# IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
# EASTERN ZONAL BENCH : KOLKATA

REGIONAL BENCH - COURT NO.2

## Excise Appeal No.320 of 2010

(Arising out of Order-in-AppealNo.24/KOL-V/2010 dated25.02.2010 passed by Commissioner of Central Excise (Appeal-I), Kolkata.)

**Commissioner of Central Excise, Kolkata-V**
(180, Shantipally, Rajdanga Main Road, Kolkata-700107.)

**...Appellant**

*VERSUS*

**M/s. Bata India Limited**

**.....Respondent**

(Bata Nagar, 24 Parganas (South), West Bengal.)

**WITH**

## Excise Appeal No.352 of 2010

(Arising out of Order-in-Appeal No.24/KOL-V/2010 dated 25.02.2010 passed by Commissioner of Central Excise (Appeal-I), Kolkata.)

**M/s. Bata India Limited**
(Bata Nagar, 24 Parganas (South), West Bengal.)

**...Appellant**

*VERSUS*

**Commissioner of Central Excise, Kolkata-V**

**.....Respondent**

(180, Shantipally, Rajdanga Main Road, Kolkata-700107.)

**APPEARANCE**

Shri S.S.Chattopadhyay, Authorized Representative for the Appellant/Revenue
Shri J.P.Khaitan, Senior Advocate & Ms. Sanjukta Gupta, Advocate for the Respondent/Assessee

**CORAM:HON'BLE SHRI P.K.CHOUDHARY, MEMBER(JUDICIAL)**
**HON'BLE SHRI K. ANPAZHAKAN, MEMBER(TECHNICAL)**

## FINAL ORDER NO. 75247-75248/2023

DATE OF HEARING : 11 April 2023
DATE OF DECISION : 21 April 2023

**Per : K. ANPAZHAKAN :**

The brief facts of the case are that the appellant manufactured and removed footwear components for use within the factory and in their own factories at other places as well as for use by their job workers for manufacture of complete footwear. They did not make proper determination of assessable value of the said goods in terms of Section 4 of the Central Excise Act, 1944 read with Central Excise (Valuation) Rules, 1975 for the period of April'1996 to August' 1998. They determined the assessable value of footwear components on the basis of cost @ 6% to 10% of the prime cost which is much lower than that of prime cost @ 51% towards captive consumption in their own factory. The element of profit margin was considered between 0.02% to 0.9% instead of @ 2.9% for 1997-98. The administrative overhead and advertising expenses and interest were totally ignored. Thus they undervalued the footwear components cleared for consumption in other units and in the factories of job workers. A Show Cause notice was issued to the appellant proposing to recover Central Excise Duty amounting to Rs.14,91,576/- along with penalty under Sec.11AC and interest under Sec.11AB of the Central Excise Act, 1944 invoking extended period of limitation in terms of proviso to Section 11A ibid.

2. The Appellant submitted that there are various methods of costing principles and they relied on Labour Cost basis for determining the value of such overheads in their factory. The departmental calculation is not tenable on the ground that this calculation is not based on any system. Accordingly, they argued that the demand made in the Notice was not tenable. They also raised the issue of invocation of extended period as Central Excise returns were regularly filed by them, as well as audit teams were regularly visited their factory.

3. The Notice was adjudicated by the Adjudicating Authority, who held that there was no ground to uphold the demand and dropped the demand along with interest and penalty.

4. On Appeal, the Commissioner (Appeals) remanded the matter back to the Adjudicating authority, with certain observations. The observations made by the Commissioner ( Appeals ) and his Order is reproduced below:

> "7. I have carefully gone through the facts of the case and the submissions made by the rival sides. The moot point of the case to be decided is as to whether non inclusion of the cost of overheads in the costing of the goods covered under captive consumption within the meaning of Central Excise Law in force is correct or not. Perusal of records reveals that the respondent under valued the goods i.e. footwear components which they cleared for consumption in their other units and in the job workers premises by way of contravening the provisions of Valuation in terms of Section 4(1)(b) of the Central Excise Act, 1994 and under Rule 6(b)(ii) of the Central Excise (Valuation) Rules, 1975. Rule 6(b)(ii) of the Central Excise (Valuation) Rule states that the value should be cost of production + profit margin (if any). Thus, cost of production has to be determined taking into account all the cost starting from inputs to the manufacturing of the footwear components and the factory overheads should have been considered and apportioned uniformly for captive consumption in their own factory and for job workers. Notional profit is to be taken as a percentage of previous year's gross profit. I am of opinion that Costing for the purpose of captive consumption is not open to individual preferences and conveniences. Regarding the additional submission of the appellant at the time of Personal Hearing discussed at Para-6, I opine that the basis of profit element on components and the basis of calculation of labour costs etc. should be gone into by the adjudicating authority for correct quantification.
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> 8. Considering the above facts, I am of the opinion that the adjudicating authority in his order has not considered the merits of the case and facts on records. Therefore, I am in agreement with the

reviewing authority that the adjudicating authority has erred in deciding the present case and therefore I find no other option but to remand the matter back to the original adjudicating authority to issue a fresh order on the basis of facts and observations aforesaid

9. Accordingly, I set aside the Order in Original No.02/Addl./Commr./CE/Adjn/Kol-V/2009 dated 28.01.2009 issued by the Addl. Commissioner, Central Excise, Kolkata-V Commissionerate and remand the matter back to the original adjudicating authority for re-adjudication taking into account aforesaid facts & observations including contents of order in review after allowing the opportunity of Personal Hearing to the respondent."

5. The Appellant is before us against the Order-in-Appeal passed by the Ld.Commissioner(Appeals) on the ground that the Adjudicating Authority has dropped the demand on merit as well as on Limitation, in the Order dated 28/01/2009. The Department preferred appeal against the O-i-O under section 35 E (4) only on merits and dropping of the demand on the ground of Limitation by the adjudicating authority in the O-i-O has not been appealed by the department. The remand order by Commissioner (Appeals) would appear to accept the Department's case, in principle. Hence, they requested to set aside the O-i-A dated 25/02/2010.

6. The Revenue is also in Appeal before us against the Order-in-Appeal against the remanding the matter to the Ld.Adjudicating Authority for re-adjudication.

7. Heard both sides.

8. We find that the Ld.Adjujdicating authority has dropped the demand on merits as well as on the ground of limitation. The finding of the Ld.Adjudicating authority is reproduced below:-

"I therefore find that the allegations leveled by the department against the noticee are not based on solid arguments. When the noticee to free to adopt any mode of Cost Accounting policy for the purpose of valuation of the costs of overheads, there should have been more efforts from the point of view of the department to substantiate the

demand, but, I find that there is no sufficient cause/ground to uphold the instant demand and I am inclined to drop the charges. Since the basic issue fails, I do not find any justification to impose interest or penalty either. I also find that the department has failed to make sufficient room for invocation of the provisions laid down in the proviso to the Sec. 11A of the CE Act, 1944."

9. From the above it is clear that the Ld.Adjudicating authority clearly held that there is no ground for invocation of provisions to Section 11A of the Central Excise Act, 1944. Thus, we find that the demand has been dropped by the Ld.Adjudicating authority on merits as well as on the ground of limitation. The Appellant contended that the dropping of demand on the ground of limitation has not been challenged by the Department before the Ld.Commissioner(Appeals). Hence, the order of the Ld.Adjudicating authority dropping the demand on the ground of limitation still survives. We find that the Department has not filed Appealed against dropping of the demand by the adjudicating authority on the ground of Limitation. But, we find that vide the O-i-A dated 25/02/2010, the Ld Commissioner Appeals had set aside the O-i-O dated 28/01/2009. Hence, the O-i-O dated 28/01/2009 is not available today. Hence, this ground raised by the Appellant cannot be considered. But, we take Note of the fact that the O-i-O has dropped the demand on the ground of Limitation which was not challenged by the Department while arriving at a decision in this case on merits.

10. In the Order-in-Appeal, the Ld.Commissiner(Appeals) has made some observations regarding costing of the final product and remanded the matter back to the Ld.Adjudicating authority and the Revenue has appealed against the Order-in-Appeal only on this ground of remanding to the matter back to the Ld.Adjudicating authority. We find that the Adjudicating Authority has not taken any decision based on the direction of the Commissioner ( Appeals ), since Department's Appeal is pending before us. As the Appellant is also before us against the O-i-A and the issue is pending for a long period, we take up both the Appeals together to decide the Appeals on merit.

11. During the time of hearing, the Appellant stated that the Department has raised the demand in the Notice on the ground of non inclusion of overhead charges in the costing of the goods cleared for captive consumption as well as to other job workers. . He stated that while arriving at the cost of the product, the Department has taken the 'prime cost' and added 51.6% of the prime cost as 'overhead charges' without any basis. The Appellant stated that the prime cost which primarily include the raw material cost will vary depending upon the raw material used. For example, the cost cannot be same for the raw material leather and rexine. Hence, he stated that it is not the right method of calculation of costing of the product. He stated that they have adopted 'wages' as the factor to work out of the overhead charges, which is more stable. They have uniformly adopted 1347% of the wages as the overhead charges to arrive at the cost of the final product. He stated that if this method is adopted, then there is no under-valuation and consequently, there is no demand also.

12. We find merit in the argument of the Appellant. The cost of raw material vary depending upon the raw material used and hence a variable item like 'raw material' cannot be the basis for working out the 'overhead charges'. The Appellant arrived at the 'overhead charges' as a percentage of 'wages' which appears to be more appropriate than adopting raw material cost, to arrive at the 'overhead charges'. We find that the Appellant has already paid duty on the basis of the cost arrived at based on the method cited above. Thus, we find that there is no under-valuation in the costing of the product adopted by the Appellant. Accordingly, we hold that the demand does not survive. As the demand is not sustainable, the demand of interest and penalty also not sustainable.

13. We find that the Appellant has also raised the issue of Limitation and argued that the demand is not sustainable on the ground of Limitation. They contended that invocation of extended period is not sustainable in this case as they were regularly filing Central Excise returns and disclosed all the information to the Department in the

Returns. Also audit teams have regularly visited their factory and conducted Audit of their accounts. As they have not suppressed any information from the Department, the demand made in the Notice by invoking extended period under proviso to Section 11A is not sustainable. We find merit in the argument of the Appellant. However, since we have already held that on merit itself the demand is not sustainable, we are not going into the issue of Limitation further.

14. In view of the above discussion, we set aside the Order-in-Appeal dated 25/02/2010, passed by the Commissioner ( Appeals ) and allow the Appeal filed by the Appellant. The Appeal filed by the Department is rejected.

(Order pronounced in the open court on 21 April 2023.)

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

Sd/
**(K. ANPAZHAKAN)**
**MEMBER (TECHNICAL)**

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