

(2011) 08 SC CK 0114

In the Supreme Court Of India

Case No : Civil Appeal No. 4406 of 2010

Royal Enfield (Unit of Eicher Ltd.)

APPELLANT

Vs

Commissioner of Central Excise, Chennai

RESPONDENT

Date of Decision : 10-08-2011

Acts Referred:

Central Excises and Salt Act, 1944 — Section 4, 4(4)

Citation : (2011) 187 ECR 137 : (2011) 8 JT 622 : (2011) 4 KCCR 462 SN :
(2011) 8 SCALE 409 : (2011) 13 SCC 135 : (2011) 9 SCR 1089

Hon'ble Judges : Mukundakam Sharma, J;Anil R. Dave, J

Bench : Division Bench

Advocate : Alok Yadav and Krishan Mohan, for P. Davanath, for the Appellant;
R.P. Bhatt Sunita Rani Singh and B. Krishna Prasad, for the Respondent

Final Decision : Disposed Of

Judgement

Mukundakam Sharma, J.—By this judgment and order we propose to dispose of this appeal which is filed by the Appellant-company challenging the judgment and order dated 24.11.2009 of the Customs, Excise and Service Tax Appellate Tribunal [for short "the Tribunal"], Chennai, whereby the Tribunal rejected the appeal filed by the Appellant and upheld the order of the Commissioner of Central Excise [Appeals], Chennai.

2. The issue that arises for our consideration in the present case is as to whether the cost of packing charges expended/incurred by the Appellant-company is liable to be included in the assessable value of the motorcycles manufactured by the Appellant-company.

3. The Appellant-company, previously known as M/s. Eicher Limited - unit Royal Enfield Motors, are manufacturing motorcycles falling under Chapter 87 of the Central Excise Tariff Act, 1985. The issue relates to non-inclusion of the value of packing charges by the Assessee-company in the assessable value for motorcycles despite the fact that the said motorcycles were cleared by the

Assessee to the dealers located outside Chennai by sending them to their various depots on stock transfer basis and in packed condition from their factory during the period from April, 1999 to December, 1999.

4. At the time of removal from the factory to depot the motorcycles were cleared in fully packed condition. It is also established from records that Rs. 190/- is being charged as packing charges by the Appellant and, therefore, the said amount which was collected as packing charges must have been passed on to the buyers. The Appellant company filed price declaration in Annexure-II for the vehicles sold from their depots and therein declared the depot sale price per vehicle and claimed abatement of Rs. 190/- per vehicle towards packing charges.

5. A show cause notice dated 4.10.1999 was issued by the Respondent to the Appellant-company for the period from April, 1999 to September, 1999 directing them to show cause as to why the aforesaid abatement claimed of Rs. 190/- should not be disallowed and as to why a differential duty of Rs. 4,41,043/- and Cess of Rs. 2,228/- should not be demanded. Thereafter, another similar show cause notice dated 24.2.2002 was also issued for a subsequent period, i.e., from October, 1999 to December, 1999 demanding differential duty of Rs. 2,45,602/- and Cess of Rs. 1,279/-.

6. The Assistant Commissioner of Central Excise, Chennai 'C' Division passed an order-in-original disallowing the abatement of Rs. 190/- claimed by the Assessee towards the cost of packing and upheld the demand made in the show cause notices. While recording the aforesaid finding and the conclusion, the Assistant Commissioner referred to the decision of this Court in the case of Government of India and Others Vs. Madras Rubber Factory Ltd. and Others, and on another order of the Customs, Excise and Service Tax Appellate Tribunal, New Delhi in the case of 2001 (78) ECC 270 in which the Tribunal, in respect of the same Assessee, held that the cost of packing is to be included in the assessable value of the motorcycles manufactured by it. Aggrieved by the aforesaid order-in-original of the Assistant Commissioner the Appellant-company filed an appeal before the Commissioner of Central Excise [Appeals], Chennai which got rejected by order dated 23.07.2003 while relying on the decision of CESTAT, Delhi in the case of Commissioner of Central Excise, Jaipur [supra].

7. Being aggrieved by the said order of the Commissioner of Central Excise [Appeals], Chennai Assessee-company filed an appeal before the Tribunal, Chennai which also was rejected by the impugned judgment and order dated 24.11.2009 and, therefore, the present appeal was filed in this Court by the Appellant-company on which we heard the learned Counsel appearing for the parties.

8. During the course of hearing our attention was drawn to Section 4 of the Central Excise Act, 1944 [for short "the Act"], the relevant portion of which is extracted below for better understanding and ready reference:

Section 4. Valuation of excisable goods for purposes of charging of duty of excise

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(1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to value, such value, shall, subject to the other provisions of this section, be deemed to be -

(a) the normal price thereof, that is to say, the price at which such goods are ordinarily sold by the Assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal, where the buyer is not a related person and the price is the sole consideration for the sale:

....

....

(4) For the purposes of this section, -

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

(b) "place of removal" means -

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

(ii) a warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty;

(iii) a depot, premises of a consignment agent or any other place or premises from where the excisable goods are to be sold after their clearance from the factory and,

From where such goods are removed;

(ba) "time of removal", in respect of goods removed from the place of removal referred to in Sub-clause (iii) of Clause (b), shall be deemed to be the time at which such goods are cleared from the factory;

....

....

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

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

Explanation - In this sub-clause, "packing" means the wrapper, container, bobbin, pirn, spool, reel or warp beam or any other thing in which or on which the excisable goods are wrapped, contained or wound;

....

....

9. Relying on the same counsel appearing for the Appellant-company submitted before us that the cost of the packing material cannot be included in the assessable value because the said cost of the packing material cannot be said to be the price at which such goods are ordinarily sold by the Assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal. He also submitted that the requisite packing is done so as to avoid scratch to the painted body and breakage of the lights fitted on to the motorcycles during transportation, and therefore, the cost of the aforesaid packing was not includable as per Section 4 of the Central Excise Act to the value of the motorcycles. In support of the aforesaid contentions he relied and referred to various judgments of this Court, viz., *Union of India and Ors. v. Bombay tyre International Ltd.* reported at 1983 (14) ELT 1896 (SC); *Union of India (UOI) and Others Vs. Godfrey Philips India Ltd.*, and *M/s. Hindustan Polymers Vs. Collector of Central Excise*,

10. Counsel appearing for the Respondent, however, submitted that the aforesaid submissions are untenable in view of the settled position of law in the decision of this Court in the case of *Government of India v. Madras Rubber Factory Limited* [supra]. He also drew our attention to the fact that the Appellant has been realizing Rs. 190/- as packing charges from the buyers, therefore, the entire amount is passed on to the buyers by the Appellant-company. He also submitted that the cases relied upon by the counsel appearing for the Appellant are distinguishable on facts. In the light of the aforesaid submissions made on behalf of the counsel appearing for the parties we would proceed to discuss and answer the issue raised before us.

11. The provisions extracted hereinbefore from the Central Excise Act would indicate that there is express provision in Section 4 for including the cost of packing in the determination of value for the purpose of excise duty. Sub-Section 4(d)(i) along with explanation has relevant bearing on the present case. According to the said provision where goods are delivered at the time of removal from the factory gate in a packed condition the value would include the cost of such packing but would not include such cost of packing which is of a durable nature and is returnable by the buyer to the Assessee.

12. In *Union of India (UOI) and Others Vs. Bombay Tyre International Ltd. and Others*, this Court had an occasion to deal with the said provision and in paragraph of the said judgment this Court has held thus:

15. 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 unlamented 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:

(4) For the purposes of this section,-

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

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

Explanation.-In this sub-clause 'packing' means the wrapper, container, bobbin, pirn, spool, reel or warp beam or any other thing in which or on which the excisable goods are wrapped, contained or wound;

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 cardboard carton, or biscuits in a paper wrapper or in a tin container, must be regarded as falling within 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"? Or does the law require a line to be drawn somewhere? 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.

13. In *Union of India (UOI) and Others Vs. Godfrey Philips India Ltd.*, his Court again considered a similar issue. What was decided by the majority of Judges in the said case was that the cost of packing done for protection of excisable goods

during the transportation is also includible in assessable value. The said case basically revolved round the cost of corrugated fiberboard containers and all the three learned Judges uniformly reiterated the principles and the test evolved in *Bombay Tyre International* but arrived at divergent conclusions (the majority comprising Pathak and Sen, JJ. taking one view and Bhagwati, C.J., the other) on the basis of differing perceptions as to the factual situation in that case. As was noted in the said case the majority and minority came to different conclusions not on account of their adopting a different test or principle but only on account of their differing perceptions of the factual situation. So far as the test applicable is concerned, all the three learned Judges were at one and in agreement.

14. Finally in the decision of *Government of India and Others Vs. Madras Rubber Factory Ltd. and Others*, a three-Judge Bench of this Court held that where the goods are delivered in a packed condition at the time of removal the cost of such packing shall be included. While recording the aforesaid conclusion this Court took notice of the aforesaid definition of value as given in Sub-Section 4 of Section 4 of the Act. After noticing the aforesaid definition it was held that the provision in the sub-clause is a plain one and does not admit of any ambiguity as what it says is that where the goods are delivered in a packed condition, at the time of removal, the cost of such packing shall be included and that only where such packing is of a durable nature and is returnable by the buyer to the Assessee, should the cost of such packing be not included in the value of the goods. It was also held in that decision that the concept of primary and secondary packing which is recognized to some extent in the decision of this Court in *Bombay Tyre International Ltd. case* [supra], which is not possible to be wished away and is merely a refinement and is not borne out by the express language of the enactment and, therefore, the same is to be resorted to with care and circumspection. Thereafter, the Court proceeded to discuss the case of *Bombay Tyre International Ltd.* [supra] and also the decision in *Godfrey Philips India Ltd. and Ors.* [supra]. Having discussed both the cases, this Court laid down the test in the following terms:

43...Whether packing, the cost where of is sought to be included is the packing in which it is ordinarily sold in the course of a wholesale trade to the wholesale buyer. In other words, whether such packing is necessary for putting the excisable article in the condition in which it is generally sold in the wholesale market at the factory gate. If it is, then its cost is liable to be included in the value of the goods; and if it is not, the cost of such packing has to be excluded.

....

15. The aforesaid decision was rendered by this Court with respect to "tyres" which also were sold at the factory gate in a packed condition for onward easy transportation. In the background of the said case, it was held that the cost of such packing would be included in the assessable value.

16. Almost similar are the facts of the present case. The authorities below as also

the Tribunal found that the facts of the present case entirely fit in the facts of the aforesaid decision in the case of Madras Rubber Factory Ltd. [supra]. The said three authorities as also the Tribunal on analyzing the records came to a finding that the packing which is given by the Appellant-company to their motorcycles is necessary for putting the excisable article in the condition in which it is generally sold in the wholesale market at the factory gate and, therefore, such cost is liable to be included in the value of the goods and the cost of such packing cannot be excluded. The aforesaid conclusions are based on cogent reasons and are also supported by a well-reasoned decision of three Judges Bench of this Court.

17. Although, the counsel appearing for the Appellant-company vehemently submitted that the facts of this case are more akin to the cases of Bombay Tyre International Ltd. [supra] and also to the that of Godfrey Philips India Ltd. and Ors. case [supra] having considered the above situation of facts and law, we are of the considered opinion, that all the aforesaid decisions, which are relied upon by the counsel appearing for the Appellant, were taken notice of in the subsequent decision in Madras Rubber Factory Ltd. [supra] and this Court after detailed discussion of such cases has given a very reasoned order which is applicable to the facts of the present case in full force.

18. Therefore, we agree and confirm the findings recorded by the Tribunal as also by the authorities below and dismiss this appeal but leaving the parties to bear their own costs.