

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE
TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA
REGIONAL BENCH - COURT NO.2**

Excise Appeal No.674 of 2009

(Arising out of Order-in-Original No.33/COMMISSIONER/CE/KOL-V/ADJN/09 dated 14.09.2009 passed by Commissioner of Central Excise, Kolkata-V.)

M/s. Bata India Limited

(6A, S.N.Banerjee Road, Kolkata-700013.)

...Appellant

VERSUS

Commissioner of Central Excise, Kolkata-V

(180, Shantipally, Rajdanga Main Road, Kolkata-700017.)

.....Respondent

APPEARANCE

Shri J.P.Khaitan, Senior Advocate & Ms. Sanjukta Gupta, Advocate for the Appellant (s)

Shri S.S.Chattopadhyay, Authorized Representative for the Respondent

**CORAM: HON'BLE SHRI P.K. CHOUDHARY, MEMBER(JUDICIAL)
HON'BLE SHRI RAJEEV TANDON, MEMBER(TECHNICAL)
FINAL ORDER NO. 75254/2023**

DATE OF HEARING : 1 March 2023

DATE OF DECISION : 25 April 2023

Per : P.K. CHOUDHARY :

Briefly stated the facts of the case are that the Appellant M/s. Bata (I) Ltd. manufactures footwear. Each pair of footwear is sold in packaged form. The assessee follows the system of assigning a 7 digit article number for its footwear. In respect of footwear, which pass the quality control inspection at the end of the assembly line, the 7 digit article number denotes the group, type, nature of basic upper material, colour, mutation and the design number. The 7 digit article number and the MRP of the footwear are printed on the insole or on the upper lining of the footwear at the component stage itself. Footwear which fail the quality control inspection at the end of the assembly line, are disposed of as 'Factory Seconds' at the reduced MRP. In order to differentiate between footwear which has passed the quality control inspection and

'Factory Seconds', the assessee follows the policy of changing the 7 digit article number of 'Factory Seconds'. In respect of 'Factory Seconds', the first 3 digits of the 7 digit article number are for the group - (gents/ladies/children) and the type of footwear - (sports, canvass/Hawaii, rubber/ leather) and the last 4 digits are for the MRP. For example Power Jogger which passes the quality control inspection carries article Number 839-7693 with MRP of Rs.699/- whereas 'Factory Seconds' of Power Jogger with reduced MRP of Rs.490/- carries article Number 800-0490.

2. In respect of footwear which has failed quality control inspection at the end of the assembly line and have to be treated as 'Factory Seconds', the assessee has to blot out the original printed article number and MRP and mark new article number and MRP. If the assessee were to use the printing process for the said purpose, the footwear would have to be opened up which is not a practical proposition at all. The assessee found that the most practical method, without affecting the aesthetics of the footwear was to permanently affix self-adhesive paper stickers over the previously printed matter in case of 'Factory Seconds'. Thus the assessee used self-adhesive paper stickers made of strong paper on which the particulars were printed with scratch proof ink and the adhesive used was such that the stickers affixed inside the footwear could not be removed without affecting the substrate and aesthetics of the footwear. Apart from permanently affixing the stickers on the footwear itself, on the box of such 'Factory Seconds', self-adhesive paper sticker with the new article number for factory seconds printed thereon was permanently affixed over the original number and self-adhesive paper sticker with the reduced MRP printed thereon was permanently affixed over the original price. Another self-adhesive sticker with the printed words 'Factory Seconds' was permanently affixed on the boxes. The factory seconds having separate 7 digit article number were invariably sold to the customers at the reduced MRP marked thereon. It is the case of the Appellant that they are availing the benefit of exemption Notification No.23/2004

dated 09.07.2004 and 5/2006 dated 01.03.2006. The Notifications provide concessional rate of duty depending on the value of footwear subject to the condition that the rejected sale price is indelibly marked or embossed on the footwear. By the first Notification complete exemption was granted in respect of footwear of retail sale price not exceeding Rs.50/- per pair. Condition 35A read as follows:-

“This exemption shall apply only to such footwear on which the retail sale price is indelibly marked or embossed on the footwear itself.”

By the second Notification, complete exemption in respect of footwear of retail sale price not exceeding Rs.250/- per pair was continued. Further the footwear of retail sale price exceeding Rs.250/- and not exceeding Rs.750/- per pair were to be charged at concessional rate of 8%. Condition 2 applicable in respect of both categories of exempted goods was identically worded as condition 35A of the first Notification.

3. The dispute regarding availability of exemption under the said Notification is confined to factory seconds i.e. footwear which failed the quality control inspection at the end of the assembly line and had, therefore, to be disposed of as factory seconds at reduced MRP. The Central Excise officers visited the assessee's factory on 09.01.2008 for the first time and objected to the manner in which the assessee was marking the reduced MRP on factory seconds. Because of such objection and in order to obviate any dispute for the future, from January 10, 2008, the assessee also started the rubber stamping the expression 'Factory Seconds', the article number meant therefore and the MRP on the footwear which failed the quality control inspection. A Show Cause Notice dated 04.12.2008 invoking the larger period of limitation was issued covering the period from July 9, 2004 to January 9, 2008. The assessee submitted its reply to the Show Cause Notice and also furnished reports of M/s. Eskaps India Pvt.Ltd., Analytical Chemist of international repute in support of the contention that using paper sticker amounted to compliance of the said Notification regarding indelible marking/embossing. However, the Ld.Commissioner vide the impugned order confirmed the demand of Central Excise duty along

with interest and imposed an equal penalty under Section 11AC of the Central Excise Act, 1944 read with Rule 25 of the Central Excise Rules, 2002. Hence the present Appeal before the Tribunal.

4. The Ld.Senior Advocate Shri J.P.Khaitan appearing on behalf of the Appellant submitted that the substantive condition of the said Notifications was the retail sale price range specified therein for the purpose of grant of exemption. The exemption was allowed only in respect of footwear which complied with the condition regarding the specified retail sale price range. For complete exemption during the entirety of the material period, the retail sale price was not to exceed Rs.250/- per pair. For partial exemption during the period from March 2006 to January 9, 2008, the retail sale price in excess of Rs.250/- was not to exceed Rs.750/- per pair. Apart from the said substantive condition, the procedural condition was that the retail sale price would be indelibly marked or embossed on the footwear itself. The condition that the retail sale price should be indelibly marked or embossed on the footwear was to ensure that the low price footwear in respect of which the exemption was granted was actually sold at the marked price and not at any higher price. He further submitted that the Show Cause Notice was barred by limitation in so far as it related to the period upto November 2007.

5. The Ld.Authorized Representative for the Department submitted that they have not marked the revised price in indelible ink and thus they have not fulfilled the conditions of the Notification. The price of a product depends on a myriad of factors. Price is a fact antecedent to exemption. The condition has been prescribed to ensure that exempted footwear within the price band is sold at that price only. The appellant's contention that keeping the price within the price band is the substantive condition and the mode of marking is a procedural one, and hence, the letter can be deviated from, is not acceptable because the fixing of price is a business necessity and not a compliance with the requirement of these Notifications. The Notifications merely accept price as a fact and allows exemption on that basis. Price fixation for availing

exemption is, therefore, not a procedural requirement. The requirement is marking price in the prescribed mode, and this is the only requirement for claiming exemption provided that the antecedent fact is present. Therefore, the question of substantial compliance does not arise in this case. The appellant's claim for exemption on footwear whose original price was within the band of exemption is not acceptable because earlier MRP is effectively cancelled when sticker is put on it, and for what has been submitted before, this mode of price marking does not entitle the appellant to exemption.

6. Heard both sides and perused the appeal records.

7. We find that in the instant case it is not in dispute that the MRP of the factory seconds made them eligible for the exemption and dispute has been raised only with regard to the manner of marking of the MRP. It is also not in dispute that the factory seconds were in fact sold by the assessee at the reduced MRP marked thereon. It was not alleged in the Show Cause Notice that such footwear were sold at any other price. The assessee had submitted before the Commissioner, a Certificate of Chartered Accountant, who upon verification of books of accounts, records and documents like excise invoices, stock transfer invoices and cash memos relating to the sale of the factory seconds cleared under Central excise invoices for the year 2005, 2006, 2007 and 2008 certified that the factory seconds were sold at the same MRP as mentioned in the excise invoices and corresponding stock transfer invoices without any exception. Along with the said certificate, the Chartered Accountant had enclosed specimen statements and documents for different years.

8. The Commissioner sought to refer to such statements as partial and not covering all sales for the period of demand. But, in saying so, he lost sight of the fact that the statements and documents annexed to the Chartered Accountants' certificate were only by way of specimen and not exhaustive and the Chartered Accountants after due verification had certified that the 'Factory Seconds' were sold at the same MRP as mentioned in the excise invoices and corresponding stock

transfer invoices '*without any exception*'. Along with the said Certificate the Chartered Accountant had enclosed specimen statements and documents for different years.

9. According to the Commissioner, the stand of the assessee regarding actual sale price was not relevant for deciding the issue since the assessee sold footwear at prices which attracted exemption, and exemption was not available because of the nature of marking. It is submitted that the fact remains that the assessee's assertion backed by Chartered Accountants' certificate that the 'Factory Seconds' were sold at the reduced MRP without any exception has not been shown to be factually incorrect.

10. As stated hereinbefore, the price and article number printed at the component stage were blotted out by permanently affixing the stickers with the new article number and reduced MRP on the footwear over the previously printed matter. The same procedure was followed in respect of the box of such 'Factory Seconds' which additionally had another self-adhesive sticker with the printed words 'Factory Seconds'.

11. In support of the contention that the reduced price was indelibly marked on the footwear itself, the assessee had submitted test certificates of Analytical Chemists of international repute to the effect that the ink used was scratch proof and cannot be removed; that the paper used in the sticker was better than normal paper in respect of strength and G.S.M. and that the adhesive fixed the sticker permanently to the footwear and cannot be removed without affecting the substrate.

12. The Commissioner did not dispute the test reports but sought to hold that since the stickers were admittedly detachable, the primary condition of exemption was not fulfilled in letter and spirit. It is submitted that the Commissioner erred in proceeding on the basis that it was the admitted position that the stickers were detachable or can be detached. The test reports were to the effect that the stickers were permanently fixed and could not be removed without affecting the substrate. In other words, the stickers could not be removed without

damaging the substrate. It is also submitted that such permanent affixation has to be necessarily regarded as indelible marking.

13. No doubt, from January 10, 2008, apart from using the stickers, the assessee started rubber stamping the 'Factory Seconds'. Such rubber stamping was said to be done because of the objections raised by the Department and to put an end to the controversy going forward. However, even without such rubber stamping, the reduced MRP was indelibly marked on the footwear by permanently affixing the printed stickers to the footwear over the previously printed matter. Moreover the stickers serve the dual purpose of blotting out the price originally printed on the footwear as well as indelibly marking the reduced MRP. The Commissioner has himself accepted the effect of affixing the stickers over the price originally printed but has contradicted himself by not regarding such permanent affixation of stickers printed with the reduced MRP as indelible marking of the reduced MRP on the footwear.

14. We find that the stickers are put on the rejected footwear after the completion of manufacture and there is no allegation against the Appellant that they have charged any higher price than the price put on the sticker on the rejected footwear. So far as the test report submitted by the Appellant is concerned, the Commissioner did not dispute the veracity of the said Certificate and there is no allegation against the Appellant that they have charged higher price than the price re-fixed on the rejected footwear. The Hon'ble Supreme Court in the case of Mangalore Chemicals & Fertilizers Ltd. Vs. Deputy Commissioner [1991 (55) E.L.T. 437 (SC)] has dealt the issue of interpretation of Statute – exemption how to be interpreted. The relevant paragraphs are reproduced:-

"11. We have given our careful consideration to these submissions. We are afraid the stand of the Revenue suffers from certain basic fallacies, besides being wholly technical. In Kedarnath's case, the question for consideration was whether the requirement of the declaration under the proviso to Sec. 5(2)(a)(ii) of the Bengal Finance (Sales-tax) Act, 1941, could be established by evidence aliunde. The Court said that the intention of the Legislature was to

grant exemption only upon the satisfaction of the substantive condition of the provision and the condition in the proviso was held to be of substance embodying considerations of policy. Shri Narasimhamurthy would say the position in the present case was no different. He says that the notification of 11th August, 1975 was statutory in character and the condition as to 'prior permission' for adjustment stipulated therein must also be held to be statutory. Such a condition must, says Counsel, be equated with the requirement of production of the declaration form in Kedarnath's case and thus understood the same consequences should ensue for the non-compliance. Shri Narasimhamurthy says that there was no way out of this situation and no adjustment was permissible, whatever be the other remedies of the appellant. There is a fallacy in the emphasis of this argument. The consequence which Shri Narasimhamurthy suggests should flow from the non-compliance would, indeed, be the result if the condition was a substantive one and one fundamental to the policy underlying the exemption. Its stringency and mandatory nature must be justified by the purpose intended to be served. The mere fact that it is statutory does not matter one way or the other. There are conditions and conditions. Some may be substantive, mandatory and based on considerations of policy and some others may merely belong to the area of procedure. It will be erroneous to attach equal importance to the non-observance of all conditions irrespective of the purposes they were intended to serve.

In Kedarnath's case itself this Court pointed out that the stringency of the provisions and the mandatory character imparted to them were matters of important policy. The Court observed :

".....The object of S. 5(2)(a)(ii) of the Act and the rules made thereunder is self-evident. While they are obviously intended to give exemption to a dealer in respect of sales to registered dealers of specified classes of goods, it seeks also to prevent fraud and collusion in an attempt to evade tax. In the nature of things, in view of innumerable transactions that may be entered into between dealers, it will wellnigh be impossible for the taxing authorities to ascertain in each case whether a dealer has sold the specified goods to another for the purposes mentioned

in the section. Therefore, presumably to achieve the two fold object, namely, prevention of fraud and facilitating administrative efficiency, the exemption given is made subject to a condition that the person claiming the exemption shall furnish a declaration form in the manner prescribed under the section. The liberal construction suggested will facilitate the commission of fraud and introduce administrative inconveniences, both of which the provisions of the said clause seek to avoid."

(Emphasis Supplied)

[See: (1965) 3 SCR 626 at 630]

*Such is not the scope or intendment of the provisions concerned here. The main exemption is under the 1969 notification. The subsequent notification which contains condition of prior-permission clearly envisages a procedure to give effect to the exemption. A distinction between the provisions of statute which are of substantive character and were built-in with certain specific objectives of policy on the one hand and those which are merely procedural and technical in their nature on the other must be kept clearly distinguished. What we have here is a pure technicality. Clause 3 of the notification leaves no discretion to the Deputy Commissioner to refuse the permission if the conditions are satisfied. The words are that he "will grant". There is no dispute that appellant had satisfied these conditions. Yet the permission was withheld - not for any valid and substantial reason but owing to certain extraneous things concerning some inter-departmental issues. Appellant had nothing to do with those issues. Appellant is now told "we are sorry. We should have given you the permission. But now that the period is over, nothing can be done". The answer to this is in the words of Lord Denning: "Now I know that a public authority cannot be estopped from doing its public duty, but I do think it can be estopped from relying on a technicality and this is a technicality" [See *Wells v. Minister of Housing and Local Government*: 1967 (1) WLR 1000 at 1007].*

Francis Bennion in his "Statutory Interpretation", 1984 edition, says at page 683 :

"Unnecessary technicality: Modern Courts seek to cut down technicalities attendant upon a statutory procedure where these cannot be shown to be necessary to the fulfilment of the purposes of the legislation."

12. Shri Narasimhamurthy against relied on certain observations in Collector of Central Excise, Bombay-I & Anr. v. Mis. Parle Exports (P) Ltd. [1989 (1) SCC 345 = [1988 \(38\) E.L.T. 741](#) (S.C.)], in support of strict construction of a provision concerning exemptions. There is support of judicial opinion to the view that exemptions from taxation have a tendency to increase the burden on the other unexempted class of tax-payers and should be construed against the subject in case of ambiguity. It is an equally well-known principle that a person who claims an exemption has to establish his case. Indeed, in the very case of M/s. Parle Exports (P) Ltd. relied upon by Sri Narasimhamurthy, it was observed :

"While interpreting an exemption clause, liberal interpretation should be imparted to the language thereof, provided no violence is done to the language employed. It must, however, be borne in mind that absurd results of construction should be avoided."

The choice between a strict and a liberal construction arises only in case of doubt in regard to the intention of the Legislature manifest on the statutory language. Indeed, the need to resort to any interpretative process arises only where the meaning is not manifest on the plain words of the statute. If the words are plain and clear and directly convey the meaning, there is no need for any interpretation. It appears to us the true rule of construction of a provision as to exemption is the one stated by this Court in Union of India & Ors. v. M/s. Wood Papers Ltd. & Ors. [1991 JT (1) 151 at 155]:

".....Truly, speaking liberal and strict construction of an exemption provision are to be invoked at different stages of interpreting it. When the question is whether a subject falls in the notification or in the exemption clause then it being in nature of exception is to be construed strictly and against the

subject but once ambiguity or doubt about applicability is lifted and the subject falls in the notification then full play should be given to it and it calls for a wider and liberal construction..."

(Emphasis supplied)

13. *It appears to us that the view taken of the matter by the High Court does not acknowledge the essential distinction between what was a matter of form and what was one of substance. There was no other disentitling circumstance which would justify the refusal of the permission. Appellant did not have prior permission because it was withheld by the Revenue without any justification. The High Court took the view that after the period to which the adjustment related had expired no permission could at all be granted. A permission of this nature was a technical requirement and could be issued making it operative from the time it was applied for."*

In the case of commissioner of C.Ex., New Delhi v. Hari Chand Shri Gopal [2010 (260) E.L.T. 3 (SC)], the Hon'ble Supreme Court held as under:-

22. *The law is well settled that a person who claims exemption or concession has to establish that he is entitled to that exemption or concession. A provision providing for an exemption, concession or exception, as the case may be, has to be construed strictly with certain exceptions depending upon the settings on which the provision has been placed in the Statute and the object and purpose to be achieved. If exemption is available on complying with certain conditions, the conditions have to be complied with. The mandatory requirements of those conditions must be obeyed or fulfilled exactly, though at times, some latitude can be shown, if there is a failure to comply with some requirements which are directory in nature, the non-compliance of which would not affect the essence or substance of the notification granting exemption. In Novopan Indian Ltd. (supra), this Court held that a person, invoking an exception or exemption provisions, to relieve him of tax liability must establish clearly that he is covered by the said provisions and, in case of doubt or ambiguity, the benefit of it must go to the State. A Constitution Bench of this*

Court in Hansraj Gordhandas v. H.H. Dave - (1996) 2 SCR 253, held that such a notification has to be interpreted in the light of the words employed by it and not on any other basis. This was so held in the context of the principle that in a taxing statute, there is no room for any intendment, that regard must be had to the clear meaning of the words and that the matter should be governed wholly by the language of the notification, i.e., by the plain terms of the exemption.

23. *Of course, some of the provisions of an exemption notification may be directory in nature and some are of mandatory in nature. A distinction between provisions of statute which are of substantive character and were built in with certain specific objectives of policy, on the one hand, and those which are merely procedural and technical in their nature, on the other, must be kept clearly distinguished. In Tata Iron and Steel Co. Ltd. (supra), this Court held that the principles as regard construction of an exemption notification are no longer res integra; whereas the eligibility clause in relation to an exemption notification is given strict meaning wherefor the notification has to be interpreted in terms of its language, once an assessee satisfies the eligibility clause, the exemption clause therein may be construed literally. An eligibility criteria, therefore, deserves a strict construction, although construction of a condition thereof may be given a liberal meaning if the same is directory in nature.*

Doctrine of substantial compliance and 'intended use' :

24. *The doctrine of substantial compliance is a judicial invention, equitable in nature, designed to avoid hardship in cases where a party does all that can reasonably expected of it, but failed or faulted in some minor or inconsequent aspects which cannot be described as the "essence" or the "substance" of the requirements. Like the concept of "reasonableness", the acceptance or otherwise of a plea of "substantial compliance" depends upon the facts and circumstances of each case and the purpose and object to be achieved and the context of the prerequisites which are essential to achieve the object and purpose of the rule or the regulation. Such a defence cannot be pleaded if a clear statutory prerequisite which effectuates the object and the purpose of*

the statute has not been met. Certainly, it means that the Court should determine whether the statute has been followed sufficiently so as to carry out the intent for which the statute was enacted and not a mirror image type of strict compliance. Substantial compliance means "actual compliance in respect to the substance essential to every reasonable objective of the statute" and the court should determine whether the statute has been followed sufficiently so as to carry out the intent of the statute and accomplish the reasonable objectives for which it was passed. Fiscal statute generally seeks to preserve the need to comply strictly with regulatory requirements that are important, especially when a party seeks the benefits of an exemption clause that are important. Substantial compliance of an enactment is insisted, where mandatory and directory requirements are lumped together, for in such a case, if mandatory requirements are complied with, it will be proper to say that the enactment has been substantially complied with notwithstanding the non-compliance of directory requirements. In cases where substantial compliance has been found, there has been actual compliance with the statute, albeit procedurally faulty. The doctrine of substantial compliance seeks to preserve the need to comply strictly with the conditions or requirements that are important to invoke a tax or duty exemption and to forgive non-compliance for either unimportant and tangential requirements or requirements that are so confusingly or incorrectly written that an earnest effort at compliance should be accepted. The test for determining the applicability of the substantial compliance doctrine has been the subject of a myriad of cases and quite often, the critical question to be examined is whether the requirements relate to the "substance" or "essence" of the statute, if so, strict adherence to those requirements is a precondition to give effect to that doctrine. On the other hand, if the requirements are procedural or directory in that they are not of the "essence" of the thing to be done but are given with a view to the orderly conduct of business, they may be fulfilled by substantial, if not strict compliance. In other words, a mere attempted compliance may not be sufficient, but actual compliance of those factors which are considered as essential."

15. In view of the above discussions and the ratio of law as laid down by the Hon'ble Apex Court & referred to supra, it is our considered view that the Appellant has complied with the condition of the Notification. The fact that the affixed stickers are printed with indelible ink, the price originally printed on the footwear is blotted out, the chemical analyst's report indicates the ink made use of as scratch proof, the adhesive fixed the sticker permanently to the footwear & cannot be removed without impacting the substrate are enough to establish the fulfillment of the condition prescribed in the exemption Notification. Extending the Doctrine of Substantial Compliance, to the facts herein, the impugned benefit cannot be denied to the Appellants. Also there is no whisper of a suggestion to allege that the goods marked as 'Factory Seconds' were sold at premium prices or at a price higher than the mandatorily prescribed. The impugned order cannot be thus sustained. The Appeal filed by the Appellant is allowed.

(Order pronounced in the open court on 25 April 2023.)

Sd/
(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/
(RAJEEV TANDON)
MEMBER (TECHNICAL)