

(1987) 04 CAL CK 0011
In the Calcutta High Court
Case No : Civil Rule No. 5107 (W) of 1977

Bata India Ltd.

APPELLANT

Vs

Government of India and Others

RESPONDENT

Date of Decision : 29-04-1987

Acts Referred:

Central Excises and Salt Act, 1944 — Section 4

Citation : (1987) 30 ELT 907

Hon'ble Judges : Suhas Chandra Sen, J

Bench : Single Bench

Advocate : R.N. Bajoria, S.K. Bagaria and C.M. Ghorawat, for the Appellant; S.N. Banerjee and Uma Sanyal, for the Respondent

Judgement

Suhas Chandra Sen, J.—The dispute in this case is about footwear known as "Miners" Boots". These boots are also known in the market and sold as "Industrial Safety Boots". According to the petitioner, both the products are identical although sold under different names. Under the provisions of the Central Excises and Salt Act (hereinafter described as the said Act), duty is levied on footwear and parts thereof at the rates set forth in the First Schedule to the said Act.

2. The case of the petitioner is that until the end of 1973, the value of the said footwear was determined u/s 4(a) of the said Act, on the basis of their wholesale cash price. The value was computed in accordance with a formula laid down in an order passed by the Central Board of Revenue on 16th October, 1957. By the said order, the Board laid down that in arriving at the assessable value, a uniform discount of 6% was to be deducted from the wholesale cash price of the footwear. The Board found that in most cases, trade discount was given as 6%, in some cases, trade discounts were allowed at rates higher than 6% and in some cases, lower rates were allowed. According to the petitioner, the Board laid down this formula with full knowledge of the fact that in some cases, no trade discount was actually given. The intention of the Board was to allow an average

trade discount in all cases including the cases where no trade discount was at all given.

3. It is the case of the petitioner that the formula of 6% deduction was arrived at by the Board as a rough and ready measure and to avoid laborious calculation in every case of manufacture of footwear. The average formula was meant to apply when actual trade discount were higher than 6% as well as to cases where actual trade discount was lower than 6%.

4. My attention was drawn to the language of Section. 4 of the Act which prior to October 1, 1975 laid down that in determining the price of any article u/s 4, no abatement or deduction shall 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. Section 4 levies a duty "on the value" of the articles manufactured. Ordinarily, the wholesale cash price of an article is deemed to be its value u/s 4. Therefore, the petitioner has contended that Section 4 clearly recognises allowance of trade discount from the price of the articles sold for the purpose of determining the excisable value of article u/s 4. Since the Board has decided to allow 6% trade discount for the purpose of determining the value of the footwear manufactured by the petitioner on an average basis irrespective of the actual discount allowed. There is no reason why the footwear manufactured by the petitioner on which no trade discount is allowable should be taxed on the basis of sale price without any discount.

5. The dispute in this case arose out of a show cause notice issued by the Assistant Collector of Central Excise, Calcutta-VI Division, on 4-12-1973 calling upon the petitioner to show cause why the discounts taken into account for the purpose of determining the assessable value for Central Excise duty in respect of "Miners" Boots" should not be disallowed and a differential duty charged under Rule 9B in terms of B-13 Bond executed by the petitioner. The case of the Assistant Collector is that the petitioner, Bata India Limited, manufactured the product known as "Miners" Boots" and supplied the same to different parties (all consumers) directly at the rate of Rs. 34/- per pair (Thirty four per pair F.O.R. Batanagar Plus Central/States Sales Tax) for the purpose of fixation of the value of the footwear sold. The usual trade discount at 6% was deducted from year to year.

6. In its reply to the show cause notice the petitioner asserted that it was entitled to deduct trade discount by virtue of the order issued by the Central Board of Revenue on 16.10.1957.

7. The case finally came up for adjudication before the Assistant Collector of Central Excise, Calcutta-VI Division. By his order dated 1.2.1974 it was held that no discount should be allowed for calculating the assessable value of the "Miners" Boots". It was held by the Assistant Collector "I find that the sales were under contract price at Rs. 34/- per pair without allowing any discount. As such, the contract price of Rs. 34/-per pair without any discount should be the

assessable value in the present case in terms of the provisions of Section 4 of the Central Excises and Salt Act."

8. An appeal was preferred by the petitioner from the order of the Assistant Collector which was disposed of by the Appellate Collector by an order dated 21.2.1975. The Appellate Collector held that the "Miners" Boots" held had no wholesale market. The appellants could not satisfy the Assistant Collector that there had been any sale of the aforesaid goods other than to the consumers directly at contractual price. The Assistant Collector, therefore, was justified in ordering determination of the assessable value of the goods on the basis of the contract price without any abatement for trade discount which had not been actually allowed by the appellants.

9. The Appellate Collector expressed the view that the order by which 6% trade discount was allowed generally was applicable only to sales of footwear having wholesale market.

10. The petitioner preferred a revision application before the Government of India which was disposed of by an order dated 16th December, 1976 by the joint Secretary to the Government of India. In that revisional order it was held:

"The petitioners have urged that the fact that no discount was extended in respect of Miners" Boots should not have made any difference when the allowance for discount in arriving at the assessable value was given on the basis of the order of the Central Board of Excise and Customs. There was only one specific clearance for supply to the miners and the boots were priced without indicating any discount. They have also contended that whether the price collected by them for Miners" Boots were gross or net minus the discount could make no difference for discount when the principle for valuation was fixed by the Board. Miners" Boots are the same as industrial boots except for the actual use in the mines. From case records, it is seen that the petitioners have sold Miners" Boots under contract price without giving any discount, they have also no wholesale market for the said goods. In view of that, the Government of India observes that the order in appeal is not maintainable."

11. Prima facie, it appears that the respondents are right in holding that no question of allowing trade discount can arise in a case where discount is not actually allowed by the petitioner to its customers at all. But the Excise Department has not followed the method of valuing each lot of goods manufactured by the petitioner separately. They have followed a formula of taking total turnover of the goods and allowing a discount of 6% irrespective of the actual discount allowed by the petitioner to its customers. The annexures to the petition go to show that the order of the Central Board of Revenue passed on the 16th October, 1957 took notice of the fact that the Bata Shoe Company sells goods on retail as well as on wholesale basis. It is recorded in the order;-

"In addition to sales through their retail shops their products are also distributed through certain independent firms (of whom there are about 175 at present

spread throughout the country) whose relations with M/s. Bata Shoe Co. are governed by a standard agency agreement. Goods meant for such business are stocked by and supplied through, the Company's own wholesale Depots. The distributors pay for them at wholesale prices fixed by the Company less certain discount stipulated in their agreements, which include a trade discount (which in most case is 6%) and certain other contractual discount depending upon the annual business transacted by the firm etc. The transactions between the Wholesale Depots of the Company and these independent distributors being in the nature of principal to principal should rightly constitute the basis of assessment to Central Excise duty within the meaning of Section 4 of the Central Excises and Salt Act, 1944".

12. In that order, it was directed that the Collector of Central Excise will determine the assessable value u/s 4 of the Central Excises and Salt Act, 1944, in the light of the principles laid down in that order. They should every year verify whether the percentage need any revision and apply the percentage that might be fixed as a result in the ensuing year for arriving at the value assessable to duty.

13. In paragraph 5 of the order, it was directed that "Subject to proper verification by the respective Collector of Central Excise, for the current year a discount of 16.43% in respect of canvas shoes and 15.93% in respect of leather shoes may be allowed off the wholesale price for arriving at such value. These discounts have been arrived at in the manner indicated below:-

"(a) Distribution Charges 5.68% (b) Travelling expenses 0.41% (c) Advertisement expenses (Note: In the absence of a clear break-up of the charges incurred by the Sales Organisation an ad-hoc allowance of 50% of the total has been made towards expenses incurred by the Sales Organization. 0.27% (d) Insurance 0.40% (e) Interest 0.47% (f) Trade discount 6.00% (g) Expenses on account of Sales Tax and Octroi duty, and discounts towards them 1.70% (h) Freight discount. 1.50% 1.00% (for Canvas Leather Shoes)
----- 16.43% / 15.93% (for Canvas Leather Shoes)

It is to be noted that a 6% allowance was given in respect of trade discount for the aforesaid order issued by the Central Board of Revenue. A question arose as to the allowability of the average trade discount in respect of footwear sold through the retail depots of the petitioner directly. The position had been clarified by an earlier order dated 2nd May, 1956 by the Central Board of Revenue to the following effect:-

"The major issue raised by the appellants is that the average trade discounts determined by the collector as admissible u/s 4 of the Central Excise, Calcutta, not only in respect of the footwear marked "BSC" and sold through wholesale depots, but also in respect of the footwear marked "Bata" and sold through the retail depots directly under the appellants own control.

The appellants have established to the Board's satisfaction that brands of

footwear marked "BSC" are identical in quality with, and are sold at the same retail price as, corresponding brands of footwear marked "Bata". Although "Bata" footwear, unlike, "BSC" footwear, is admittedly not sold on a wholesale basis, Section 4 makes a clear provision for a case of this kind under the provision of that section, "Bata" footwear must be regarded as goods of "like kind and quality" as compared to "BSC" footwear, and its value for assessment, including the discount allowable in respect thereof, must at any particular time be the same as the value and discount adopted for assessment of "BSC" footwear. The Board, therefore, hereby directs that the assessment of "BATA" footwear shall be revised accordingly.

Sd/-B.N. Banerji.

MEMBER CENTRAL BOARD OF REVENUE".

14. Therefore, the intention of the Central Board of Revenue was to allow the formula of 6% trade discount not only in respect of footwear sold wholesale by the petitioner company but also in respect of footwear sold from the retail outlets of the petitioner under the trade name "Bata". In other words, the trade discount of 6% was allowable not only in respect of assessment of BSC footwears which were sold wholesale but also in respect of footwear marked "Bata" which were sold through retail shops of the petitioner.

15. This formula, according to the petitioner, has been followed year after year till the present dispute arose. The "Miners" Boots" that are sold by the petitioner to the consumers directly cannot be in a position different from footwear sold through retail outlets of the* petitioner. My attention was drawn to the fact that in some cases a trade discount of 6% was allowed even when actual claim of the petitioner was 7%. Since a rough and ready formula of 6% trade discount was being allowed, the petitioner had accepted the position. This will be evident from the order dated 14.8.1973 passed by the Collector of Central Excise in which it was observed "As in the previous years a trade discount of 6% is allowed against 7% claimed by the party". The show cause notice dated 4.12.1973 for the first time sought to calculate excise duty payable on footwear sold by the petitioner under the brand name "Miners" Boots" on the ground that these boots were supplied to different parties, all consumers, directly at the contracted price of Rs. 34/- per pair F.O.R. The method sought to be adopted by the respondents is unexceptionable in law and should have been followed in the case of each lot of footwear manufactured by the petitioner but the method adopted by the department has been to take the total turnover of the footwear manufactured by the petitioner and allow a discount of 6% regardless of the actual discount and also regardless of the fact whether the goods were sold to wholesale dealers or sold through retail outlets of the petitioner. The department must make up its mind about the method of assessment of the goods manufactured by the petitioner. There is nothing to prevent the department to assess each lot of footwear separately as and when they are manufactured. But having chosen not to follow this practice but to allow trade discount at 6% on all goods

manufactured by the petitioner irrespective of the actual discount allowed by the petitioner to its customers. It is not open to the department to allow a different method in respect of footwear sold under the name of "Miners" Boots".

16. An attempt was made in course of the argument to establish that "Miners" Boots" were different from the other footwear manufactured by the petitioner. The case was adjourned to enable the respondents to produce evidence in support of its contention but the respondents were unable to produce any material to show that this type of goods could not come within the footwear usually manufactured by the petitioner which has been described as "Canvas/Rubber Footwear".

17. In my judgment, the department is entitled to assess the goods separately on the basis of wholesale price as and when each lot is sold to the consumers. But since the department has not adopted that procedure, it is not open to the department to allow trade discount on a rough and ready measure to some of the goods manufactured by the petitioner and not to allow the trade discount in some other cases on the allegation that the goods are supplied directly to the consumers.

18. It is not the case of the department that the direction given by the Central Board of Revenue by the orders dated 16th October, 1957 and 2nd May 1956 do not hold good any longer and the goods are being separately assessed. I fail to see why footwear marked "Bata" sold through retail outlets to customers directly will enjoy 6% discount; but the footwear described as "Miners" Boots" sold directly to the consumers will not enjoy this discount because the discount was not actually allowed to the consumers. The respondents are entitled to strictly follow the terms of the Excise Act and assess the value of the goods manufactured by the petitioner as and when each lot of goods came out of the factory of the petitioner. But that is not what has been done in this case. The respondents have chosen to make assessment by allowing 6% trade discount on average basis even when the petitioners have claimed that the trade discount should be 7% or more. That being the position, I fail to see how the respondents consistently with their stand of making assessment on average basis can treat the footwear manufactured by the petitioner called "Miners" Boots" on a separate basis.

19. The impugned order passed by the Appellate Collector of Central Excise assumes that the 6% trade discount or ordered to be allowed by the Collector, C.E.Cal. and Orissa in his order dated 14.8.1973 was of limited scope and was confined to sales of footwear on wholesale basis. The attention of the Appellate Collector was not drawn to the order dated 2nd May, 1956 passed by the Central Board of Revenue by which footwear marked "Bata" sold through retail depots of the petitioner directly to the consumers were to be allowed trade discount. The order passed by the Joint Secretary to the Government of India dated 16th December, 1976 has also overlooked this aspect of the case. The affidavit filed on behalf of the respondents has not touched upon this point and has not dealt with

the order dated 2nd May, 1956, a copy of which has been annexed to the writ petition.

20. Therefore, the scope and effect of the order passed by the Central Board of Revenue on 2nd May, 1956 will have to be examined by the Excise authorities. Since this aspect of the matter has not been considered at all, the impugned order being order No. 2033 of 1976 of the Government of India passed by the Joint Secretary to the Department of Revenue and Banking on 24-11-1976 is quashed. The order of the Appellate Collector of Central Excise being order in appeal No. 54/C.O. of 1975 dated 21.2.1975 is also quashed. The Appellate Collector the respondent No. 3, is directed to pass a fresh order in accordance with law after giving a notice of hearing to the petitioner. The Appellate Collector must examine the scope and effect of the order passed by the Central Board of Revenue on 2nd May, 1956, and must dispose of the case within a period of four months from the date of communication of this order. All the questions of fact and law are left open to be agitated before the Appellate Collector. The Appellate Collector will also be entitled to find out the facts and decide all questions of law as he thinks fit.