CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT AHMEDABAD

REGIONAL BENCH – COURT NO. 03

EXCISE Appeal No. 11069 of 2017-DB

[Arising out of OIO-SIL-EXCUS-000-COM-072-16-17 dated 24/01/2017 passed by Commissioner of Central Excise, Customs and Service Tax-SILVASA]

C.C.E & S.T.-Silvasa .....**Appellant**
Commissioner Central Excise,
Customs & Service Tax,
Silvassa, 4th floor,
Adarsh Dham Building,
Vapi Daman Road Vapi
Opp. Old Town Police Station
VAPI, Gujarat

VERSUS

Sterling Generators Pvt Ltd .....**Respondent**
Survey No:59, 343/1,Khadoli Road,
Village-Kala & Kherdi, Khanvel,
SILVASSA,
GUJARAT

APPEARANCE:
Shri P K Rameshwaram, Commissioner (Authorized Representative) for the Appellant
Shri. Anand Nainawati, Advocate for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU

FINAL ORDER NO. A / 12623 /2023

DATE OF HEARING:13.09.2023
DATE OF DECISION:16.11.2023

RAMESH NAIR

Revenue is in appeal against Order-in-Original No. SIL-EXCUS-000-COM-072-16-17 dtd. 24.01.2017 passed by the Commissioner of Central Excise & Service tax, Silvassa.

1.2 The brief facts of the case are that the respondent, M/s. Sterling Generators Pvt. Ltd. DTA Unit (in short "M/s SGPL-DTA") are inter alia engaged in the manufacture of diesel generator sets and parts thereof. During the course of EA-2000 Audit of the records of M/s Sterling & Wilson Powergen Pvt. Ltd. (M/s SWPPL)

1.3 it was noticed by the department that M/s SWPPL was purchasing goods from the respondent and both the companies were under the same management. Thereafter, department conducted detailed investigation against the respondent which revealed that apart from M/s SWPPL, there were also other sister concerns viz., Sterling & Wilson Energy Systems Pvt. Ltd. (M/s SWESPL); (ii) M/s. Sterling & Wilson Pvt. Ltd. (M/s. SWPL) and M/s Sterling & Wilson Co-Gen Solutions Pvt. Ltd. (M/s SWCGSPL). The share-holding pattern in SGPL, SWPPL, SWPL, SWPPL and SWESPL was as under:

Name of the Shareholder	SWPL	SWPPL	SWESPL	SGPL	SWCGSPL
M/s Shapoorji Pallonji and Company Pvt. Ltd.	65.77%	56%	--	56%	51%
Mr. Khurshed Y. Daruvala	33.33%	40%	50%	17%	24.5%
Mrs. Kainaz K. Daruvala	--	04%	49.80%	27%	24.4%
Others	0.90%	-	0.20%		01.

1.4 It was alleged that, it is clear that all the above firms are under the control of the same management. Thus, they were covered within the meaning of Section 4(3) of Central Excise Act 1944 as 'related person'. Hence, the provisions of Section 4(1)(b) read with section 4(3) of the Act read with Rule 5 and 9 of Central Excise valuation (Determination of Price of Excisable goods) 2000 (hereinafter referred to as 'Valuation Rules') would be applicable in this case. On scrutiny of the records it was noticed by the department that, seller i.e respondent and buyers are related persons and the price is not sole consideration for sale. All these companies are interconnected undertakings owned and controlled by the same persons, as well as by the same group of management. They are also related person as per Section 4(3)(b)(i) and (iv) of the Central Excise Act, 1944. Therefore, the clearances of the goods i.e. DG sets etc. to their interconnected undertakings M/s SWPPL, M/s SWESPL, M/s SWPL and M/s SWCGSPL could not be considered as sale to independent buyers. As a consequence, it was noticed that the valuation of excisable goods manufactured by the respondent and cleared to their sister concerns were to be arrived on the basis of the value of such goods at which the goods are, in turn, sold by them to buyer not being a related person as per Rule 9 and 10 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules,

2000. Accordingly, show cause notice dtd. 05.05.2016 was issued to M/s SGPL-DTA (Respondent) as well as to the EOU unit of M/s SGPL (M/s SGPL – EOU) proposing demand of differential Central Excise duty amounting to Rs. 12,96,25,493/- on finished goods sold by M/s SGPL –DTA unit to 4 buyers (SWPPL, SWESPL, SWCGSPL and SWPL) during the period 2011 to October 2014. The show cause notice also proposed to demand differential Central Excise Duty of Rs.1,18,38,887/- on finished goods sold by SGPL-EOU unit to the said 4 units during the period June 2011 to October 2015. The show cause notice dtd. 05.05.2016 also proposed to impose penalty. In Adjudication, Ld. Commissioner vide impugned order dropped the proceedings initiated by the show cause notice. Aggrieved of the same, revenue filed the present appeal.

2. Shri P.K. Rameshwaram, learned Commissioner (Authorized Representative) appearing on behalf of the Revenue reiterating the grounds of appeal and submits that Ld. Commissioner has ignored the provisions contained in sub-clauses (ii), (iii) and (iv) of Section 4(3)(b) of the Central Excise Act, 1944. From the reading of the said provisions , it is amply clear that the term 'related person' therein not only refer to a relationship of the nature of holding –subsidiary relationship as erroneously arrived at by the adjudicating authority, but also to a relationship wherein they are relatives within the meaning of Section 4 (3)(b)(ii) of the Act; and or associated in such a way that they have interest, directly or indirectly in the business of each other in terms of Section 4(3)(b)(iv) of the Act. Therefore, the conclusion arrived at by the adjudicating authority completely ignores the provisions contained in sub-clauses (ii),(iii) & (iv) of clause (b) to Section 4(3) of the Act, and hence erroneous.

2.1 He also submits that in the present matter respondent themselves have admitted that the final products sold by the them to M/s SWPPL and M/s SWPL are consumed by them in the execution of project and not cleared as such for further sales; and they avail duty credit to discharge service tax liability to works contracts on such projects. Therefore from the said admission, it is very clear that even though they may not be selling the excisable goods to their customers/ unrelated buyers, however admittedly these goods are being sold to such customers as part of the works contract services being provided by M/s. SWPPL and M/s. SWPL. In case of works contract services, there is both supply /sales/ transfer of property in goods as well as, provision of services to the customers; and what is leviable to Service Tax under the Finance Act, 1994 is only the service portion involved therein, whereas, supply/sales/

transfer of property in goods are deemed to be sales of goods. Therefore, it would not be correct to state that in works contracts there is no sales involved. Further, only in the cases where the excisable goods are not sold by the respondent but are used for consumption by him or on his behalf in the production or manufacturer of other articles, Rule 8 would come into play. In the present case, since admittedly both M/s SWPPL and M/s SWPL are not engaged in either in production or manufacture, but are only engaged in the provision of works contract service and uses the excisable goods in such Turnkey project, Rule 8 would definitely not come into play. Hence, the invocation of the provisions of Rule 9 and 10 the valuation Rules by the department as per the show –cause notice is correct, whereas the conclusion arrived by the adjudicating authority that Rule 8 is applicable in this case is incorrect and erroneous.

2.2. He further submits that the investigation have clearly brought on records the evidence, as alleged in the show cause notice that the directors, who are relatives of one another of the respondent company and shareholder are common, hence mutuality of interest between buyer and seller companies is absolute and established. Type or degree of interest in transactions is not necessarily to be brought-out once persons found to be related. The distinct legal nature of companies cannot be used as an eyewash to portray its independent nature, even while preponderance of evidence suggesting they are related. The selling of good by the respondent to these related person and interconnected undertakings are influenced by their relationship in the benefit of both the manufactures and such buyers. Both the entities are definitely "related person" in the eyes of excise law. In such circumstances, the corporate veil has to be lifted since the subject goods has not been sold by the respondent but have been arranged in such a manner that it could not be considered as sales on 'principal to principal' and as consequence, valuation has to be resorted to at the value of the goods at which the goods are sold to a buyer not being a related person as per Rule 10 read-with Rule 9 of Valuation Rules.

2.3. He also argued that the adjudicating authority vide her findings recorded in the impugned order held that it cannot be said that the assessee and any of the aforesaid four entities are interested in the business of each other even though the shareholders are common. However applying the ratio of decision of Hon'ble supreme court decision in the case of Commissioner of Central Excise, Mumbai Vs. J. Foundation reported at 2015(0324) ELT 0422

(SC) to the facts of the present case, it is clearly brought on record that in the case of respondent i.e M/s SGPL M/s Shapporji Pallonji and Company Pvt. Ltd. holds 56% of shares constituting one group, while the remaining shares constituting 44% is held by Shri Khurshed Y. Daruvala and his wife Mrs. Kainaz K. Daruwala constituting another group. In rest of the 4 firms to whom the respondent have cleared the excisable goods, except in the case of M/s SWESPL held by only Daruwala Group, it is held by the same group of persons, i.e M/s SPCPL and Daruwala (either individually or Jointly). In view of the above, it is clear that apart from the being relatives in terms of sub-clause(ii) of Section 4(3)(b), there also exists mutuality of interest between these parties in terms of sub-clause (iv) of Section 4(3)(b) of the Act. Therefore, the adjudicating authority has erred in dropping the proposal contained in the show cause notice. He also placed reliance on the decisions of Collector of Central Excise, Ahmedabad Vs. I.T.E.C(P) Ltd. – 2002(145)ELT 280 (SC).

3. Shri Anand Nainawati, Learned Advocate appearing on behalf of the respondent supported the order of the Commissioner and submits that show cause notice alleges that the Respondent and the 4 buyers are related in terms of sub-clauses (i) and (iv) of Section 4(3)(b) of the Central Excise Act, 1944. Since it is not in dispute by the Respondent that the Respondent and 4 buyers are related in terms of sub-clause (i) of Section 4(3)(b) of the Central Excise Act, 1944 as interconnected undertaking, the Ld. Commissioner in the order has rightly examined whether the Respondent and the 4 buyers are related in terms of sub-clause (iv) of Section 4(3)(b). It would be beyond the scope of show cause notice for the department to contend that the Respondent and the 4 buyers are related in terms of sub-clause (ii) or (iii) of Section 4(3)(b) in as much as the same is never alleged in the show cause notice. It is settled law that the department cannot travel beyond the scope of the show cause notice. He placed reliance on the following decisions:

(i) CCE, Nagpur Vs. Ballarpur Industries Ltd. – 2007(215) ELT 489(SC)
(ii) CC, Customs Vs. Toyo Engineering India Ltd. – 2006(201) ELT 513 (SC)

3.1 Without prejudice, he also submits that respondent are not related to the 4 buyers in terms of sub-clauses (ii) or (iii) of Section 4(3)(b) of the Central Excise Act, 1944. The respondent and the buyers are not related person under clause (ii) of Section 4(3)(b) since the concept of "relatives" has no application to impersonal bodies like body corporate. He placed reliance on the decision UOI Vs. Hind Lamps -1977(1)ELT J1 (SC) , affirmed by the Supreme Court – 1989(43)ELT 161 (SC)

3.2 He further submits that respondent and the buyers are also not covered by sub-clause (iii) of Section 4(3)(b) of the Act. In terms of clause (iii) of Section 4(3)(b), a person shall be deemed to be related if amongst them the buyer is a relative and a distributor of the assessee or sub-distributor of such distributor. Only natural person can be treated as "relatives" , since the first condition itself of sub-clause (iii) is not satisfied, the buyers and the respondent cannot be considered as related under sub-clause (iii) of Section 4(3)(b). In any case, the respondent and the 4 buyers are not holding or subsidiary companies of each other. Therefore, the second condition of such –clause (iii) is also not fulfilled in the present case. Ld. Commissioner has not erred in examining the relationship of the respondent and the buyer under sub-clause (iv) of Section 4(3)(b) of the Central Excise Act, 1944.

3.3 He also submits that with respect to the goods cleared to SWPL and SWPPL, the Ld. Commissioner has rightly set aside the demand on the ground that provision of Rule 9 and 10 of the Valuation Rules, 2000 are not applicable. Ld. Commissioner in order has rightly held that since the goods are not sold further by SWPL and SWPPL but consumed in providing works contract services, the provisions of Rule 9 and Rule 10 of the valuation Rules cannot be invoked to demand differential duty. Rule 9 read with Rule 10, provide for payment of duty on the value at which the goods are sold further by related person to unrelated/ independent buyer whereas in the case of SWPL and SWPPL, there is no further sale.

3.4. He further submits that, assuming without admitting the respondent and SWPL and SWPPL are treated as related person in terms of sub-clauses (i) as well as (iv) of section 4(3)(b) of the Act, the duty liability in respect of goods cleared to SWPL and SWPPL cannot be quantified in terms of Rule 9 and 10 of the Valuation Rules, since the further sale price to independent buyer cannot be available in the case of SWPL and SWPPL. The Ld. Commissioner has rightly dropped the demand on the ground that Rule 9 read with Rule 10 of the valuation Rules cannot be applied in such a case for demanding differential duty.

3.5. He also argued that with respect to the goods cleared to SWPL and SWPPL, the Ld. Commissioner at para 4.7.2 of the Order-In-Original has also dropped the demand on the ground that the same is a revenue neutral situation since SWPL and SWPPL are using the purchased goods in providing taxable services and would be eligible for credit of duty paid by the Respondent.

3.6 He also submits that there is no mutuality of interest between the respondent and the 4 buyers. The respondent and the 4 buyers are not related in terms of sub-clause (iv) of Section 4(3)(b) of the Central Excise Act. He placed reliance on the following decisions.

(i) UOI Vs. Atic Industries – 1984 (17) ELT 323(SC)

(ii) UOI Vs. Hind Lamps – 1989(41) ELT 161(SC)

(iii) Marc Pharmaceuticals Vs. CCE – 2005 (183) ELT 145(T)

(iv) CCE Vs. Goodyear South Asia Tyres Pvt. Ltd. – 2015(322) ELT 389 (SC)

(v) CCE Vs. Dynamic Electronics Ltd. – 2005(191) ELT 285 (T)]

(vi) Alembic Glass Industries Ltd. Vs. CCE – 2002 (143) ELT 244 (SC)

3.7 He further argued that in the present case there is no evidence produced by the revenue to allege any price suppression by the respondent on the goods cleared to the alleged 4 related person. Even if the respondent and the aforesaid 4 buyers entities are considered as related person in law, it has to be shown that there is an arrangement between them to evade tax and where no such arrangement is found the sale price cannot be rejected. He placed reliance on the decisions in the case of CCE Vs. Detergents India Ltd. and Anr-2015(318) ELT 559(SC).

3.8 He also submits that the price charged for the final products sold to the 4 buyers was on a principal-to –principal basis and extra –commercial reasons were not involved while arriving at the sale price. The price charged from the 4 buyers is not influenced by any relationship and therefore the price charged to them should be treated as transaction value. He placed reliance on the following decisions:

(i) CCE Vs. Beacon Neyrpic Ltd. -2006(193) ELT 16(SC)

(ii)Philips (I) Ltd. Vs. CCE -2006-TIOL-359-CESTAT-MUM

(iii) Aquamall Water Solutions Ltd. Vs. CCE – 2003(153) ELT 428(T)

(iv) Xerographers Ltd. Vs. CCE- 1999(108) ELT 372(T)

(v) Rallis India Ltd. Vs. CCE – 2000(118) ELT 780 (T)

3.9 In addition to above, he further submits that the Revenue has challenged the Order-In-Original on limited grounds. In fact, the revenue has not claimed that the entire Order-In-Original is bad in law. Demand dropped by the Ld. Commissioner on the grounds, other than the grounds specifically challenged in the appeal of the revenue, has attained finality. The Order-In-Original has not been challenged to such extent and the relief arising therefrom to the Respondent cannot be denied by the revenue. It would be beyond the scope of the revenue's appeals to entertain any plea on other grounds raised in the revenue's appeal, where relief has been granted by the Order-In-Original to the respondent. It is settled legal position that when relief is granted on two independent grounds and revenue chooses to file appeal only on one ground, the said appeal is liable to be dismissed on the ground which is not challenged by the Revenue. He placed reliance on the following decisions:

(i) CCE Vs. Hindustan Trust Ltd. – 1998(97) ELT 361(T)
(ii) CCE Vs. Indofil Chemical Co.- 2001(45) RLT 1068(T)
(iii) CCE Vs. Mahindra & Mahindra Ltd. – 2001 (43) RLT 514(T)
(iv) Saharia Krishi Van Prathistha Vs. CCE – 2003(58) RLT 308(T)
(v) CCE Vs. Spade Elektro (P) Ltd. – 2004 (175) ELT 319(T)

3.10 Without prejudice he also submits that the demand for the period prior to 01.12.2013 is not sustainable as the provisions of Rule 9 and 10 of the valuation Rules, as they existed prior to 01.12.2013 are not applicable when a part of the goods manufactured by the respondent are admittedly cleared to independent buyers as well as the entire production is not sold to alleged related person.

3.11 He also argued that the demand beyond the normal period of limitation is not maintainable. The Ld. Commissioner has rightly held that extended period of limitation is not invokable in view of audit and inquiry conducted against the respondent on the same issue in 2009.

3.12 He further submits that Ld. Commissioner rightly dropped the proposal of demand of excise duty of Rs. 1,18,39,887/- against the EOU unit of SGPL on the ground that the same *ab inito void* and not permissible in law as the said demand was required to be determined or raised under the provisions of Customs Act, 1962. The demand against the EOU unit of SGPL has been rightly set aside. The same is not challenged by the revenue. The appeal of the revenue is restricted to the demands against the DTA unit as the DTA unit alone has been made respondent in the Revenue's appeal.

4. Heard both the sides and perused the record of the case. We find that the allegation of Revenue is that respondent and alleged buyers of the goods are related persons in terms of Section 4(3)(b) of the Central Excise Act. The Revenue has relied on the various provisions in the bye-laws of the said assessee's and organizational structure of the buyers to hold that they are inter-connected undertakings. The question which needs to be answered is that the seller and buyer being inter-connected undertakings is sufficient to hold them as related parties. In this regard, Section 4(3)(b) of the Central Excise Act,1944 needs to be read which is as under:-

> *"4(3)(b) persons shall be deemed to be "related" if -*
>
> *(i) they are inter-connected undertakings;*
>
> *(ii) they are relatives;*
>
> *(iii) amongst them the buyer is a relative and a distributor of the assessee, or a sub-distributor of such distributor; or*
>
> *(iv) they are so associated that they have interest, directly or indirectly, in the business of each other.*
>
> *Explanation. - In this clause -*
>
> *(i) "inter-connected undertakings" shall have the meaning assigned to it in the clause (g) of section 2 of the Monopolies and Restrictive Trade Practices Act, 1969 (64 of 1969); and*
>
> *(ii) "relative" shall have the meaning assigned to it in clause (41) of section 2 of the Companies Act, 1956 (1 of 1956);"*

4.1 The issue regarding inter-connected undertaking has also been clarified by the Circular of C.B.E. & C. No. MF/DR/F/354/81/2020-TRU, dated 30-6-2000 as under:-

> *"23. Where goods are sold through related persons, the transaction value is not applicable. However, there is some change in the definition of 'related persons' vis-a-vis the old definition. It includes "inter-connected undertakings" as defined in the Monopolies and Restrictive Trade Practices Act, 1969. The definition of inter-connected undertaking in the said Act reads as follows :*

"Inter-connected undertakings" means two or more undertakings which are inter-connected with each other in any of the following manner, namely :-

(i) if one owns or controls the other,

(ii) where the undertakings are owned by firm, if such firms have one or more common partners,

(iii) where the undertakings are owned by bodies corporate, -

(a) if one body corporate manages the other body corporate, or

(b) if one body corporate is a subsidiary of the other body corporate, or

(c) if the bodies corporate are under the same management, or

(d) if one body corporate exercises control over the other body corporate in any other manner;

(iv) Where one undertaking is owned by a body corporate and the other is owned by a firm, if one or more partners of the firm, -

(a) hold, directly or indirectly, not less than fifty per cent of the shares, whether preference or equity, of the body corporate, or

(b) exercise control, directly or indirectly, whether as director or otherwise, over the body corporate,

(v) if one is owned by a body corporate and the other is owned by firm having bodies corporate as its partners, if such bodies corporate are under the same management,

(vi) if the undertakings are owned or controlled by the same person or (by the same group),

(vii) if one is connected with the other either directly or through any number of undertakings which are inter-connected undertakings within the meaning of one or more foregoing sub-clauses.

Explanation I. - For the purpose of this Act, (two bodies corporate,) shall be deemed to be under the same management, -

(i) if one such body corporate exercises control over the other or both are under the control of the same group or any of the constituents of the same group; or

(ii) if the managing director or manager of one such body corporate is the managing director or manager of the other; or

(iii) if one such body corporate holds not less than (one fourth) of the equity shares in the other or controls the composition of not less than (one fourth) of the total membership of the Board of Directors of the other; or

(iv) if one or more directors of one such body corporate constitute, or at any time within a period of six months immediately preceding the day when the question arises as to whether such bodies corporate are under the same management, constituted (whether independently or together with relatives of such directors or the employees of the first mentioned body corporate) one-fourth of the directors of the other; or

(v) if the same individual or individuals belonging to a group, while holding (whether by themselves or together with their relatives) not less than (one-fourth) of the equity shares in one such body corporate also hold (whether by themselves or together with their relatives) not less than (one-fourth) of the equity shares in the other; or

(vi) if the (same body corporate or bodies corporate belonging to a group, holding, whether independently or along with its or their subsidiary or subsidiaries, not less than one-fourth of the equity shares) on one body corporate, also hold not less than (one-fourth) of the equity shares in the other; or

(vii) if not less than (one-fourth) of the total voting power (in relation to) each of the two bodies corporate is exercised or controlled by the same individual (whether independently or together with his relatives) or the same body corporate (whether independently or together with its subsidiaries);

(viii) if not less than (one-fourth) of the total voting power (in relation to) each of the two bodies corporate is exercised or controlled by the same individuals belonging to a group or by the same bodies corporate belonging to a group, or jointly by such individual or individuals and one or more of such bodies corporate; or

(ix) if the directors of the one such body corporate are accustomed to act in accordance with the directions or instructions of one or more of the directors of the other, or if the directors of both the bodies corporate are accustomed to act in accordance with the directions or instructions of an individual, whether belonging to a group or not.

Explanation II. - If a group exercises control over a body corporate, that body corporate and every other body corporate, which is a constituent of or controlled by, the group shall be deemed to be under the same management.

Explanation III. - If two or more bodies corporate under the same management hold, in the aggregate, not less than (one-fourth) equity share in any other body corporate, such other body corporate shall be deemed to be under the same management as the first mentioned bodies corporate.

Explanation IV. - In determining whether or not two or more bodies corporate are under the same management, the shares held by (financial institutions) in such bodies corporate shall not be taken into account.

Illustration

Undertaking N is inter-connected with undertaking A and undertaking C is inter-connected with undertaking B. Undertaking C is inter-connected with undertaking A; if undertaking D is inter-connected with undertaking C, undertaking D will be inter-connected with undertaking B and consequently with undertaking A; and so on.

24. Thus the term inter-connected undertakings covers large categories of legal entities/undertakings to whom goods are sold by the assessees which may be held as "related person" under the new definition. It may be noted that under the erstwhile provisions under Section 4, except for the specifically named categories, namely, holding company, subsidiary company, a relative and a distributor of the assessee and any sub-distributor of such distributor, buyer was held to be related to selling assessee only if they were so associated that they have interest directly or indirectly in the business of each other. In contrast no such general condition/restriction applies for inter-connected undertakings to be "related" under new Section 4. However, a provision has been made in the new valuation rules that even if the assessee and the buyer are inter-connected undertakings, the transaction value will be "rejected" only when they are "related" in the sense of any of Clauses (ii), (iii) or (iv) of sub-section 4(3)(b) or the buyer is a holding company or a subsidiary company of the assessee. In other words, while dealing with *transactions between inter-connected undertakings, if the relationship as described in Clauses (ii), (iii) or (iv) does not exist and the buyer is also not a holding company or a subsidiary company, then for assessment purposes, they will not be considered related. "Transaction value" could then form the basis of valuation provided other two conditions, namely, price is for delivery at the time and place of removal and the price is the sole consideration for sale are satisfied. If any of the two aforesaid conditions are not satisfied then, quite obviously, value in such cases will be determined under the relevant rule.*

25. In essence, notwithstanding the change in definition of "related" person in the new Section 4, for practical applications, its scope has been restricted and but for small variation it would not be much different from that covered under the old Section 4 definition. The Commissioners may, however, examine carefully whether any other situation described in the definition of inter-connected undertakings need to be excluded for satisfying the qualification of mutuality of interest. The actual revenue potential in such situations may be estimated and a report sent in due course."

4.2 From the above cited provisions and the clarification, it is clear that only if the parties are related in terms of Clause (ii), (iii), (iv) of Section 4(3)(b) of Central Excise Act, they would be treated as related persons. In the present matter we find that show cause notice alleges that the Respondent and buyers are related in terms of sub-clause (i) and (iv) of Section 4(3)(b) of the Central Excise Act, 1944. Before we proceed to examine whether valuation needs to be arrived under the valuation Rules as proposed in the show cause notices, it would be appropriate to go thru the relevant rules which are given herein below for ease of reference:

"*RULE 8. (w.e.f. 01.12.2013) - Where whole or part of the excisable goods are not sold by the assessee but are used for consumption by him or on his behalf in the production or manufacture of other articles, the value of such goods that are consumed shall be one hundred and ten per cent of the cost of production or manufacture of such goods.*

RULE 8. (as existing upto 01.12.2013) - Where the excisable goods are not sold by the assessee but are used for consumption by him or on his behalf in the production or manufacture of other articles, the value of such goods that are consumed shall be one hundred and ten per cent of the cost of production or manufacture of such goods.

RULE 9.- (w.e.f. 01.12.2013)- Where whole or part of the excisable goods are sold by the assessee to or through a person who is related in the manner specified in any of the sub-clauses (ii), (iii) or (iv) of clause (b) of sub-section (3) of section 4 of the Act, the value of such goods shall be the normal transaction value] at which these are sold by the related person at the time of removal, to buyers (not being related person); or where such goods are not sold to such buyers, to buyers (being related person), who sells such goods in retail :

Provided that in a case where the related person does not sell the goods but uses or consumes such goods in the production or manufacture of articles, the value shall be determined in the manner specified in rule 8.

RULE 9.- (as existing upto 01.12.2013)- Where the excisable goods are sold by the assessee to or through a person who is related in the manner specified in any of the sub-clauses (ii), (iii) or (iv) of clause (b) of sub-section (3) of section 4 of the Act, the value of such goods shall be the normal transaction value] at which these are sold by the related person at the time of removal, to buyers (not being related person); or where such goods are not sold to such buyers, to buyers (being related person), who sells such goods in retail :

Provided that in a case where the related person does not sell the goods but uses or consumes such goods in the production or manufacture of articles, the value shall be determined in the manner specified in rule 8.

RULE 10. (w.e.f. 01.12.2013)-Where whole or part of the excisable goods are sold by the assessee to or through an inter-connected undertaking, the value of such goods shall be determined in the following manner, namely :-

(a) If the undertakings are so connected that they are also related in terms of sub-clause (ii) or (iii) or (iv) of clause (b) of sub-section (3) of section 4 of the Act or the buyer is a holding company or subsidiary company of the assessee, then the value shall be determined in the manner prescribed in rule 9. Explanation. - In this clause "holding company" and "subsidiary company" shall have the same meanings as in the Companies Act, 1956 (1 of 1956).

(b) in any other case, the value shall be determined as if they are not related persons for the purpose of sub-section (1) of section 4.

RULE 10. (as existing upto 01.12.2013)-Where the excisable goods are sold by the assessee to or through an inter-connected undertaking, the value of such goods shall be determined in the following manner, namely :-

(a) If the undertakings are so connected that they are also related in terms of sub-clause (ii) or (iii) or (iv) of clause (b) of sub-section (3) of section 4 of the Act or the buyer is a holding company or subsidiary company of the assessee, then the value shall be determined in the manner prescribed in rule 9. Explanation. - In this clause "holding company" and "subsidiary company" shall have the same meanings as in the Companies Act, 1956 (1 of 1956).

(b) in any other case, the value shall be determined as if they are not related persons for the purpose of sub-section (1) of section 4."

4.3. In the present matter it is not disputed by the respondent that the respondent and other buyers are related in terms of sub-clause (i) of Section 4(3)(b) of the Central Excise Act 1944 as interconnect undertaking and impugned show cause notice only rely the clauses (i) and (iv) of the Section 4(3)(b) of the Central Excise Act, 1944, therefore the Ld. Commissioner in impugned order –in-original has correctly examined whether the Respondent and other buyers are related in terms of sub-clause (iv) of Section 4(3)(b). In the present matter it is rightly pointed out by the Ld. counsel that the argument of the revenue that the respondent and other buyers are related in terms of sub-clause (ii) or (iii) of Section 4(3)(b) would be beyond the scope of show cause notice inasmuch as the same is never alleged in the show cause notice. Hence, the same is also not acceptable at this stage. It is admitted that in the SCN the allegation of being related person was made by resorting the provision of Section 4(3)(b) (i) and (iv). The Adjudicating Authority has rightly examined that whether the appellant and their buyers are related or otherwise, in terms of Sub-Clause (i) & (iv) of Section 4(3)(b) of Central Excise Act, 1944, and dropped the proceedings. The revenue in their grounds of appeal enhanced the scope by contending that the appellants are also related in terms of Sub-Clause (ii) & (iii) of Section 4 (3)(b). It is a settled law in the grounds of appeal, ground cannot be made on the provision which was not invoked in the SCN. In the facts of the present case, the relationship is based on the fact that when Sub-Clause (ii) and (iii) were not invoked, the facts related thereto were also neither required to be examined nor the Adjudicating Authority has rightly examined. Therefore, by making ground of Sub-Clause (ii) & (iii) holding the appellant and their buyer are related person is completely beyond the SCN as well as the impugned order, which is not permissible. In this regard, we take support from the following judgments:

4.4 The Hon’ble Supreme Court in the case of CC Nagpur Vs. Ballarpur Industries Ltd-2007 (215) ELT 489 (SC), has held that the SCN is the foundation in the matter of levy and recovery of duty, penalty and interest.

4.5 In the case of C.C, Customs Vs. Toyo Engineering India Ltd-2006 (201) ELT 513 (SC), the Hon’ble Supreme Court has held that the ground did not find in the SCN, the department cannot travel beyond SCN.

4.6 Therefore, since the revenue’s appeal is based on alleged relationship in terms of Sub-Clause (ii) (iii) of Section 4 (3)(b), the same cannot be sustained only on this settled legal position by the Apex Court.

4.7 Without prejudice to the above, even if it is considered that the relationship is under Clause (ii), (iii) or (iv), we find that from the plain reading of the above provisions it appears that interconnected undertakings are also related person. However, as per Rule 9 and 10 of Central Excise Valuation Rules, 2000 it is clear that Rules shall apply only when the goods are sold through person who are related in terms of sub-clause (ii), (iii) or (iv) of clause (b) of Section 4 (3) of the Act. Further the provisions of Rules also suggest that merely because buyer is interconnected undertaking that alone is not sufficient for holding as related person. We find that the show cause notice and revenue have not brought any material to establish that the relationship between respondent and buyers company are one of the relationship as prescribed under sub-clause (ii), (iii) or (iv) of Section 4(3)(b) of Central Excise Act therefore, in our considered view even if it is accepted that the buyers company are interconnected undertaking of the respondent company it cannot be treated as related person in terms of Section 4(3)(b) in absence of relationship as specified under sub-clause (ii), (iii) or (iv) of Section 4(3)(b). Even if it is examined that whether the respondent and buyers are related in terms of Sub-Clause (ii) and (iii), we find that Clause (ii) under any circumstances cannot be invoked as it is applicable only for the natural persons and not for artificial persons like carporater, but in the present case, the respondent and the buyers being a corporate bodies they are not related in terms of Clause (ii). This has been held in the case of M/s. Union of India Vs. Hind Lamps Limited- 1977 (1) ELT J1 (All), which has been upheld by the Hon'ble (S.C) as reported under 1989 (43) ELT 161 (S.C). This is for the reason that relative shall have the meaning assigned to it in Clause 41 of Section 2 of Companies Act ,1956 as per the explanation to Section (4)(3) of the Central Excise Act, 1944 during the relevant period. The meaning of word related under Clause 41 of Section 2 of the Companies Act, 1956 covers only natural persons and artificial persons like companies cannot be relative amongst themselves. Consequently, the buyers who are all companies cannot be treated as relatives for the purpose of sub clause (ii) of Section 4 (3)(b) of Central Excise Act, 1944.

4.8 We also find that the respondents and the buyers are also not covered by Sub-Clause (iii) of Section 4 (3)(b) of Central Excise Act 1944. In terms of Sub-Clause (iii) of Section 4(3)(b) a person shall be deemed to be related if amongst them the buyer is a relative and distributor of the assessee or distributor of such distributor. As discussed above, only natural person can be treated as relatives since the first condition itself of Sub Clause (iii) is not satisfied, the 4 buyers and the respondent cannot be considered as related under Sub-Clause (iii) of Section 4 (3)(b). In any case, the respondent and the 4 buyers are not holding or subsidiaries Companies of each other, therefore the second condition of Sub-Clause (iii) is also not fulfilled in the present case. As regard the allegation in the SCN and grounds of appeal that the appellant and the respondents are related in terms of Sub-Clause (iv) of Section 4 (3)(b), we find that as per Sub-Clause (iv) the seller and buyer should be so associated that they have interest directly or indirectly in the business of each other. As per the undisputed fact of the present case, as regard the transactions which was disputed by the revenue there is a pure relationship of seller and buyer of the goods between the respondent and their buyers. The revenue neither in the SCN nor in the grounds of appeal brought any material to establish that the respondent and the buyers have interest directly or indirectly in the business of each other except the sale and purchase the goods, between the respondent and the buyers there is no other interest. Therefore, the Clause (iv) is clearly not applicable in the present case.

4.9 This issue has been considered time and again in various judgments. The Hon'ble Supreme Court has considered the issue similar in the present case in UOI Vs. Atic Industries- 1984 (17) ELT 323 (SC). In this case, M/s Atik Industries was manufacturing dyes. The entire production was sold to two companies namely, Atul products Ltd and ICI India Ltd. Atul products was holding 50% of share capital in M/s. Atik Industries Ltd ICI, UK was holding balance 50% share capital of Atik Industries. ICI India ltd was a wholly owned subsidiary of ICI, UK since 1978, shareholding of ICI, UK in ICI India was reduced to 40 % (shareholding of iCi, UK in Atik Industries continued to be 50%)

4.10 The revenue took a view that Atik Industries and two buyers are related persons rejecting the contention of the department, the Hon'ble Supreme Court has held as under:

> *"…..Now in the present case, Atul Products Limited has undoubtedly interest in the business of the assessee, since Atul Products Ltd. holds 50 per cent of the share capital of the assessee and has interest as shareholder in the business carried on by the assessee. But it is not possible to say that the assessee has any interest in the business of Atul Products Limited. There are two points of view from which the relationship between the assessee and Atul Products Limited may be considered. First, it may be noted that Atul*

Products Limited is a shareholder of the assessee to the extent of 50 per cent of the share capital. But we fail to see how it can be said that a limited company has any interest, direct or indirect, in the business carried on by one of its shareholders, even though the shareholding of such shareholder may be 50 per cent. Secondly, Atul Products Limited is a wholesale buyer of the dyes manufactured by the assessee but even then, since the transaction between them are as principal to principal, it is difficult to appreciate how the assessee could be said by virtue of that circumstance to have any interest, direct or indirect, in the business of Atul Products Limited. Atul Products Limited buys dyes from the assessee on principal to principal basis and then sells such dyes in the market. The assessee is not concerned whether Atul Products Limited sells or does not sell the dyes purchased by it from the assessee nor is it concerned whether Atul Products Limited sells such dyes at a profit at dyes from it on principal to principal a loss. It is impossible to contend that the assessee has any direct or indirect interest in the business of a wholesale dealer who purchases basis.

….

We, therefore, affirm the view taken by the High Court and hold that the assessable value of the dyes manufactured by the assessee cannot be determined with reference to the selling price charged by Atul Products Limited and Crescent Dyes and Chemicals Limited to their purchasers but must be determined on the basis of the wholesale cash price charged by the assessee to Atul Products Limited and Crescent Dyes and Chemicals Limited. The demand made by the Assistant Collector for differential duty must, therefore, be held to be rightly quashed by the High Court.”

4.11 Similar view has also been taken by the Hon’ble Supreme Court in M/s. Union of indis Vs. 1989 (43) ELT 161 (SC) by affirming the decision of Hon’ble Allahabad High Court reported in 1977 (1) ELT J1 (All.), in this case the share capital of Hind Lamps was held by the following shareholders:

- Bajaj Electricals Ltd: (50%)
- Crompton Parkinson Ltd., London: (6.88%)
- N.V. Philips, Holland: (17.67%)
- General Electric Co. Ltd., London: (10.59%), and
- Mazda Lamp Co. Ltd., England: (14.86%)

4.12 The entire production of Hind lamps was sold M/s. Bajaj Electricals Ltd subsidiary companies of the remaining 4 foreign shareholders. Thus, the entire production of hind lamps was sold to its shareholder companies, either directly or through their wholly owned subsidiary companies. The revenue contended that hind lamps and its 5 buyers are related persons. Rejecting the above contention of the revenue, the Division Bench of the Allahabad High court in 1997 (1) ELT J1 Allahabad held as under:

> *"16. We shall first examine whether the five customer companies come within the first part of the definition of 'related person'. As rightly contended by Shri S. N. Kacker, learned counsel for the petitioner company, in order to come within the first part of this definition, the petitioner company and the customer companies must have interest directly or indirectly in the business of each other. Such of the customer companies, which hold shares in the Petitioner Company, can be said to have interest in the business of the Petitioner Company. But only one of the customer companies, namely, Bajaj Electricals Ltd., Bombay. holds shares in the Petitioner Company. The remaining four customer companies do not hold any shares in the Petitioner Company.*
>
> *19. Even assuming that all these four customer companies have interest in the business of the Petitioner Company, it is not shown that the Petitioner Company has any interest directly or indirectly, in the business of these four customer companies.*
>
> *…….*
>
> *21.Thus, we are unable to accept the contention of the learned Chief Standing Counsel that these five customer companies fulfil the requirement of the first part of the definition of 'related person'."*

4.13 The above judgments were affirmed by the Hon'ble Supreme Court vide its detailed judgments reported at 1989 (43) ELT 161 (SC) relevant portion of the judgment is reproduced below:

> *"7. Shri Sibal placed before us a Chart indicating the similarity of the facts of Atic Industries' case (supra) and the facts of the present case. In Atic Industries' case, 50 per cent of share capital belonged to Atul Products Ltd. and 50 per cent to the Imperial Chemicals (London) Ltd., a foreign company. In the case of the respondent herein, 50 per cent share capital belonged to the Bajaj Electricals Ltd. (Indian Company) and 50 per cent belonged to Philips (17.67%), Mazda (14.86%), G.E.C. (10.59%) and Crompton (6.88%), all foreign companies. In case of Atic Industries' the sale of goods was on principal to principal basis and to a share holding company and to another company, which was initially a subsidiary of the foreign share holding company and to which subsequently became*

> *"associate" company of the foreign shareholding company. In the instant case also, it was on principal to principal basis and to a shareholding company (Bajaj Electricals Ltd.) and so called to associate companies of the foreign shareholding companies. Goods were supplied to customers in their brand name in the case of Atic Industries as in the instant case. In Atic Industries' case, there was no allegation of extra commercial consideration and in the instant case also there was no allegation of extra commercial consideration. In Atic Industries' case, same prices were charged from all the customers; similar is the position in the instant case.*
>
> *8. In the aforesaid view of the matter and in view of the ratio of the said decision, Shri Sibal sought to urge that the High Court was right in the facts mentioned hereunder."*

4.14 In the case of CCE Vs. Goodyear South Asia Tyres Pvt Ltd- 2015 (322) ELT 389 (SC), the Hon'ble Supreme Court has held that when there is only one-way interest in the business the requirement of mutuality of interest stipulated under Section 44 does not stand satisfied. In order to be covered Sub-Clause 4 of Section 4(4)(c) there should be two-way business interest. We find that in the present case it was not established that there is even one-way interest in the business of each other therefore this case is on much better footing.

4.15 In view of above, we find that there is no mutuality of interest in the present case between the respondent an the 4 buyers and the relationship is not covered by Sub-Clause (iv) of Section 4(3)(b) of Central Excise Act 1944S but only Sub-Clause (i) of Section 4(3)(b) of Central Excise Act 1944.

4.16 We find that the judgments relied upon by the revenue are completely on different facts in the present case. Therefore, the same are not applicable. In this position, the transaction value of the goods between respondent and the so-called interconnected undertaking is correct valuation and the same cannot be disturbed, therefore, we do not find any merits in the appeal of revenue.

4.17 We have also gone through judgments relied upon by the rivals. We find that the judgment relied upon by the ld. Counsel are directly applicable in the facts of the present case. Further the Ld. Commissioner in impugned order dealt with the disputed matter in details and given detail findings. After careful examination of the impugned order, we find no reason to interfere with the impugned order.

4.18 On going through the impugned order and grounds of appeals of the revenue we also find that the Ld. Commissioner has also set aside the demand on grounds –

(i) limitation

(ii) revenue neutrality

(iii) Clearances made by an EOU is required to be raised in terms of Customs Act, 1962 and not under Central Excise Act, 1944

(iv) demand for the period prior to 01.12.2013 on the ground that the respondent had also sold the goods to independent buyers and prior to 01.12.2013, the provisions of Rule 9 and Rule 10 of the valuation rules are applicable only if the entire quantity of goods cleared to related persons.

4.19 In this appeal we find that the Revenue has not challenged finding of the Ld. Commissioner related to the above grounds. Since the finding of the Ld. Commissioner on the other ground is not under challenge the same stands accepted by the revenue, hence the said finding attained finality. We are, therefore of the view that Revenue's appeal is required to be rejected on this ground also.

4.20 In totality, on the facts and circumstances of the case, we find that impugned order passed by the Adjudicating Authority is correct, legal and the same has no infirmity.

5. In view of the above reasoning, we are of the considered view that the impugned order needs to be upheld and we do so. The appeal filed by the revenue is dismissed.

(Pronounced in the open Court on 16.11.2023)

RAMESH NAIR
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

PALAK