

Asstt. Collector of Central Excise and Others

Vs

Bata India Ltd.

Modi Rubber Limited and Another

Vs

Union of India and Others

Civil Appeals No. 8762 of 1994

(CJI A. M. Ahmadi, B. L. Hansaria, S. C. Sen JJ)

07.05.1996

JUDGMENT

SEN. J. -

1. 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 the 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 Excises and Salt Act, 1944 comes up to 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 up to 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 up to 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 char :

#-----Wholesale price Rate of
duty Deduction on Value as per after discounts account of duty Section 4 etc.-----
-----Rs. 56.00 10% Rs. 5.09 Rs. 50.91Rs.
58.00 10% Rs. 5.27 Rs. 52.73Rs. 60.00 10% Rs. 5.45 Rs. 54.55Rs. 62.00 10% Rs.
5.64 Rs. 56.36Rs. 64.00 10% Rs. 5.82 Rs. 58.18Rs. 66.00 10% Rs. 6.00 Rs. 60.00Rs.
68.00 10% Rs. 6.18 Rs. 61.82Rs. 70.00 10% Rs. 6.36 Rs. 63.64Rs. 72 00 10% Rs.
6.55 Rs. 65.45-----##

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 rules 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 under Section 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 of 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, ... of 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 Mukharji, J. (as his Lordship then was) pointed out in the case of Hindustan Polymers v. CCE [(1989) 4 SCC 32 : 1990 SCC (Tax) 118] 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 the 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 up to 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, the manufacturer will have to explain by giving the break-up, how was this price fixed. If 10% was the rate of duty and footwear valued up to 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 under Section 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 the 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, even if 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 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 under Section 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 under Section 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 under Section 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 up to 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 imposed on various bases. It could be imposed unitwise as in TI 33-AA (Parts of Wireless Receiving Sets) or lengthwise as in TI 37 (Cinematograph Films) or on the basis of weight as in the case of TI 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 that '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 excise duty payable will depend on

this valuation. The Explanation has been inserted "for the purposes 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 up to 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 any 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 up to 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 up to 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 any 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 goods. 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 Co. (P) Ltd. v. CCE [(1985) 3 SCC 9 : 1985 SCC (Tax) 37 : (1985) 3 SCR 960], and particularly, on the passage below : (SCC p. 102, para 8)

"... It is, therefore, plain that before determining the question of availability of the exemption under Notification dated 24-7-1967, 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 5-3-1993 passed by the Punjab and Haryana High Court is set aside. There will be no order as to costs.