

(1996) 05 SC CK 0005

In the Supreme Court Of India

Case No : Civil Appeal No's. 1121 of 1992 and 8762 of 1994

Asstt. Collector of Central Excise and Others

APPELLANT

Vs

Bata India Ltd.
Modi Rubber Limited and Another Vs
Union of India (UOI) and Others

RESPONDENT

Date of Decision : 07-05-1996

Acts Referred:

Central Excise Rules, 1944 — Rule 8(1)

Central Excises and Salt Act, 1944 — Section 4(1), 4(4)

Citation : AIR 1996 SC 3380 : (1996) 56 ECC 130 : (1996) 64 ECR 678 : (1996) 84 ELT 164 : (1996) 5 JT 230 : (1996) 4 SCALE 508 : (1996) 4 SCC 563 : (1996) 2 SCR 424 Supp

Hon'ble Judges : A. M. Ahmadii, C.J;S. C. Sen, J;B. L. Hansaria, J

Bench : Full Bench

Advocate : V.R. Reddy, Additional Solicitor General D.A. Dave, H.N. Salve, Joseph Vellapally, A.K. Ganguly, Shanti Bhushan, R. Nath, for Khaitan and Co., Ravinder Narain, Ashok Sagar, Amrita Mitra, Rajan Narain, Sonu Bhatnagar and Amit Bansal, for JBD and Co., V.K. Verma, N.K. Bajpai, A. Subba Rao, T.V.S.N. Chari, Manik Karanjawala, K.R. Nambiar, Suman Khatain and Shalini, for Khaitan and Co., V.B. Saharya, for Saharya and Co., A.K. Goel and H.K. Puri, for the Appellant;

Final Decision : Dismissed

Judgement

Suhas C. Sen, J.—The only point that falls for determination in this appeal is whether the benefit of exemption given to footwear can be claimed by the manufacturer even where (he wholesale price of the footwear exceeds the limit of the exemption specified in the notification. There can be no dispute that if the assessable value calculated according to Section 4 of the Central Excise and Salt Act, comes upto or below the limit set by the notification, the assessee will be entitled to the benefit of the notification.

2. The notification which was originally issued under Sub-rule (1) of Rule 8 of Central Excise Rules, 1944 exempted footwear the value of which did not exceed

Rs. 5 per pair from the whole of the duty of excise leviable thereon. The exemption limit of Rs. 5 per pair has been enhanced from time to time and at the material time, for the purpose of this case, the exemption was limited to footwear the value of which was upto Rs. 60 per pair.

3. Mr. Shanti Bhushan on behalf of the respondent has contended that if excise duty was payable on these shoes, the amount of excise duty had to be deducted from the wholesale price in order to determine the assessable value of the shoes which was less than the limit set by the exemption notification. If this is not allowed, the Department will claim excise duty even on shoes which would otherwise qualify for benefit of exemption notification because of the lower value. To illustrate this point, Mr. Shanti Bhushan has argued that when the exemption notification was limited to Rs. 60 per pair of shoes, there would be no difficulty in cases where the wholesale price was upto Rs. 60 or less. There can be no dispute that in respect of these types of shoes, no excise duty will be leviable. If the shoes were priced at Rs. 60 and above, the excise duty will be levied. But, if the wholesale price was at Rs. 62 or Rs. 66, in such a case, after deduction of excise duty at the rate of 10%, the value of the goods will be in the range of Rs. 56.36 to Rs. 60.00. Mr. Shanti Bhushan has contended that even, in such cases when by deducting excise duty payable on goods, the value has been arrived at the price of Rs. 60 or less, the question of levying excise duty will not arise. To demonstrate his argument, he has given a chart:

4. It was argued that in respect of the first three items of which wholesale price (after trade discount etc.) was Rs. 56.00, Rs. 58.00 or Rs. 60.00, there was no controversy that these were exempted. There was also no controversy in respect of the last three items of which the wholesale price (after trade discount etc.) was Rs. 68.00, Rs. 70.00 or Rs. 72.00. The controversy is restricted to the items in the second category, where the wholesale price after trade discount etc. was in the range of Rs. 62.00, Rs. 64.00 or Rs. 66.00. In these cases, if the excise duty element was taken away, the value will become Rs. 60.00 or less. Applying rule of valuation laid down in Section 4 of the Act, no duty was payable even on shoes under this category.

5. Mr. Shanti Bhushan has contended that if excise duty is payable on these shoes, then the duty element has to be deducted from the wholesale price in order to ascertain the assessable value u/s 4. Once excise duty at the rate of 10% is taken out from the wholesale price of the shoes falling under the disputed category, the assessable value would come to less than Rs. 60.00 and the benefit of exemption notification cannot be denied to the manufacturer in these cases.

6. We are unable to uphold this contention because the normal price charged by the manufacturer at the time and place of removal of goods to the wholesaler is treated by the Act to be the value of the goods. Sub-section (1)(a) of Section 4 makes it clear that "such value shall be deemed to be the normal price thereof, that is to say, the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade....". Therefore, the normal wholesale

price of the goods must be deemed to be the value of the goods. It is not necessary to refer to the various types of prices that may be charged from the buyer set out in the proviso to Section 4(1)(a). But there cannot be any dispute that excise duty will be levied on the value of the excisable goods and the basic rule is that the normal wholesale price is the value of the goods. The normal wholesale price is the cum-duty price which the wholesaler has to pay to the manufacturer. The cost of production, estimated profit and the taxes on manufacture and sale of the goods are usually included in the wholesale price of the goods. It is only because the wholesale price is usually the cum-duty price that Sub-section (4)(d) lays down that 'value' will not include duty of excise, sales tax and other taxes, if any, payable on the goods. But if a manufacturer includes in the wholesale price any amount by way of tax, even when no such tax is payable, then he is really including something in the price which is not payable as duty at all. He is really increasing the profit element included in the wholesale price in another guise. In such a situation, there cannot be any question of deduction of duty payable on the goods from the wholesale price because as a matter of fact, no duty has actually been included in the wholesale price.

7. In the chart given by Mr. Shanti Bhushan the controversy relates to the second category of price-list after discounts etc. But, these prices - Rs. 62.00, Rs. 64.00 or Rs. 66.00 - are not inclusive of any duty. If that be so, these are the values of goods on which excise duty would be leviable in usual course without any further deduction.

8. Clause (d) of Sub-section (4) of Section 4 lays down that 'value' will include the cost of packing of the goods when the goods are sold in packed condition in certain cases. Sub-clause (ii) of Clause (d) provides that the value will not include "the amount of duty of excise...if any, payable on such goods." Otherwise, there will be tax upon the amount of tax which forms part of the price of the goods. But in a case where the wholesale price is not inclusive of any duty payable on the goods, then no question of deduction of any duty for determination of value will arise. Sub-clause (ii) of Clause (d) specifically states that what will not be included in the value "is the amount of duty of excise,...if any, payable on such goods". The phrase "if any" signifies that if no duty is payable, nothing will be deducted from the wholesale price. It is only when excise duty is actually payable that the duty element can be excluded from the wholesale price. Sabyasachi Mukharjee, J. (as his Lordship then was) pointed out in the case of *M/s. Hindustan Polymers Vs. Collector of Central Excise*, that the two sub-clauses of Section 4(4)(d) dealt with abatements or deductions in respect of actual burdens, either by way of an expenditure or discount, borne by the assessee. If the assessee has not allowed any trade discount, he cannot ask for deduction of the same from his price. If he does not have to pay any tax as a matter of fact, he cannot ask for it to be deducted from the wholesale price for calculating the value of the goods. In such a case, the normal price, that is the wholesale price will be deemed to be the value of the goods.

9. To revert back to the chart, if value of the goods exclusive of any duty is Rs. 56.36 or Rs. 58.18 or Rs. 60.00, no duty is payable on such goods at all. The wholesale price need not be higher than the value of the goods in such cases. These values are inclusive of profit intended to be made by the manufacturer. The manufacturer can sell these goods at the aforesaid prices and enjoy the tax exemption. But if the manufacturer with full knowledge that no duty is payable when the value of the goods are below Rs. 60.00, raises the prices to above Rs. 60.00, then he has included in the wholesale price something which is not the anticipated duty of excise payable on such goods but an extra amount of profit in another guise.

10. For the purpose of excise duty, the manufacturer has to submit a price-list to the excise authority before removal of the goods from the factory. He has to indicate in the forms and documents relating to assessment, the value of the goods and the amount of duty which will form part of the prices at which such goods are to be sold. Costs and estimated profits are included in the price of the goods. Inclusion of the anticipated amount of the excise duty in the wholesale price is the last part of the pricing mechanism. The manufacturer has to calculate the value on which duty would be payable, estimate the amount of duty payable and add that amount to value of the goods to arrive at the wholesale price. It is on the value of the goods and not the cum-duty-price that the duty is paid to the excise authority before the clearance of the goods. If, as in this case, before adding any amount by way of excise duty, the manufacturer found that the value of the footwear was Rs. 60.00 per pair or less, no question of payment of excise duty could arise. There was no necessity to add anything on account of tax to raise the price of the goods to above Rs. 60.00 per pair. The wholesale price of Rs. 62.00, Rs. 64.00 and Rs. 66.00 given in the chart included costs, estimated profits, etc, but could not have included any amount by way of excise duty because footwear valued upto Rs. 60.00 per pair was exempt from duty.

11. It has not been explained in the chart how the wholesale price has been fixed at Rs. 62.00 or Rs. 64.00 or Rs. 66.00 as inclusive of duty. Did these prices contain any amount on account of estimated excise duty payable ? If so, what were the values on which the manufacturer estimated the amounts at the duties payable ? For example, if Rs. 62.00 is the price, I he manufacturer will have to explain by giving the break-up, how was this price fixed. If .1.0% was the rate of duty and footwear valued upto Rs. 60.00 per pair was exempt from duty, Rs. 6 could not be added to the value for fixation of the price. If Rs. 66.00 is an ex-duty price, then duty has not been included in the price. In such a situation, no question of any deduction of duty from the wholesale price u/s 4(4)(d)(ii) could arise.

12. The construction suggested by Mr. Shanti Bhushan will also defeat the purpose of the exemption notification. Exemption from duty has been given to footwear valued at Rs. 60.00 or less per pair. Excise duty is usually passed on to the consumer by including the duty in the price of the goods. The obvious

intention behind the notification was to give relief to the consumers who could not afford to buy higher priced footwear. If the argument on behalf of the manufacturer is upheld, he will be entitled to sell footwear at a price of more than Rs. 60.00 per pair and yet will be able to claim the benefit of the exemption notification and not pay any duty. An anomalous situation will arise. The consumer will pay ex-duty price of more than Rs. 60 per pair and bear the brunt of a tax burden which is not payable by the manufacturer in law. The manufacturer will enjoy the benefit of the exemption notification by deducting an amount on account of non-payable excise duty from the price and thereby make profit in the guise of payment of tax. At the same time, the revenue will be deprived of the duty which is payable on footwear valued at above Rs. 60.00.

13. If the ex-duty value of the footwear given in the chart was Rs. 60.00 or less, then that should have been the excise value. There could be no reason for fixing the price at above Rs. 60.00 except for the purpose of making a larger profit. A manufacturer at the time of clearance of the goods has to indicate in all the documents relating to assessment, the amount of duty which will form part of the price at which such goods are to be sold. In the instant case, the manufacturer could not have included any amount by way of excise duty as part of the price of the goods, if the ex-duty value of the goods was Rs. 60.00 or less per pair. A manufacturer has to fix the wholesale price of the goods before removal of the goods from factory. The price will include costs, planned profit and taxes, if any. If, as in the chart given by Mr. Shanti Bhushan, the ex-duty price of the footwear manufactured by the Company, after all other permissible adjustments, fell short of Rs. 60.00, there could be no reason for the manufacturer to price the goods at a rate above Rs. 60.00 by including an amount as duty even when no such duty was payable. Sub-section (1) of Section 4 lays down that 'value' shall be deemed to be the normal price which is the wholesale price of the goods. But, if any amount payable as excise duty or sales tax formed part of the normal price that will have to be excluded from the 'value' of the goods under the provision of Sub-clause (ii) of Clause (d) of Sub-section (4) of Section 4. (If the values of the goods as given in the chart were Rs. 60.00 or less, then these values should have been the normal prices of the goods, that is to say, the prices at which such goods were sold to the wholesale market. But, if even in such cases, the wholesale prices were fixed at Rs. 62.00, Rs. 64.00 or Rs. 66.00, per pair, then these prices were not inclusive of any tax. In such a situation, provisions of Sections Section 4(4)(d)(ii) are not attracted at all. The value of the goods shall be deemed to be the normal price of the goods u/s 4(1) of the Act (Rs. 62.00 or Rs. 64.00 or Rs. 66.00 as the case may be).

14. Unless it is shown by the manufacturer that the price of the goods includes an amount of excise duty payable by him, no question of exclusion of the duty element from the price for determination of value u/s 4(4)(d)(ii) will arise. What the manufacturer has really done in the instant case is to increase the profit element in the wholesale price. In the chart given by Mr. Shanti Bhushan, in the second category the wholesale price of goods after discounts etc. has been

shown to be Rs. 62.00, Rs. 64.00 and Rs. 66.00 inclusive of duty at 10%. These are self-contradictory figures. If the corresponding ex-duty figures come to Rs. 60.00 or less, then no excise duty was payable on the goods. If the ex-duty price of the footwear manufactured by the Company fell short of Rs. 60.00 per pair, then by virtue of the exemption notification no duty was payable on the goods. In such a situation, a manufacturer could not include in the price of the goods any amount by way of excise duty.

15. Any doubt about this position in law has been dispelled by the Explanation added by Act 14 of 1982 to Sub-clause (ii) of Clause (d) which is as under:

Explanation-For the purposes of this sub-clause, the amount of the duty of excise payable on any excisable goods shall be the sum total of -

(a) the effective duty of excise payable on such goods under this Act; and

(b) the aggregate of the effective duties of excise payable under other Central Acts, if any, providing for the levy of duties of excise on such goods,

and the effective duty of excise on such goods under each Act referred to in Clause (a) or Clause (b) shall be, -

(i) in a case where a notification or order providing for any exemption (not being an exemption for giving credit with respect to, or reduction of duty of excise under such Act on such goods equal to, any duty of excise under such Act, or the additional duty u/s 3 of the Customs Tariff Act, 1975 (51 of 1975), already paid on the raw material or component parts used in the production or manufacture of such goods from the duty of excise under such Act is for the time being in force, the duty of excise computed with reference to the rate specified in such Act in respect of such goods as reduced so as to give full and complete effect to such exemption; and

(ii) in any other case, the duty of excise computed with reference to the rate specified in such Act in respect of such goods.

16. The Explanation makes it clear that the amount of duty of excise on any excisable goods shall only be the effective duty of excise payable as defined under the Act. Therefore, before deducting any amount claimed to be payable on account of excise duty, it has to be seen what is the duty of excise in force at the material point of time. Any notification granting exemption will have to be taken into account; full and complete effect to such notification will have to be given. In the instant case at the material point of time, there was a notification granting exemption from duty to a pair of footwear upto the value of Rs. 60.00. This means that if the value of a pair of shoes came to Rs. 60.00 or less no excise duty was leviable; it was not open to the manufacturer to claim any deduction on account of any duty which was not payable.

17. We are unable to uphold the contention of Mr. Shanti Bhushan that the Explanation to Section 4(4)(d)(ii) comes into operation only when there is a

variation in the rate of duty and not otherwise. The duty of excise under Schedule I of the Act was imposable on various bases. It could be imposed unitwise as in T.I. 33 AA (Parts of Wireless Receiving Sets) or lengthwise as in T.I. 37 (Cinematograph Films) or on the basis of weight as in the case of T.I. 25 (Iron in any Crude Form). The duty has to be calculated at the rates prescribed in the Schedule on the basis of number of units, length or weight or some other basis, as laid down in the Schedule. When the duty is imposed ad valorem, calculation of duty at the prescribed rate will have to be made on the basis of the value of the goods. Section 4 deals with value of excisable goods where the duty of excise is chargeable with reference to value. It has nothing to do with the rate of duty. Sub-clause (ii) of Sub-section (d) of Section 4 lays down the 'value' will not include the amount of duty of excise, if any, payable on such goods. This is a rule of valuation. What is the amount of duty excise payable will depend on this valuation. The Explanation has been inserted "for the purpose of this sub-clause" i.e. Sub-clause (ii). The amount of excise duty payable has been explained to be the effective duty of excise payable on such goods, in other words, not the duty of excise calculated in the manner laid down in Schedule I only. Regard must be had to any relief or abatement of duty given by any statutory notification or order. It has been made clear by the Explanation that if a notification or order providing for any exemption from duty of excise under the Act is in force, full and complete effect to such exemption will have to be granted for the purpose of computation of the value. "The duty of excise computed with reference to the rate specified" has to be calculated first. Thereafter the duty of excise so computed will have to be reduced in accordance with the exemption notification. For example, if duty on 'Footwear' is 10 per cent ad valorem per pair then the duty payable on Footwear valued at Rs. 60 will be Rs. 6. Since there is a notification exempting Footwear valued upto Rs. 60 per pair from duty, under the Explanation or even otherwise the dutiable amount of Rs. 6 will have to be reduced in terms of the exemption notification. To give full and complete effect to exemption, the taxable amount will have to be reduced to nil. The argument of Mr. Shanti Bhushan that the Explanation is attracted only when the rate of duty is reduced is not supported either by clear words of the Explanation or by necessary implication. The amount of duty payable has to be computed by reference to the rate of duty in force on the value of the Footwear. The duty payable may be reduced by any notification or order by lowering the rate of duty or by exempting any excisable goods from duty wholly or in part. The Explanation will apply to every case "where a notification or order providing for exemption from the duty of excise under such act is for the time being in force" and not only to a case where the rate of duty is lowered. The effective duty of excise on the notified goods shall be the duty of excise computed with reference to the specified rate in the First Schedule "as reduced" so as to give full and complete effect to such exemption. "As reduced" in this context means the duty of excise as reduced by a notification granting exemption.

18. There is yet another way of looking at the problem. The notification by

exempting footwear upto the value of Rs. 60 from duty of excise has not removed "footwear" from the list of excisable goods in the first schedule. It has in effect reduced the ad valorem duty of 10 per cent payable on such footwear upto the value of Rs. 60 to nil.

19. The construction suggested by Mr. Shanti Bhushan will lead to anomaly and should be avoided. It will have to be held that "the amount of duty payable, if any" in Sub-clause (ii) of Clause (d) will mean the amount of duty payable as computed in accordance with the provisions of the First Schedule which will stand reduced only when relief is granted by reduction in the rate of duty and not otherwise, "A notification or order providing for exemption" in the Explanation will have to be read as a notification or order granting exemption by reduction in the rate of ad valorem duty only. The object of the statute is clearly to exclude the actual burden of excise duty from the wholesale price for determining the value of any excisable good. The construction suggested by Mr. Shanti Bhushan will defeat the object of the statute altogether.

20. The assessee has adopted a scheme which can easily be seen through. After valuing the footwear at less than Rs. 60.00, he has fixed the price at above Rs. 60.00. He is entitled to make as much profit as he can. But he has tried to claim deduction of a part of the profit as excise duty payable for the goods. In order to claim this deduction, the assessee will have to show that the 'value' of the goods became more than Rs. 60.00 per pair because of inclusion of excise duty. If that cannot be done, there is no question of deducting any duty payable on the goods manufactured by the assessee. The conundrum spoken of by Mr. Shanti Bhushan does not exist. Once the principle underlying the mechanism of valuation of excisable goods is borne in mind, this becomes a straightforward case. No intriguing conundrum perplexes our mind. We can easily behold what lies behind the assessee's scheme.

21. Strong reliance was placed on behalf of the assessee on the decision of this Court in the case of Bata Shoe Company (P) Ltd. Vs. Collector of Central Excise and Others, and particularly, on the passage below:

...It is, therefore, plain that before determining the question of availability of the exemption under Notification dated July 24, 1967, the first essential step is to determine the 'value' of the article in the manner prescribed in Section 4 of the Act. The fact that on such a computation the article may ultimately be found to be exempted from excise duty does not have any bearing on the question of applicability of Section 4 of the Act for determining the 'value', for purpose of duty.

22. Section 4 has undergone drastic changes since this case was decided. The concept of effective duty of excise was also not there at that time.

23. The appeal is, therefore, allowed. The judgment dated 5th March, 1993 passed by the Punjab and Haryana High Court is set aside. There will be no order as to costs.

24. This appeal raises the question as to the scope and effect of the Explanation to Section 4(4)(d)(ii) of the Central Excises and Salt Act, 1944 (hereinafter referred to as 'the Act'). The Explanation was added to clarify what would be the amount of duty which had to be deducted from the wholesale price for arriving at the assessable value of goods. The Delhi High Court in the case of I.T.C. Ltd. and another Vs. Union of India and another, took the view that by virtue of the Explanation only that amount of duty which was actually paid by the assessee after giving effect to various exemption notifications would qualify for deduction.

25. The contention of the appellant is that during the period in dispute, duty of excise was leviable under the Act at the rates specified in the First Schedule to the Act. Under Rule 8 of the Central Excise Rules, 1944 (hereinafter referred to as 'the Rules') the Central Government had power to issue notifications for exempting the amount of duty of excise leviable on goods to the extent mentioned in such notifications. The Central Government had issued a series of notifications under which exemption was granted from levy of duty of excise. The language of the notifications provided that the goods specified in the notification shall be exempted 'from so much of duty of excise leviable thereon as in excess of ...' the specified amount. The contention of the assessee is that on a true interpretation of the notifications, the assessable value has to be determined first and the notification has to be applied thereafter.

26. This controversy has been dealt with in a large number of cases before the amendment of Section 4 of the Act. The Delhi High Court in the case of Modi Rubber Ltd. Vs. The Board of Central Excercise and Customs, , held that from the language of the notification it appeared that the duty of excise leviable and the assessable value of the goods had to be determined first, the relief under the notification had to be given thereafter. According to the appellant, the notifications exempted goods from 'so much of duty of excise leviable thereon' as was specified. In order to determine the extent of the exemption, it was necessary to determine 'the excise duty leviable' in the first instance. In a case where the price is inclusive of Excise Duty (cum-duty price) the amount of excise duty leviable under the Act has to be deducted from the cum-duty price in order to determine the assessable value. This is done without applying the notification. Therefore, before giving effect to the notification and before determining the extent of exemption available thereunder, it is necessary to finally determine the 'assessable value' as well as 'excise duty leviable'. This method of determining the assessable value has been accepted by this Court in the case of Bata Shoe Company (P) Ltd. Vs. Collector of Central Excise and Others,

27. After these cases were decided, major changes have been brought about in the Central Excise Act. The controversy about the quantum of deduction of duty from wholesale price for the purpose of computation of value u/s 4 of the Act has

been set at rest specifically by the Explanation added to Section 4(4)(d)(ii) by the Finance Act, 1982 with retrospective effect from 1.10.1975. Section 4(4)(d)(ii) with the added Explanation now stands as under:

(d) value in relation to any excisable goods.

(i) x x x x

(ii) does not include the amount of the duty of excise, sales tax and other taxes, if any, payable on such goods and, subject to such rules as may be made, the trade discount (such discount not being refundable on any account whatsoever) allowed in accordance with the normal practice of the wholesale trade at the time of removal in respect of such goods sold or contracted for sale;

Explanation: For the purpose of this sub-clause, the amount of the duty of excise payable on any excisable goods shall be the sum total of:

(a) the effective duty of excise payable on such goods under this Act; and

(b) the aggregate of the effective duties of excise payable under other Central Acts, if any, providing for levy of duties of excise on such goods,

and the effective duty of excise on such goods under each Act, referred to in Clause (a) or Sub-clause (b) shall be-

(i) in a case where a notification or order providing for any exemption (not being an exemption for giving credit with respect to or reduction of excise on such goods equal to any duty of excise already paid on the raw material or component parts used in the production or manufacture of such goods) from the duty of excise under such Act, is for the time being in force, the duty of excise computed with reference to the rate specified in such Act in respect of such goods as reduced so as to give full and complete effect to such exemption; and

(ii) in any other case, the duty of excise computed with reference to the rate specified in such Act, in respect of such goods.

28. The legislative intent is quite clear. The Explanation has been brought into effect from 1.10.1975. By virtue of Sub-section (2) of Section 47 of the Finance Act, 1982, all actions taken during the period 1st October, 1975 to 27th February, 1982 have been deemed to have been taken for all purposes as validly and effectively taken or done as if the Explanation was in force. This will have the effect notwithstanding anything contained in any judgment, decree or order of any court, tribunal or other authority. There is no reason to assume that the law laid down in the earlier judgments which had been rendered before the amendments were made to Section 4 will continue to be in force and operative notwithstanding the amendments made in Section 4 with retrospective effect.

29. The Explanation makes it clear that the amount which will have to be taken out from the wholesale price of the goods for purpose of ascertaining value of any excisable goods shall be the sum total of the effective duty of excise payable

on such goods under the Central Excise Act and the aggregate of the effective duties of excise payable under other Central Acts. Therefore, when Section 4(4)(d)(ii) lays down that 'value' does not include the amount of duty of excise, if any, payable on such goods, an enquiry will have to be made as to the amount of the effective duty of excise, which is actually payable on (the goods and not merely leviable in accordance with the rates prescribed in the schedule. The newly added Explanation makes it clear that for the purpose of Section 4(4)(d)(ii), the calculation for "the amount of duty of excise, if any, payable on such goods" will not be on the basis of the rate given in the schedule only, but also after taking into account any notification or order providing for exemption from the duty of excise under the Act. The ad valorem duty leviable by the Central Excise Act will have to be calculated according to the rule prescribed in the schedule for the specified goods. But the amount so calculated is not payable as duty but will have to be reduced in terms of the notification in order to give full and complete effect to the notification. By virtue of Rule 8 of the Central Excise Rules, the Central Government has been empowered to exempt any excisable goods from the whole or any part of duty leviable on such goods.

30. The contention of Mr. Salve is that this notification granted relief from 'so much of the duty of excise leviable thereon...as is in excess of seventy five per cent of such duty'. The notification envisaged ascertainment of the base year of clearance. What was produced in excess of the base year qualified for exemption. The language used in these notifications makes it clear that the amount of duty payable according to the First Schedule to the Central Excise Act on the excisable goods will have to be calculated first. Thereafter, if other conditions laid down in the notifications were fulfilled, then for the quantum of the excess production only, seventy five per cent of such duty had to be paid. In effect, Mr. Salve has contended that the amendments have not really brought about any effective change in the manner of calculation of the "amount of excise duty" payable u/s 4(4)(d)(ii).

31. This contention is not borne out by the language of the Section and also the notification. It is of significance that the notification seeks to exempt the excisable goods 'from so much of the duty of excise leviable thereon as is in excess of seventy five per cent of such duty'. Section 4(4)(d)(ii) speaks of the amount of excise duty payable. What is to be excluded from 'value' is only the amount of duty which is payable. The entire amount which is otherwise leviable under the Central Excise Act will not be payable because of the exemption from duty granted in the notification. No question can arise of deduction in the first instance of the amount which is not payable from the wholesale price for determination of the assessable value. Having regard to the language of Section 4(4)(d)(ii) and, in particular, the Explanation added thereto and also to the language of the notification, we are unable to uphold the contention of Mr. Salve that the assessment of excise duty must be in two stages. In the first stage, the excise duty calculated in accordance with the rate given in the schedule must be deducted from the wholesale price even though this amount is not payable at all.

The relief under the notification will have to be calculated only thereafter. Although this was the interpretation given in various judgments before the amendment of Section 4, the position has radically changed after the amendment. It is only the amount of excise duty which is payable, that is to say, the effective duty of excise which can be deducted u/s 4(4)(d)(ii).

32. The language of notification No. 198 76-C.E. dated 16th June, 1976 was:

In exercise of the powers conferred by Sub-rule (1) of Rule 8 of the Central Excise Rules, 1944, the Central Government hereby exempts the excisable goods of the description specified in column (3) of the Table hereto annexed (hereinafter referred to as the specified goods) and falling under such Item Number of the First Schedule to the Central Excises & Salt Act, 1944 (1 of 1944), as are specified in the corresponding entry in column (2) of the said Table and cleared from one or more factories in excess of the base clearances by or on behalf of a manufacturer, from so much of the duty of excise leviable thereon under the said Item as is in excess of seventy five per cent of such duty,....

33. Section 4(4)(d)(ii) provides that 'value' in relation to any excisable goods will not include the amount of duty of excise, if any, payable on such goods. The duty payable on such goods must be the actual amount of duty the assessee has to pay and not any hypothetical figure. The Explanation has put this beyond doubt by specifically providing that if there is a notification providing for any exemption from the duty of excise under the Central Excise Act, then the amount of the duty of excise payable under Sub-clause (ii) of Clause (d) will be the amount computed with reference to the rates specified in the Act as reduced by the exemption notification.

34. In the instant case, the exemption notification provides that if the other conditions laid down in the notification are fulfilled, then the goods cleared from the factory of the assessee which are in excess of 'base clearances' by the assessee will be exempt from 'so much of the duty of excise leviable thereon as is in excess of seventy five per cent of such duty'. Therefore, the excess production will bear excise duty only to the extent of seventy five per cent of what would have been otherwise payable by the assessee, under the Act calculated according to the rate prescribed in the Schedule.

35. The contention of Mr. Salve that the calculation will have to be made in two stages is not supported by the wording of the Explanation. A clear distinction has been drawn in the section between the amount of duty leviable and the amount of duty payable. 'Value' will not include the amount of duty of excise which is payable. This amount has to be calculated on the basis of the duty levied under the Act and also after taking into account any relief from duty given by any order or notification issued by the Government. The resultant figure is the amount of duty of excise which is payable and deductible from the wholesale price. There is nothing in the Act to suggest that the 'value' has to be calculated by deducting in the first place the tax leviable under the Act, from the wholesale price.

Thereafter, a second valuation on the basis of the notification will have to be made. The Explanation clearly states that the duty of excise computed with reference to the prescribed rate in the schedule will have to be reduced "so as to give full and complete effect to such exemption". If the amount of duty calculated according to the schedule became smaller by virtue of the notification, then the only way to give full and complete effect to the notification is to take only the smaller amount in reckoning for the purpose of determination of value in Section 4(4)(d)(ii). Whatever may have been the position before the amendment of the Act, the in view of the Explanation to Clause (d)(ii), the 'value' in Section 4(4)(d)(ii) can no longer be computed by reference only to the Act and the Schedule without taking into consideration the exemption notification.

36. In the case of I.T.C. Ltd. and another Vs. Union of India and another, (Delhi) at p. 339, it was observed, and in our opinion rightly:

At the time of the earlier decisions, the Act and the notification were in two watertight compartments; the Act was first applied and, from the duty computed, an exemption was granted. This involved three stages: One, the determination of the assessable value; two the computation of the amount of duty payable under the Act; and three, the calculation of the amount of exemption. Once the exemption operated the duty payable in effect became smaller and this may have an impact on the assessable value if it could be redetermined but there was no statutory language which authorised the authorities to go back again to redetermine the assessable value and that had been determined already. The statute and notification operated successfully in three different stages of calculation and the High Court could find no reason to intertwine them into one another so as to make such a redetermination of the assessable value possible or necessary. The amendment has altered the position by expressly integrating and incorporating the effect of the notification in the statute. The assessable value can no longer be computed by reference only to the Act and schedule without taking into consideration the effect of a notification under Rule 8, where it exists. This is made doubly clear by amending the definition of the word assessable 'value' and clarifying that, for this purpose duty payable would be the effective duty payable after taking the notification into account. This definition vitally alters the first stage of computation which was easily done under the Act earlier without any reference to the notification. Though the terms of the notifications under Rule 8 remain unaltered, the inclusion of a reference to the notification in Section 4 itself has made the notification a material part of that section which can no longer be interpreted without reference to the notification.

37. In view of the above and also in view of our decision in the case of The Asstt. Collector of Central Excise and Ors. v. Bata India Ltd. Civil Appeal No. 8762 of 1994 (judgment delivered earlier on this date), this appeal is dismissed. The judgment under appeal is affirmed. There will be no order as to costs.

Civil Appeals Nos. 1965/86, 1966/86, 1967/86, 2328/86, 1059/81

2393-2409/80,1052/81, 285/88, 285/88,2155/87,1415-16/86, 8178/95, 8263/95 and Civil Appeals Nos. 7848, 7852 of 1996 (Arising out of S.L.Ps. (C) Nos. 5881/86, 5882/86).

38. Special leave granted in S.L.P.(C) Nos. 5881 and 5882 of 1986.

39. For the reasons given in these two cases (Civil Appeal Nos. 8762 of 1994 and 1121 of 1992), the above appeals are dismissed. There will be no order as to costs.