. Under the order of Pendse, J. "all final orders including orders for payment of the demands and the time within which the amounts are to be paid and all incidental, consequential and supplementary matters (including payment of interest) will be determined and decided by this Court in each case." Liberty was given to the respective parties to make their appropriate submissions.

7. Pursuant to the aforesaid directions dated 5th December 1983, the Petitioner Company had filed with Respondent No. 6 three statement of deductions. The Company had also filed revised price list for the period 12th August 1980 to 23rd December 1983. By another letter the Petitioner Company had made revised

refund claims amounting to Rs. 25,74,740.23 p. for the period 1st April 1971 to 6th August, 1980. According to the Petitioners, for the period covered by the Writ Petition, i.e. from 1st October 1975 to 6th August 1980, the Petitioner Company was entitled to refund amounting to Rs. 16,20,485.82 p. under the following headings :-

- (1) Carriage and freight.
- (2) Transit insurance.
- (3) Interest on distributors' advances.
- (4) Surcharge on sales tax.
- (5) Packing and card-board boxes.

8. Thereafter various correspondence ensued between the Petitioner Company and Respondent No. 6. According to the Petitioners, Respondent No. 6 had also deputed his representative to examine and verify the books and documents of the Petitioner Company. After giving a personal hearing to the Petitioner Company on 13th March 1984, on 19th March 1984 Respondent No. 6 passed an order which was, however, withdrawn pursuant to the order of this Court dated 18th June 1984.

9. On 9th July 1984 personal hearing was again granted to the Petitioner Company. During the said personal hearing, the Petitioner Company claimed to have submitted copies of price lists. The Petitioner Company also submitted two invoices, two transport bills and a copy of an argument between the petitioner Company and the authorised wholesalers.

10. By his order dated 10th August 1984, Respondent No. 6 had upheld the Petitioners' claim for deduction in respect of transit insurance and surcharge on sales tax but had disallowed the claim for deduction in respect of carriage and freight, interest on distributors' advances and packing and card-board boxes. By his said order, Respondents No. 6 had assessed the sum of Rs. 35,92,599.61 p. as excise duty payable by the Petitioners for the period in question.

11. On 25th March 1985 Respondent No. 6 had given further personal hearing to the Petitioner Company. At the said hearing the Petitioner submitted a revised refund claim. Respondent No. 6, by his order dated 25th March 1985 allowed the Petitioners refund amounting to Rs. 1,72,144/- in respect of transit insurance and surcharge on sales tax for the period 1st October 1975 to 6th August 1980. Respondent No. 6, however, rejected the claim for deduction in respect of carriage and freight, interest on distributors' advances and packing and card-board boxes.

12. Thereafter, the Petitioners, after obtaining leave, amended their Writ Petition by adding, inter alia, paragraphs 13(A) to 13(M). An additional prayer was also inserted. The Respondents filed an affidavit in reply for contesting the Petitioners' claims and contentions in respect of the determination of the value,

price lists, assessment of duty and refund.

13. In view of the decision of the Supreme Court in the case of *Union of India v. Bombay Tyres International Ltd.* (supra) and the interim order dated 5th December 1983 of Pendse, J., the scope of the present Writ Petition has become much narrower than that of the original writ petition. Broadly three points now arise for decision : Whether or not in addition to cost of transit insurance and amounts paid as surcharge on sales tax which have been allowed to be deducted by the order of Respondent No. 6, the Petitioner Company is entitled to refund also under the following heads, viz. (1) carriage and freight, (2) packing and cardboard boxes and (3) interest paid on distributors' advances. Secondly, whether the Petitioner Company is entitled to obtain refund of the amounts of excise duty which it had paid in excess of the duties lawfully payable upon its products during the period 1st October 1975 to 6th August 1980. Although initially the learned Counsel for the petitioners had urged that the Petitioners were entitled to obtain refund of the alleged excise duty paid from 1st April 1971, after the Respondents pointed out that the Petitioners' claim for refund from 1st April 1971 to 30th September 1975 was subject-matter of another Writ Petition, Mr. Hidayatullah, the learned Counsel for the Petitioners, submitted that the Petitioners would confine, in the present Writ Petition, their claim for refund from 1st October 1975 and not from earlier. Thirdly, whether assessments of excise duty made by Respondents No. 6 were lawful.

14. We may first take up the Petitioners' claim for deduction from the assessable value of the Petitioner Company's products of amounts allegedly paid by the Petitioner Company as interest on deposits from its various distributors. The Petitioner Company through its Solicitors by letter dated March 14, 1984, had claimed that the Petitioner Company received advance deposits from the wholesale dealers which were in the nature of security acting as debenture on buyers so that they did not default in making payments in respect of supplies made by the Petitioner Company. Since the wholesalers normally provided such deposits in the trade, the Petitioner Company paid interest at 8 per cent per annum. In both of his orders respectively dated 10th August 1984 and 30th March 1985 Respondent No. 6, after giving reason, rejected the claim for deduction on account of interest paid on the said deposits.

15. In his order dated 10th August 1984 Respondent No. 6 pointed out that the amounts of advances collected were utilised for the working of the Company in its activities and while utilising the said moneys they had paid interests to their authorised wholesalers. The said amounts were in no way connected with the determination of the assessable value of goods. The said advances did not differ from the moneys borrowed by the Petitioner Company from banks or other financial institutions. In his order dated 30th March 1985 Respondent No. 6 recorded the submission made on behalf of the Petitioner Company that the said advances from the distributors were by way of security and not borrowings in the nature of loans. The Respondent No. 6 also found that although the terms for

receiving advances from its distributors were not identical with the terms of other borrowings made by the Petitioner, these distributors' advances were indistinguishable from other borrowings so far as utilisation of the same was concerned. It was not accepted that the cash monies in the form of these deposits available to the assessee Company were allowed to lie idle and borrowings deposits from the wholesale dealers which were in the nature of security acting as debenture on buyers so that they did not default in making payments in respect of supplies made by the Petitioner Company. Since the wholesalers normally provided such deposits in the trade, the Petitioner Company paid interest at 8 per cent per annum. In both of his orders respectively dated 10th August 1984 and 30th March 1985 Respondent No. 6, after giving reasons, rejected the claim for deduction on account of interest paid on the said deposits.

16. In his order dated 10th August 1984 Respondent No. 6 pointed out that the amounts of advances collected were utilised for the working of the Company in its activities and while utilising the said moneys they had paid interests to their authorised wholesalers. The said amounts were in no way connected with the determination of the assessable value of goods. The said advances did not differ from the money borrowed by the Petitioner Company from bank or other financial institutions. In his order dated 30th March 1985 Respondent No. 6 recorded the submission made on behalf of the Petitioner Company that the said advances from the distributors were by way of security and not borrowings in the nature of loans. The Respondents No. 6 also found that although the terms for receiving advances from its distributors were not identical with the terms of other borrowings made by the Petitioner, these distributor's advances were indistinguishable from other borrowings so far as utilisation of the same was concerned. It was not accepted that the cash monies in the form of these deposits available to the assessee Company were allowed to lie idle and borrowings were made from other sources at higher market rate. The assessee did not adduce evidence to show that the said amounts were not at all utilised as capital. Liability to pay interest on these deposits was to be discharged out of the miscellaneous income arising, if any, by way of deposits and not out of the sale price of goods.

17 In our view, the Assistant Collector of Central Excise, Respondent No. 6, did not commit any jurisdictional error in rejecting the Petitioner Company's claim for deduction on account of such interest payments on deposits from its wholesalers. It was not very material that in the books of account of the Petitioner Company interest paid on the said deposits was separately shown. Prior to the filing of this Writ Petition, the Petitioners at no earlier stage of the proceedings had claimed deduction of such interest payments entered in their books of account for the purposes of fixation of price lists for their products sold to wholesalers. Secondly, payments of interest are made for use of money borrowed, lent or advanced. We see no reason why the said interest payments upon deposits received by the Petitioner Company are to be deducted in assessing the wholesale price u/s 4 of the Act merely because the persons who

made the said deposits of money happened to be wholesale buyers of the Petitioners' products. Therefore, the petitioner company's claim for deduction on account of interest payments upon the deposits made by its wholesale distributors ought to fail.

18. We next take up consideration of the question whether the Assistant Collector of Central Excise had committed error of jurisdiction in rejecting the Petitioner Company's prayer for deductions on account of costs of carriage and freight of its products. In his order dated 10th August 1984 the Assistant Collector mentioned two invoices and transport bills produced by the Petitioner Company in order to show payments of transport charges. The Assistant Collector had referred to clause 5 of the agreement between Messrs. Britannia Industries Ltd. and their authorised wholesalers and interpreted the same by holding that all the expenses including transport demurrage/wharfages had to be borne by the wholesale dealer. Therefore, the assessee's claim that it incurred transport charges was not acceptable and anything contrary to the provisions of clause 5 of the agreement had not been brought forward. The Assistant Collector observed that the sale of biscuits by the Petitioner was on the basis of different regions and the prices of biscuits manufactured by the Petitioner Company in Bombay city and suburbs and always remained lower than the prices of the same biscuits sold in the regions outside Bombay city and suburbs. The differences in prices in the different regions was due to the delivery charges payable on account of carriage of the goods for delivery over longer distances. The further finding of the Assistant Collector was that in the case before him freight paid was not averaged in order to make the wholesale cash prices of the biscuits same everywhere.

19. In his second order dated 30th March 1986 the Assistant Collector recorded as follows the submission made on behalf of the Petitioner Company in respect of carriage and freight. According to the learned senior Advocate appearing on behalf of the petitioner company, costs of carriage and freight were being borne by it as a practice for fifty years. There was transits insurance with regard to transportation which had been already allowed and the same showed that the transport costs were being incurred by the Petitioner Company. Reliance was placed on behalf of the Petitioner Company upon clause 2, according to which it had not only to sell but to supply biscuits. Therefore, the Company had to transport biscuits to wholesaler's destination. The Company also relied upon Clause 5 and contended that the same indicated the costs which arose only after the goods delivered at the wholesaler's destination were to be on wholesaler's account. Clause 5 did not include the costs of transport. Reference was also made to the decision of the Supreme Court in the case of Bombay Tyre International Ltd. (*supra*). The Assistant Collector did not accept the aforesaid submissions regarding carriage and freight advanced on behalf of the Petitioner Company for the following reasons. The Assistant Collector did not accept the Petitioner's interpretation of Clause 5 of the agreement with its wholesalers that the said clause dealt with those expenses which were to be incurred after

delivery to the wholesale buyers. The Assistant Collector also found that the Company did not adduce any direct evidence to support its contention that during the material period the freight was borne by the assesseees and not by the wholesale buyers and also as to the nature of the freight.

20. Mr. Hidayatullah, the learned Counsel for the Petitioner Company, submitted before us that the conduct of the parties and the terms of the contract established that freight was incurred and kept by the Petitioners and the same was in-built into the price charged to the wholesalers because the Petitioner engaged the transporters who issued goods consignment notes indicating that the said consignments were carried to the wholesale dealers and the amounts of such transportation were payable by the Petitioner Company. The transport company had also issued bills drawn against the Petitioners. The amounts borne and paid by the Petitioners were also reflected in the profit and loss account. The said fact of payment of freight charges to the carriers, according to Mr. Hidayatullah, was also proved before the Assistant Collector by the certificate issued by the Chartered Accountants of the Company.

21. Mr. Hidayatullah, the learned Counsel for the Petitioners, further submitted that the fact that the Petitioner Company had two price lists, one for the Bombay city and suburbs and the other for the Western India, did not mean that the transport or freight charges were not averaged. According to Mr. Hidayatullah, two sets of price list for the finished products of the Petitioner Company indicated that carriage and freight charges were averaged in respect of one region where the distance to which the goods were to be carried were small and the freight charges incurred were comparatively less. In case of areas beyond Bombay city and the suburbs delivery from the Petitioner Company's depot involved transport over longer distances and necessarily payments of included averaged transport costs were charged to wholesale buyers of the Petitioner Company's products. Mr. Sethna, the learned Counsel appearing on behalf of the Respondents, has submitted that in view of the provisions of sub-section (2) of Section 4 of the Central Excises and Salt Act he does not dispute the legal proposition that where the value of an excisable product 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 said goods are ordinarily sold to a wholesale buyer at the time and place of removal, i.e. at the factory gate or a warehouse where excisable goods had been permitted to be deposited without payment of duty. Mr. Sethna has correctly pointed out that ordinarily when goods are sold at the place of removal and the normal price thereof is known, the question of deducting cost of removal from the value of the excisable goods would not arise. Sub-section (2) of Section 4 provides for deduction of cost of transportation in the following cases :-

(i) The price for delivery at the place of the removal is not known, i.e. the normal price u/s 4(1)(a) of the Act.

(ii) Delivery takes place at a place other than the place of removal.

(iii) Cost of transportation is incurred and is added to the price payable by the wholesaler at the place of delivery.

In the event the goods are sold for delivery at the place of removal, i.e. at the factory gate or the warehouse where goods could be stored without payment of duty and the price charged, such price does not include cost of transportation. Ad valorem duty is to be computed according to such normal price paid by the wholesaler at the factory gate without any deduction.

22. The observations of the Supreme Court about costs of transportation and averaged freight in paragraphs 49 and 50 of its judgment in the case of *Union of India v. Bombay Tyre International Ltd.*, 1983 (14) E.L.T. 1896, were presumably made with reference to the provisions of sub-section (2) of Section 4 of the Central Excises and Salt Act. It will be clear from the following passage in paragraph 49 of the judgment :-

"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."

In paragraph 50 the following observations were made :-

"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 has to be deducted in order to arrive at the real whole cash price at the factory gate and no excise duty can be charged on it."

23. The Assistant Collector has not believed that the freight chargers were loaded with the prices charged by the Petitioner Company to its wholesalers. According to Mr. Sethna, the said finding of fact cannot be successfully assailed by the Petitioner Company in this Writ Petition. Whether transport charges had entered into the prices payable by the wholesalers was a question of fact. We, however, cannot subscribe to the extreme view canvassed on behalf of the Respondents that the price charged by the manufacturer at the factory gate can never include transport charges. In case excise duty levied u/s 3 of the Central Excises and Salt Act is to be collected with reference to the value of excisable articles, such value is to be determined in terms of Section 4 of the Act. Such value u/s 4(1)(a) is deemed to be the normal price, i.e. the price at which such goods are ordinarily sold by the assessee to a buyer in the course of at wholesale trade. It is possible to visualize cases in which the price payable by a wholesaler at the factory gate includes charges and payments which do not enrich or add the value of the product at the time and place of removal. In view of the observations of the Supreme Court in paragraph 49 of its judgment in the case of

Union of India v. Bombay Tyre International Ltd. (supra), the price of an article is related to its value and into that value is added the expenses incurred on account of the factors which have contributed to the value up to the date of the sale. In case the freight is averaged in order to have uniform wholesale cash price at the factory gate and elsewhere, the price charged at the factory gate would be loaded, i.e. the wholesale cash price at the factory gate and at the place of delivery elsewhere made the same. The cost of transportation may be equalised and included and one averaged figure may be added to the price.

24. But in the instant case, according to the Assistant Collector, the Petitioner Company did not prove that either the specific or the equalised amount of freight charges had been included in the price payable by its wholesale buyers. In this connection, Mr. Sethna, the learned Counsel for the Respondents, relied upon a recent Supreme Court decision in the case of Indian Oxygen Ltd. v. Collector of C.E. 1989 (36) ELT 723. Mr. Sethna pointed out that even before the decision of the Supreme Court in Bombay Tyre International Ltd.'s case (supra) was reported, transportation cost incurred for delivery at the place other than the factory gate was liable to be deducted in order to ascertain the normal wholesale cash price at the factory gate. But while claiming deductions from 1st October 1975 from the Excise authorities, the Petitioner Company did not claim any deduction on account of transport charges. In the price list of the wholesale cash price of biscuits manufactured by it submitted for approval the Petitioner Company did not indicate that the transport charges had been included in the said prices. According to the Petitioner, the price list submitted by it mentioned the ex-factory prices. Only in its subsequent price list dated 6th August 1980 the Petitioner Company had first time filled up the columns relating to other deductions claimed from the price u/s 4(2) and Section 4(4)(d) of the Act. According to the Petitioners themselves, since 1968, the Petitioner Company's products were being sold by following self-removal procedure laid down in Chapter VIIA of the Central Excise Rules. In the original Writ Petition the Petitioner Company did not mention the amount of deduction claimed towards freight charges. We have already mentioned that in his orders dated 10th August 1984 and 30th March 1985 the Assistant Collector had, inter alia, held that the Petitioner Company had failed to satisfy him that the Company had incurred transport charges and the same had been added to the wholesale cash prices, on the basis of which excise duties were levied. Mr. Sethna also pointed out that since removal from the Petitioner Company's factory took place under Rule 52 of the Central Excise Rules, although the price charged at the factory gate was known, at the time of removal the Petitioner Company had not claimed deduction on account of freight and transport cost.

25. The Petitioner Company, even after the Writ Petition was amended, did not claim that besides the goods consignment notes, Chartered Accountants' certificates and profit and loss account, it had other materials to substantiate its claim for refund on account of transport charges. After Pendse, J. had made the format order on 5th December 1983, the Petitioner Company had further

opportunity to produce all its evidence in support of its claim for deduction under different heads including freight and transport costs. On 23rd January 1984 the Assistant Collector had called upon the Petitioner Company to produce documents and papers. The Petitioner Company had availed of the same. Personal hearing was given to the petitioner Company more than once. At none of these hearings the Petitioner Company produced the necessary evidence in support of its claim that it had incurred transport charges and that the same were part of the price charged. The Petitioner Company did not also make a consistent case as regards recovery of the said transport charges from its wholesalers. In paragraph 13(N)(a) of the Writ Petition it has been averred that during the personal hearing it was stated that the Petitioner Company was and is not recovering the said transport charges from the authorised wholesalers. As stated earlier, the Petitioner Company had submitted copies of two transport bills at the time of the personal hearing. The Petitioner Company also claimed that the books of accounts and documents of the Petitioner Company were checked and verified by the representative of Respondent No. 6. These books and documents also evidenced payment of transport charges by the Petitioner Company.

26. In their affidavit in reply the Respondents did not deny that the books of account and documents of the Petitioner Company were checked and verified, but it was denied that the said books evidenced payment of transport charges by the Petitioner Company in respect of finished products. From the extracts of profit and loss account of the Petitioner Company produced before the Excise authorities it is not possible for this Court to say how much of these transport charges were incurred for carriage of the raw materials or of the bread which were not excisable articles. In the above view, it is not possible to hold that upon the material produced before the Central Excise authorities the Assistant Collector had committed any error apparent on the face of the record in rejecting the deduction claimed on account of transport and freight charges in order to arrive at the normal wholesale price during the period 1st October 1975 to the date of the issue of the present Rule. We are not inclined to further protract the proceedings by remitting the matter back to the Central Excise authorities. The Petitioner Company has been already given ample opportunity to establish its claim for refund on account of deductions towards transport charges. Under orders of this Court, the Assistant Collector, even after issue of the Rule, twice considered whether the Petitioner Company was entitled to deduction on account of transport charges but had come to the conclusion that the Petitioner Company had failed to prove the same by producing necessary material. Therefore, the matter cannot be again remitted back and the Petitioners' contention for deduction on account of freight and carriage costs ought to stand rejected.

27. The third head of deduction was the costs of special secondary packing from the assessable value of the biscuits. u/s 4(4)(d), the value in relation to excisable articles included the cost of packing except the cost of packing which is of a durable nature and is returnable by the buyer to the assessee. In the

present case, the Petitioner Company had initially claimed that some of its manufactured goods were packed materials which were durable in nature and returnable by the buyer. The Petitioner Company failed to prove the same. In fact, at the time of the final hearing, Mr. Hidayatullah, the learned Counsel for the Petitioners, fairly submitted before us that he was not in a position to pray for deduction on account of the cost of packing which was of a durable nature and was returnable by the buyer to the Petitioner Company assessee. After the format order dated 5th December 1983 was passed by Pendse, J., the Petitioner Company raised the question of deduction on account of packing and cardboard boxes, vide letter dated 24th January 1984 (Exhibit "K" to the Writ Petition) addressed to tech Assistant Collector of Central Excise. In paragraph 8(v) of their letter dated 14th March 1984 the Petitioners' Solicitors stated the packing cases act as a vehicle for transporting the cases, i.e. when the goods are transported for outstation, the same are transported in packing cases. These packing cases are special packing and are done as per the requirements of the purchasers. For the sale at the factory gate, the biscuits are wrapped and dispatched in craft paper. Whenever the delivery is to be made upcountry, then at the customer's request the goods are further packed in card-board boxes and cases. It was submitted that card-board boxes and packing cases were special packing and as such the same should be allowed to be deducted in view of the judgment of the Supreme Court in the case of Union of India v. Bombay Tyre International Ltd. 1983 (14) ELT1896.

28. Before deciding whether the Assistant Collector was right in rejecting the Petitioner Company's claim for deduction on account of special packing cases, we may refer to two other decisions of the Supreme Court which had also made pronouncements with regard to deduction for special packing. In the case of Union of India (UOI) and Others Vs. Godfrey Philips India Ltd., , R. S. Pathak, J. (as he then was) and A. N. Sen, J. both held that costs of secondary packing incurred by the manufacturers Godfrey Philips India Ltd. were deductible. Incidentally, on the question of secondary packing Bhagwati, C.J. who gave the minority view and also Pathak and Sen, JJ. representing the majority of the union had relied upon the following observations made in paragraph 53 of the judgment in the case of Union of India v. Bombay Tyre International Ltd. (supra) (A.I.R. report) :-

"It seems to us 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 the degree of packing whose cost can be included in the "value" of the article for the purpose of the excise levy."

But the majority view and the minority view in Godfrey Philips case (supra) differently interpreted the above quoted passage from the judgment in the case of Union of India v. Bombay Tyre International Ltd. (supra). The majority view was that the packing in corrugated fire board containers was not necessary for putting the cigarettes in the condition in which they were generally sold in the

wholesale market at the factory gate. The corrugated fibre board containers were 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. A. N. Sen, J. who countered with Pathak, J.'s judgment in the case of *Union of India v. Godfrey Philips India Ltd.* observed at page 323 of the report that 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. On this point of special packing, Bhagwati, C.J. expressed the minority view that the degree of secondary packing which is necessary for putting the excisable article in the condition in which it is generally sold in the wholesale market at the factory gate is the degree of packing whose cost can be included in the "value" of the article for the purpose of the excise duty.

29. Bhagwati, C.J. himself in the later case of *Assistant Collector of Central Excise and Others Vs. Madras Rubber Factory Ltd.*, followed the majority decision in the case of *Union of India v. Godfrey Philips India Ltd.* (supra) and held in paragraph 19 of the judgment that the secondary packaging 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. If a packaging is not necessary for the sale of the product in the wholesale market at the factory gate, the same cannot be included in the value for the purpose of assessment of excise duty. Bhagwati, C.J. had approved the view taken by Bhargava, J. In his judgment dated 7th January 1986 in *Bombay Tyre International Ltd. v. Union of India* in Miscellaneous Petition No. 1534 of 1979 on the question of secondary packaging for tread rubber. Bhargava, J. held that in the case before him the card-board cartons and the wooden cases were not secondary packing materials as could be excluded in computing the assessable value of tread rubber manufactured by the Petitioner. According to the judgment of Bhargava, J., tread rubber is a strip of rubber which is tightly wound into a roll which, however, is not held together by any means. The roll is inserted into a loose and open polythene bag which also cannot hold the roll together. The bag is placed in a card-board carton or a wooden case. The card-board carton is held together by rubber bands. The wooden cases are nailed together.

30. These authorities lay down that for the purpose of determining the assessable value, packing charges are deductible when such packing is in addition to and over and above the packing made for the goods to be sold at the factory gate to wholesale dealers. The special packing means packing which is to be at the request of the wholesaler or because of express or implied arrangements. Such special packing is for the purpose of protection of the goods

during the transit or delivery beyond the place of removal. The number of layers or wrappers in which the manufactured goods are packed is not relevant. In order to be special packing, it must be such packing which is in addition to the normal packing and is done at the request of or by reason of arrangement with the wholesale dealer, the object of such packing being for facilitating transport and delivery at a place other than the factory gate.

31. In his order dated 10th August 1984 the Assistant Collector mentioned that the Petitioner Company had submitted that card-board boxes and cases were special packing and were done as per requirements of customers and hence should be allowed to be deducted from the price. Reliance was placed upon the Supreme Court decision in the case of *Union of India v. Bombay Tyre International Ltd.* (supra). In support of the claim the Petitioner Company had submitted two letters dated 3rd September 1980 and 4th January 1981 received from its wholesalers requesting for packing in card-board boxes to avoid damages. Two letters from the Canteen Stores Department were also submitted. The Assistant Collector in his order dated 10th August 1984 had observed that the Petitioner Company packed standard number of primary cartons only to facilitate easy transport to the long distance suppliers. It also utilised card-board boxes for export too. The Assistant Collector also rejected the claim for refund for supplying biscuits in wooden boxes to the Canteen Stores Department. We are unable to agree with the submission of Mr. Hidayatullah, the learned Counsel for the Petitioners, that in his order dated 10th August 1984 the Assistant Collector had in any way admitted that the Petitioner Company during the relevant period used special packing because after having made the observations mentioned above about packing to facilitate easy transport, the Assistant Collector concluded that in respect of every sale outside Bombay city and suburbs, the same was done in Mofusil Bulk Tin (MBT) or through card-board boxes. According to the Assistant Collector, this type of sale had become a normal practice of sale and not a special practice.

32. In his subsequent order dated 30th March 1985 the Assistant Collector again rejected the Petitioner Company's claim on account of costs of packing. On the occasion of the personal hearing prior to the passing of this order, the Petitioner Company did not claim deduction in respect of ordinary packing nor in respect of sale of collophane bags but only in respect of third packing namely card-board boxes which were provided at the request of the customer. Before the Assistant Collector it was purported to be pointed out by the Petitioners that sometimes third packing at the request of the wholesaler was in tins which were then put in card-board boxes. The card-board boxes then became the fourth packing. At that time, it had been submitted that both the cost of tins and also the cost of card-board boxes ought to be deducted for determining the value of the goods manufactured by the Petitioner Company. The Assistant Collector again rejected the claim for deduction on account of packing charges. He Assistant Collector pointed out that deduction on this account was originally not claimed in the refund claims filed by the assessee in the Writ Petition. Claim for the first time

was made in the letter of the Solicitors of the Petitioner Company dated 9th January 1984. The Assistant Collector came to the categorical finding that in the case before him the packing was in the nature of essential packing for the biscuits prepared in loose form or in small packets which, without the help of the secondary packing like tin container or card-board box, could not be obviously marketed or despatched. The Assistant Collector further observed that these tin containers were used by the party for movement of biscuits and were obviously primary packing of the goods. According to the Assistant Collector, it had been admitted by the assesseees themselves that these packings were substitutes of craft paper packings. In respect of outstation sales the goods were cleared by the assesseees to their godown and subsequently thereafter the same moved to wholesalers. The situation of storage, transport, loading and unloading required packing which could protect the biscuits against humidity conditions, damage/breakage that might be caused due to handling, loading, unloading and transport and to preserve the quality of the biscuits. The Assistant Collector refused to accept the Petitioner Company's claim that the packings were done at the request of the buyer firstly because there was no evidence to substantiate the same and secondly because the a packings were essential packings in view of the nature of the goods manufactured by the assessee. Even the goods sold locally were cleared in tins and such packings. In view of these facts, the Assistant Collector rejected the Petitioner Company's claim regarding special packing.

33. In our view, the Assistant Collector had rightly rejected the claim for deduction on account of wooden packing used for supply of biscuits to Canteen Stores Department. No particulars of purchase of wood, use of wooden packing and the total quantity of biscuits sold to the Canteen Stores Department were placed before the Assistant Collector. Therefore, no sufficient material in this behalf was placed before the Assistant Collector. Upon Appraisal of the evidence, the Assistant Collector had rejected the Petitioners' claim for deduction on account of wooden boxes.

34. In our view, these findings of fact regarding (i) the nature of packing and (ii) the reasons for such packing cannot be assailed in Writ Court. The Assistant Collector found that the packings in question were necessary for marketing biscuits. The claim of the Petitioner Company to the effect that the wholesalers themselves had made request was not substantiated by evidence.

35. Before us, on behalf of the Petitioner Company, attempt was made to demonstrate how the Petitioner Company's products were packed for sale at the factory gate and also for upcountry sales. Before us, it was tried to be contended that the air-tight cartons in which biscuits were kept was the primary factor. The air-tight cartons, according to the submission made at the Bar, were placed inside card-board boxes or craft paper packings for being sold at the factory gate. According to the submission made at the Bar, these air-tight cartons were packed in corrugated fibre containers (CFCs) for giving delivery in Mofussil to wholesalers. We are unable to decide the case on the basis of the demonstration

given before us about the nature of the packing for sale at the factory gate and elsewhere of the biscuits manufactured by the Petitioner Company. The relevant period of the refund claimed was between 1st October 1975 to the date of filing of the Writ Petition. Secondly, how the biscuits manufactured by the Petitioner Company were despatched upcountry is a matter entirely one of fact. The Petitioner did not place any material before us in order to substantiate its contention. The Collectors' finding that the packing in question was normal packing and not additional or special packing is one of fact. As already stated, before filing the Writ Petition, such a claim for deduction on account of special packing charges was not made. Even during the heading of the matter before him, according to the Assistant Collector, the evidence adduced was not sufficient to prove the Petitioner's claim. The Petitioner Company's profit and loss account or the certificate granted by its auditors did not indicate separately the costs of normal packing and the costs of special packing made either at the request of the party or for facilitating delivery in Mofussil. It is not at all clear whether the Petitioner Company had claimed deduction of entire packing costs or only the costs of packing in corrugated card-board boxes. It has been pointed out before us that the sale invoices of the Petitioner did not also mention such packing.

36. In this connection, Mr. Sethna has strongly relied upon the decision of this Court in the case of *Sathe Biscuits and Chocolate Company Ltd. and another Vs. Union of India and others*, . The said case was also concerned with manufacture and sale of biscuits in tin containers of corrugated fibre cartons. In *Sathe Biscuits*" case (supra) Chandurkar, C.J. and Jahagirdar, J. held that the said tin containers and fibre carton packings were necessary for putting the excisable article in the condition in which it was generally sold in the wholesale market at the factory gate and that the costs of these packings were includible in the assessable value. The Division Bench in *Sathe Biscuits*" case (supra) had relied upon the Supreme Court decision in *Bombay Tyre International Ltd.*"s case (supra). In the present case before us also, the Assistant Collector found as a fact that secondary packing of the Petitioner's biscuits in tin boxes and corrugated card-board boxes was not special packing done at the request of the wholesale buyer but was part of the normal packing for marketing these goods. This view about the nature of packing of biscuits is supported by the Division Bench decision of this Court in *Sathe Biscuits*" case (supra).

37. For the foregoing reasons, we conclude that the Petitioners' claim for deduction on account of special packing was rightly rejected by the Assistant Collector. Even if the Petitioners can legitimately contend that the law relating to deduction on account of special packing had developed only after, pronouncements made by the Supreme Court in *Bombay Tyre International Ltd.*"s case (supra), the Petitioners must still fail because even after being given further opportunities under the order of the learned Single Judge dated 5th December 1983, the materials produced by them were not believed by the Assistant Collector. In rejecting the Petitioners' said case regarding special packing, the Assistant Collector did not commit any error of law or fact apparent

on the face of the record which would warrant interference under Article 226 of the Constitution. After giving reasons, the Assistant Collector had disbelieved the Petitioners' case. He found the packings to be normal or usual packings. Therefore, we are unable to interfere with the order of the Assistant Collector rejecting the claim for deduction on account of special packing.

38. Before we conclude, we may deal with the preliminary objection raised by Mr. Hidayatullah. His submission was that it was not open to Mr. Sethna, the learned Counsel for the Respondents, to urge any point which cannot be found in the orders of the Assistant Collector dated 10th August 1984 and 30th March 1985. According to Mr. Hidayatullah, the learned Counsel for the Petitioners, the points now urged by Mr. Sethna were also not taken in the affidavit filed on behalf of the Respondents. In this connection, the learned Counsel for the Petitioners had relied upon a number of reported decisions including Commissioner of Police, Bombay Vs. Gordhandas Bhanji, ; Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, ; ; Bush (India) Ltd. Vs. Union of India and others, and Leukoplast (India) Ltd. Vs. State of Goa, . We find no substance in the preliminary objection by which, in effect, the learned Counsel attempted to shut out submissions made on behalf of the Respondents. The orders in question of the Assistant Collector were quasi judicial in nature. The Assistant Collector had given several reasons in his two orders dated 10th August 1984 and 30th March 1985. Even if it is assumed that some of his reasons are erroneous, in the event this Court is unable to strike down the rest of the reasons contained in the orders of the Assistant Collector, this Court under Article 226 of the Constitution cannot quash such quasi judicial order of the Assistant Collector. The Petitioners accordingly are bound to fail. Amongst other reasons, on facts, the Assistant Collector had disbelieved the claim of the Petitioner Company that it had in fact incurred transport costs and that such costs were included in the price charged to its wholesalers. The Assistant Collector also disbelieved that any special packing was used by the Petitioner Company. The secondary packing were found upon the facts to be part of the normal packing for making the petitioner Company's goods marketable. These findings were sufficient for rejecting the Petitioners' claim for deduction under the heads of freight and transport charges and costs of special packing.

39. In the instant case, by the format order dated 5th December 1983 Pendse, J. had directed the Assistant Collector to pass orders subject to final orders of this Court. Therefore, at the final hearing, in order to support the orders passed by the Assistant Collector, the Respondents were entitled to make all appropriate submissions on points of law which did not require further investigation of facts and which related to the question of jurisdiction of the Assistant Collector.

40. At the time of his reply, Mr. Hidayatullah, the learned Counsel for the Petitioners, had relied upon some decisions rendered by the CEGAT, vide 1988 (17) ECR 669 . In their said decisions the ratio of Godfrey Philips India Ltd.'s case (supra) was purported to be applied. We have already dealt with the

decision in Godfrey Philips India Ltd's case (supra). Therefore, we consider it unnecessary to separately deal with the decisions which had only applied the law laid down in Godfrey Philips India Ltd.'s case (supra) and Madras Rubber Factory's case (supra) to the particular fact.

41. In the above view, we are unable to interfere with the order of the Assistant Collector demanding balance excise duty payable by the Petitioner Company. He has already given credit for deductions to be made on account of freight insurance and surcharge on sale tax. The Petitioners have failed to make out any case for refund under any other head. We have already noticed that in the present case the Petitioners ultimately did not urge their claim for refund for any period prior to 1st October 1975. The same is subject-matter of a separate Writ Petition. It is, therefore, unnecessary to any longer consider the submission of the learned Counsel on both sides regarding the extent of the Writ Court's power to order refund of duties paid in excess of the amount lawfully recoverable. In the present case, the question of unjust enrichment was not taken in the affidavit. We, therefore, need not decide the said point also.

42. For the foregoing reason, we dismiss the Writ Petition with costs.