CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH

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REGIONAL BENCH – COURT NO. 1

Excise Appeal No.2210 Of 2011

[Arising out of Order-in-Original No.JNK/CEX/000/COM/13/2011 dated 20.05.2011 passed by the Commissioner of Central Excise, Jammu]

The Commissioner of Central Excise, Jammu : Appellant
OB-32, Rail Head Complex, Bahu Plaza,
Jammu & Kashmir- 180012

VERSUS

M/s Indigo Flavours Pvt. Ltd. : Respondent
104, Mhatre Pen Building, C-Wing, 1st Floor,
Senapati Bapat Marg, Dadar, Mumbai
Maharashtra-400028

APPEARANCE:
Shri Narinder Singh, Authorised Representative for the Appellant
Shri Prakash Shah, Advocate for the Respondent

CORAM: HON'BLE Mr. S. S. GARG, MEMBER (JUDICIAL)
HON'BLE Mr. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER No.60457/2024

DATE OF HEARING: 02.05.2024
DATE OF DECISION: 02.08.2024

PER: P. ANJANI KUMAR

The respondents, M/s Indigo Flavours Pvt. Ltd., are registered for manufacture of Menthol Flakes and Dementalized Oil (DMO); the respondents are availing benefit of area-based exemption under Notification No.56/2002 dated 14.11.2002; during the course of audit, the Department observed that during the period 2006-07 to 2008-09, the respondents have undervalued the finished goods supplied to the related persons who used the same for captive consumption; a SCN dated 23.09.2010 was issued to the respondents, invoking extended period, seeking recovery of duty of Rs.3,86,38,977/- and recovery of erroneously
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taken self-credit of Rs.30,45,794/- along with interest and penalty. Learned Commissioner vide Order dated 20th May, 2011 dropped the demand on the grounds that the appellants and their customers are not related; the Show Cause Notice did not establish any mutuality of interest; Rule 8 is not applicable as the goods are not consumed captively by the manufacturer or on his behalf; M/s Everest Flavours Ltd. being a distributor or sub-distributor of the noticee is ruled out and hence Rule 9 is not applicable and that the valuation is to be done under Rule 10(b) in terms of Board's Circular No.354/81/2000-TRU dated 30.06.2000.

2. Committee of Chief Commissioners, having reviewed of the order of the Commissioner, directed the Commissioner to file an appeal on the following grounds:

- Commissioner erred in holding that the respondent and M/s Everest Flavours Ltd. are merely related being inter-connected undertakings and the value shall be determined under Rule 10(b) of the Valuation Rules, 2000.
- Commissioner has failed to appreciate that the case of M/s Kanchan Industries is misplaced as the facts are different; whereas neither M/s Kanchan Industries- 2005 (186) ELT302. nor their sole customer i.e. M/s Meghal Enterprises have any common partner, in the instant case, Shri Kamal Ladsariaya holding 20% of share in the respondent's company and 90% share in the buyer's company; except for M/s Markand Trading Co. Pvt. Ltd. who hold 01% share in the buyer's company, all other Directors of the respondent and their buyer are blood-related.

- The case of M/s Atic Industries – 1984 (017) ELT 0323 (SC) is misplaced as the facts are different.

3. Shri Narinder Singh, learned Authorized Representative for the Department, reiterates the grounds of appeal; takes us through the relevant provisions of law and submits that the reliance placed by the impugned order, on the case of M/s Kanchan Industries, is misplaced as the facts are different. He submits that the instant case is covered by the decision of the Tribunal in the case of M/s Sudarshan Castings Pvt. Ltd. – 2007 (127) ELT 428. He submits that the cases relied upon by the respondents are not applicable as they cover the period before 01.07.2000 i.e before the new Valuation Rules have come into existence; there is a change in the definition of "Related Person" under the old Rules and the new Rules. He relies on the following cases:

- M/s ITEC (P) Ltd. – 2002 (145) ELT 280 (SC)
- M/s "J" Foundation – 2015 (324) ELT 422 (SC)
- Haldyn Glass Works – 2016 (334) ELT A122
- Global Yarn Spinners – 2007 (214) ELT 401
- Goodwill Textiles Pvt. Ltd. – 2016 (339) ELT A216 (SC)

4. Shri Prakash Shah, learned Counsel for the respondents, submits that the case of M/s Sudarshan Castings (supra) relied upon heavily by the Department is misplaced as the facts are different; the case of ITES will not help the case of the Department as the main issue in that case was that the prices at which the goods are cleared to the related person were "lower". He submits that the respondents are availing the exemption under Notification No.56/2002 and as long as the admissibility of exemption is not questioned, valuation of goods for the purposes of

payment of duty is inconsequential as the respondent would be eligible for the refund of the duty paid by them; he relies on M/s Wander Ltd. – 2003 (157) ELT 3 (SC) and to that extent, Revenue is not prejudiced in any way. He submits that though the Show Cause Notice alleges that the respondent and M/s Everest Flavours Ltd. are related, no extra commercial consideration in the transaction and no evidence to the effect has also been placed on record. He submits that the Department did not challenge the CAS-4 submitted by them on any solid grounds and no finding that the goods cleared by them to M/s Everest Flavours Ltd. was lower than the price of the goods in the market. Under these circumstances, the allegation is not sustained as held by the Hon'ble Apex Court in the case of M/s Bilag Industries Pvt. Ltd. – 2023 (384) ELT 494 (SC).

5. Learned Counsel for the respondent submits that the Review Order passed by the Committee of Chief Commissioners is at variance with the SCN and travels beyond the scope of the SCN. Whereas the SCN, other than merely stating that there is mutuality of interest, has not given any pattern of shareholding in the respondent's and their customer's company, the Review Order seeks to show the shareholding pattern. He submits that as held by the Hon'ble Apex Court in the case of M/s Besta Cosmetic Ltd. – 2005 (183) ELT 132 (SC), new ground cannot be raised at any stage of the proceedings. He submits that the SCN does not make any comparison with the market value of the identical goods manufactured and cleared by other manufacturers but simply concludes on the basis of CAS-4 submitted by the respondent. He relies on the following cases:

- Handy Wires Pvt. Ltd. Versus Commissioner of Central Excise, Nagpur., 2015 (329) E.L.T. 169 (Tri. Mumbai)
- Sri Krishna Alloys Versus Commissioner of Central Excise, Selam., 2015 (326) E.L.T. 329 (Tri. Chennai)
- Commissioner Versus Sri Krishna Alloys., 2016 (332) E.L.T. A139 (S.C.)
- Universal Starch Chem Allied Ltd. Versus Commr. of C. EX. &Cus., Nashik., 2017 (358) E.L.T. 279 (Tri. Mumbai)
- Commissioner of Central Excise, Nagpur Versus Ramsons Casting Pvt. Ltd., 2017 (357) E.L.T. 431 (Tri. - Mumbai)
- Commissioner of Central Excise, Ahmedabad Versus Xerographic Ltd., 2010 (257) E.L.T. 11 (S.C.)
- J.P.P. Mills Pvt. Ltd. Versus Commissioner of Central Excise, Salem., 2016 (46) S.T.R. 317 (Tri. Chennai)
- Bilag Industries Pvt. Ltd. Versus Commissioner of C. EX., Daman., 2023 (384) E.L.T. 494 (S.C.)
- Collector of Central Excise, Pune Versus Wander Ltd., 2003 (157) E.L.T. 3 (S.C.)
- Swiber Offshore Construction P. Ltd. Versus C.C. (Import), Mumbai., 2014 (309) E.L.T. 373 (Tri. Mumbai)
- Coolade Beverages Ltd. Versus Commissioner of C.EX., Ghaziabad., 2009 (246) E.L.T. 574 (Tri. - Del.)
- Commissioner of C.EX. &Cus., Surat Versus Besta Cosmetics Ltd., 2000 (116) E.L.T. 293 (Tribunal)
- Commissioner of Central Excise, Surat Versus Besta Cosmetics Ltd., 2005 (183) E.L.T. 132 (S.C.)
- Nirlon Ltd. Versus Commissioner of Central Excise, Mumbai. 2015 (320) E.L.T. 22 (S.C.)
- Ganon Dunkerley & CO. Ltd. Versus Commissioner (Adj.) of S.T., New Delhi., 2021 (47) G.S.T.L. 35 (Tri. - Del.)

6. Learned Counsel submits, in addition, that there was no suppression, mis-declaration etc. on the part of the respondents; they have been following the same pattern of sale for a long time and have not only been submitting Returns but also were claiming self-credit duly verified by the Department. Under the circumstances, extended period cannot be invoked only on the basis of an audit report and thus, the no penalty can be imposed under Section 11AC. He submits that the impugned order does not suffer from any infirmity and thus, the Department's appeal is liable to be dismissed.

7. Heard both sides and perused the records of the case. The Show Cause Notice alleges that the respondents and M/s Everest Flavours Ltd. are related to each other in terms of Section 4 (3) (b) of the Central Excise Act, 1944 and satisfy the definition of "Inter-connected Undertakings" as defined under Section 2 (g) (iii) and 2 (g) (vi) read with Explanation I (i), (ii), (iii), Explanation II and V (b) of Monopolies and Restrictive Trade Practices Act 1969 and that the valuation of goods supplied by the respondent to M/s Everest Flavours Ltd. requires to be done under proviso to Rule 9 read with Rule 8 of the Valuation Rules i.e 110% of cost of production.

8. We find that learned Commissioner had dropped the demand on the grounds that:

(i) The respondent and the buyer cannot be related in terms of section 4(3)(b)(ii) as they are juridical persons and therefore, they are not covered in the definition of relatives as defined under section 2(41) and section 6 of the Companies Act, 1956.

(ii) The respondent and the buyer cannot be related in terms of section 4(3)(b) (iv) as clearance of entire production does not establish mutuality of interest between the parties as held by the Hon'ble tribunal in the case of Kanchan Industries.

(iii) The respondent and the buyers are related in terms of 4(3)(b)(i) as they are interconnected undertakings in terms of section 2(g)(vi) of the Monopolies and Restrictive Trade Practices Act, 1969.

(iv) As such, provisions of section 4(i)(a)does not apply to the transactions between the respondent in the buyer as they are interconnected undertakings, and provisions of 4(1)(b) would be applicable which prescribes the valuation under Valuation Rules. Consequently, the case of respondent is covered under rule 10(b), which provides that value shall be determined in such cases under Sub- section (1) of Section 4 of the Act.

(v) As regards mentioning of the buyer as related person in the balance sheet by the respondent, the same is in reference to related person within the meaning of section 40(a)(2)(b) of Income Tax Act, 1967 and the definition of other statute cannot be mechanically applied as held by Hon'ble Supreme Court in the case of M/s. Baidyanath Ayurved Bhavan Limited – 2009 (12) SCC 149 SC.

(vi) The case of M/s. Sudershan Casting Private Limited 2007.127.ELT.428. is not applicable as in that case the parties were held related on the issue of mutuality of interest as well.

9. We find that learned Commissioner has relied on the decision of the Tribunal in the case of M/s Kanchan Industries. Tribunal finds in that case that:

> **5.** ------
> It is thus apparent from this definition that the person who is sought to be branded as a related person must be a person who is so associated with the assessee that they have interest directly or indirectly, in the business of each other. It is not enough that the assessee has an interest, direct or indirect, in the business of the person alleged to be a related person nor is it enough that such peson has an interest, direct or indirect, in the business of the assessee. In the case of *UOI* . v. *Atic Industries Ltd.,* 1984 (17) E.L.T. 323 (S.C.), the Supreme Court has held that each of them must have direct or indirect interest in the business of each other. In the present matters, the mutuality of interest has been presumed by Revenue on the basis of sale of entire production by the manufacturing units to M/s. Meghal Enterprises on the basis of mutually agreed price, the goods were known in the market to be those of Kanchan Industries, price list was circulated on the letter head of Kanchan Industries and the entire responsibilities of advertisement and publicity rested with Meghal Enterprises. These grounds do not satisfy the first part of the definition of "related person" as given in Section 4(4)(c) of the Central Excise Act, that is, all these factors do not establish that they have interest, directly or indirectly, in the business of each other. Sale of entire production by a manufacturing unit is not sufficient to prove that the purchaser is a related person as found by the Tribunal in the case of *Lakme Ltd.,* supra. All the factors mentioned in the impugned order for treating M/s. Meghal Enterprises as a related person are nothing but business transaction as Meghal Enterprises purchase the entire production of the goods manufactured by the manufacturing units on mutually agreed price and they are responsible for advertising and publicity by of the goods. Bearing the responsibility of advertisement and publicity by Meghal Enterprises does not make them related person as they have also their own interest in advertising the goods. In any case the question may be that whether cost of such advertisement is includible in the assessable value of the goods. But that is not the issue involved here. The

> fact that the goods are known in the market as those of Kanchan Industries does not establish the mutuality of interest. This is a normal business phenomenon. When a dealer of Maruti Udyog Ltd. sells motor vehicles of Maruti Udyog, these vehicles are known as Maruti vehicles and not the vehicles of dealers. Mutuality of interest cannot be established by merely showing that they have business dealings between them. Normal commercial terms in agreement between the manufacturer and buyer do not constitute mutuality of interest between them. The second part of the definition of related person as given in Section 4(4)(c) of the Act is also not attracted as it is not that a natural relative is purchasing the goods. Meghal Enterprises as a partnership concern and M/s. Kanchan Kitchen Aid P. Ltd. is a company under the companies Act. We thus hold that the Revenue has not succeeded in establishing that M/s. Meghal Enterprises are a related person. To this extent we allow the appeal without going into the aspect of demand being time-barred. As the question of clubbing of the value of clearance has not been pressed before us, the matters are remanded to the jurisdictional Adjudicating Authority to examine as to whether even after clubbing the value of clearance, the manufacturing units would be eligible for exemption as a small scale unit. All other questions such as demand of duty, if any, being time-barred and penalties to be imposed on any of the Appellants are left to be decided by the Adjudicating Authority in accordance with law and after following the principles of natural justice.

10. We find that in the above case, Tribunal has enunciated two principles i.e. (i) it is not important to be merely related; mutuality of interest requires to be established to allege that the price at which the entire goods are sold to 'related person' was lower than either the cost or than the price at which identical goods are cleared (ii) mutuality of interest cannot be alleged only owing to the fact that the entire production is sold to a 'related person'. Learned Authorized Representative submits that the facts of the case are not identical and the decision is rendered in the old Valuation Rules and therefore, reliance

on M/s Kanchan Industries is misplaced. We find that CBEC vide Circular No.354/81/2000-TRU dated 30.06.2000 has clarified that:

> 25. In essence, notwithstanding the change in definition of "related" person in the new 1 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 ofmutuality of interest. The actual revenue potential in such situations may be estimated and a report sent in due course.

11. We find that Hon'ble Supreme Court in the case of Besta Cosmetic Ltd. (supra) held that:

> 3. The decision of this Court in Union of India and others v. Atic Industries Ltd. - 1984 (17) E.L.T. 323 (S.C.) has clearly stated that for the purpose of Section 4, a concern would be taken to be the related person if there is a reciprocity of interest between the assessee and such allegedly related person, interest being defined as shareholding. The interest claimed in this case by the appellant is not an interest of the assessee in BHPL or of BHPL in the assessee but in a third concern, which is not relevant for the purpose of Section 4 of the Act.
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> 4. As far as the common Directors are concerned, this Court has in Alembic Glass Industries Ltd. v. Collector of Central Excise & Customs which is reported in 2002 (143) E.L.T. 244, held that -
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> "The fact that two public limited companies have common Directors does not mean that the one company has an interest in the business of the other."
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> 6. Additionally, before us, a ground was sought to be raised that BHPL bears the entire advertisement cost of the product of the assessee. This was not a ground which was urged on behalf of the Revenue at any stage of the proceedings and we do not permit them to raise it now. This appeal is accordingly dismissed without any order as to costs.

12. We also find that Hon'ble Apex Court held in the case of Xerographic Ltd. (supra) held that:

> **6.** Section 4(4)(c) defines the expression "related persons" and the said section has to be read in the context of third proviso to Section 4(1)(a). On the reading of the entire section it is clear that three conditions are required to be satisfied before invoking the third proviso. Firstly there should be mutuality of interest; secondly that the alleged related person should be related to the assessee as per definition of Section 4(4)(c) given in the Act and thirdly and importantly that the price charged from the "related persons" was not the normal price but the price lower than the normal price and because of extra commercial considerations the price charged was less than the normal value.

13. Hon'ble Supreme Court held in the case of Bilag Industries Pvt. Ltd. (supra) that:

> 17. In the present case, undoubtedly AgrEvo SA/Aventis CropScience SA holds the entire shareholding in Aventis CropScience (India) Ltd. (the buyer). It also is a shareholder in BIL. All of the latter's products are sold to Aventis CropScience (India) Ltd. However, this does not show that BIL has any business interest or interest in the affairs of Aventis CropScience (India) Ltd., nor, conversely, that Aventis CropScience (India) Ltd has any such interest, direct or indirectly in BIL. The revenue's concern in examining whether the parties were related might be justified; however, it could not have concluded that such relationship, as is contemplated by Section 4(4)(c) could have been inferred, without applying the proper test. Additionally, the revenue had the materials before it, in the form of documents which indicated the mark up towards profit margin, and other objective evidence to compare, if indeed, the cost of the goods sold, were depressed, or were comparable to the market price of the same or similar goods. There is no finding that the price of the goods was lower than what was the price of those goods, in the market.

14. We find that in the impugned case, it is simply alleged that as the respondent and M/s Everest Flavours Ltd. are related valuation requires to be done with reference to Valuation Rules 8 & 9; further the Show Cause Notice finds fault with the CAS-4 submitted by the respondents. We find that no effort seems to have been made by the Revenue to ascertain the actual price of the goods, except alleging that the goods cleared by the respondents are over-valued to avail additional refund. While the Show Cause Notice does not give the constitution of both the respondent and M/s Everest Flavours Ltd., the Review Order lists out Directors in each of the companies. Learned Counsel for the appellants submits that the grounds taken in Review are beyond the scope of the Show Cause Notice and the same cannot be taken in view of the finding of the Hon'ble Apex Court in the case of Besta Cosmetic Ltd. (supra). The Hon'ble Apex Court held that:

> 6. Additionally, before us, a ground was sought to be raised that BHPL bears the entire advertisement cost of the product of the assessee. This was not a ground which was urged on behalf of the Revenue at any stage of the proceedings and we do not permit them to raise it now. This appeal is accordingly dismissed without any order as to costs.

15. Learned Counsel for the respondents has also taken the plea that as the appellants are availing exemption under Notification No.56/2002, the issue is revenue neutral. Whatever duty is paid in cash by the appellants is available to them in the form of refund. We find that Tribunal Chennai in the case of M/s JPP Mills Pvt. Ltd. (supra) held that:

> 12. However, we are also of the view that this service is an "input service" as defined under Rule 2(k) of the Cenvat Credit Rules, 2004 because the service is in relation to "sales promotion" which is specifically

> included in the inclusive part of the definition. That being the case, the appellants were eligible to take credit of the Service Tax so payable if the appellants were to pay excise duty on any of the export goods. Though there were conflicting decisions in this issue by the Hon'ble Gujarat High Court in the case of CCE v. Cadilla Health Care - 2013 (30) S.T.R. 3 (Guj.) and by Hon'ble Punjab and Haryana High Court in CCE v. Ambika Overseas - 2012 (25) S.T.R. 348 (P & H), now it stands accepted by C.B.E. & C. in their circular 943/4/2011-CX dated 29-4-2011 at item 5 that Cenvat credit can be taken on such services. On textile products a voluntary scheme for payment of excise duty was in force. So the appellants could pay duty, take credit and utilize it either for local clearance or on any export consignment and get rebate. It is also seen that from 1-4-2008, the Government exempted such taxes subject to certain conditions by issuing Notification 17/2008-S.T. Part of the demand is after 1-4-2008. Thus this is not just a case of revenue neutrality; but a special case of revenue-neutrality involving the same person taking credit of tax paid and also being eligible for relief from such tax incidence on account of the fact that services are used for export of goods. In such circumstances, there is no justification to slap a tax liability on an exporter of goods invoking extended period of time. Therefore, the allegation of suppression is not sustainable.

16. Learned Counsel for the respondents also submits that the respondents have not indulged in any suppression, mis-declaration etc. with intent to evade payment of duty; they have been not only filing the Returns but also availing refund/ credit of duty paid in terms of Notification No.56/2002 which was scrutinized by the Revenue from time to time; the respondents would be eligible for refund of duty paid by them and as such, the issue is revenue neutral to themselves; therefore, under the circumstances, extended period cannot be invoked and no penalty can be levied. In view of the catena of judgments in this regard, some of which cited by the appellants, we are of the considered opinion

that Revenue has not made out any case for invocation of extended period and imposition of penalty.

17. As submitted by the learned Counsel for the respondents, we find that the Department's reliance on M/s Sudarshan Castings (supra) is not of much help as in the instant case, the recipient company has one more independent Director i.e Markand Trading Co. Pvt. Ltd., though holding only 01% of the shareholding; moreover, it is not the case of the Department that M/s Sudarshan Castings also availed the benefit of Notification No.56/2002. Similarly, the reliance placed on M/s ITEC is of no avail as that case pertains to sale of entire production to a related company at a price lower than market price.

18. In view of the above, we are of the considered opinion that the appeal filed by the Revenue cannot be sustained both on merits and limitation. We do not find any reason whatsoever to interfere with the impugned order. Accordingly, Revenue's appeal is dismissed.

(Order pronounced in the open court on 02/08/2024)

(S. S. GARG)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

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