

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH
Court No. IV

EXCISE APPEAL NO. 51634 of 2019

[Arising out of Order-in-Original No. RPR/EXCUS/000/COM/014/2019 dated 21.03.2019 passed by the Principal Commissioner of Customs, Central Excise & Service Tax, Raipur (CG)]

MAHENDRA SPONGE & POWER LTD. ... APPELLANT
Plot No. 76, Siltara Industrial Area
Phase II, Siltara, Raipur (CG).

VERSUS

PRINCIPAL COMMISSIONER OF ... RESPONDENT
CUSTOMS, CENTRAL EXCISE,
SERVICE TAX RAIPUR (C G)

APPEARANCE:

Shri Manish Saharan, Advocate for the Appellant
Shri Rakesh Agarwal, Authorised Representative for the Department

CORAM:

HON'BLE SHRI P V SUBBA RAO, MEMBER (TECHNICAL)
HON'BLE MRS RACHNA GUPTA, MEMBER (JUDICIAL)

DATE OF HEARING: May 25, 2022
DATE OF DECISION: 29.08.2022

FINAL ORDER No. 50752 /2022

PER RACHNA GUPTA

The appellant herein are the manufacturer of iron and steel products and are also availing Cenvat Credit on inputs, capital goods and input services in terms of Cenvat Credit Rules 2004. During the course of audit of books and accounts of appellant, the audit team observed that appellant has sold sponge iron and MS

ingots to its related units i.e. M/s. Mahendra Strips Pvt Ltd. Raipur, M/s. Super Ispat (Raipur) Pvt Ltd., and M/s. Animesh Iron, Raipur, at the value lower than the normal price charged to the independent buyers during the period 2011-12 and 2012-13 (upto September 2012). The companies were alleged to be related based upon the information given by the appellant in the balance sheet of the year 2014-15 wherein three of the above named companies were shown as 'Associated and Joint Ventures'. The aforesaid three companies were observed to have used /consumed those goods in further manufacture by them. Accordingly vide Show Cause Notice No. 5291 dated 04.04.2016, it is alleged that the value of the goods cleared by the appellants to the related firm should have been determined in the manner specified in Rule 8 and in terms of Rule 9 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 (hereinafter referred to as 'Valuation Rules').

2. Accordingly, Central Excise duty amounting to Rs.2,58,14,047/- along with interest and appropriate penalty was proposed to be recovered from the appellant. The said proposal was confirmed vide Order-in-Original No. 014/2019 dated 21.03.2019. Being aggrieved the appellant is before the Tribunal.

3. We have heard Shri Manish Saharan, learned Counsel appearing for the appellant and Shri Rakesh Agarwal, learned Authorised Representative appearing for the department.

4. It is submitted on behalf of the appellant that all the companies i.e. the appellant as well as three other companies mentioned in the show cause notice are legally separate entities. They file their sales tax and income tax separately. It is submitted that there is nothing either in the show cause notice or even in the order under challenge which may be taken as evidence showing financial flow back between these companies

and that they are related persons. It is submitted that only fact about the Director being common cannot be the reason to allege that the company is as such being interested in the business of each other. Learned Counsel has relied upon the decision of this Tribunal vide **Final Order No. 50209-50210/2022 dated 02.03.2022** titled as **M/s. Khyati Ispat Private Limited vs Principal Commissioner**, Central Tax & Central Excise, in Excise Appeal No. 52120/2019.

5. The issue in the present appeal has already been acknowledged by learned Departmental Representative to be similar as that in **M/s. Khyati Ispat Private Limited**. On the request of learned Departmental representative this matter was earlier kept pending till the final disposal of **M/s. Khyati Ispat Private Limited**. The application of said decision to the present case is accordingly prayed and order is prayed to be set aside and appeal is prayed to be allowed.

6. Learned Departmental Representative per contra, relied upon the order under challenge. It is submitted that findings in the order are based upon the admissions of the appellant about the fact that Shri Manoj Kumar Agrawal and Shri Deepesh Agrawal who are the Managing Director and Director respectively of the appellant company are key managerial persons in the said other company. Shri Deepesh Agrawal is also admitted to be the Managing Director of M/s. Mahendra Strips Pvt Ltd. Raipur. The related parties disclosure as mandated according to the Accounting standard 2018 wherein the appellant has mentioned three of companies to be their 'Associated and Joint Ventures' has also been rightly considered as the reason for impugned sale by the appellant as sale to the related parties. It is submitted that liability of appellant to pay the excise duty @ 110% of the cost of production or manufacture of such goods instead of paying the duty on the transaction value of sale thereof has rightly been confirmed. Otherwise also, the transaction value to

three of the allegedly related companies was much lower than the transaction value of the sale to the independent buyers. Impressing upon no infirmity in the order under challenge, the appeal is prayed to be dismissed.

7. After hearing rival contentions and perusing the entire record, it is observed and held as follows:

Based upon the disclosure in the balance sheet of the appellant about three of the companies namely M/s. Mahendra Strips Pvt Ltd. Raipur, M/s. Super Ispat (Raipur) Pvt Ltd., and M/s. Animesh Iron, Raipur to be the appellant's 'Associated and Joint Ventures', that the impugned show cause notice was issued to the appellant proposing the calculation of their duty demand in terms of Rule 8 / Rule 9 of Valuation Rules instead of in terms of Rule 4 thereof.

8. Foremost, it is held necessary to look into the legal provisions.

Duties of excise are leviable on the value of the goods determined as per Section 4 of the Central Excise Act read with Central Excise Valuation (determination of price of excisable goods) Rules, 2000. As per section 4 the assessable value for each removal of the goods is the transaction value if four conditions are met:

- (a) there is a sale;
- (b) the sale is for delivery is at the time and place of removal;
- (c) the assessee and the buyer of the goods are not related; and
- (d) the price is the sole consideration of sale.

If any of these four conditions are not met, the value has to be determined as per the Valuation Rules. Revenue's case is that the

appellant and its buyers are related persons and that the buyers used the goods which they bought from the appellant. The buyer and seller will be 'related persons' according to clause (b) of sub-section (3) of section 4 if one more of the following conditions are met:

- (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.

The first question to be decided by us is if the appellant and its buyers are related persons and if so, under which of the above clauses. If they related only by being inter-connected undertakings and not related by any of the other clauses, then as per Valuation Rule 10(b), value shall be determined as if they are not related persons for the purpose of sub section (1) of section 4.

If they are related as per clauses (ii), (iii) or (iv) above, then if the buyer, in turn, sells the goods, the price at which the buyer sells the goods shall be the value as per Valuation Rule 9. If such buyer does not further sell the goods but uses them, then the value shall be 110% of the cost of manufacture as per Rule 9 read with Rule 8.

If they are related by being inter-connected undertakings and are also related by any of other clauses (ii), (iii) or (iv) above, as per Valuation Rule 10(a) read with Rule 9 and Rule 8, if such buyer sells the goods the price at which such goods are sold will be the value and if the buyer uses the goods, then the value shall be 110% of the cost of manufacture.

Rule 9 reads as follows:

“ **RULE 9.** [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 prior to 1.12.2013 reads as follows:

"Rule 9 prior to 01.12.2013 - 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 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 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 of goods shall be determined in the manner specified in Rule 8."

Since the goods sold by the appellant to the said three firms were not subsequently sold by them but were consumed for further manufacture, Rule 8 of Valuation Rules was applied by the Adjudicating Authority to calculate the excise duty liability of the appellant. Rule 8 as was applicable till 1.12.2013 reads 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."

The value of excisable goods for the purpose of calculating excise duty is otherwise explained in section 4 of Central Excise Act, 1944, which is reproduced as under:-

Section 4. Valuation of excisable goods for purposes of charging of duty of excise. -

(1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to their value, then, on each removal of the goods, such value shall -

(a) in a case where the goods are sold by the assessee, for delivery at the time and place of the removal, the assessee and the buyer of the goods are not related and the price is the sole consideration for the sale, be the transaction value;

(b) in any other case, including the case where the goods are not sold, be the value determined in such manner as may be prescribed.

"In terms of Explanation (i) given under Section 4(3)(b) of Central Excise Act, 1944 "inter-connected undertakings" means two or more undertakings which are inter-connected with each other in any of the following manners, namely :-

- (A) if one owns or controls the other;
- (B) where the undertakings are owned by firms, if such firms have one or more common partners;
- (C) where the undertakings are owned by bodies corporate,-
 - (i) if one body corporate manages the other body corporate; or
 - (ii) if one body corporate is a subsidiary of the other body corporate; or
 - (iii) if the bodies corporate are under the same management; or
 - (iv) if one body corporate exercises control over the other body corporate in any other manner;
- (D) 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, —
 - (i) hold, directly or indirectly, not less than fifty per cent. of the shares, whether preference or equity, of the body corporate; or
 - (ii) exercise control, directly or indirectly, whether as director or otherwise, over the body corporate;
- (E) if one is owned by a body corporate and the other is owned by a firm having bodies corporate as its partners, if such bodies corporate are under the same management;
- (F) if the undertakings are owned or controlled by the same person or by the same group;
- (G) 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 of the foregoing sub-clauses.

Explanation 1. — For the purposes of this clause, 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 employees of the first mentioned body corporate) one-fourth of the directors of the other; or

(v) to (x)

This section 4 clarifies that the transaction value shall be the value for calculating the duty of excise if the buyer and seller are not related and Section 4(3) explains as to when the selling and buying undertakings of a given transaction shall be interconnected or relatives. The above discussion also clarifies that the mere fact that buying and selling undertakings / body corporate are interconnected will not affect the applicability of Section 4 as far as the valuation for the purpose of excise duty is concerned. It shall still be the transaction value. Value other than transaction value, in terms of Rule 9 and proviso thereof (Rule 8), shall be ascertained case where an interconnected undertakings are also related in the manner specified in either of the sub clauses (ii) (iii) or (iv) of Clause (b) of sub section (3) of section 4 of Central Excise Act, 1944, as already mentioned above. In the present case, the department has alleged the buyers of appellant to be the related persons of appellant to appreciate the said allegation but in the light of above discussion it is also observed that the word 'related' is held to have same

meaning as is assigned to it in clause 41 of Section 2 of Companies Act, 1956 which reads as follows:

"relative" means, with reference to any person, anyone who is related to any person, anyone who is related to such person in any of the ways specified in Section 6, and no others.

Section 6 of the Companies Act, 1956 states that a person shall be deemed to be a relative of other if, and only if, -

- (a) they are members of Hindu undivided Family; or
- (b) they are husband and wife, or
- (c) the one is related to the other in the manner indicated in schedule IA."

From the very definition of 'related', it becomes clear that the definition is applicable to persons as individuals and not to the companies or Undertakings or body corporates. Companies are the separate legal entity as defined from its owner / members / share holders of/ Directors of companies are simultaneously the body corporates.

Resultantly, the appellants and other three of the companies named herein being the private limited companies cannot ever be relatives/ related. Hence sub-clause (i) of Section 4(3)(b) of Central Excise Act, 1944 does not apply to them. It is not the case of the department that M/s. Mahendra Strips Pvt Ltd. Raipur, M/s. Super Ispat (Raipur) Pvt. Ltd., and M/s. Animesh Iron, Raipur, are the distributor of the appellant company or sub-distributor of such distributor. Nor it is the case that they are so associated that they have interest, directly or indirectly in the business of each other. Hence, undertaking/ companies herein including that of appellate do not even fall under clause (iii) and (iv) of Section 4(3)(b) of Central Excise Act, 1944.

8. In the final order of **M/s. Khyati Ispat Pvt Ltd.** (supra), this Tribunal has held as under:-

"13. The Valuation Rules treat cases where the buyer and seller are related persons because of being inter-connected undertakings different from those cases where the buyer and seller are related persons under any of the other clauses of sub section (3) of section 4. Further, the Rules also make a distinction between cases where the buyer and seller are only 'inter-connected undertakings' and those cases where, the buyer and seller, in addition to being inter-connected undertakings, are also related in any of the other ways indicated in clause (b) of sub-section (3) of section 4."

9. We see no reason to differ from these findings. Further we observe that the only case of the department rests on two counts: (i) the appellant has shown three of said companies as its 'Associated and Joint ventures' in their balance sheet; and (ii) The directors of appellants are the directors in either of the three undertakings. Further we rely upon the decision of Hon'ble Apex court in the case of **Commissioner of Central Excise, Mumbai V vs. J Foundation** reported as **[2015 (324) ELT 422 (SC)]** where the Court has interpreted the statutory provision in respect of related person, and has held that test of mutuality of interest established and satisfied as between the buyer and seller shall be the criteria of calculating excise duty on the sale of manufactured cost in terms of Rule 9 of Valuation Rules. In the present case, we observe that the Department has not produced any evidence of proving the mutuality of interest of three other companies with the appellant. There is no evidence that M/s. Mahendra Strips Pvt Ltd. Raipur, M/s. Super Ispat (Raipur) Pvt Ltd., and M/s. Animesh Iron, Raipur along with the appellant are so associated that they have interest directly /indirectly in the business of each other. There is no evidence to show any financial flow back as the sale of impugned companies appeared to be where, some business transaction on principal to principal basis. There is no evidence produced by the department to falsify the said fact. The department has failed to produce on record either by explaining or by production of material evidence as to how the appellant and three of companies could be termed

as related or amongst them the buyer when related and distribution of the appellant or the sub distribution of distributor or that of the appellant and the buyer are so associated. They have interest directly or indirectly in the business of each other as provided in the statute for the applicability of the Rule 9 of Valuation Rules.

10. We are of the opinion that the fact about two or more Directors in two companies to be common, it does not automatically apply that two companies are related person. This issue also stands settled in terms of decision of Hon'ble Apex Court in the case of **CCE vs. Sanghi Organisation vs CCE** reported as **[2007 (209) ELT 160 A (SC)]**. Even this Tribunal in the case of **Continental Furnishers vs CCE NOIDA** reported as **[2015 (330) E.L.T. 787 (Tri. - Del.)]** has held the same. We also observe that the similar allegations were also been raised by the Department against the present appellant and alleged other three companies. The said earlier show cause notice has been falsified by the Department itself vide Order in Appeal No. 423-16-17 dated 17.2.2017. In the case of appellant themselves it has already been held that three companies named herein are not to be considered as interconnected or related companies. Based on this finding that the duty as was demanded in said earlier show cause notice in terms of Rule 9 or Rule 8 of the Valuation Rules has already been set aside by the Commissioner (Appeals) in the said order. It is specifically held by Commissioner (Appeals) as follows:

"v. That, the appellant, as a company, does not own or control M/s Mahendra Sponge & Power Pvt. Ltd. / M/s Animesh Iron. None of the clauses "A", "B", "C", "D", "E", "F" and "G" of the definition of "inter-connected undertakings are inapplicable. Further, Shri Deepesh Agrawal, who is the Managing Director of the appellant company is not Managing Director of any of the other Two companies, namely, M/s Mahendra Sponge & Power Pvt. Ltd. / M/s Animesh Iron. Also, Shri Manoj Kumar Agrawal,

who is the Managing Director of M/s Mahendra Sponge & Power Pvt. Ltd. company is not Managing Director of any other two companies. Neither Shri Deepesh Agrawal nor Shri Manoj Kumar Agrawal is the Managing Director of M/s Animesh Iron. Thus these three companies are not under the 'same management', in terms of the meaning assigned to this term in the definition of "inter-connected undertakings". Thus, the appellant and M/s Mahendra Sponge & Power Pvt. Ltd./M/s Animesh Iron are not 'inter-connected undertakings' within the meaning of sub-clause (i) of section 4(3)(b) of the Act."

11. That, in order to invoke the provisions of sub-clause (iv) of section 4(3)(b) of the Act, it has to be proved that the appellant on the one hand, and M/s Mahendra Sponge & Power Pvt. Ltd. / M/s Animesh Iron, on the other hand, are so associated that they have interest, directly or indirectly, in the business of each other. The appellant is in no way directly involved with the business activities of M/s Mahendra Sponge & Power Pvt. Ltd. / M/s Animesh Iron and such sales between them are business transactions which are on principal to principal basis. There is no evidence to show that there was any financial flow back.

12. Coming to the contention about directors been common, we hold that where two or more Directors in two companies are common, it does not automatically imply that the two companies are related persons. The law on this issue is well settled. The adjudicating authority was bound to follow these decisions as has earlier been pointed out by Hon'ble Apex Court also in the case of **Union of India vs Kamlakshi Finance Corporation Ltd.** reported as **[1991(55) ELT 433 (SC)]**.

13. In terms of entire above discussion, we hereby hold that excise duty on the sale of M S ingots / sponge iron by the appellant to the three other companies is not to be arrived at by considering the transaction value, in terms of Rule 9 of the Central Excise Rules as mere mention in balance sheets about

the buyer to be the 'Associated or Joint Ventures' will not be sufficient to prove that the buyers fall in either of (ii)(iii) or (iv) sub clause of section 4 (3) (b) of Central Excise Act, 1944. The question of confirmation of demand as proposed by the impugned Show Cause notice does not arise. The order under challenge is held to have passed based upon wrong interpretation arrived at by the Adjudicating Authority. He is also held to have failed to consider the settled law in said Rule by the Hon'ble Apex Court and by several Benches of this Tribunal, that too in appellants own case.

14. Accordingly, the order under challenge is hereby set aside and consequent thereto the appeal stands allowed.

(Dictated and pronounced in the open court on **29.08.2022**)

(P V SUBBA RAO)
MEMBER (TECHNICAL)

(RACHNA GUPTA)
MEMBER (JUDICIAL)

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