CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SCO 147-148, SECTOR 17-C, CHANDIGARH-160017

DIVISON BENCH
COURT NO.1

Appeal No. E/291,489,490,491/2010, E/1031-1032/2009, E/375/2011

Sr. No	Case No	Impugned Order Detail's	Date of Impugned Order	Passed By	Appellant	Respondent
1	E/291/2010-DB	OIA- 227-230/CE/DLH/2009	05/11/2009	Commissioner of Central Excise-PANCHKULA	HINDUSTAN PUMPS & ELECTRICAL ENGINEERING PVT. LTD.	C.C.E. & S.T.-PANCHKULA
2	E/489/2010-DB	OIA- 227-230/CE/DLH/2009	05/11/2009	Commissioner of Central Excise-PANCHKULA	HINDUSTAN PUMPS & ELECTRICAL ENGINEERING PVT. LTD.	C.C.E. & S.T.-PANCHKULA
3	E/490/2010-DB	OIA- 227-230/CE/DLH/2009	05/11/2009	Commissioner of Central Excise-PANCHKULA	HINDUSTAN PUMPS & ELECTRICAL ENGINEERING PVT. LTD.	C.C.E. & S.T.-PANCHKULA
4	E/491/2010-DB	OIA- 227-230/CE/DLH/2009	05/11/2009	Commissioner of Central Excise-PANCHKULA	HINDUSTAN PUMPS & ELECTRICAL ENGINEERING PVT. LTD.	C.C.E. & S.T.-PANCHKULA
5	E/1031/2009-DB	OIA- 11-12/ANS/PCK/2009	21/01/2009	Commissioner of Central Excise-DELHI-III	HINDUSTAN PUMPS & ELECTRICALS ENGINEERING PVT. LTD.	C.C.E.-DELHI-III
6	E/1032/2009-DB	OIA- 11-12/ANS/PCK/2009	21/01/2009	Commissioner of Central Excise-DELHI-III	MALKOH MARKETING PVT. LTD.	C.C.E.-DELHI-III
7;	E / 375 / 2011-DB	OIA- 684/CE/D-II/2010	12/11/2010	Commissioner of Central Excise-PANCHKULA	HINDUSTAN PUMPS & ELECTRICAL ENGUNEERING PVT. LTD.,	C.C.E. & S.T.-PANCHKULA

Date of Hearing: 05.09.2018
Date of Decision:

Appearance

Shri. A.K. Prasad-Advocate- for the appellant
Shri. Tarun Kumar-AR. - for the respondent

CORAM: Hon'ble Mr. Ashok Jindal, Member (Judicial)
Hon'ble Mr. Bijay Kumar, Member (Technical)

FINAL ORDER NO: **63235-63241 / 2018**

Per Ashok Jindal:

The appellants are in appeal against the impugned orders wherein the duty has been demanded from M/s Hindustan Pumps & Electricals

Engineering Pvt. Ltd. (in short M/s Hindustan) and penalties on both the appellants have been imposed by way of impugned orders.

2. As the issue involved in all the appeals is common, therefore, all the appeals are disposed of by a common order.

3. M/s Hindustan is engaged in the manufacture of Submersible pumps. From 01.04.2003, they started selling their goods except Government supply and export sales through a marketing firm, namely M/s Malkoh Marketing Pvt. Ltd. (in short M/s Malkoh). The case of the Revenue is that both the appellants are related to each other, therefore, valuation of the goods cleared to M/s Malkoh is to be determined in terms of Rule 9 of the Central Excise Valuation Rules, 2000. In these set of facts, charge of under valuation has been alleged against M/s Hindustan and consequently, duty was demanded from M/s Hindustan on the ground that M/s Hindustan and M/s Malkoh are related person and valuation is to be arrived in terms of Rule 9 of Central Excise Valuation Rules, 2000. Consequently, duty was demanded along with interest and penalty on both the appellants were imposed. Against the said orders, the appellants are before us.

4. The ld. Counsel appearing on behalf of the appellant submits that the appellant namely M/s Hindustan was partnership firm during the relevant time and M/s Malkoh was a Private Limited Company. The constitution of both the appellants is as under:

M/s Hindustan having the partners as under:

(i) Shri. Vijay Kohli S/o Shri. M.L. Kohli

(ii) Shri. Vinay Kohli S/o Shri. M.L. Kohli

(iii) Shri. Rajiv Malhotra S/o Shri. P.R. Malhotra

(iv) Shri. Anil Malhotra S/o Shri. P.R. Malhotra

M/s Malkoh having the directors as under:

(i) Shri. M.L. Kohli (35%)

(ii) Shri. Vinay Kohli S/o Shri. M.L. Kohli (15%)

(iii) Shri. Rajiv Malhotra S/o Shri. P.R. Malhotra (15%)

(iv) Shri. P.R. Malhotra (35%)

5. It is his submissions that the department was of the view that the partner of M/s Hindustan namely Shri. Vijay Kohli and Shri. Vinay Kohli are real brothers and sons of Shri. M.L. Kohli, who is one of the four Directors in M/s Malkoh. Similarly, Shri. Rajiv Malhotra and Shri. Anil Malhotra are real borthers and sons of Shri. P.R. Malhotra who is one of the Directors in M/s Malkoh. The remaining two Directors in the M/s Malkoh firm are Shri. Vinay Kohli and Shri. Rajiv Malhotra, who are the most active partners of M/s Hindustan. It was, therefore, assumed that both the firms i.e. M/s Malkoh and M/s Hindustan are 'related' as per Schedule 1-A to the clause (c) of Section 6 of the Companies Act, 1956 and as per Section 4(3)(b) of the Central Excise Act, 1944 therefore, it was alleged that the partners/directors of these above two firms belongs to the same two families who are having mutuality of interest in the business of each other and it was also alleged that payment of Rs. 65 Lacs was made by M/s Malkoh to the manufacturing firm M/s Hindustan in the guise of franchisee charges, retention of security deposits of dealers by the manufacturing firm M/s Hindustan and Rs. 20,37,824/- and Rs. 14,20,692/- paid by the M/s Malkoh on advertisement, attracting sub clause (ii) and (iv) of the clause (b) of the sub Section (3) of Section 4 of the Act, therefore, duty was to be demanded for the period 2003-2004 and 2005-2006. It was also alleged that both the firms were covered as relative as provided under sub clause (ii) of clause (b) of sub-section (3) of Section 4 of the Act, as such Rule 9 of Central Excise Valuation Rules,2000, is applicable in the instant case for determining the value of goods.

6. In response to these allegations, the ld. Counsel submits that M/s Hindustan is a partnership firm and M/s Malkoh is Private Limited Company, therefore, both are related and separate entities in the eyes of law. Merely, some of the partner of M/s Hindustan is also direction in M/s Malkoh is not sufficient to treat them as related person in terms of Section 4(3)(b)(ii) of the Central Excise Act, 1944. He further submits that the price at which M/s Hindustan was selling the goods to M/s Malkoh was purely on commercial considerations and also a principle to principle basis. There is no evidence that there was any financial flow back from M/s Malkoh to M/s Hindustan or vice versa. There is no evidence on record to show that the price at which M/s Hindustan has sold the goods to M/s Malkoh were not at arm's length or were influenced by the purported relationship between the two parties. Therefore, M/s Hindustan has discharged their duty correctly. it is also submitted that merely two partner of M/s Hindustan were directors in M/s Malkoh and were holding shareholding to the extent of 15% each, the same could not be a ground to hold that they were related person. Further, merely because the father of both Shri. Vijay Kohli and Shri. Vinay Kohli was a director in M/s Malkoh and was holding 35% shareholding can also not be a ground to treat them as a related person. Similarly, in the case, Shri. Rajiv Malhotra and Shri. Anil Malhotra who are the sons of Shri. P.R. Malhotra who is also holding 35% shareholder in M/s Malkoh. It is submits that the relationship is defined under Companies Act, 1956 which has been adopted in Central Excise Act and is applicable to natural person only and not to impersonal bodies like Private Limited Company. In such, a case, neither the provisions of Section 4(3)(b)(ii) of the Central Excise Act nor the Provisions of Rule 9 of Central Excise Valuation Rules, 2000 would be applicable. To support, he relied on the decision of this Tribunal in the case of ***Reliance Industrial Products Vs. Commissioner of Central Excise, Thane-II reported in 2012 (276) ELT 107 (Tri. Mum.).*** He further

submitted that even otherwise there is no mutuality of interest in the business of M/s Hindustan and M/s Malkoh and the directions were holding share to the extent of 15% each in their individual capacity. Father of both Shri. Vijay Kohli and Shri. Vinay Kohli on the one hand and Shri. Rajiv Malhotra and Shri. Anil Malhotra were having shareholder of 35% each in the company of M/s Malkoh which they have holding in their individual capacity. Therefore, they cannot be related person. He further submits that the provisions of Rule 9 of Central Excise Valuation Rules,2000, is not applicable, as this Rule could be applied only where the entire goods are sold through so called related person. But in the present case, the entire clearances were not made through M/s Malkoh but the M/s Hindustan was directly selling the goods to Government Departments and also selling for exports. It is reiterated that the provisions of Rule 9 are applicable only when the manufacturer so arranges that the excisable goods are not sold by an assessee except to or through a person who is related manner specified in either of sub clauses (ii), (iii) or (iv) of clause (b) of sub section (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 or where such goods are not sold to such buyers, to buyers who sells such goods in retail. In the present case, it is admitted in the show cause notice M/s Hindustan was supplying goods to Government department and also for exports. To support this contention, he relied on the decision of this Tribunal in the case of ***Phillips Electronic India Ltd. reported in 2015 (328) ELT 600 (Tri. Del.)***. He further submits that the retention of security deposit by M/s Hindustan also could not be a ground to treat them related person, as a person can be treated as related person of another in terms of prevalent legal provisions. Further, the payment of Rs. 65 Lacs as franchise charges by M/s Malkoh to M/s Hindustan was purely based on commercial considerations and were entered in the books of accounts of both the parties. In fact, the department has demanded service tax on the same as per the show cause notice dated 14.02.2007 and the demand of Service Tax was confirmed on the said amount, therefore, it cannot be said that they are related person. Further, advertisement expenses incurred by M/s Malkoh were only for selling the submersible pumps to the dealers were approximately 3% to 7% increase prices over purchase prices. He submits that in view of the above submissions, the impugned orders are not sustainable.

7. On the other hand, the ld. AR reiterated the findings of the impugned order.

8. Heard the parties and considered the submissions.

9. We find that in this case the facts of the case are not dispute that M/s Hindustan is a partnership firm and M/s Malkoh is a Private Limited Company, therefore, it has been alleged that they are related person to each other and valuation to be arrived in terms of Rule 9 of Valuation Rules, 2000.

10. For better appreciation, the provisions of law which are applicable to the facts of this case are in corroborative as under:

Section 4(3)(b)(2) is extended herein below:

> *"(3) For the purpose of this Section-*
> *(a) 'assesee' means the person who is liable to pay the duty of excise under this Act and includes his agent;*
> *(b) <u>Persons shall be deemed to be "related" if-</u>*
> *(i) They are inter-connected undertakings;*
> *(ii) <u>they are relatives</u>;*
> *(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 toit in clause (g) of Section 2 of the Monopolies and Restrictive Trade Practices Act, 1969 (64 of 1969); and*
> *(ii) "<u>relative" shall have the meaning assigned to it in clause (41) of section 2 of the Companies Act, 1956 (1 of 1956)"</u>*

Rule 9 of the Central Excise Valuation Rules, 2000, is extracted also herein below:

> *" Rule 9. When the assesee 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) of clause (b) of sub-section (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:"*

Further, we find that as per the Section 2(41) of the Companies Act, 1956, its definition of related person given as under:

> *" (41) 'relative' means with reference to any person, anyone who is related to such person in any of the ways specified in section 6, and no others;"*

Further, as per Section 6 of the Companies Act, 1956, the following are the related person as per Schedule 1-A.

"A person is a close relative of other if:

1. *They are members of a Hindu Undivided Family (HUF); or*
2. *They are husband and wife; or*
3. *They are related to each other in the manner as given in Schedule IA.*

Relationship as indicated in Schedule IA are:

1. *Father*
2. *Mother,*
3. *Son (Including step son),*
4. *Son's wife,*
5. *Daughter (Including step daughter)*
6. *Daughter's Husband,*
7. *Father's Father,*
8. *Father's Mother,*
9. *Mother's Father,*
10. *Mother's Mother,*
11. *Son's Son,*
12. *Son's son's wife,*
13. *Son's Daughter,*
14. *Son's daughter's husband,*
15. *Daughter's son,*
16. *Daughter's son's wife,*
17. *Daughter's daughter,*
18. *Daughter's daughter's husband,*
19. *Brother (including step brother),*
20. *Brother's wife,*
21. *Sister (including step sister),*
22. *Sister's husband."*

11. On going through the above provisions, we find that in terms of section 4(3)(b)(ii), if the person is relative then he should be relative in terms of Section 2(41) of Companies Act, 1956, which defines that relative means with reference to any person who is related to such person in anyway specified section 6 of and no others. The section 6 as cited hereinabove defines the relationship.

12. On going through the same, we find that as the Private Limited Company is not a living person and partnership firm is consist on various partners but the private limited company/partnership firm find no mention in schedule of 1(A) of section 6 of the Companies Act, 1956, therefore, the Revenue's case fails on this ground only.

13. In view of the above, we hold that the appellants are not related person in terms of Section 4(3)(b)(ii) of the Central Excise Act, 1944.

14. Further, we take note of the fact that valuation is to be done if the goods are not sold by the assessee except through the persons who is related. Admittedly, whole of the goods are not sold by the M/s Hindustan through M/s Malkoh. In fact, M/s Hindustan is selling goods to Government Department as well as for exports. In that circumstances, the provisions of Rule 9 of Central Excise Valuation Rules, 2000, are not applicable to the facts of this case. Therefore, on that ground also, the charge of Revenue of under valuation is not sustainable.

15. Without going to the other aspect of the case, we hold that the appellant are not related persons in terms of section 4(3)(b)(ii) of Central Excise Act,1944 and provisions of Rule 9 of the Central Excise Valuation Rules, 2000, are not applicable to the facts of this case, therefore, the impugned orders are not sustainable in the eyes of law.

16. In view of the above, the following order is passed:

(A) No demand is sustainable against the appellant namely M/s Hindustan, therefore, the impugned orders qua demanding duty from M/s Hindustan are set aside.

(B) Consequently, no penalties are imposable on both the appellant.

In view of the above, we allow the appeals with consequential relief.

(order pronounced in the open court on)

Bijay Kumar	**Ashok Jindal**
Member (Technical)	**Member (Judicial)**

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