
(1993) 03 P&H CK 0014

In the Punjab And Haryana At Chandigarh

Case No : Civil Writ Petition No. 11633 of 1988

Bata India Ltd.

APPELLANT

Vs

Assistant Collector of Central Excise

RESPONDENT

Date of Decision : 05-03-1993

Acts Referred:

Central Excise (Amendment) Act, 1973 — Section 4(1), 4(2)
Central Excise Rules, 1944 — Rule 8(1)
Central Excises and Salt Act, 1944 — Section 3(2), 4, 4(4)
Constitution of India, 1950 — Article 226
Customs Tariff Act, 1975 — Section 3

Citation : (1993) 43 ECC 88 : (1993) ECR 25 : (1993) 67 ELT 281

Hon'ble Judges : G.C. Garg, J;A.L. Bahri, J

Bench : Division Bench

Advocate : Sarvshri R.N. Bajoria and L.M. Suri, S.K. Bagaria, A.K. Laitan, Deepak Suri and Arun Jain, for the Appellant; Viney Mittal and Raman Walia, for the Respondent

Final Decision : Allowed

Judgement

A.L. Bahri, J.—M/s. Bata India Limited, a Company constituted under the Companies Act, a manufacturer of footwear in India, claims mandamus in this petition filed under Article 226 of the Constitution commanding the respondents to withdraw, cancel or rescind notice dated November 7, 1988 and proceedings initiated thereon and to direct the respondents to deduct amount of duty at the scheduled rate under the provisions of the Central Excises and Salt Act, 1944 (hereinafter referred to as "the Act") while applying Notification No. 49/86-C.E., as amended by Notification No. 89/87-C.E. The petitioner-Company has three manufacturing units in India. One of the units is situated at Faridabad in the State of Haryana. Prior to February 28, 1986 the duty was leviable as and at the rates set forth in the First Schedule to the Act. After February 28, 1986 such duty is leviable as and at the rates set forth in the Schedule to the Central Excise Tariff Act, 1985 (hereinafter referred to as "the 1985 Act")- By virtue of the

powers conferred by Rule 8(1) of the Central Excise Rules, 1944 (hereinafter called "the 1944 Rules"), the Central Government has been issuing notifications from time to time exempting from the payment of excise duty on all footwears value whereof did not exceed the specified amount. By notification dated July 24, 1967, the aforesaid value was not to exceed Rs. 5/- per pair of footwear to claim exemption from whole of the duty of excise. The aforesaid limit was subsequently increased to Rs. 15/- on March 16, 1979, Rs. 30/- on February 28, 1982, Rs. 45/- on February 12, 1986 and Rs. 60/- by Notification No. 89/87-C.E., dated March 1, 1987.

2. In implementation of Notification No. 171/67-C.E., dated July 24, 1967, the Assessing Authorities took the view that while determining value of the footwears for the purposes of granting exemption from the wholesale price indicated the amount of excise duty was not to be deducted and in this manner the value determined would be more than the minimum value mentioned in the notification and the assessee would not be entitled to claim exemption. This led the petitioner-Company to file three separate writ petitions in different High Courts. The Calcutta High Court accepted the contention of the Central Excise Authorities. Punjab and Haryana High Court dismissed the petition in limine. The Patna High Court allowed the writ petition accepting the contentions of the assessee, the present petitioner. The matter ultimately went to the Supreme Court in Bata Shoe Company (P) Ltd. Vs. Collector of Central Excise and Others, . The petitioner Company had filed the appeals against the decisions of Punjab and Calcutta High Courts whereas the Department challenged the decision of the Patna High Court. The decision of the Patna High Court was affirmed holding that the value of the footwears in question calculated in accordance with the provisions of Section 4 of the Act did not exceed Rs. 5/- per pair, the articles in question were exempted from the charge to duty of excise under the notification dated July 24, 1967. It may be noticed that at that stage the duty involved related to the years 1967 and 1968 and provisions of Section 4 of the Act 1944 as it then existed were so interpreted. It was observed that before determining the question of availability of the exemption under the notification dated July 24, 1967, the first essential step was 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 purposes of duty. The expression "for the purposes" of duty occurring in Section 4 has a wide import. It was observed that :-

"For all purposes connected with the determination of chargeability and levy of duty the provisions of the section are to be applied for computation of the "value" of the article. Under the Explanation to Section 4, it is mandatory that in determining the price of an article both trade discount as well as the amount of duty calculated as payable on the wholesale cash price payable at the time of removal of the article based on the wholesale cash price referred to in clause (a) are to be deducted from such wholesale price."

3. It was after the decision of the Supreme Court aforesaid that the matter was again taken up by the Assistant Collector of Central Excise by issuing the impugned notice dated November 7, 1988, raising demand of excise duty on such like footwears with respect to applicability of Notification No. 49/86-C.E., as amended by Notification No. 89/87-C.E., dated February 12, 1986 and March 1, 1987, respectively fixing value of the footwears at Rs. 45/- and Rs. 60/- respectively for the purposes of claiming exemption from excise duty.

4. The contention of the learned counsel for the petitioner is that in view of the decision of the Supreme Court in Bata Shoe Company (P) Ltd. Vs. Collector of Central Excise and Others, for the purposes of determining value of the footwears manufactured by the petitioner in order to see whether the same are exempted from excise duty under the relevant notification, the petitioner-assessee is entitled to deduct from the wholesale price of the footwear chargeable at the time of the footwears being delivered at factory gate (i) trade discount, (ii) excise duty, (iii) packing charges and (iv) transport expenses. It is only such deemed value which is to be considered for the purposes of granting exemption. The stand of the department in the show cause notice and in the proposed assessment is that after amendment of Section 4 of the Act of 1944 only trade discount and excise duty is to be excluded in respect of such category of footwears whose price is ascertainable at the time of their leaving the factory gate.

5. With respect to the unamended Section 4 of the Act the ratio of the decision in Bata Shoe Co.'s case (supra) is to be applied. The period in dispute is after the amendment of Section 4 which was effected in 1973. The effect of amendment was considered by the Supreme Court in Union of India (UOI) and Others Vs. Bombay Tyre International Ltd. and Others, . After referring to the entire previous case law on the subject the position of law under the Central Excises and Salt Act, 1944, as amended by Act 22 of 1973 was summarised as under :-

(i) The price at which the excisable goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal as defined in Sub-section (4)(d) of Section 4 is the basis for determination of excisable value provided, of course, the buyer is not a related person within the meaning of Sub-section (4)(c) of Section 4 and the price is the sole consideration for the sale. This proposition is subject to the terms of the three provisos to Sub-section (1)(a) of Section 4.

(ii) Where the price of excisable goods in the course of wholesale trade for delivery at the time and place of removal cannot be ascertained for the reason that such goods are not sold or for any other reason, the nearest ascertainable equivalent thereof determined in the manner prescribed by the Central Excise (Valuation) Rules, 1975 should be taken as representing the excisable value of the goods;

(iii) Where wholesale price of any excisable goods for delivery at the place of

removal is not known and the value thereof is determined with reference to the wholesale price for delivery at a place other than the place of removal, the cost of transportation from the place of removal to the place of delivery should be excluded from such price;

(iv) Of course, these principles cannot apply where the tariff value has been fixed in respect of any excisable goods under Sub-section (2) of Section 3;

(v) On a proper interpretation of the definition of "related person" in Sub-section (4)(c) of Section 4, the words "a relative and a distributor of the assessee" do not refer to any distributor who is a relative of the assessee within the meaning of the Companies Act, 1956. So read, the definition of "related person" is not unduly wide and does not suffer from any constitutional infirmity. It is within the legislative competence of Parliament. It is only when an assessee so "arranges that the goods are generally not sold by him in the course of wholesale trade except to or through such a related person that the price at which the goods are ordinarily sold by the related person in the course of wholesale trade at the time of removal to dealers (not being related persons) or where such goods are not sold to such dealers, to dealers (being related persons) who sell such goods in retail is liable to be taken as the excisable value of the goods under proviso (iii) to Sub-section (1)(a) of Section 4."

6. While determining the value of the excisable articles and the deductions made therefrom in respect of post manufacturing expenses the position of law was laid down in para 49 as under :-

"The old Section 4 provided by the Explanation thereto that in determining the price of any article under that section no abatement or deduction would be allowed except in respect of trade discount and the amount of duty payable at the time of the removal of the article chargeable with duty from the factory or other premises aforesaid. The new Section 4 provides by Sub-section (2) that where the price of excisable goods for delivery at the place of removal is not known and the value is determined with reference to the price for delivery at a place other than the place of removal, the cost of transportation from the place of removal to the place of delivery has to be excluded from such price. The new Section 4 also contains Sub-section (4)(d)(ii) which declares that the expression "value" in relation to any excisable goods, 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. Now these are clear provisions expressly providing for deduction, from the price, of certain items of expenditure."

The arguments were thus addressed with respect to deduction of different 8 items which are as under :-

"(1) Storage charges.

- (2) Freight or other transport charges, whether specific or equalised.
- (3) Outward handling charges, whether specific or equalised.
- (4) Interest on inventories (stocks carried by the manufacturer after clearance).
- (5) Charges for other services after delivery to the buyer.
- (6) Insurance after the goods have left the factory gate.
- (7) Packing charges.
- (8) Marketing and Selling Organisation expenses, including advertisement and publicity expenses."

7. With respect to determination of value under Old Section 4(a) and in view of Section 4(1)(a) in Para 51 of the judgment it was held as under :-

"It is apparent that for the purpose of determining the "value", broadly speaking both the old Section 4(a) and the new Section 4(1)(a) speak of the price for sale in the course of wholesale trade of an article for delivery at the time and place of removal, namely the factory gate."

With respect to value which could not be ascertained either under the old provision or under the new provision it was observed as under :-

"Where the price contemplated under the old Section 4(a) or under the new Section 4(1)(a) is not ascertainable, the price is determined under the old Section 4(b) or the new Section 4(1)(b). Now, the price of an article is related to its value (using this term in a general sense) and into that value have poured several components, including those which have enriched its value and given to the article its marketability in the trade. Therefore, the expenses incurred on account of the several factors which have contributed to its value upto the date of sale, which apparently would be the date of delivery, are liable to be included. Consequently, where the sale is effected at the factory gate, expenses incurred by the assessee upto the date of delivery on account of storage charges, outward handling charges, interest on inventories (stocks carried by the manufacturer after clearance), charges for other service after delivery to the buyer, namely after-sales service and marketing and selling organisation expenses including advertisement expenses cannot be deducted. It will be noted that advertisement expenses, marketing and selling organisation expenses and after-sales service promote the marketability of the article and enter into its value in the trade. 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 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."

8. Coming to the order of assessment-Annexure Page 7 and the show cause notice for the subsequent period Annexure Page 8 the stand of the department with respect to fixation of value as contemplated u/s 4(4)(d)(ii) of the Act Clause 47 of the Finance Act of 1982 which has been made effective from October 1,1975 is that the amount of duty of excise payable on any excisable goods is to be 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)

(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 to 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.

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"This extra amount collected by the party becomes part of the assessable value and after adding this amount in "Value" already fixed u/s 4 of the Act, if the value exceeds the permissible limits as given in the exemption Notification, the article no longer remains exempted under the said Notification and the duty is chargeable."

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P. 14 It was further observed :-

"The effective duty actually chargeable or payable alone should be excluded from the cum "value" what is chargeable is only the real or actual excise chargeable under the Act on such goods. In other words, only the duty as reduced and actually paid on the manufactured goods should be excluded in determining the assessable value of such manufactured goods. In cases of exemption only the actual or real duty paid by the assessee should alone be excluded and not the duty hypothetically chargeable under the Act. The point may be illustrated

thus :- cum duty value of pair of Foot Wear which is chargeable to duty @ 15% is Rs. 66.70. By a Notification issued under Rule 8(1) foot wear upto the value of Rs. 60/- have been exempted from whole of the duty of Excise. If an amount equal to the duty of excise i.e. Rs. 8.70 is deducted from the cum value the assessable value comes to Rs. 58.00. This being less than Rs. 60/- is exempt from payment of duty."

It was further observed :-

"Central Excise duty is a tax which is not "He" the manufacturer who pays. It is "His" hand which pays the tax. His hand moves by a chain of reaction. The hand ultimately gets inserted into pockets of ultimate buyers, the consumer of the commodity. The consumer pays the tax, always under the bona fide belief that the "Hand" has an authority of law and will pass on the amount of tax so collected to the Government and "Hand" will not turn to his own (the manufacturers) pocket. It is not even legally permissible for him (the manufacturer) to turn his "Hand" towards his own pocket and retain the amount. If this is permitted it will be difficult to distinguish between pick-pocketing simplicitor and pick pocketing under the cover of Law. I am unaware of any civilised system of laws which permits the "Hand" of manufacturer to take out the amount from the pockets of consumers and then allow it to turn to his own pocket for retaining the same with him. I accordingly order that in all cases where the assessable value already fixed after adding the amount of duty collected and retained by the party exceeds the permissible limit of Rs. 15, 30, 45, or 60/- as mentioned in Notification No. 171/67, dated 24-7-1967 as amended Notification No. 49/86-C.E., dated 12-2-1986, Central Excise duty is chargeable."

9. The aforesaid approach of the department to the interpretation of the statute is not in accordance with the interpretation given by the Supreme Court in the two cases referred to above. Rather the cart is being placed before the horse by the authorities by first considering the price of the goods on which the same is sold to the consumer and after allowing deductions as permissible under the law to treat the remaining amount as the wholesale market price on which the goods could be liable to assessment of excise duty leaving the gate of the factory. It is in that context that it is observed as above that the manufacturer is not to pocket the excise duty which has been charged by him. from the consumer. There is fallacy in the stand of the department. The petitioner has not charged excise duty from the customers credit of which is being claimed as an exemption from the payment of excise duty. As would be seen from the ratio of the decisions of the Supreme Court referred to above the excise duty is payable on the value of the goods primarily at the time when they are to leave the factory. If at that stage the value is fixed for being sold to wholesale dealers or a subsequent stage at the premises of the wholesale dealers the element of excise duty and treating account and transport charges of taking the goods from the factory gate to the premises of the wholesale dealer are to be excluded

therefrom for determining notional value of the article leaving the gate of the factory premises for the purpose of either charging of excise duty or exemption therefrom. The view of the department that the dealer had charged the excise duty while showing the element of excise duty in the statements is not to be taken into consideration while fixing notional value to be fixed as required u/s 4 of the Act, rather the interpretation of Section 4 as put forth by the decision of the Supreme Court referred to above is unambiguous with respect to determination of such value at three stages after amendment of Section 4. The first stage is when the goods are sold to the wholesale dealers from the factory premises in that case the value determined by the dealer is known and therefrom treating discount and the element of excise duty is to be deducted to find out the manufacturing cost of the goods liable to excise duty at this stage. It may further be pointed out that any tax already paid on the raw material goods used on the manufacture of particular articles are also to be excluded. The second stage comes when the goods are sold through a relation to the wholesale dealer. In that eventuality it is the price for which the wholesale dealer is charged by the relation which would be the governing factor and therefrom the deductions aforesaid are to be made to determine as to whether excise duty would be chargeable or the item to be exempted from such a charge. The third stage is when the goods are sold to the wholesale dealer at his premises. Apart from the aforesaid deductions the element of transport of the goods from the factory premises to the premises of the dealer are also to be deducted. It may also be observed that the charge of excise duty is on the goods manufactured by the dealer when they are to leave the factory premises. Collection of excise duty may be at a subsequent stage; the stages having been described above. In that eventuality the question of determination of value u/s 4 of the Act requires to be considered as discussed above. The entire approach of the authorities in the show cause notice, as referred to above, that from the price of the goods when sold to the consumer deductions are to be made as permissible to determine the remaining amount as value of the goods subjected to charge is not correct and legal.

10. It may be observed that if the dealer has charged some extra amount from the consumer that cannot necessarily be called as excise duty to be payable by the dealer. It may go towards the earning (income). The petitioner submitted the statement concerning the following columns on the basis of which the notice appears to have been issued :-

Article Code	Name	Max. Price	Max. Price per sale	Abate-Discount	Value	Assess-ment	No. 13-2-91	No. 1.	No. 2.	No. 3.	No. 4.	No. 5.	No. 6.	No. 7.	No. 8.

On the data against such columns the value u/s 4(4)(d)(ii) of the Act is not to be fixed as such. It is the notional value to be fixed and the element of excise duty and trading discount is to be deducted therefrom to determine as to whether articles would be exempt from the payment of excise duty as has been held by

the Supreme Court in the two judgments referred to above.

11. For the reasons recorded above, this writ petition is allowed and the impugned order Annexure P. 7 is quashed and the notice Annexure P. 8 is also quashed.