IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI, PRINCIPAL BENCH NEW DELHI

COURT-IV

Appeal Nos. E/1340/2009

[Arising out of the Order in Original No. 06/2009 dated 27.02.2009 passed by Commissioner, Central Excise, Delhi]

M/s. Hi-Line Pens Limited … Appellant

Vs.

Commissioner of Central Excise & S.T., Delhi … Respondent

Appearance:

Rep. by - Shri Lakshmi Kumaran, Advocate for the appellants
Rep. by - Shri H.C. Saini, DR for the respondent

Coram: Hon'ble Mr. Ashok Jindal, Member (Judicial)
Hon'ble Mr. V. Padmanabhan, Member (Technical)

Date of Hearing : **22.02.2017**

Date of Decision : **15.03.2017**

Final Order No. 52340 /2017-DB

Per V. Padmanabhan

The appellant has directed this appeal against the impugned Order in Original No. 06/2009 dated 27.02.2009 passed by Commissioner, Central Excise, Delhi.

2. The appellants are manufacturing "pens and writing instruments", classifiable under Chapter heading 96.03 of the First Schedule of Central Excise Tariff Act, 1985. The said pens are manufactured under the brand names of 'Luxor', 'Pilot', 'Parker' etc. and are sold M/s. Luxor Writing Instruments Pvt.

Limited ("Luxor" for short). M/s. Luxor, in turn sells the aforesaid pens to various consumers through the network of distributors/ wholesale dealers. Since M/s. Luxor and the appellants are inter-connected undertakings, appellants were discharging the duty liability by taking into account the retail sale price charged by Luxor. For this, the appellants worked out the assessable value by taking into account the retail sale price of the pens and by doing the backward calculations after claiming deductions on account of discounts, taxes, duties etc. in the absence of MRP based assessment of goods. The appellants were claiming benefit of exemption from duty under Notification Nos. 4/97-CE dated 01.02.1997, 5/98-CE dated 02.06.1998, 5/99-CE dated 28.02.1999, 06/2002-CE dated 01.03.2002 and the successor notifications and in terms of which pens of the value less than Rs. 100/ Rs. 200 were exempted from duty. Also, the appellants filed period declarations with the department. Since the appellants and Luxor were related persons, the appellants adopted the maximum retail price of the pens, as fixed by Luxor, for discharging the duty since beginning, from which the appellant have worked out the assessable value as shown below:-

Price to consumer	
Less :	Retail margin (Discount) (Rs.)
Less :	Distributor margin (Discount) (Rs.)
Price to distributor	
Less :	Sales tax (Rs)
	Average Sales Tax (%)
	Invoice rate

	PPD 2%
	Net of discount
	Freight 1%
	Value with Excise
Less :	Excise
	Excise %
Assessable Value	

Pursuant to the audit of the appellant's excise records during the period from 13.02.2007 to 19.02.2007, an objection dated 23.04.2007 was raised that the appellants, by making deduction towards cum-duty price, were collecting duty from their customers but not depositing the same with the government, which is recoverable from them under Section 11D. The officers of Central Excise visited the factory premises of Luxor on 17.08.2007 and appellant's factory premises on 19.09.2007. Consequently, a show cause notice dated 31.01.2008 was issued to the appellant proposing to demand Central Excise duty of Rs. 1,92,00,459/-, with interest and penalty, alleging that in respect of the final products which are not chargeable to duty, claiming deduction on account of cum-duty price was not correct. In the show cause notice, reliance was placed on the decisions of Hon'ble Supreme Court in the case of *Bata India Limited – 1996 (84) ELT 164 (SC)* (hereinafter referred to as Bata India 1996 case) and *Amrit Agro Industries Limited – 2007 &210) ELT 183 (SC).* The show cause notice also proposed to invoke the extended period of limitation. The Commissioner vide impugned order dated 27.02.2009 has held that price lists did not clearly indicate that no duty was being paid; the appellant did not declare the true position about the computation of the assessable value in unambiguous terms, hence, there is suppression of facts. He confirmed the duty demand of Rs. 1,92,00,459/-, along with penalty and interest, relying on the decisions of Bata India 1996 and Amrit Agro case (supra). Aggrieved by the same, the appellant has filed the present appeal.

3. With the above background, we have heard Shri V. Lakshmikumaran, ld. Counsel for the appellant and Shri H.C. Saini, ld. DR for the Revenue.

4. The appellant is manufacturing and clearing various types of Pens and have claimed benefit of exemption notification which granted nil rate of duty for the Pens of value of Rs. 100/ Rs. 200. The dispute in the present case is whether the appellants were correct in claiming the deduction on account of duty from the cum-duty price of Luxor to arrive at the transaction value. Such deduction was claimed by the appellants in terms of Section 4(3) (d) and the explanation to Section 4(1).

> **"(d)** "transaction value" means the price actually paid or payable for the goods, when sold, and includes in addition to the amount charged as price, any amount that the buyer is liable to pay to, or on behalf of, the assessee, by reason of, or in connection with the sale, whether payable at the time of the sale or at any other time, including, but not limited to, any amount charged for, or to make provision for expenses, storage, outward handling, servicing, warranty, commission or any other matter; but does not include the amount of duty of excise, sales tax and other taxes, if any actually paid or actually payable on such goods.**"**
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> ***"Explanation.*** – For the removal of doubts, it is hereby declared that the price-cum-duty of the excisable goods sold by the assessee shall be the price actually paid to him for the goods sold and the money value of the additional consideration, if any, flowing directly or indirectly from the buyer to the assessee in connection with the sale of such goods, and such price-cum-duty, excluding

sales tax and other taxes, if any, actually paid, shall be deemed to include the duty payable on such goods."

The extract of Notification No. 6/2002-CE dated 01.03.2002, is reproduced below for ready reference:-

S/No	Chapter or heading No. or sub-heading	Description of goods	Rate under the First Schedule	Rate under the Second Schedule	Condition
(1)	(2)	(3)	(4)	(5)	(6)
229	96.08	Pens and parts thereof, of value not exceeding Rs. 100 per piece	Nil	-	-

Shri V. Lakshmikumaran, Ld. Senior Advocate contended that since the definition of transaction value, as above does not include the amount of excise duty, to determine the eligibility of notification, the amount of excise duty is to be deducted and such value is to be considered to determine the eligibility. He further contended that the explanation to Section 4(1) clearly provides that the price-cum duty of the excisable goods shall be the price actually paid for the goods sold and that such price shall be deemed to include the duty payable on such goods. Since the notifications grant exemption to the Pens of the value less than Rs. 100 or Rs. 200, it was essential for the appellant to arrive at the value of the Pens to determine the eligibility for the exemption. The appellant had to deduct the duty deemed to be included in the price. Thus, the deduction claimed by the appellant was in accordance with law. The appellant further submitted that the ld. Commissioner has erred in placing reliance on the case laws of *Bata India Limited – 1996 (84) ELT 164 (SC)* and *Amrit Agro Industries*

Limited – 2007 &210) ELT 183 (SC), for the reason that these judgments of the Apex Court were delivered in the context of Section 4 which was prevalent during the period 1975 to 30.06.2000. The present dispute is in the context of Section 4 as it stands with effect from 01.7.2000, after the introduction of transaction value. Shri Lakshmikumaran, further submitted that the provisions of Section 4 with effect from 01.07.2000 is similar to that which was prevalent prior to 01.10.1975 in respect of deduction allowable from the whole sale cash price to arrive at assessable value. He submitted that, consequently the decision of Bata Shoe Company – 1985 (21) ELT 9 (SC) which was delivered in the context of Section 4, prior to 1975 will be directly applicable to the facts of the present case and not the decision relied upon by the ld. Commissioner. He also submitted that in Bata India 1996 case, the Hon'ble Supreme Court has distinguished their own earlier decision of 1985 by saying that the provisions of Section 4 has undergone changes after 01.10.1975.

5. Shri Lakshmikumaran also assailed the impugned order on the ground of limitation. He submitted that the appellants have been regularly filing price declarations from time to time along with calculation charts detailing how the assessable value of the pens have been arrived at. In such price declarations, it has been clearly indicated that the benefit of exemption has been claimed for pens having value less than Rs. 100, after deducting the excise duty. Further, since the unit has been subjected to audit periodically, the price declarations have been extensively scrutinized with the related documents, the department

could not allege any suppression on the part of assessee and could not invoke extended period of limitation for demanding duty.

He also submitted that ld. Commissioner has wrongly invoked the provisions of Section 11D of the Central Excise Act to confirm the demand of duty. He pointed out that the provisions of Section 11D were never proposed in the show cause notice dated 31.01.2008 and hence, invocation of the same in the impugned order is legally unsustainable and to this extent, the impugned order has gone beyond the scope of show cause notice.

6. Ld. DR supported the impugned order. He referred to the definition of the term 'transaction value' in Section 4(3)(d) and argued that excise duty will be deductable from the price to arrive at the transaction value only in those cases where it has actually been paid or actually payable. He submitted that in cases where the appellant becomes entitled to the benefit of notification, no excise duty is payable and consequently deducting the excise duty from the price to arrive at the transaction value, will not be permissible as has been held by the Commissioner in the impugned order. He also supported the reliance placed by the ld. Commissioner on the Apex Court decisions [Bata India – 1996 as well as Amrit Agro case -2007].

7. From the definition of transaction value under Section 4(3)(d) (with effect from 01.07.2000), it is seen that the deduction is available from the price

actually paid or payable for the goods when sold, to the extent of amount of duty of excise, sales tax and other taxes, if any, actually paid or actually payable on such goods. An Explanation has been added to Section 4(1) with effect from 14.05.2003 through which the concept of cum-duty price was inserted in Section 4. This explanation explains how the "price-cum-duty" of the excisable goods has to be arrived at. The explanation provides for deduction of sales tax and other taxes, if any actually paid. Further, the explanation specifies that the price-cum duty so arrived at shall be deemed to include the duty payable on such goods.

When we look at the calculation attached by the appellant in arriving at assessable value, we find that the retail price is the price charged by Luxor (from the customers i.e. retail price). From such retail price, initially the retailer and distributor margins are deducted to arrive at the price to distributor. Subsequently, the sales tax actually paid is deducted followed by the allowable deduction for discounts as well as the amount attributable to freight involved in transportation of the goods, from which the excise duty element is deducted to arrive at the assessable value. In those cases, wherein the value arrived as per above calculation, is less than that specified in the notification, the benefit of nil rate of duty is claimed by the appellant. In all other cases, the excise duty is paid at the applicable rates.

8. Revenue has contended that the element of excise duty is not a permissible deduction since in cases where the exemption from duty is claimed,

no duty becomes payable. Such a stand by the Revenue does not appear to be in line of the concept of transaction value enshrined in section 4 with effect from 01.07.2000 as amplified by the explanation inserted with effect from 14.5.2003. As can be seen from the definition of transaction value as well as explanation reproduced earlier, while the transaction value exclude of taxes, if any actually paid or payable, the explanation inserted has created the concept of price cum-duty. This is a deemed concept in which deduction is allowed only to the extent of sales tax and other taxes actually paid. It follows that, to arrive at the transaction value from price cum duty, the excise duty element is deductable. In fact, the calculation of the appellant proceeds exactly as per the concept of transaction value and price-cum-duty, as above. Ld. Commissioner in the impugned order has disallowed deduction of excise duty to arrive at the assessable value by following the decision of the Hon'ble Supreme Court in Bata India-1996 case as well as Amrit Agro case -2007. We have gone through the above decisions. It is evident that these decisions have been rendered by the Apex Court by considering the provisions of Section 4 prior to insertion of explanation with effect from 14.05.2003 by Section 136 of Finance Act, 2003. Since these decisions were in the context of erstwhile provisions, when no such concept of price-cum-duty was enshrined in Section 4, the same are not applicable to the facts of the present case.

9. Shri Lakshmikumaran has argued that to the facts of the case, the decision of the Apex Court in Bata Shoes – 1985 will be more correctly applicable. To

consider the applicability of Bata Shoes – 1985 case, it is necessary to look at Section 4 as it stood prior to 01.10.1975. The concept of value at that time was deemed to be wholesale cash price. The explanation available in Section 4 at the relevant time reads as follows:-

> "*Explanation* – In determining the price of any article under this Section, no abatement or deduction shall be allowed except in respect of trade discount and amount of duty payable at the time of removal of the article chargeable with duty from the factory or other premises aforesaid."

As can be seen from the above, the explanation allowed deduction in respect of only trade discount and the amount of duty payable. Even though, the concept of value with effect from 01.7.2000 and the concept of price-cum duty with effect from 14.05.2003 are not identical to the pre 1975 provisions, the two are similar in respect of deduction which shall be allowed to arrive at value.

The Hon'ble Supreme Court in the Bata Shoe – 1985 case, held as follows:-

> **"9.** The short question for consideration is whether the mode of determination of "value" prescribed by Section 4 is not attracted while computing the "value" of the articles of footwear for the purposes of testing the availability of the exemption granted under the Notification dated July 24, 1967. To our mind the answer to the question is perfectly simple. Section 4 is comprehensive in its coverage and it lays down the procedure to be followed for determination of "value" of any article in every case where the article is chargeable with duty at a rate dependent on the value of the article. On a careful reading of the Notification dated July 24, 1967, it also becomes clear that the effect of the Notification is to render the chargeability or otherwise to duty of excise of footwear falling under Item 36 of the First Schedule is made wholly dependent upon the `value' of the article of footwear; in case such `value' exceeds Rs. 5 per pair, duty will be chargeable at the rate of 10% whereas if the value does not exceed Rs. 5 per pair, no duty will be chargeable on such items of footwear, that is the rate of duty will be `nil'. It is precisely to such a situation that the provision of Section 4 gets attracted because as expressly stated in the opening part of the said section the mode of determination of `value' specified in the section will be applicable to all cases where any article is chargeable with duty at a rate dependent upon the value of the article. In the case of a total exemption, the rate will be `nil'. Thus, Entry 36 read along with the Notification dated July 24, 1967 clearly shows that the chargeability to duty in respect of any

> article of footwear is made dependent upon its value in the sense that the chargeability to duty of excise will arise only if the `value' of the article does not exceed Rs. 5 per pair. It is, therefore, plain that before determining the question of availability of the exemption under the 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 purposes of duty. The expression `for the purposes of duty' occurring in Section 4 has a wide import. 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. This is the view taken by the High Court of Patna in the judgment appealed against in C.A. No. 1469 of 1972 and we have no hesitation to agree with the said view. The High Court of Calcutta was of opinion that Section 4 only lays down the formula or the principle for determination of "value for the purpose of duty" and it has not laid down any principle or formula for the determination of value for exemption from duty as already indicated. In our opinion this is not a correct interpretation of the scope and ambit of Section 4 of the Act.
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> **10.** In the result, we hold that inasmuch as the value of the articles of footwear 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 exempt from the charge to duty of excise under the Notification dated July 24, 1967.**"**

We find that the above decision is applicable to the present case and supports the calculation attached by the appellant to determine the value.

10. The impugned order has been challenged on the ground of time-bar also. The appellant has claimed that they have been filing the price declarations from time to time during the period when they were required to do so. They have enclosed few sample price declarations filed. We have perused the same. We note that the method of calculation of value has been fairly spelt out in such declarations. It is clear that appellant has claimed deduction for excise duty to arrive at the assessable value and accordingly claimed the benefit of exemption notification. Since all the relevant facts were in the knowledge of the

department, we are of the view that the extended period of limitation is not applicable.

11. The appellant has also argued that the ld. Commissioner in the impugned order has confirmed the demand of duty under Section 11D, whereas no such ground has been taken in the relevant show cause notice. We have considered the relevant show cause notice and find that the ground of Section 11D has not been raised in the relevant show cause notice and consequently, the impugned order has travelled beyond the scope of show cause notice and is liable to be quashed.

12. In view of the above discussions, we find no merit in the impugned order. Consequently, the impugned order is set-aside and the appeal is allowed.

[pronounced in open court on 15.03.2017]

(**Ashok Jindal**)
Member (Judicial)

(**V. Padmanabhan**)
Member (Technical)

KL.