PETITIONER:
COLLECTOR OF CENTRAL EXCISE, INDORE.

Vs.

RESPONDENT:
M/S.HINDUSTAN LEVER LTD., CHHINDWARA.

DATE OF JUDGMENT: 03/08/2000

BENCH:
S.P.Bharucha, R.C.Lahoti, N.S.Hegde

JUDGMENT:

SANTOSH HEGDE, J.

In the above appeals, common questions of law are involved, hence these appeals are disposed of by this common order. For the purpose of convenience, we shall refer to the facts of the case as found in C.A. Nos.303-304 of 1999. The respondent in the above appeals is engaged in the manufacture of Toilet Soaps and organic surface active agents. It submitted various price lists under Rule 173-C of the Central Excise Rules, 1944 (for short the Rules) claiming deductions from the assessable value. The Assistant Collector provisionally approved the prices after disallowing some of the deductions claimed. Being aggrieved by the said order of disallowing some of the deductions claimed by it, the respondent preferred appeals before the Commissioner of Appeals who allowed most of the deductions sought by the respondent except three items out of which discount damages was one of the items. In an appeal filed to the Customs Excise Gold (Control) Appellate Tribunal (CEGAT), the Tribunal allowed the said appeal following its earlier orders in Assam Valley Plywood Pvt.Ltd. vs. Collector of Central Excise (1989 (43) ELT 360) and Tungbhadra Industries Ltd. vs. Collector of Central Excise (1992 (60) ELT 512) and directed the original Authority to consider afresh claim for deduction in accordance with law in the light of observations contained in the said order. On remand, the original Authority again disallowed some of the deductions claimed by the respondent including the deductions in regard to damages. Having failed in the appeal before the Appellate Authority, the respondent approached the Tribunal once again and the Tribunal by the impugned order allowed the appeal of the respondent once again solely relying on its judgments in Assam Valley and Tungbhadra Industries cases (supra) and held that discount should be allowed in regard to the value of compensation paid to the buyers in lieu of damages caused to goods during transit depending on the nature and extent of damage. It is against this order of the Tribunal, the Collector of Central Excise has preferred the above appeals. Learned Attorney General for India appearing for the appellant contended that the Tribunal erred in placing reliance on Assam Valley and Tungbhadra Industries cases (supra) as they had no relevance whatsoever to the facts of the case in hand. He further contended that the deduction claimed being in the nature of a post- manufacturing deduction, under Section 4(4)(d)(ii)

of the Central Excise Act, 1944 (hereinafter referred to as the Act), the same is not deductible from the assessable value. He also contended that assuming that such post-manufacturing expenses are deductible, the assessee will have to establish that such deduction is being claimed because same is a part of the trade discounts allowed in accordance with normal practice of that wholesale trade which fact, according to learned Attorney General, the respondent has failed to establish. He also argued that the contention of the respondent that, as a matter of fact, such a practice existed stood belied by the agreement entered into by the respondent with its buyers. Shri Anil Divan, learned senior counsel appearing for the respondent firstly contended that the appellants should not be permitted to question the finding of the Tribunal as to the deductibility of the damage discount because this question was finally adjudicated and decided by the Tribunal in the first round of litigation between the parties and the appellants did not, at that stage, question the finding of the Tribunal which remanded the matter back to the original Authority to decide certain other questions. Hence, the issue in hand having attained finality, the same should not be permitted to be reopened by way of the present appeal. He also defended the impugned order of the Tribunal on the ground that the deductions permissible under Section 4(4)(d)(ii) are not confined only to deductions available at the time of removal of the goods from the factory-gate but are also available to such of those deductions whose existence in practice has been established even though they get computed subsequent to the removal of the goods from the factory gate. He also contends that the respondent has established the normal practice of the wholesale trade with reference to this deduction by filing affidavits of its buyers and certificates of the Chartered Accountants. He contended that the respondent is not relying upon the agreement referred to by the learned Attorney General for the purpose of claiming the deductions in question. We will first deal with the objection of Shri Divan which is in the nature of a preliminary objection. As noted, he contended that the issue in question is finally decided inter se between the parties in an earlier proceedings which was not challenged by the Department; therefore, so far as the parties to these appeals are concerned, the matter stands concluded and the parties cannot reopen the said issue. It is true that this issue was decided by the Tribunal in the earlier round of litigation primarily relying upon two orders to which we have already made reference; the correctness of that finding was not challenged in this Court because the matter stood remanded to the original Authority. Inspite of this finding of the Tribunal, the parties again joined issue before the original Authority on this issue by producing materials like affidavits and made their submissions based on which the original Authority gave a finding against the respondent, who took the matter in appeal before the Appellate Commissioner and having lost before the Appellate Commissioner, the respondent once again took the matter before the Tribunal. From the materials on record, we do not find any argument based on finality of the decision having been urged before the Tribunal nor the Tribunal having decided this issue on that basis. On the contrary, it seems that the Tribunal considered the issue afresh but, relying on the two decisions referred to above, once again decided to hold in favour of the respondent which decision is now under challenge before us. Therefore, on facts, finality is not the ground on which the Tribunal allowed the

appeal. That apart, even in law, so far as this Court is concerned, it is not bound by the finding of the Tribunal rendered in the first instance while remanding the case to the lower authorities because this Court is now hearing an appeal against the order of the Tribunal in which the earlier order has merged. This Court in the case of Jasraj Inder Singh vs. Hemraj Multanchand {(1977) 2 SCC 155} has held :- In an appeal against the High Courts finding the Supreme Court is not bound by what the High Court might have held in its remand order. It is true that a subordinate court is bound by the direction of the High Court. It is equally true that the same High Court, hearing the matter on a second occasion or any other court of coordinate authority hearing the matter cannot discard the earlier holding, but a finding in a remand order cannot bind a higher Court when it hears the matter in appeal. (emphasis supplied).

Therefore, the above contention of the respondent has to be rejected. In support of the contention as to the applicability of Section 4(4)(d)(ii) of the Act, the learned Attorney General relied on the observation of this Court in the case of Assistant Collector of Central Excise & Ors. vs. Madras Rubber Factory Ltd. (1986 Supple. SCC 751) wherein this Court held at para 9 of the said report that trade discounts of any nature should be allowed to be deducted provided, however, the discount is known at or prior to the removal of the goods. Taking support from these observations, learned Attorney General contended that the discounts in regard to which the deduction is sought by the respondent pertain to the damages to the goods which have occurred in transit, admittedly after the goods were removed from the factory-gate; therefore, such a deduction is not permissible in law. He also relied upon a subsequent decision of this Court in Madras Rubber Factory case reported in (1995) 4 SCC 349, at page 384) wherein this Court after referring to the judgment in the earlier case of M.R.F. (supra) held: - As rightly pointed out by Bhagwati, C.J. in the order dated 20.12.1986, what is really relevant is the nature of the transaction (SCC p.760, para 8). The learned Chief Justice pointed out further that the warranty is not a discount on the tyre already sold, but relates to the goods which are being subsequently sold to the same customers. It cannot be strictly called as discount on the tyre being sold. It is in the nature of a benefit given to the customers by way of compensation for the loss suffered by them in the previous sale (SCC p.760, para 8). He characterised it as a compensation in the nature of warranty allowance on a defective tyre (SCC p.760, para 11). We express our respectful concurrence with the said observations.

Therefore, it is contended that the claim of the respondent for deduction being one arising out of a post-manufacturing situation, the same is outside the purview of Section 4(4)(d)(ii) of the Act. He further contended that the claim of the respondents based on normal practice of the wholesale trade is also unacceptable in view of the agreement between the respondent and its buyers wherein at Clause 14 of the agreement it is unequivocally stated that the claim for damages in transit to the goods sold will be borne by the buyer. Therefore, according to the appellant, the respondent cannot claim any trade practice in regard to reimbursement of any value of the goods which have suffered damage in view of Clause 14 of the

said agreement. He further contended that the affidavits of the buyers filed by the respondents which are contrary to the terms of the agreement are neither admissible nor can be relied upon. Shri Anil Divan, per contra, contends that the deductions contemplated under Section 4(4)(d)(ii) of the Act are not confined only to deductions that could be attributable to a stage prior to the removal of the goods from the factory gate only. According to him, even those expenses which have occurred subsequent to removal of the goods from the factory gate have been held to be deductible expenditure from the assessable value of the goods by this Court. As an example, he submitted that the expenses incurred on the insurance of the goods, year ending discount, interest on receivables etc. even though are expenses incurred after the removal from the factory gate have been accepted as deductible expenditure by various pronouncements of this Court; on this basis he contends that the respondents are entitled for damage deduction. In support of this contention, Mr. Divan relied on the judgments of this Court in Assistant Collector of Central Excise & Ors. vs. Madras Rubber Factory Ltd. (1986 Supp. SCC 751), Government of India & Ors. vs. Madras Rubber Factory Ltd. & Ors. (1995 (4) SCC 349), Guljag Chemicals & Plastics Pvt.Ltd. vs Collector of Central Excise (1993 (63)ELT 710) and Authorised Officer (Land Reforms) vs. M.M. Krishnamurthy Chetty (1998 (9) SCC 138), wherein this Court according to Shri Divan has allowed deductions which are referable to expenditure occurring after the removal from the factory. He laid special emphasis on deduction allowed on account of insurance. He said that the deductions now sought by the respondent are similar to the insurance deductions and as a matter of fact in the instant case in effect the company is acting as an insurer of its own goods. We will now consider the correctness of the Tribunals finding based on its earlier two decisions in the cases of Assam Valley Plywood Pvt.Ltd. and Tungbhadra Industries Ltd. (supra). The Tribunal was of the view that the said decisions fully covered the issue that arose for its consideration in the impugned order. In Assam Valley Plywood Pvt.Ltd., the Tribunal at para 6 of its order held thus: In Appeal No.E-396/80-A, there is an additional point of dispute. It relates to the quantum of discount or reduction in value for damaged goods cleared by the appellants. The lower authorities have allowed the minimum discount of 25%. Before the Appellate Collector, the appellants claimed that they had allowed 40% to 50% discount for the damaged goods. In the appeal before us, it is contended that there was reduction of upto 75% in some cases. The appellants explained that the nature and extent of damage on different pieces of their products was not uniform and hence the price reduction for the damaged goods could not be uniform. They had allowed varying discount/reduction depending upon the nature and extent of the damage in each case and they prayed that the discount/reduction so actually allowed from case to case may be accepted after necessary verification by the authorities. The learned representative of the department had no comments to make. We find the appellants request quite fair and reasonable, and allow it.

From a perusal of this part of the order, we are unable to deduce any principle either in law or in facts decided by the Tribunal so as to make it applicable to the issue that arose before it in the case with which we are concerned. None of the questions which are addressed before

us or decisions cited have been considered by the Tribunal in the said order in Assam Valley case. After carefully considering the said order, we are unable to agree with the Tribunal that those cases either wholly or in part cover the issue involved in the present case. While in the case of Tungbhadra Industries case (supra), the Tribunal held in para 19 of its order thus: Admittedly, the appellants are giving discount for damages to the goods caused during transit. Shri Beri relied on the order on this Tribunal in Assam Valley (P) Ltd.case reported in 1989 (43) ELT 360 (Tri.). According to the said order, varying discount reduction depending upon the nature and extent of damage in each case is admissible. It is also a case of damage caused to the goods during transit. Following the above order, we direct the A.C. to verify the nature and quantum of discount for damage caused to the goods in the transit and allow the same.

It is seen that this order of the Tribunal is based on certain admissions made by the parties and reliance was once again placed on the order in Assam Valley which, according to us, does not lay down any principle in law. Tribunal, in our opinion, erred in applying the orders delivered by it in the cases of Assam Valley and Tungbhadra Industries to the facts of the present case.

This, however, will not assist us to dispose of these appeals finally. When the original Authority took up the matter for consideration after remand, the respondent filed certain affidavits of its buyers who in their own words have stated that some trade practice was existing whereby the respondent company was reimbursing the loss suffered by the buyers due to the damages caused to the goods. Learned Attorney General has argued that these affidavits cannot be relied upon. He also urged that the appellant has produced a copy of the agreement between the respondent and its buyers which, according to him, belies the existence of the trade practice as claimed by the respondent. Even though this document was produced only at the first appellate stage, we find it has direct bearing on the question in issue in view of the contents of clause 14 of the said agreement. Based on this clause, it is contended for the appellant that no trade practice in regard to damage deduction is in existence. On behalf of the respondent, it is contended that they are not relying on the agreement to establish the trade practice; still, to rebut the argument of the appellant based on clause 14 of the agreement. the respondent places reliance on clause 15 of the said agreement which, according to the respondent, creates an obligation on the respondent to compensate the buyers for the loss suffered by them due to damage to the goods. We do not want to express any opinion in regard to these arguments addressed by the parties. The authorities below have not gone into the impact of the various clauses of the agreement on the claim of the respondent as to the existence of trade practice in the wholesale market. We feel this raises primarily a question of fact and is a matter which goes to the root of the claim, therefore, it should be decided in the first instance by the original Authority. Therefore, we consider it appropriate to remand the matter back to the original Authority directing it to decide the matter afresh after giving the parties concerned an opportunity of producing such evidence as they desire to produce and after hearing the parties. We make it clear that we have not

expressed any opinion with reference to the various arguments addressed before us and referred to in this order of ours except to the extent of the finding delivered by us in regard to the finality of the decision rendered by the Tribunal in the earlier round of proceedings and in regard to the correctness of the reliance placed by the Tribunal on the two orders of its own while allowing the appeal of the respondent, which according to us, is unsustainable.

For the reasons stated above, the impugned order is quashed, the matter is remitted to the original Authority for fresh disposal in accordance with the observations made hereinabove. The appeals are disposed of accordingly.