REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOs. 7251-7302 OF 2000

M/s. Tata Chemicals Ltd. ... Appellant

Versus

Collector of Central Excise, Ahmedabad ... Respondent

J U D G M E N T

Dipak Misra, J.

In this batch of appeals, the appellant calls in question the assailability of judgment and order dated 6.9.2000 passed by the Customs, Excise and Gold Control (Appellate) Tribunal, New Delhi (for short 'the tribunal') in Appeal Nos. E/1073-1090/90-A, E/4285-4289/90-A, E/4293-4294/91-A, E/4296-4322/91-A, whereby the tribunal has not accepted the letters dated 15.12.1970, 01.02.1971 and 02.04.1971 to bring out the arrangement for the return of durable packing, namely, gunny bags, for reuse as packing material for selling the soda ash in bulk. The tribunal has

further opined that assessee's effort to establish that there was an arrangement between the manufacturer and their customers to return the durable packing, namely, gunny bags, and accordingly the claim put forth by them that the value of gunny bags used for packing soda ash manufactured by them should be excluded in finding out the assessable value was unsustainable and hence, unacceptable.

2. The controversy, to be appreciated, requires narration of certain background facts. Dispute with regard to these gunny bags between the assessee and revenue have arisen for the period from 1970 to 1985. As is evident, proceedings for the entire period were taken in three compartments, namely, 1970-75, 1976-1980 and 1981-1985. Initially the dispute related to payment of duty of excise on the value of goods manufactured i.e. soda ash, after exclusion of post-manufacturing expenses. Subsequently, it was settled as a proposition that post-manufacturing expenses as such were not deductible and that the deduction/exclusions could only be in terms of specific provisions contained in Section 4 of the Central

Excise Act, 1944 (for brevity, 'the Act'). On the basis of the aforesaid law laid down, the matters were remanded by this Court for reconsideration.

3. Be it noted, it was for the first period, that is, 1970-75, the matter was remanded to the Assistant Commissioner to decide the issue relating to exclusion/inclusion of cost of packing in determining the value of goods for payment of excise duty under Section 4 of the Act. The claim of the assessee was eventually rejected by order no. 194/2006-Ex-PB dated 14.2.2006 in appeal No. E-480/04. That compelled the assessee to prefer Civil Appeal No. 2988/2006. The said appeal has been disposed of by this Court vide judgment and order dated 21.8.2014. This Court had referred to certain paragraphs of the order passed by the tribunal and thereafter passed the following order:-

> "The aforesaid paragraphs clearly demonstrate that the Tribunal has followed the reasoning that it had followed for the period 1981 to 1985. Mr. B.L. Narasimhan, learned counsel for the appellant would contend that the claim of the assessee before the authorities we absolutely different inasmuch as two contentions were raised before the authorities, namely, that excise duty was not leviable on the packing materials

supplied by the buyer, and the second, the same was durable and returnable, but, the Tribunal has adverted to the second aspect by expressing its view on the basis of the decision rendered by it pertaining to the assessment years 1981 to 1985 and not adverted to the issue that no levy could have been imposed on packing material, if it is supplied by the purchaser and the said fact proven to the satisfaction of the authorities that it has been used for packing.

Learned counsel for the appellant fairly submitted that he does not intend to press the issue with regard to durability and returnability. He has confined his submission with regard to levy of excise duty on the packing material supplied by the buyer.

Mr. Rohtagi, learned Attorney General, we must appreciably state submitted with all fairness at his command that as far as the first aspect is concerned, if the packing materials are supplied by the buyer, the levy could not have been impsed. The said contention is absolutely correct is view of the law laid down in *M/s. Hindustan Polymers Vs. Collector of Central Excise*[1].

As the Tribunal has not adverted to the said facet, we allow this appeal and remand the matter to the Tribunal exclusively for delineation on the said issue. Accordingly, the order of the Tribunal is set aside to the said limited extent. We may hasten to clarify, our setting aside of the order would not have no effect whatsoever for the assessment years 1981 to 1985.

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1 (1989) 4 SCC 323

4. It is necessary to mention here that for the subsequent period, i.e. 1976-1980, the matter is still subjudice before the adjudicating authorities and I am not concerned with the same. The present batch of appeals relates to the period 1981-1985. It is apt to note here that when the batch of appeals was listed before a three-Judge Bench, it referred to Section 4(4)(d) of the Act and letters issued by the appellant; took note of the decisions in ***Mahalakshmi Glass Works (P) Ltd. v. Collector of Central Excise***[2], ***Triveni Glass Ltd. v. Union of India & Ors.***[3] and ***Commissioner of Central Excise v. Hindustan National Glass & Industries Ltd.***[4]; adverted to the order of the tribunal that has not accepted the documents holding that it did not show that there was any arrangement regarding returnability of gunny bags which would justify the exclusion of cost of gunny bags from the cost of soda ash; analysed the proposition of law stated in ***K. Radha Krishnaiah v. Inspector of Central Excise and others***[5] and opined thus:-

[2] 1988 (Supp) SCC 601
[3] (2005) 3 SCC 484
[4] (2005) 3 SCC 489
[5] (1987) 2 SCC 457

"As we read the decisions in *K. Radha Krishnaiah* (supra) and *Mahalakshmi Glass Works (P) Ltd.* (supra), the Court was of the view that there must be an arrangement to the effect that the packing material must be returnable to the seller by the buyer. In such a case actual return would not have to be established. The reason for this is obvious. From the section it appears that if the packing material is obliged to be returned to the seller, the seller does not in fact transfer the title in the packing material to the buyer. The seller retains the property in the packing material. In such circumstances irrespective of the actual return of the packing material by the buyer to the seller, the seller, not having effect the sale of packing material, was not required to include the cost of packing material in the cost of excisable goods. In the present case, there was no obligation on the part of the buyers to return the gunny bags and the assessee-seller clearly indicate that only if the gunny bags are actually returned would the buyers be entitled to a deduction of the value of the gunny bags. Therefore value of the gunny bags formed part of the prices and were otherwise includible in the value of the goods. There would be a deduction of the sale price only if the gunny bags were returned by the customers to the assessee. The Tribunal rightly came to the conclusion that there was in fact no such arrangement between the appellant and its customers that the packing material shall be returned. The letters show request, recommendation and urging of the customers by the assessee, all of which were open to the customers concerned to either accept or reject. If we were to hold that such an arrangement would allow the appellant to exclude the cost of the packing material from the value of the goods as a matter of course and irrespective of the customers returning the gunny bags, it would run contrary to the language of the section and the decisions in *K. Radha Krishnaiah*

(supra) and *Mahalakshmi Glass Works (P) Ltd.* (supra). The basis for making an exception in the statute in respect of durable and returnable packing material would also cease to justify such an exception.

"We may, also note at this stage that the appellant has also contended and in fact it had only claimed a reduction in the value of the soda ash on the basis of gunny bags actually returned. Nevertheless on the basis of the decision in *Triveni Glass Ltd.* (supra), it contends that irrespective of the actual return of the gunny bags, the Tribunal was bound to exclude the cost of the gunny bags from the value of the soda ash in all cases where there was an arrangement to return the packing materials as a matter of law."

After so stating, the three-Judge Bench proceeded to observe as follows:-

"The decision in *Triveni Glass Ltd.* (supra) does appear to suggest that even if there is no obligation on the part of the buyer to return the packing material, but there is an obligation on the part of the seller to accept the packing material if the buyer chooses to return it, then in all cases the cost of the packing material must be excluded from the cost of the excisable goods. This view is, in our opinion, contrary to the ratios laid down in the cases of *K. Radha Krishnaiah* (supra) and *Mahalakshmi Glass Works (P) Ltd.* (supra).

5. In view of the aforesaid it referred the matter to be placed before the larger Bench by order dated March 23,

2006. The Constitution Bench vide order dated 4.8.2010 passed the following order:-

> "In view of paragraphs 12 and 17 of the judgment of Three-Judge Bench of this Court in the case of Triveni Glass Limited vs. Union of India and Ors., reported in 2005(3) SCC 484, we are of the view that the assumption made in the referral order dated 23rd March, 2006 to the effect that the decision of this Court in Mahalakshmi Glass Works (P) Limited vs. Collector of Central Excise, Bombay, reported in 1988 (Supp) SCC 601, is erroneous. On the contrary, the judgment of this Court in Triveni Glass Limited (supra) in turn follows the judgment in Mahalakshmi Glass Works (P) Limited (supra).
>
> For the above reasons, the order of reference dated 23rd March, 2006, is set aside and consequently, the civil appeals will be heard by the appropriate Bench in accordance with law. All arguments on merits on both sides are kept open."

6. In view of the aforesaid chronology of events, I am required to adjudge whether the finding recorded by the tribunal is justified in the backdrop of the letters issued by the assessee. The tribunal, as is noticeable, has held that there has been no arrangement between the manufacturer and their customers to return the durable packing and, therefore, the claim put forth by the assessee that the value of gunny bags used for packing soda ash manufactured by

them should be excluded in finding out the assessable value is untenable.

7. It is submitted by Mr. Ravinder Narain, learned counsel for the appellant that the controversy has to be appreciated regard being had to the applicability of the word "value" as employed in Section 4(4)(d)(i) of the Act in relation to excisable goods and the interpretation placed by this Court on various authorities in the backdrop of the letters that have been brought on record. It is also his submission that the concept of durability and returnability has to be understood on the bedrock of the propositions laid down by the decisions of this Court. Additionally, it is canvassed by him that once it is established that there has been an arrangement, the authorities can be asked to appreciate the other documents, regard being had to the period in question to find out whether the arrangement was in vogue during that period.

8. The aforesaid submissions have been seriously controverted by Mr. Mukul Rohtagi, learned Attorney General, on the foundation that the letters cannot form the

basis of an arrangement and they are fundamentally self-serving documents.

9. Section 4(d) which defines "value" reads as follows:-

> "(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."

10. Section 4(d)(i) uses the word "returnable". The said word fell for consideration before a two-Judge Bench in ***K. Radha Krishnaiah*** (supra). While interpreting the said term, the Court held thus:-

> "Does it mean physically capable of being returned or does it postulate an arrangement under which the packing is returnable. While interpreting this word, we must bear in mind that what Section 4(4)(*d*)(*i*) excludes from computation is cost of packing which is of a durable nature and is "returnable by the buyer to the assessee". The packing must be one which is returnable by the buyer to the assessee and obviously that must be under an arrangement between the buyer and the assessee. It is not the physical capability of the packing to be returned which is the determining factor because, in that event, the words "by the buyer to the assessee" need not have found a place in the section; they would be superfluous. What is required for the purpose of attracting the applicability of the exclusion clause in Section 4(4)(*d*)(*i*) is that the packaging must be

> returnable by the buyer to the assessee. The question which has to be asked in each case is: Is the packing in this case returnable by the buyer to the assessee and obviously it cannot be said that the packing is returnable by the buyer to the assessee unless there is an arrangement between them that it shall be returned."

11. In ***Mahalakshmi Glass Works*** (supra), the assessee-appellant have been paying duty on the value of the glass bottles including the cost of gunny bags or the cartons in which these are packed at the time of sale. It had been paying duty on the glass bottles on the basis of assessable value which included the costs of packing material, namely, the gunny bags and the cartons. It was contended before the adjudicating authority by the assessee that the glass bottles are normally sold by it in the packing consisting of gunny bags which are durable and returnable and in several cases the gunny bags are returned by the buyers and reused by the appellant again for packing the glass bottles. It was also brought to the notice of the said authority that only when the customers ask for delivery in cartons instead of gunny bags, the appellant deliver the glass bottles packed in cartons which are durable and returnable. When the assessee submitted a price list in

regard to the glass bottles manufactured by it for approval by showing separately the price at which such goods were actually sold in the course of "whole-sale trade" and "the cost of packing", Superintendent of Central Excise returned to the assessee the price list duly approved but noting therein that price should be inclusive of the cost of packing and the packing charges in terms of Section 4(4)(d)(i) of the Act. On the basis of the said communication, the assessee paid the duty under protest and, thereafter, lodged claims for refund. When it did not receive any payment or any intimation, the litigation commenced. When the matter arrived before the tribunal, the tribunal relied on the authority in ***K. Radha Krishnaiah*** (supra) and opined that there was no clause about the returnability of the cartons and gunny bags. This Court, in appeal, while relying upon the principle in ***K. Radha Krishnaiah*** case ruled that:-

> "As noted above, this Court has considered the meaning of the expression "returnable" in the section in *K. Radha Krishnaiah case*. This Court held that so far as the question of durability is concerned, there cannot be such controversy about it, but a question has been raised as to what is the meaning and connotation of the word "returnable". Does it mean physically capable of being returned or does it postulate an arrangement under which the packing is

> returnable? While interpreting this word, we must bear in mind that what Section 4(4)(*d*)(*i*) excludes from computation is cost of packing which is of a durable nature and is "returnable by the buyer to the assessee". The packing must be one which is returnable by the buyer to the assessee and obviously that must be under an arrangement between the buyer and the assessee. It is not the physical capability of the packing to be returned which is the determining factor because, in that event, the words "by the buyer to the assessee" need not have found a place in the section, they would be superfluous."

After so stating, the Court dismissed the appeal as there have been no evidence of the agreement that the cartons and gunny bags were returnable.

12. In ***Hindustan Polymers*** (supra), a three-Judge Bench was dealing with the concept of value of excisable goods under Section 4(4)(d)(i). Sabyasachi Mukharji, J. (as His Lordship then was) opined that:-

> "The contention that the value of packing materials including those supplied by the buyer, has to be included in the value of the goods, is repugnant to the very scheme of Section 4. It overlooks the use of the expression "cost" in relation to packing in the clause (*i*) of Section 4(4)(*d*) of the Act. The word "cost" has a definite connotation, and is used generally in contradistinction to the expression "value". Thus, the clear implication of the use of the word "cost" is that only packing cost of which is incurred by the assessee i.e. the seller, is to be included. The use of the expression "cost" could not obviously

be by way of reference to packing for which the cost is incurred by the buyer. It has to be borne in mind that such a provision would make the provision really unworkable, since in making the assessment of the seller, there is no machinery for ascertaining the "cost" of the packing which might be supplied by the buyer. Such a contention further overlooks the scheme of clause (*i*) whereunder durable packing returnable by the buyer has to be excluded. It would create an absurd situation if durable packing supplied by the assessee and returnable to the assessee is not to be included in the assessable value but a durable packing supplied by the buyer to the assessee and returnable to the buyer is made a part of the assessable value."

Ranganathan, J., in his concurring opinion, expressed the view thus:-

"In construing Section 4(4)(*d*)(*i*), all that has to be seen is whether the goods are delivered in packed condition. If this question is answered in the affirmative, then, in respect of the goods so sold, the cost of packing, whether incurred by the manufacturer or by the supplier, has to be automatically included in the assessable value if necessary, by addition to the sale price, except only where the packing is of durable nature and returnable to the manufacturer. He reminded us of the oft-quoted truism that, in tax matters, one has to look at what is said and that there is no question of any intendment, implication, equity or liberality in construing the taxing provision. I agree with Mukharji, J. that this contention cannot be accepted. The principle referred to by the learned Attorney General is unexceptionable but the words of a statute have to be read in the context and setting in which they occur. The proper interpretation to be placed on the words of

Section 4(4)(*d*)(*i*) has been explained in the judgment of my learned Brother and I am in full agreement with him on this point."

And again:-

"Where the manufacturer supplies his own container or drum but does not charge the customer therefor, then the price of the goods will also include the cost of the container. There will be no question of separate addition to the sale price nor can the assessee claim a deduction of the cost of packing from the sale price except where the container is a durable one and is returnable to the manufacturer. If the manufacturer supplies the drums and charges the customers separately therefor, then, under Section 4(4)(*d*)(*i*), the cost of the drums to the buyer has to be added to the price except where the packing is of durable nature and is to be returned to the manufacturer. If on the other hand, the manufacturer asks the customer to bring his own container and does not charge anything therefor then the cost (or value) of the packing cannot be "notionally" added to, or subtracted from, the price at which the goods have been sold by the manufacturer."

Verma, J., in his concurring opinion, ruled that:-

"The "cost of such packing" referred in Section 4(4)(*d*)(*i*) does not include within its ambit the cost of packing not incurred by the manufacturer when the packing is supplied by the buyer and not the manufacturer. This construction of the expression "cost of such packing" in Section 4(4)(*d*)(*i*) of the Act clearly excludes in these matters the question of its addition to the price of goods recovered by the manufacturer from the buyer for determining the "value" in relation to the

> excisable goods for computing the duty payable on it."

13. Learned counsel for the appellant has commended me to the authority in ***Triveni Glass Limited*** (supra). In the said case, a three-Judge Bench has held thus:-

> "We have considered the submission of the parties. In our view, the law laid down by this Court in *Mahalakshmi Glass Works (P) Ltd.* is the correct law. There is no necessity that the crates must be actually returned. So long as there is an obligation on the seller to take back the crates, if the buyer chooses to return them, it is sufficient. The term in the contract, set out above, imposes an obligation on the appellants to take back the wooden crates and to pay the stipulated amount to the buyer if the buyer chooses to return them. Wooden crates merely consist of planks of wood which are nailed together. Therefore, even if they are dismantled by the buyer and the planks are returned to the appellants, the appellants would be in a position to use them again. In our view, the High Court was wrong in holding that the wooden crates are not durable or returnable. The answer to the second question therefore has to be in favour of the appellants. It is held that, in view of the specific term in the bills/invoices, the wooden crates are durable and returnable packing whose cost is not to be included in the value of glass sheets."

The principle stated therein has been followed in ***Triveni Glass Ltd. v. Commissioner of Central Excise, Guntur***[6].

[6] Civil Appeal Nos. 4852-4853 of 2005

14. From the aforesaid proposition of law, it is graphically clear that there has to be an arrangement for the return of the packing material. In the case at hand, the tribunal has ruled, after referring to the letters, that there has been no arrangement. The said finding has been seriously challenged by Mr. Ravinder Narain, learned counsel for the appellant on the foundation that the letters clearly spell out the arrangement; that there has been responses by the dealers and that the benefits were availed accordingly. To appreciate the factual controversy, it is appropriate to reproduce the relevant paragraphs from the letter dated 15.12.1970:-

> 4. At this stage, it will be relevant to recall several attempts that we have made in the past to encourage and promote the cyclic use of jute bags and to introduce cheaper and alternative packing materials like cloth, plastics, etc. Unfortunately, these attempts have so far met with only limited and interrupted success. In order to eliminate or to reduce the cost of packing materials, we were strongly motivated by the consumer interest because the packing materials can count for nearly 10% of the bulk price of Soda Ash and were guided by the fact that in several developed countries as much as 90% of the Soda Ash is sold in bulk. In terms of the national interest, another powerful incentive lay in the need for conserving the jute supplies both for the domestic demand from the agricultural sector and for export.

xxxxx xxxxx xxxxx

6. Until the bulk movement of Soda Ash becomes more sidle possible and acceptable, we would strongly urge our customers to reclaim the used bags and return the sound ones back to our Works at Mithapur for reuse. Such cyclic uses of bags, in the interim, would once again result in substantial benefit to the consumer as there will be no cost of packing material involved. Our distributors throughout the country will offer assistance, at nominal charge, for organizing this operation as a customer service.

7. On such occasions when either the bulk movement of the material or the reuse of the bags is not possible, the customers will be offered free choice of any of the two following courses:-

(a) They can send their own packing materials – jute cloth, plastic etc. – to our Works at Mithapur for use in packing the bulk Soda Ash.

(b) They can authorise Tata Chemicals to use, on their behalf, packing materials from their stocks at actual cost accruing at the point of packing Soda Ash.

xxxxx xxxxx xxxxx

9. If and when and at the customer's own option, the use of packing material is involved in connecting the bulk-priced Soda Ash to the customer, we will separately bill the following charges in addition to ex-Works bulk prices arrived at under (8) above:

		Rs./Tonne	
A.	Cost of packing material	P	(note 1)
B.	Charges for branding / Packing and stitching if and when necessary	3	(note 2)

C. "Refundable" excise contingency R (note 3)

NOTE 1: When the customer accepts deliveries in bulk and/or furnishes his own packing material (used or new) the value of P will obviously be zero. If Tata Chemicals are requested to furnish new packing material on the customer's account, then P will equal the actual cost of packing material that Tata Chemicals incur at the point of packing – on the basis of current stocks of packing materials with Tata Chemicals, the value of P for Light Soda Ash is estimated at Rs.46.00 and Dense and Medium Dense Soda Ash ant Rs.52.00."

Note 3 We have been legally advised on good authority that the ad valorem excise duty at 10% should be applicable only on our basic ex-Works price of Soda Ash in bulk and not on the packing material if and when the use of packing material is involved at the customer's option and account. This position has, however, to be yet established clearly and fully with the excise authorities. Only in the event of excise authorities not accepting this position readily and Tata Chemicals having to contest this in the court, we shall recover R which will equal additional excise duty, if any, which the excise authorities might impose on account of the use of packing material (used and/or new) furnished either directly by the customer or, at his request, by Tata Chemicals on his account. Such recoveries as Tata Chemicals might be compelled to make on this account shall be refunded to the clearly identifiable end-users after Tata Chemicals succeed in securing a favourable verdict either from the excise authorities directly or in the court.

10. At the time of placement of orders, the customers are requested to specify whether:-

(a) They want Soda Ash to be dispatched in bulk.

(b) They want the material to be packed in their own bags – new or used, or

(c) They want to authorise Tata Chemicals to use bags from their own stock, on their account, at actual cost at the point of packing.

15. In this context, reference to letter dated 1.2.1971 is pertinent. The relevant part of the same is as follows:-

"We invite your attention to our Circular No. CON/G-50/70 dated 15th December 1970, wherein we had agreed that customers could send their own packing materials – jute, cloth, plastic etc. to our Works at Mithapur for use in packing the bulk Soda Ash. While we would be pleased to receive such packing materials from our customers, to avoid problems with the Excise and the Railway authorities and to facilitate the filling of the product at our Works at Mithapur, we shall be glad if the customers send unbranded bags only of the following specifications:-

Gunny bags

Soda Ash Light	39" x 26.1/2" L Twills, WIP 2.1/2 lbs./44"hd., 8 x 8 Plain Unbranded
Soda Ash Dense	39" x 26.1/2" L Twills, WIP 2.1/2 lbs./44"x26.1/2"hd., 8 x 8 Plain Unbranded
Soda Ash Dense Medium	39" x 26.1/2" L Twills, WIP 2.1/2 lbs./44"hd., 8 x 8 Plain Unbranded"

16. Learned counsel appearing for the appellant has drawn my attention to letter dated 2.4.1971. I think it appropriate to reproduce the communication in entirety:-

> "Dear Sirs,
>
> Soda Ash – Packing
>
> You will have noted from the newspaper reports that due to the political upheaval in East Pakistan, the prices of jute bags are rising sharply and are expected to up still further.
>
> We have been recommending over the last few years to our customers to return our Soda Ash bags to our Works at Mithapur for refilling of the product on their account. We have further pointed out that such cyclic use of jute bags would, now that we have a price for bulk Soda Ash, result in considerable saving to our customers.
>
> In the interest of our consumers and conservation of jute supplies we once again very strongly urge the return of our used bags to Mithapur for re-use. May we, therefore, request that you give this matter your urgent consideration and arrange for the return of the used bags to Mithapur for packing your further supplies?
>
> While returning the bags please remember that -
>
> (1) you should return to us only our Soda Ash bags and not the bags of other manufacturers.
>
> (2) the bags should be in good condition so that we are able to bring them into re-use.
>
> (3) The bags should be returned to Mithapur, freight paid."

17. The contents of the aforesaid letters are to be appreciated in the proper context and on the bedrock of authorities, I have referred to hereinabove. The decision in ***Triveni Glass Limited, 2005*** (supra) which has been approved by the Constitution Bench clearly lays down that it is not the physical capability of packing to be returned which is the determining factor but the condition that if the buyer chooses to return the packing, the seller is obliged to accept it and refund the stipulated amount. The question whether the packing is actually returned or not has no relevance. It must be manifest that it is the obligation of the assessee to take back the packing items from the purchaser. The tribunal has interpreted the letters treating them that they do not meet the nature and character of an "arrangement". It is urged before me by the assessee-appellant that it is circulated to all the dealers and that there has been responses from the buyers to the letters circulated by the assessee. It is put forth by him that communications from the buyers were brought on record before the tribunal by way of an affidavit and invoices were also brought on record. The letters clearly show the

obligation of the assessee-appellant to take back the packing materials. Learned counsel has also taken me through the billing from which it is clear that in addition to the bulk prices of soda ash, the packing material was also required and in such cases as per the formula set out in the letter, the cost of packing material has been shown and charged and in that event, the value of the packing material is zero. That apart, submits Mr. Ravinder Narain, learned counsel for the appellant that when the appellant has demonstrably stated that it is obliged to accept such packing material for reuse, the test laid down in the decision ***Triveni Glass Limited, 2005*** (supra) is met with. Certain responses issued by buyers namely, All India Glass Works Pvt. Ltd., The Cawnpore Chemical Wokrs Private Ltd., The Alembic Glass Industries Ltd., ATIC Industries Limited, Ashok Silicate Industries, Ultramarine & Pigments Limited and The Gwalior Rayon Silk Mfg. (Wvg.) Co. Ltd. have been brought on record. He has also drawn my attention to number of endorsements which shows that empty bags have been returned by the buyers and in fact the reference is to the "empty bags" supplied by the

appellant which have been returned to the appellant for refilling and reuse, is in consonance with the letter dated 29.12.1970.

18. Be it clarified, an arrangement need not be in a particular form, it can be oral or in writing by way of an agreement or can be ascertained from communication or letters exchanged. When oral it has to be proved and established and when in writing it should be genuine and not a camouflage, but an arrangement cannot be ignored and treated as *non est* because it is by means of written communications.

19. In ***Hindustan Polymers*** (supra), it has been clearly held that when an arrangement *per se* exists for return of durable packaging by the buyer to the manufacturer, then whether or not the packaging was in fact returned would be inconsequential. More importantly, it was held therein that if the durable packaging was supplied by the buyer to the assessee and was returnable to the buyer, the cost of durable packaging would not form a part of the assessable value. To treat value of the durable supplied by the buyer as a part of the assessable value, it was observed, would

result in an absurd situation. In this context, it was held that proper contextual interpretation was required to be placed on the words of Section 4(4)(d)(i), as literal interpretation would lead to difficulties. The letter dated 2nd April, 1971 in this context is relevant.

20. In view of the aforesaid analysis, I arrive at the irresistible conclusion that the letters spell out an arrangement between the assessee and the buyers. The tribunal has not accepted the stand of the appellant on the ground that it is not an arrangement and on that basis has remanded the matter to the adjudicating authority for computation of the actual amount of duty payable by the appellant. Once I accept that it has the nature and character of an arrangement, then the authority is required to ascertain from the record whether the buyers continued to have a choice to return the packing material for reuse. I need not indicate the method of verification of the existence of the arrangement for the period in question. Once the existence arrangement and choice to return the packing material for reuse are established for the period in question in view of the second decision in ***Triveni Glass Limited***

(supra), the packing cost would not be included. If the assessee succeeds in establishing the choice mentioned in the documents which I have accepted to be an arrangement, and is prevalent during the relevant period i.e. 1981 to 1985, the appellant shall be given the benefit. If he fails to establish the same, the adjudicating authority shall look into the consideration the actual return as has been directed in Civil Appeal No. 2988 of 2006 on 21.8.2014.

21. Resultantly, the appeals are allowed and the orders passed by the forums below are set aside and the matter is remanded to the adjudicating authority for adjudication in accordance with the principles stated hereinabove. There shall be no order as to costs.

.....J.
[Dipak Misra]

New Delhi
August 06, 2015

Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOs. 7251-7302 OF 2000

M/S. TATA CHEMICALS LTD. .....**APPELLANT**

Vs.

THE COLLECTOR OF CENTRAL EXCISE, AHMEDABAD .....**RESPONDENT**

J U D G M E N T

I have gone through the judgment of my learned brother Judge, Justice Dipak Misra, wherein certain relevant facts have been adverted to by my learned brother on the contentious legal issues urged on behalf of the parties. My learned brother has also adverted to the relevant provisions under Section

4(4)(d)(i) of the Central Excise and Salt Act, 1944 (hereinafter referred to as "the Act").

2. My learned brother Judge has also referred to the decisions of this Court in the cases of ***Mahalakshmi Glass Works (P) Ltd.*** *v.* ***Collector of Central Excise***[7], ***Triveni Glass Ltd.*** *v.* ***Union of India***[8] and ***CCE*** *v.* ***Hindustan National Glass & Industries Ltd.***[9] and ***K. Radha Krishnaiah*** *v.* ***Inspector of Central Excise***[10] in support of his decision that the letters dated 15.12.1970, 01.02.1971 and 02.04.1971 and the credit notes dated 12.3.1988 and 31.3.1988, spell out an arrangement between the assessee and the buyers. He has further opined that once the existence of an arrangement is established and there is a choice on the buyer to return the packing material for reuse, then the cost of packing shall not be included. He

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7 (1988) Supp SCC 601

8 (2005) 3 SCC 484

9 (2005) 3 SCC 489

10 (1987) 2 SCC 457

has further held that if the assessee succeeds in establishing the choice mentioned in the documents which this Court has accepted to be an arrangement and the same is prevalent during the relevant period of time, i.e.1981 to 1985, the appellant shall be given the benefit. My learned brother after arriving at the abovementioned conclusion has remanded the matter to the adjudicating authority for adjudication in accordance with the principles laid down by this Court.

I respectfully dissent with the said view taken by my learned brother Judge by giving the following reasons:

The main issue of dispute in the present batch of appeals is that whether the price of the gunny bags should be included in the assessable value of the soda ash for the purpose of levy of excise under the Act?

3. In order to arrive at an irrefutable conclusion that the appellant is not liable to get the exemption from payment of excise duty on the packing material of soda ash, it has to be determined whether the gunny bags which are used for packing soda ash by the appellant were durable and returnable in nature and whether the same were returned to the appellant for re-use/repacking of soda ash by the appellant. Secondly, it has to be further determined whether there was any arrangement, express or implied by the appellant with its buyers of soda ash with regard to the returnability of the used gunny bags to it in the light of the provisions provided under the Act and the legal principles laid down by this Court in a catena of cases.

4. To determine the same, letters dated 15.12.1970, 01.02.1971 and 02.04.1971 have to be scrutinized in proper perspective. The relevant

portions of the above dated letters are extracted hereunder:

Letter dated 15.12.1970, reads thus:

> "6. Until the bulk movement of Soda Ash becomes more sidle possible and acceptable, we would strongly urge our customers to reclaim the used bags and return the sound ones back to our Works at Mithapur for reuse. Such cyclic uses of bags, in the interim, would once again result in substantial benefit to the consumer as there will be no cost of packing material involved. Our distributors throughout the country will offer assistance, at nominal charge, for organising this operation as a customer service.
>
> 7. On such occasions when either the bulk movement of the material or the reuse of the bags is not possible, the customers will be offered free choice of any of the two following courses:-
>
> (a) They can send their own packing materials-jute cloth, plastic etc.-to our Works at Mithapur for use in packing the bulk Soda Ash.
>
> (b) They can authorize Tata Chemicals to use, on their behalf, packing materials from their stocks at actual cost accruing at the point of packing Soda Ash.

8. Against the background of what has been explained in the preceding paragraphs, our prices of Soda Ash, Light and Dense, are hereby revised and re-fixed, effective from 21 December, 1970 as follows :-

SODA ASH (RUPEES PER TONNE)

	LIGHT		DENSE		MEDIUM DENSE	
BASIS	CURRENT BAGGED EX-WORKS	REVISED * BULK EX-WORKS	CURRENT BAGGED EX-WORKS	REVISED BULK EX-WORKS	CURRENT BAGGED EX-WORKS	REVISED BULK EX-WORKS
BASE PRICE	476.00	467.00	496.00	505.00	486.00	495.00
LOADING	2.00	2.00	2.00	2.00	2.00	2.00
EXCISE DUTY	47.80	46.90	49.80	50.70	48.80	49.70
	525.80	515.90	547.80	557.70	536.80	546.70

(* Effective 21 December 1970)

These prices are exclusive of sales tax and other levies, if any.

It will be noticed that to the extent that the customers avail of the option, being afforded to them under our pricing policy of eliminating or reducing the cost of the packing material, the average price of Tata Soda Ash, F.O.R., Mithapur basis, can be marginally lower than hitherto."

Letter dated 1.2.1971, reads thus:

"We invite your attention to our Circular No.CON/G-50/70 dated 15th December 1970, wherein we had agreed that customers could send their own packing materials-jute, cloth, plastic etc. to our Works at Mithapur for use in packing the bulk Soda Ash. While we would be pleased to receive such packing materials from our customers to avoid problems with the Excise and the Railway authorities and to facilitate the filing of the produce at our Works at Mithapur, we shall be glad if the customers send unbranded bags only of the following specifications :-

	GUNNY BAGS
SODA ASH LIGHT	39"x26.1/2", L Twills, WIP 2.1/2 lbs./44"hd., 8x8 Plain Unbranded.
SODA ASH DENSE	36"x26.1/2", L Twills, WIP 2.1/2 lbs./44"x26.1/2"hd. 8x8 Plain Unbranded
SODA ASH DENSE MEDIUM	39"x26.1/2", L Twills, WIP 2.1/2 lbs./44"hd., 8x8 Plain Unbranded

We shall be grateful if you will ensure that the bags sent by you to our works at Mithapur for filing Soda Ash, conforms to the above specifications."

Letter dated 2.4.1971, reads thus:

"We have been recommending over the last few years to our customers to return our used Soda Ash bags to our Works at Mithapur for refilling of the product on their account. We

have further pointed out that such cyclic use of jute bags would, now that we have a price for bulk Soda Ash, result in considerable saving to our customers."

5. The same have to be referred to in the light of the decision of this Court in the case of ***K. Radha Krishnaiah*** *v.* ***Inspector of Central Excise*** (supra), wherein this Court has held thus:

> "The only question which arises in this special leave petition is as to what is true meaning and scope of the word "returnable" in Section 4(4)(*d*)(*i*) of the Central Excises and Salt Act, 1944. If the packing is durable and returnable then its cost is liable to be excluded in computation of the assessable value of the goods for the purpose of excise duty. So far as the question of durability is concerned, there cannot be such controversy about it, but a question has been raised as to what is the meaning and connotation of the word "returnable". Does it mean physically capable of being returned or does it postulate an arrangement under which the packing is returnable. While interpreting this word, we must bear in mind that what Section 4(4)(*d*)(*i*) excludes from computation is cost of packing which is of a durable nature and is "returnable by the buyer to the

assessee". The packing must be one which is returnable by the buyer to the assessee and obviously that must be under an arrangement between the buyer and the assessee. It is not the physical capability of the packing to be returned which is the determining factor because, in that event, the words "by the buyer to the assessee" need not have found a place in the section; they would be superfluous. What is required for the purpose of attracting the applicability of the exclusion clause in Section 4(4)(*d*)(*i*) is that the packaging must be returnable by the buyer to the assessee. The question which has to be asked in each case is: Is the packing in this case returnable by the buyer to the assessee and obviously it cannot be said that the packing is returnable by the buyer to the assessee unless there is an arrangement between them that it shall be returned. Here in the present case it is not the contention of the petitioner that there was any such arrangement for return of the packing by the wholesale buyers to the petitioner nor is there any evidence to that effect. The excise authorities were, therefore, right in not excluding the cost of packing in determination of the assessable value of the goods……"

6. With reference to the above decision, it is amply clear that the gunny bags used for packing soda ash by the appellant have to be returnable in nature and the same has to be done under an arrangement between the buyer and the appellant. However, in the present case, with reference to the above stated letters, it is apparent that no such express arrangement has been made between the parties. This is so because the value of the gunny bags have been included in the final sale price of the soda ash and a careful perusal of the above stated letters would clearly go to show that no express arrangement has been made by the appellant with the buyers for the return of the gunny bags for the reason that there would be a deduction in the sale price, only when the gunny bags were returned to the appellants. If we allow such an arrangement to exist in the guise of conditional returnability of the gunny bags which may or may not be returned, then the same would run contrary

to the principles laid down by this Court in the cases of ***Mahalakshmi Glass Works (P) Ltd.***(supra) and ***K. Radha Krishnaiah*** (supra). The exclusion of the cost of the packing material from the value of the goods, irrespective of the customers returning the same to the appellants is illegal and invalid and the same cannot be justified by the appellant by taking the plea that the above mentioned letters indicate that there is an arrangement between the parties to return the used gunny bags to the appellant.

7. Further, the appellant has already charged for the value of the gunny bags from the customers by adding the same to the cost of soda ash. The fact that some of the customers of the appellant have returned the gunny bags out of several ones already sold between the period of 1971 to 1988, does not entitle it to get the benefit of exclusion of the cost of all the gunny bags which were not even returned to the appellant.

8. The test for the determination of inclusion or exclusion of the value of the gunny bags from the overall value of the soda ash can be ascertained on the basis of 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 as held by this Court in the case of ***CCE v. Hindustan National Glass & Industries Ltd.,*** (supra), which reads thus*:*

> "12. In *Govt. of India* v. *Madras Rubber Factory Ltd.* it was, inter alia, held as follows:
>
> > "The test is: whether packing, the cost whereof is sought to be included is the packing in which it is ordinarily sold in the course of a wholesale trade to the wholesale buyer. In other words, whether such packing is necessary for putting the excisable article in the condition in which it is generally sold in the wholesale market at the factory gate. If it is, then its cost is liable to be included in the value of the goods; and if it is not, the cost of such packing has to be excluded. Further, even if the

> packing is 'necessary' in the above sense, its value will not be included if the packing is of a durable nature and is returnable by the buyer to the assessee. We must also emphasise that whether in a given case the packing is of such a nature as is contemplated by the aforesaid test, or not, is always a question of fact to be decided having regard to the facts and circumstances of a given case."

After analysing various decisions, the position was succinctly summed up by this Court in *Hindustan Safety Glass Works case* as follows:

> "*14*. We are in complete agreement with the above conclusions. The question is not for what purpose the packing is done. The test is whether the packing is done in order to put the goods in a marketable condition. Another way of testing would be to see whether the goods are capable of reaching the market without the type of packing concerned. Each case would have to be decided on its own facts. It must also be remembered that Section 4(4)(*d*)(*i*) specifies that the cost of packing is includible when the packing is not of a durable nature and returnable to the buyer. Thus, the burden to show that the cost of packing is not

includible is always on the assessee.""

(emphasis laid by this Court)

9. Thus, in the light of the aforesaid decision, the burden to prove that the value of the gunny bags is not inclusive and not excisable with the value of the soda ash, lies on the appellant and it has miserably failed to do so as is clear from the facts and circumstances of the case that the soda ash are sold in bulk in the gunny bags at the factory gate to the wholesale market and such packing is indispensible for the transport and preservation of soda ash.

10. The appellant has also failed to establish an arrangement as per Section 4(4)(d)(i) of the Act. Mere suggestion of the same in the above dated letters, regarding the return of used gunny bags to the appellants by the buyers does not establish the terms and conditions that are prerequisites for establishing an arrangement of return of the gunny

bags to the appellant. Further, the above dated letters also suggest that the buyers send their own packing materials for the soda ash for which no extra charges are incurred on them.

11. Hence, in these circumstances the appellant is bound to include the cost of the gunny bags that are provided by it in the overall value of the soda ash as per the provisions of the Act. Reliance has been placed in the case of ***Mahalakshmi Glass Works (P) Ltd.*** *v.* ***Collector of Central Excise*** (supra), wherein this Court has held thus:

> "5. The Tribunal noted that the appellant manufactured glass bottles. It delivered these in two types of packing, namely, in open crates and in cartons and gunny bags. So far as the crates were concerned, the same belonged to the appellant. The customer was billed for the cost of glass bottles only. The crates were returnable to the appellant within 30 days. The revenue has not included the cost of such crates in the assessable value. The revenue has also not included the cost of packing, if any, supplied by the customer himself. There was no dispute about these packings. So far as the packings in cartons and gunny bags were concerned, it was noted by the Tribunal, that these

belonged to the appellant but their cost was realised from the customer along with the cost of glass bottles. The appellant's case was that these packings were also returnable and in many cases they were actually returned and reused by the appellant. There was no evidence about the durability of the cartons and gunny bags but nothing to show that these were returnable. The position seems to be as follows: The Tribunal has rightly applied the returnability test. In *K. Radha Krishnaiah* v. *Inspector of Central Excise* this Court observed that it cannot be said that the packing is returnable by the buyer to the assessee unless there is an arrangement between them that it shall be returned. Therefore, such arrangement has been established. Actual return or extent of return is not relevant. What is necessary is that if the buyer chooses to return the packing, the seller should be obliged to accept it and refund the stipulated amount. In this case after examining the facts, the Tribunal found that there was no clause about returnability of the cartons and gunny bags. The appellant invited the attention of the Tribunal to the following clause in their standard contract. It read as follows:

> "6. All packing cases, other than such as may be supplied or paid for by buyer, shall be returnable in good order and condition within 30 days after receipt."

6. The Tribunal was of the view that the above clause related to "cases". It could have meant only the crates which belonged

> to the appellant and for which the customers had not paid anything. The property in the crates having remained with the appellant all along, the buyers were naturally obliged to return them to their rightful owners. But that was not the case with the cartons and gunny bags. The buyers pay for these and the property in these pass on to the buyers. They could be asked to return them to the appellant only under a term of sale and on payment of the agreed amount and not for the free. No such contract or agreement was forthcoming. The Tribunal was not convinced that in the normal course of business anyone could be asked to part with his property, and in addition incur return freight therefore too for nothing. In those circumstances, the Tribunal held that the cartons and gunny bags were not returnable in the accepted sense of the term. The Tribunal further noted that since the statute insisted on the packing being returnable, in addition to being durable, the authorities are bound to see whether the transaction fulfilled the tests of returnability as per the Supreme Court and High Court judgments."

12. Thus, with reference to the judgments referred to supra, it is safe to say that in the present case, the appellant has failed to establish any arrangement between itself and the buyers regarding the returnability of the used gunny bags.

Therefore, the appellant is hereby directed to pay the total amount of the gunny bags which are excisable under the Act. The credit notes dated 12.3.1988 and 31.3.1988 cannot be relied upon in the facts and circumstances of the present case, since the credit notes relate to the year 1988, whereas the present case is concerned with the period 1981 to 1985. There is no independent evidence which can help establish the case of the appellant during that relevant period of time. Moreover, in most of the letters sent by the buyers to the appellant, the buyers send their own packing material and in case they cannot provide the appellant with a packing material, the appellant was required to send the soda ash in its own packing material on which packing charges have been incurred by the buyers. The counsel for the appellant had put forward a request for filing an application for additional documents before the CEGAT in Appeal No.E/1088/90-EB(WR) of 1990, under

Rule 23 of Customs, Excise and Gold (Control) Appellate Tribunal (Procedure) Rules, 1982, with regard to its claim that there has been a deduction on account of packing in the durable and returnable gunny bags, the same have been produced before us for our perusal. The CEGAT has rightly not considered the same as they do not support the claim of the appellant that the gunny bags were reclaimed by the appellant under an arrangement between the appellant and the buyers for the return of the used gunny bags. Therefore, they have no bearing in justification of their claim that the gunny bags were actually returned. The concurrent finding of facts recorded by CEGAT at paras 5 and 6 of its judgment, on the basis of the facts pleaded and the evidence placed on record with regard to the returnability of the gunny bags are just and proper and the same cannot be refuted as they are backed by cogent and reasonable evidence.

13. Therefore, the claim of the appellant cannot be sustained in the light of the provisions of the Act and the laws laid down by this Court in a catena of cases, as the same is marred by lack of proper and independent evidence.

14. Therefore, the tribunal has rightly rejected the claim of the appellant so far as the exclusion of the cost of packing material with the value of soda ash is concerned and hence, it is liable to pay the tax liability for the same in the light of the findings and observations made in this judgment. The appeals are dismissed.

.....J.
[V.GOPALA GOWDA]

New Delhi,
August 6, 2015