

Collector of Central Excise Vs. Patel Detergents

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Aug-09-1996

Reported in : (1996)(87)ELT546TriDel

Appellant : Collector of Central Excise

Respondent : Patel Detergents

Judgement :

1. These are 9 appeals which for proper understanding could be grouped as under :- Group-1 : Three appeals bearing Nos. E-2570/86-A, E/2571/86-A and E-2572/86-A, all filed by the Revenue against the common Order-in-Appeal No. M-1277-1279/AHD/687-689/86, dated 26-8-1986 passed by the Collector of Central Excise (Appeals), Bombay, and corresponding three appeals bearing Nos. E/2522/86-A, E/2523/86-A and E/2524/86-A filed by the three assessee's, M/s. Nirma Chemical Works Pvt. Ltd., Patel Detergents & Harsiddh Detergents, against the same common Order-in-Appeal No. M-1277-1279/ AHD/687-689/86, dated 26-8-1986 of the Collector of Central Excise (Appeals), Bombay.

Group 2 : Two appeals bearing Nos. E/2502/86-A and E/2640/86-A, filed by the Revenue Appeal No. E/2502/86-A is against the Order-in-Appeal No. M-623-624/AHD/272-273/86, dated 7-8-1986 passed by the Collector of Central Excise (Appeals), Bombay in which the respondents are (i) M/s. Nirma Sales and Mfg. Corpn. and (ii) Narayan Soap Factory. In Appeal No. E/2640/ 86-A the impugned Order-in-Appeal is M-1374-1375/AHD/726-727/86, dated 26-9-1986 in which the Collector of Central Excise (Appeals), Bombay had followed his earlier decision as

recorded in Order-in-Appeal No. M-623- 624/AHD/272-273/86, dated 7-8-1986, referred to above. In this appeal, the respondents are (i) New Kem Chemical Industries and (ii) International Detergents (I).

Group 3: One appeal bearing No. E/215/87-A filed by the Revenue against the Order-in-Appeal No. M-1381/AHD/729/86, dated 6-11-1986 passed by the Collector of Central Excise (Appeals), Bombay in which the respondents are M/s. K.K. Patel.

2. All these appeals involve common issues of packing, commission and handling charges. They were heard together and are being disposed of by this common order.

3. The goods involved in these proceedings are detergent washing powder/detergent cakes, classifiable under Item No. 15AA of the old Central Excise Tariff, which was in force prior to the introduction of the new Central Excise Tariff in the year 1985. The detergent washing powder was initially packed in 1/2 kg. and 1 kg. primary polythene bags. This packing was the consumer pack as the detergent powder was to be delivered to the ultimate consumer in such primary pack. For delivery in the wholesale quantities, a number of such packs were further packed in gunny/High Density polythene (HDPE) bags. The detergent washing powder so packed in gunny/HDPE bags was transported to different consignee distributors, who marketed such product on behalf of the assessee at prices fixed by such assessee. The consignee distributors sold the powder through their selling organisation on agreed commission basis under an agreement with the assessees.

Similarly, the individual detergent cakes were packed in wrappers, and a number of such wrapped cakes were placed in cartons/cardboard boxes.

In this case also, the goods were sold through agents, who were paid commission charges at the rates agreed upon. The agents were required to sell the goods at the rates fixed by the assessees, and whole of the sale proceeds were to be handed over back to the assessees. The expenses towards transport/delivery etc. were borne by the assessees.

The assessee have contended that the cost of gunny/HDPE bags and that of the cartons /boxes was not includible in the assessable value of the detergent washing powder and the detergent cakes. Further, they have pleaded that the commission paid by the assesseees to their consignee distributors for sale of the goods was a permissible deduction for the purposes of arriving at the assessable value under Section 4 of the Central Excises & Salt Act, 1944 (hereinafter referred to as the 'Act'). They have also pleaded that the handling charges viz. loading and unloading charges were a part of the transport cost and these charges were also eligible for deduction from the sale price for arriving at the assessable value of detergent washing powder and detergent cakes. The Collector of Central Excise (Appeals) had held that the cost of gunny/HDPE bags and that of cartons/cardboard boxes was not to be included in the assessable value. On this point, the Revenue had come in appeal. With regard to the commission and the handling charges, he had held that they were not eligible for deduction from the sale price to arrive at the assessable value, and on these points, the assesseees are in appeal before us.

4. We have been benefited by the analysis made by Sr. Advocate, Shri D.Dave and Shri G.D. Sharma, JDR. We have carefully considered the submissions made by both the sides and have gone through the facts and circumstances leading to the present controversies.

5. First, we will take-up the issue of secondary packing. Where the goods are delivered at the time of removal in a packed condition then their assessable value for the purposes of Section 4 of the Act will include the cost of such packing. The only exception is when the goods are delivered at the time of removal in a packing which is of a durable nature and is returnable by the buyers to the assessee. In such a situation the cost of such packing, which is of a durable nature and is returnable by the buyer to the assessee, is not includible in the assessable value of the goods under assessment. The nature of the packing, whose cost is includible in the assessable value of the goods in question, is to be determined by the fact as to how and in what condition, "packed condition", at the time of removal the goods are delivered to the wholesale buyer in the course of wholesale trade. The packing could be of different type. It will depend on the goods as to what type

of packing is used. The packing could be a wrapper, container, bobbin, pirn, spool, reel, warpbeam or it may be any other thing in which and on which the excisable goods are wrapped, contained or wound. Depending upon the nature of the goods and the trade practice, there could be more than one packing of the same goods. There could be a primary packing and there could be a secondary packing.

There could be other packings also, other than primary and secondary.

The degree of the packing in which the excisable article is packed will vary from one class of articles to other and for the same article also there could be varying packings. There may not be much dispute about the primary packing. The cost of the secondary packing which is includible in the assessable value may be of different grades. As observed by the Hon'ble Supreme Court in the case of *U.O.I. v. Bombay Tyre International Ltd.* - 1983 (14) E.L.T. 1896 (SC), the secondary packing may consist of larger cartons in which a standard number of primary cartons are packed. The Hon'ble Supreme Court had laid down the law in these terms : "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." The cost of the primary packing as well as of the secondary packing in the sense covered by the provisions of the law as explained by the Supreme Court in their several decisions would be included within the meaning of the expression 'value'.

6. Detergent washing powder is an item of daily consumption by the households. When the consumer goes to the retailer for purchase of the detergent washing powder it is delivered to him in the primary polythene pack of 1/2 kg. or of 1 kg. or of larger quantity as required by him. This is the consumer pack. In the wholesale market, the goods are not transacted in 1/2 kg. or 1 kg. or 2 kgs. packs, but in wholesale quantities which could not be delivered in loose individual packs. By necessity to effect the wholesale transactions, the individual polythene packs have to be placed in the larger cartons or container. Even if a wholesale dealer carries on business within a reasonable distance from the factory premises he will not accept individual pack/cake at the factory. The wholesale buyer is not a consumer.

He further sells the goods down the line in the stream of trade to other wholesale dealers/retailers. For the wholesale dealer standing at the factory gate and asking for delivery of quantities in wholesale lot, it is not the question of facilitating the smooth transport or the possibility of the damage. For him, packing in a larger container in which a number of primary packs are packed is a basic requirement of delivery as such.

7. There is no evidence that any sale in wholesale lot was effected without such secondary packing in the form of gunny/HDPE bags and cartons/boxes. In fact no delivery is possible without such secondary packing. The powder and the cakes could not be delivered in the wholesale trade without this packing. It is seen from some of the delivery challans on record that number of bags were to be specifically recorded therein. In the statement of sales, the rate is shown as per 10 kgs. Obviously, the initial pack is the primary packing and the packing in which a number of primary packs are further packed is the secondary packing, and as held by the Supreme Court "to that extent the cost of secondary packing cannot be deducted from the wholesale cash price of the excisable article at the factory gate".

8. The assessees have described such a secondary packing as the special secondary packing. The facts and circumstances of the case amply establish that the packing in which the primary packs are packed is not a special secondary packing which is provided at the instance of the wholesale buyers and which is not generally provided as a normal feature of the wholesale trade. It is not the appellation given by the assessees to a particular type of packing, which is determining factor for the levy. The actual nature of the packing with reference to the particular excisable goods in question is the criteria.

9. The test as laid down by the Hon'ble Supreme Court in the case of Collector of Central Excise v. Ponds India Limited - 1989 (2) SCALE 168 at page 849 is as under :- "The question is not whether these goods could be so sold, but the question is whether these goods are so sold usually and as such used to become marketable in such manner. (12)." The facts of the present cases clearly establish that the gunny/HDPE bags/cartons and boxes were the necessary packing for

selling the powder and cakes in the wholesale market at the factory gate and in all cases the powder/cakes were sold duly packed in such packing.

10. Keeping in view the nature of the product and the arrangement under which the washing powder/detergent cake were marketed by the assessees, the secondary packing in these cases could not be taken as durable and returnable. The concept of returnability is relevant only for durable packing and not for the primary and the secondary packing whose cost is includible in the assessable value of the excisable goods by virtue of Section 4(4)(d) of the Act read with the Supreme Court's decision in the case of Bombay Tyre International referred to above. There is nothing on record to show that there was any arrangement between the assessees and their buyers that the gunny bag packing shall be returned to the assessees and that the assessees were obliged to accept the packing returned and refund the stipulated amount. In the agreements on record, there is no clause about packing what to talk of the returnability of the packing. In this connection, reference may be made to the Hon'ble Supreme Court's decision in the case of Mahalakshmi Glass Works Pvt. Ltd. v. C.C.E., Bombay - 1988 (2) SCALE 111 at page 118 wherein the Hon'ble Supreme Court had held that there being no evidence of the agreement that the cartons and gunny bags were returnable, they were not returnable for the purpose of Section 4(4)(d)(i) of the Act.

11. The whole of the case law on the subject of the secondary packing had been summarised by the Hon'ble Supreme Court in their latest decision in the case of Government of India v. Madras Rubber Factory Ltd. reported in 1995 (77) E.L.T. 433 (SC). Paras 43 and 44 from that judgment are extracted below: "43. The position emerging from the review of the decisions aforesaid may now be summarised each and every decision has accepted and acted upon the law laid down in Bombay Tyre International. The test evolved in the said decision has been expressly reiterated in all the judgments, though it is a fact that there has been some divergence in what may be called 'emphasis'. Since the said decision lays down that the cost of "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 to be included, the court enquired in Godfrey Philips (majority opinion) whether the CFCs were necessary for such

delivery. The court found in the facts of that case that they were not so necessary and accordingly held that the cost of CFCs is not includible. In Geep Industrial Syndicate, the court adopted the approach of the majority in Godfrey Philips on the footing that the wooden boxes were not necessary" for delivery at the gate. In Ponds, however, both the learned judges constituting the Bench laid down tests consistent with the one in Bombay Tyre International. Indeed, Ranganathan, J. understood the majority decision in Godfrey Philips and the decision in Geep Industrial Syndicate in the same manner as we have done - a fact emphasised by us hereinabove while discussing the ratio of Ponds. As pointed out by us hereinabove, it would not be reasonable to infer any conflict or deduce any inconsistency between the ratio of Bombay Tyre International and the ratio of Godfrey Philips for the reason that not only both Benches were of coordinate jurisdiction (Bombay Tyre International was thus binding upon the latter Bench) but also because both the decisions were rendered by the very same Bench. The adage in such matters is : look for harmony, not divergence. It is equally relevant to point out that Bombay Tyre International was equally binding upon the Bench (of three learned Judges) which decided Geep Industrial Syndicate and that it would be equally unreasonable to suggest that the Bench (deciding Geep Industrial Syndicate) would lay down an inconsistent proposition from the one in Bombay Tyre International without even referring to the decision or its ratio. The conclusion in these two later cases turned upon the finding as to factual situation obtaining therein whereas the two opinions in Ponds not only follows the test in Bombay Tyre International but reiterate it in dear terms. The test laid down in Bombay Tyre International has never been departed from in any of the later decisions and must be treated as good and sound. We may as well stress the obvious: in a matter like this, certainty in law is essential. It may be that in applying the principle having regard to the facts of a given case, there may be some divergence in conclusion but so far as the principle - the relevant test to be applied - is concerned, there should be no uncertainty. 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 emphasize 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.

44. Keeping the above principle in mind, we shall now turn to the facts in Civil Appeal No. [5375] of 1995 arising out of S.L.P. (C) 4041 of 1981 (Union of India v. Hindustan Lever) because it is in this case that the issue of cost of packing has been argued by Shri Harish Salve. The assessee claims deduction of the cost of 'outer packing'. The Assistant Collector who examined the claim pursuant to the 'formal order' rejected the claim. He has stated in his order that in the first instance, the assessee claimed that the said packages are of a durable nature and have a ready resale value all over the country and that to avoid transportation cost, the trade (buyers), instead of sending the packages back to the company, resell the same. The assessee conceded that though it is possible to pack the produce for sale in the ordinary packings, they are also packed in special outer packings for the sake of uniformity. At a later stage of hearing the assessee adopted a different stand. It contended that the cost of only the primary packing, viz., the packing which is in physical contact with the soap and is wrapped around the soap, is includible and that the cost of cartons and cardboard boxes in which the soaps are then packed in outer packing has to be excluded. The Assistant Collector rejected both the contentions on the following reasoning : (a) in the instant case, the company has not adduced any evidence to show that there are any agreements or contracts between it and its buyers for return of such packings; (b) as a matter of fact, the goods in question are invariably delivered to their customers packed in cartons/cardboard boxes; (c) the unit of sale for the said goods for which the company files its price lists from time to time is a wholesale package comprising of a dozen or gross pieces; (d) the packing of such goods in cartons/cardboard boxes is indispensable, as in the absence of the same, they cannot be conveniently delivered to the customers; (e) not a single instance could be shown where the assessee ever delivered the goods without the above packing

and (f) the assessee conceded that its buyers are not returning such packages to it on account of the cost of transportation. We are of the opinion that on the above findings recorded by the Assistant Collector, the only conclusion that can follow is that the cost of the cartons/cardboard boxes cannot be excluded from the value of the goods. If, however, the assessee wishes to challenge the correctness of the findings of fact recorded by the Assistant Collector, the proper course is to file an appeal as provided by law." 12. From the facts and circumstances of these cases and the case law on the subject there is no doubt that the cost of the gunny/HDPE bags and that of boxes/cardboard cartons is includible in the assessable value of the detergent washing powder/detergent cakes. To that extent the view taken by the Collector (Appeals), Central Excise is not correct and the Revenue's appeals on this ground are allowed.

13. Now coming to the question of the commission paid by the assessees to their agents. The manufacturers had claimed deduction from the assessable value of the commission paid by them to their consignee distributors who sold the goods to the buyers on behalf of such manufacturers at prices fixed by those manufacturers. The goods were disposed of by the consignee distributors on behalf of the manufacturers. They were the agents of the manufacturers. They were not the wholesale buyers for the purpose of Section 4 of the Act. The sale proceeds had to flow back to the manufacturers. In this connection, the preamble and clauses 5, 6, 7, 9 and 10 of the memorandum of agreement at page 29 of the paper book in Appeal No. E/2522/86-A are reproduced below :- "Whereas the principals who are the manufacturers of washing powder are desirous of marketing their goods through the selling organisation of the Consignee Distributors at above place and later have agreed to act as Consignee Distributors of the former and effect sales of the goods belonging to the principals on fixed commission basis." 5. The Consignee Distributor should sell the goods only at prices fixed by the principals and at no other price higher or lower.

6. Sale bills are to be made in triplicate, one to the buyers, one to be retained by the Agents and the third to be kept by the Consignee Distributor for the use of the principals.

7. The Consignee Distributor is responsible for collection of sales value of goods sold by him and should remit the same to the principals immediately.

9. For services rendered by the Consignee Distributors, they will be paid as remuneration a commission at the rate of 20 paise per kg. or more or less as mutually agreed from time to time.

10. It is also agreed that the principal will bear the expenditure for transportation, octroi and loading and unloading. The Distributor shall be primarily responsible to advertise the products and shall incur the required sales promotion expenses. The principal will arrange for, on his own, through agency, individually or jointly or otherwise the advertisement and incur such sale promotion expenses as required.

The expenditure incurred by the principal whether directly or through agency or by way of reimbursement to any other concern towards, on or for advertising and/or sales promotion of the products shall be recoverable from the Distributor at the rates and on the terms and conditions specified hereunder.

That the rate of recovery will be @ 2% of net sales or to a maximum of Rs. 1,50,000/- whichever is lesser. At the end of every quarter the principal shall, alongwith the requisite working, forward debit note to the Distributor and at the end of its accounting year final working alongwith requisite debit or credit note.

At the end of every accounting year of the principal and as soon as the Accounts are finalised, the principal shall prepare final working to ascertain the advertisement and sales promotion expenses recoverable from the Distributor and if there has been any excess recovery during the Accounting year, such excess recovery shall be refunded to the Distributor." 14. The Collector of Central Excise (Appeals) on page 5 of his Order-in-Appeal No. M-1277-1279-AHD/687-689/86, dated 26-8-1986 had recorded as under :- "With regard to the deduction claimed by the appellants on account of commission given by them to Stockists/Commission Agents, I find that according to the sale pattern of the appellants they are having distributors in different States to whom the goods are sent on consignment basis as stock transfer. The Consignee Distributors are required by the appellants to sell the goods to dealers or retailers at a fixed price.

These Consignee Distributors are sending credit notes after selling the goods. Thus, according to this sales pattern it is quite clear that the sale does not take place between the distributors and the appellants but the distributors act as commission agents who sell the goods on behalf of the appellants.

Moreover, the appellants are not selling their goods at the factory gate but the goods are sold by the Consignee/Commission Agents at the place of destination. According to the Supreme Court's decision in the case of Coromandel Fertilizers reported as - AIR 1984 SC/1772 such a commission paid for the service rendered by the Commission Agents cannot be called trade discount and cannot therefore be allowed to be deducted from the wholesale price under Section 4 of the Central Excises & Salt Act, 1944. There is therefore, no force in the argument of the appellants in this connection and I am fully in agreement with the Asstt. Collector's view that such a commission is to be included in the assessable value." 15. In the case of Coromandel Fertilizers Ltd. v. U.O.I. reported in 1984 (17) E.L.T. 607 (SC), the question for consideration was whether the amount of commission paid by the appellants to their selling agents was deductible as trade discount in computing the value of fertilizers for assessment of excise duty. Paras 12,13 and 18 from that judgment are extracted below :- "12. The other question raised on behalf of the appellants relates to the appellant's claim for deduction of the commission paid to the selling agents from the assessable value of the goods manufactured in the matter of computation of the excise duty. The agreements which the appellant had with the selling agents clearly go to indicate that the selling agents who were being appointed were the agents of the appellant for sale of fertilizers on behalf of the appellant. The agreement clearly provides that the selling agents will secure orders on behalf of the appellant, execute such orders on behalf of the appellant and will also remain liable to the appellant for realisation of the price of goods sold to various parties; and for such services rendered by the selling agents, the selling agents will be entitled to the commission stipulated in the agreement between the parties. The agreement is essentially an agency agreement and the selling agents were being appointed as agent for sale and distribution of the product of the appellant on the basis of the terms and conditions stipulated in the agreement.

Clause 2(a) of the agreement dated April 1, 1971 with M/s. Rallis India Limited which deals with the question of appointment clearly states : "Coromandel hereby appoints the agents as one of Coromandel sales agents for sale and distribution on behalf of coromandel of the product in the territory...." 13. The commission which is paid by the appellant to the selling agents is for services rendered by them as such agents. Such commission paid to agents for services rendered cannot be considered to be in the nature of any trade discount which may qualify for deduction in determining the assessable value of the goods for the purpose of imposition of excise duty under the Central Excises and Salt Act, 1944.

18. It is possible that in a given case, payment of what is termed as commission may, depending on the facts and circumstances of the case be in the nature of trade allowance. But every kind of trade allowance does not necessarily qualify for deduction in assessment of excise duty. Commission paid to an agent for services rendered by him in the matter of sale of the product of the appellant on behalf of the appellant on the basis of the agreement the appellant had with its selling agents cannot be considered to be in the nature of such trade discount as may qualify for deduction in the computation of the assessable value of the goods for the purpose of levy of excise duty. The commission paid to the selling agents is not a trade discount given either to the wholesale buyer or to the retail buyer, it is not given to the consumer or the trader. The commission paid on the basis of the agreement to the selling agent by way of remuneration for services rendered by the agent cannot by any process of reasoning be said to be trade discount payable or paid at the time of removal of the goods from the factory or any other premises of manufacture or production for delivery at the place of manufacture or production. The amount of commission paid to the selling agents, therefore, is not trade discount within the meaning of the Explanation to Section 4 of the Act and does not qualify for any deduction. In our view, the High Court was clearly justified in rejecting this claim of the appellant." 16. Taking all the relevant consideration into account, we are of the considered view that the commission in this case could not be considered as trade discount and that there is no infirmity in the order passed by the Collector of Central Excise (Appeals) on this account. To that extent, the appeals filed by the assesseees have no force and are rejected.

17. As regards the handling charges, the Collector of Central Excise (Appeals) had recorded that they were incurred by the consignee/commission agents and were in the nature of expenses incurred by the selling organisations. The assessee had disputed this recording and had submitted that these charges pertained to the freight, unloading and delivery expenses and were borne by the assessee themselves and that these charges were part and parcel of the transportation expenses. They have affirmed that these charges were neither being charged nor recovered separately either from the stockists or the buyers.

18. There is no doubt that the actual cost of transportation i.e.

transportation originating from the factory gate if included in the sale price of the goods is eligible for deduction to arrive at the assessable values. Any expenses however, incurred inside factory gate are part of the value of the goods. The Supreme Court in the case of *Indian Oxygen Ltd. v. C.C.E.* reported in 1988 (36) E.L.T. 723 (SC) had held "in so far as the loading charges incurred for loading the goods within the factory are concerned, they are to be included in the assessable value, irrespective of who has paid for the same, but the loading expenses incurred outside the factory gate are excludible.

(5)." The Hon'ble Supreme Court in the case of *U.O.I. v. Bombay Tyre International Ltd.* referred to above had observed, "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 to the date of delivery under the aforesaid heads cannot on the same grounds be deducted. 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." 19. Thus, the actual cost of transportation is eligible for deduction from the price at the place of delivery, and if handling charges incurred outside the factory gate are part of the cost of the transportation of the detergent washing powder/detergent cakes, from the factory gate to the place of delivery, then from the price at the place of delivery such charges on the basis of

the actual evidence are eligible for deduction. The order on this account passed by the Collector (Appeals), Central Excise, Bombay is modified in the above terms.

20. The Tribunal's decision in the case of Mysore Rolling Mills (P) Ltd., Belgaum C.C.E., Belgaum - 1985 (21) E.L.T. 296 (Tribunal), relied upon by the assesseees related to the electrical grade aluminium ingots sold at statutory cum-duty prices fixed under the Aluminium (Control) Order, 1970. The facts are distinguishable.

21. As regards the different prices to the buyers in different zones, we may refer to the Tribunal's decision in the case of Jagdish Electronics Pvt. Ltd. v. C.C.E., Pune - 1995 (6) RLT 646 (Tribunal) wherein it has been observed that different buyers situated at different places could constitute separate class of buyers, and that separate prices charged from them were in [conformity] with the provisions of Section 4(l)(a) Main Definition Clause. The view taken by the Collector (Appeals), Central Excise, Bombay, on this account is not correct.

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