IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI

APPEAL NO: E/964/2007

[Arising out of Order-in-Appeal No: SVS/159/NGP-II/2007 dated 26th March 2007 passed by the Commissioner of Central Excise & Customs (Appeals), Nagpur.]

Commissioner of Central Excise
Nagpur …***Appellant***

versus

Trimurti Ispat Ltd ***…Respondent***

Appearance:

Shri NN Prabhudesai, Superintendent (AR) for appellant

None for respondent

CORAM:

Hon'ble Justice Dr. Satish Chandra, President
Hon'ble Shri C J Mathew, Member (Technical)

Date of hearing: 13/12/2017
Date of decision: 03/04/2018

ORDER NO: A/85885 / 2018

Per: C J Mathew

Revenue is an appeal against order-in-appeal no. SVS/159/NGP-II/2007 dated 26th March 2007 of Commissioner of

Central Excise (Appeals), Nagpur which has set aside demand of ₹30,846 confirmed under section 11A of Central Excise Act, 1944, along with appropriate interest and like amount penalty, by the original authority against show cause notice alleging short-payment of ₹48,66,583 between 1st July 2000 and 31st December 2004. The proceedings were initiated against M/s Trimurti Ispat Ltd for discharging duty liability on clearance of 'mild steel ingots' and 'alloy steel ingots' to M/s Maler Kotla Steel Rolling Mills Pvt Ltd, an entity related to them, on transaction value without compliance of rule 8 of Central Excise (Determination of Price of Excisable Goods) Rules, 2000.

2. The jurisdictional authorities found the two entities to be related on account of common director, shareholding of the buyer in the capital of the seller and substantial share of the market of the seller. The first appellate authority held the two be interconnected undertakings but that, for invoking rule 9 of Central Excise (Determination of Price of Excisable Goods) Rules, 2008, it was also necessary for the two to be related in terms of (ii), (iii) and (iv) of rule 4(3) which was not alleged in the show cause notice. According to the impugned order, while the interest of the buyer in the seller has been established, mutuality of interest requires investment in the shares of each other.

3. In the grounds of appeal, this narrow view of insistence on share capital investment in each other being the sole criteria for determination of mutuality of interest has been contested by re-iterating the evidences highlighted in the show cause notice and the common ownership. Further, reliance is placed in the decision of the Hon'ble Supreme Court in *Calcutta Chromotype Ltd v. Collector of Central Excise, Calcutta [1998 (99) ELT 202 (SC)]*.

4. None appeared for respondent. We have heard Learned Authorized Representative who drew attention to the definition of 'interconnected undertaking' in section 2 of Monopolies & Restrictive Trade Practices Act, 1969 and the decision of the Hon'ble Supreme Court in *re Calcutta Chromotype Ltd* while referring to the decision of the Tribunal in *Commissioner of Central Excise, Delhi-I v. Ever shine Engineering Works [2000 (125) ELT 1042 (Tribunal)]* in which the necessity of applying ratio of precedent decision in analogous circumstances has been highlighted.

5. We do find that in *re Calcutta Chromotype Ltd*, the Hon'ble Supreme Court has held that

> *'14. In M/s. Mcdowel and Company Ltd. v. Commercial Tax Officer [(1985) 3 SCC 230 = (1985) 154 ITR 148], this Court examined the concept of tax avoidance or rather the legitimacy of the art of dodging tax without breaking the law. This Court stressed upon the need to make a departure from the Westminster principle based upon the observations of*

Lord Tomlin in the case of IRC v. Duke of Westminster [(1936) AC 1] that every assessee is entitled to arrange his affairs as to not attract taxes. The Court said that tax planning may be legitimate provided it is within the framework of law. Colourable devices, however, cannot be part of tax planning. Dubious methods resorting to artifice or subterfuge to avoid payment of taxes on what really is income can today no longer be applauded and legitimised as a splendid work by a wise man but has to be condemned and punished with severest of penalties. If we examine the thrust of all the decisions, there is no bar on the authorities to lift the veil of a company, whether a manufacturer or a buyer, to see it was not wearing that mask of not being treated as related person when, in fact, both, the manufacturer and the buyer, are in fact the same persons. Under sub-section (1) of Section 4 of the Act, value of the excisable goods shall not be deemed to be normal price thereof, i.e., the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal, if the buyer is a related person and price is not the sole consideration for sale. As to who is a related person, we have to see its definition of Section 4(4)(c) of the Act. It is not only that both, the manufacturer and the buyer, are associated with each other for which corporate veil may be lifted to see who is behind it but also that they should have interest, directly or indirectly, in the business of each other. But once it is found that persons behind the manufacturer and the buyer are same, it is apparent that buyer is associated with the manufacturer, i.e., the assessee and then regard being had to the common course of natural events, human conduct and public and private business it can be presumed that they have interest, directly or indirectly, in the business of each other (refer Section 114 of the Evidence Act). It is, however, difficult to lay down any broad principle to hold as *to when corporate veil should be lifted or if on doing that, could it be said that the assessee and the buyer are related persons. That will depend upon the facts and circumstances of each case and it will have to be seen who is calling the shots in both the assessee and the buyer. When it is the same person the authorities can certainly fall back on the third proviso to clause (a) of Section 4(1) of the Act, to arrive at the value of the excisable goods. It cannot be that when the same person incorporates two companies of which one is the manufacturer of excisable goods and other is the buyer of those goods, the two companies being separate legal entities, the Excise authorities are barred from probing anything further to find out who is the person behind these two companies. It is difficult to accept such a narrow interpretation. True that shareholdings in a company can change but that is the very purpose to lift the veil to find out if the two companies are associated with each other. Law is specific that when duty of excise is chargeable on the goods with reference to its value than the normal price on which the goods are sold shall be deemed to be the value provided (1) the buyer is not a related person and (2) the price is the sole consideration. It is a deeming provision and the two conditions have to be satisfied for the case is to fall under clause (a) of Section 4(1) keeping in view as to who is the related person within the meaning of clause (c) of Section 4(4) of the Act. Again if the price is not the sole consideration, then again clause (a) of Section 4(1) will not be applicable to arrive at the value of the excisable goods for the purpose of levy of duty of excise.*

15. In the present case, we do find that the authorities of and the Appellate Tribunal did address themselves to the basic question as to the shareholdings of both, the assessee and the buyer, inasmuch as they found that the Managing

> *Director of both the companies was the same and one more Director was common. It was also found that the shares of both the companies were held by the members of the `Sharma family' but that is quite a vague expression and, therefore, in our view, the Appellate Tribunal was partly right in giving the direction to ascertain the break up of the shares of each member of the family in the two companies. To lift the veil the actual shareholding of both the companies and the persons in control of the management of both the companies needed to be ascertained to consider the identity of interest of both the companies in the business of each other. No presumption of such mutuality of interest in the business of each other could have been drawn without the factual data.'*

6. For such an exercise to be completed, it is necessary that the impugned order be set aside and the matter remanded back to the first appellate authority for reconsideration of the facts of mutuality of interest and, thereafter, decide on the application of the relevant valuation provision. Needless to say, the appellate authority shall afford opportunity to the assessee to be heard before passing a fresh order.

7. Appeal is disposed off on the above terms.

(Pronounced in the Open Court on 03/04/2018)

(C J Mathew)
Member (Technical)

(Justice Dr. Satish Chandra)
President

**/as*