

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

REGIONAL BENCH - COURT NO. 3

EXCISE Appeal No. 10102 of 2016 -DB

[Arising out of Order-in-Original/Appeal No AHM-EXCUS-003-COM-011-12-15-16 dated 30.10.2015 passed by Commissioner of CUSTOMS-AHMEDABAD]

Mother Dairy

.... Appellant

A Unit Of Gujarat Co-operative Milk Marketing
Federation Ltd, Having Its Packaging Film Plant and
Office At Sector-25, GIDC, Gandhinagar
GUJARAT-382044

VERSUS

Commissioner of Central Excise & ST, Ahmedabad

.... Respondent

Custom House, 2nd Floor,
Opp. Old Gujarat High Court, Navrangpura,
Ahmedabad, Gujarat-380009

WITH

- (i) Excise Appeal No. 11993 of 2017 (Mother Dairy)**
- (ii) Excise Appeal No. 11200 of 2018 (Amulfed Dairy)**
- (iii) Excise Appeal No. 11201 of 2018 (Amulfed Dairy)**
- (iv) Excise Appeal No. 12992 of 2019 (Amulfed Dairy)**

[Arising out of Order-in-Original/Appeal No AHM-EXCUS-003-APP-080-17-18 dated 28.08.2017 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-AHMEDABAD]

[Arising out of Order-in-Original/Appeal No AHM-EXCUS-003-APP-0237-38-17-18 dated 04.04.2018 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-AHMEDABAD]

[Arising out of Order-in-Original/Appeal No AHM-EXCUS-003-APP-0237-38-17-18 dated 04.04.2018 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-AHMEDABAD]

[Arising out of Order-in-Original/Appeal No AHM-EXCUS-003-APP-44-19-20 dated 21.11.2019 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-AHMEDABAD-III]

APPEARANCE :

Shri Amal Dave, Advocate for the Appellant
Shri Prabhat K. Rameshwaram, Addl. Commissioner (AR) for the Revenue.

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

DATE OF HEARING : 15.11.2022
DATE OF DECISION: 28.11.2022

FINAL ORDER NO. A/11765-11769 / 2022**RAMESH NAIR :**

Briefly stated the facts of the case are that appellant is engaged in the manufacture of multi layer Printed Plastic Film and cleared to various District Co-operative Milk Producers Union (DCMPU for short) and also to the associated members affiliated to Gujarat Co-operative Milk Marketing Federation Limited (GCMMF for short). The case of the department is that the buyer of the appellant is inter-connected undertaking therefore, the price at which the goods were sold to DCMPU is not normal transaction value where the price is sole consideration. Accordingly it was contended by the Revenue that the value of the goods should be in terms of Rule 8 of Central Excise Valuation (determination of price of excisable goods) Rules, 2000. Accordingly, the differential duty demand is confirmed. The same was upheld by the Commissioner (Appeals) in the impugned order therefore, the present appeals.

2. Shri Amal Dave, learned Counsel appearing on behalf of the appellant, at the outset submits that the issue is no longer *res-integra* as in the appellant's own case the issue has been considered vide order No. A/11106-11110/2022 dated 08.09.2022.

3. Shri Prabhat K. Rameshwaram, learned Addl. Commissioner (AR) appearing on behalf of the Revenue reiterates the findings of the impugned order.

4. We have carefully considered the submissions made by both the sides and perused the record. We find that in the appellant's own case, in the

transaction with the same buyers DCMPU, the issue has been decided vide order dated 08.09.2022. The relevant portion of the order is reproduced:-

"04. We have gone through the rival submissions. We find that the primary allegation of revenue is that DCMPUs and associate members 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 bylaws of the said assessee's and organizational structure of the co-operatives to hold that two are interconnected undertakings. This fact has not been disputed by the appellant as well. The question which needs to be answered is if being inter-connected undertakings is sufficient to hold the two as related parties. In this regard, Section 4(3)(b) of the Central Excise Act reads 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 rule 8, 9 and 10 of the Central Excise Valuation Rules read as follows:-

"Rule 8.

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 shall be one hundred and ten per cent of the cost of production or manufacture of such goods.

"Rule 9.

When the assessee so arranges that the excisable goods are not sold by an assessee except to or through a person who is related in the manner specified in either of sub-clauses (ii), (iii), or (iv) or clause (b) of subsection (3) of section 4 of the Act, the value of the 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.

When the assessee so arranges that the excisable goods are not sold by him except to or through an inter-connected undertaking, the value of 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.

4.2 The issue regarding inter-connected undertaking has also been clarified by the Circular of CBEC No. MF/DR/F/354/81/2020-TRU dated 30.06.2000. In the said circular following has been clarified 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 under-takings 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

Undertakings 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 assessee 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 interconnected 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.

4.3 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, would they be treated as related persons. Analysis of the impugned order shows that the said order after reaching at the conclusion that the two namely, the appellant and the Dairies are interconnected undertakings does not proceed further. The impugned order holds that since GCMMF holds control that both the appellants as well as Dairies, there is mutuality of interest between the appellant and the dairies. The impugned order hold that M/s. GCMMF has a decisive role to play in financial matter on which the price of products is done. The impugned order holds that as per bylaw no.5.2.9, it is incumbent on GCMMF to plan overall production programme for the federation and its members keeping in view the market strategy. Bylaw no. 5.2.13 casts obligation on M/s. GCMMF to purchase or assist in purchasing raw material, etc and manufacture or collaborate with someone when required and bylaw no. 5.2.19 authorizes GCMMF to advise the members on price fixation, price policy, public relations and allied matters. She also relies on the fact that bylaw no. 9.2.1, 9.2.2, 9.2.3, 9.2.4 and 9.2.5 casts responsibility on member unions to abide by the directions given by the federation. She also pointed out that GCMMF is empowered to liquidate membership of any union faulty to the federation as per bylaw no. 5.2.30. She also relied on the balance sheet of GCMMF reflects the financial performances of the units owned by the federation as well as by the member unions of the federation.

4.4 On the basis of the above facts, she concludes that there is mutuality of interest in the business of each other. We find that the arguments of the Commissioner are misplaced in so far as in the entire discussion, she has focused on the control that GCMMF has over the appellant and the dairies. All the bylaws cited by the Commissioner shows some kind of control of GCMMF over the member unions/dairies and on the appellant however, there is not an iota of evidence to suggest that the appellant had any control over the dairies or vice-versa.

4.5 The Commissioner has sought to distinguish the order of the Hon'ble Gujarat High Court in the case of M/s. Kaira District Co-Operative Milk Producers Union Ltd. dispute was that GCMMF was charging commission as distributor and therefore, there was only one way interest. She has argued that in the instant case since GCMMF is dealing with the financial aspects of both the appellants and the dairies, the interest becomes mutual. We find that this observation again misplaced. In the case of M/s. Kaira District Co-Operative Milk Producers Union Ltd., relationship between appellant and GCMMF

was examined by Hon'ble Apex Court in its order reported in 2002 (146) ELT 502 (S.C.) has observed as follows:-

"2.The respondent is a co-operative society under the Gujarat Cooperative Societies Act, 1961. It is engaged inter alia, in the manufacture of milk and cocoa products and for that purpose has two units, one at Anand and the other at Mogar, both in Kaira district. The respondent receives milk, from milk producers who are all members of the respondent unit. After the product is received and some manufacturing process is undertaken by the respondent, the product is then sent to a Federation known as „Gujarat Co-operative Milk Marketing Federation Limited". That Federation is also registered under the Gujarat Cooperative Societies Act, 1961.

3.The respondent submitted a price list to the Superintendent of Central Excise, Anand. In the price list they claimed a deduction of the commission charged by the Federation from the Union for the purposes of marketing the products of the appellants. The Commissioner rejected the price list on the ground that the respondent-Union and the Federation were "related persons" within the meaning of Section 4(4)(c) of the Central Excise Act, 1944.

4.The respondent, thus, filed a writ petition challenging the rejection of its price list. The High Court has, by the impugned judgment, allowed the writ petition and held that the Union and the Federation cannot be said to be related persons. The High Court has so held on the basis of a decision of this Court in the case of Union of India and Ors. v. ATIC Industries Ltd. reported in [1984 (3) SCC 575]. In this case, it has been held that in order to attract the definition of a "related person" in Section 4(4)(c), the assessee and the person alleged to be related, must have interest, direct or indirect, in the business of each other. It has been held that if there is a shareholder, then the shareholder may have an interest in the assessee company, but merely because some products are being sold by the assessee to the shareholder, it cannot be said that the assessee has any interest in the business of the shareholder. The ratio laid down in this case would fully cover the present case. In this case also, the Union, being a member of the Federation, may have an interest in the Federation. However, the question would be whether the Federation has any interest in the business of the Union. Merely because the Federation purchases milk from the Union would not be sufficient for the purposes of making the Federation a related person.

5. Reliance was placed on bye-laws 23.21, 23.15 and 5.2.18 of the Federation. It was submitted under these bye-laws, the Federation could decide the pricing policy of the Union; fix the rate of service charges for manufacturing, processing or marketing and render financial, technical, administrative or other necessary assistance to the members and enter into corroboration agreements. It was submitted that these clauses clearly indicate that the Federation could exercise control over the Union. It was submitted that this was sufficient for the purposes of making the Federation a related person of the Union. We are unable to accept this submission. In our view, the High Court is right in holding that this is not sufficient for the purpose of making the Federation a related person of the Union.

6. We, therefore, see no reason to interfere with the impugned judgment. The appeal stands dismissed. There shall be no order as to costs."

4.6 The Hon'ble High Court held that GCMMF, the body actually having control over the M/s. Kaira District Co-Operative Milk Producers Union Ltd., were not related. In the instant case the relationship between dairies and appellant is being examined which have no control or interest in each other. Furthermore, it can be seen that the question of law is identical and the question of fact is not relevant. Perusal of Para 4 & 5 of the order of the Hon'ble Apex Court, clearly shows that the order is based on the bylaws

and the relationship between the two entities. It is not based on the nature of transaction between M/s. Kaira District Co-Operative Milk Producers Union Ltd and GCMMF but on the basis of constitution of two entities and share holding of two entities. The case of the appellant in the instant case is more clear as in the instant case the appellant does not hold any shares, dairies and vice-versa. The ratio of law laid down by Hon'ble Apex Court in the case of M/s. Kaira District Co-Operative Milk Producers Union Ltd (supra) is squarely applicable to the instant case.

5. In view of the above, we do not find any evidence to hold that the appellant and the dairies are related in terms of Section 4(3)(b) of Central Excise Act. The appeals are consequently allowed.

5. In view of the above decision, it is observed that in the same set of facts between the same parties, this Tribunal has held that the seller (appellant) and the buyers are not related in terms of Section 4. Hence, the price at which the goods were sold is the transaction value in terms of Section 4. Following the above decision, we are of the considered view that issue is settled in favour of the appellant. Accordingly, the impugned orders are set-aside and the appeals are allowed.

(Pronounced in the open court on _____)

(Ramesh Nair)
Member (Judicial)

(Raju)
Member (Technical)