CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH

Excise Appeal No. 1146 of 2012

(Arising out of Order-in-Original No. 01/Commr/M-II/2012 dated 11.05.2012 passed by the Commissioner of Central Excise, Mumbai-II)

M/s. EWAC Alloys Ltd. **Appellant**
L&T Business Park, TC II Tower B,
5th Floor, Gate 5, Powai Campus,
Saki Vihar Road, Mumbai 400 072.

Vs.

Commissioner of Central Excise, Mumbai-II **Respondent**
9th Floor, Piramal Chambers, Jijibhoy Lane,
Lalbaug, Parel, Mumbai 400 012.

WITH

Excise Appeal No. 1147 of 2012

(Arising out of Order-in-Original No. 01/Commr/M-II/2012 dated 11.05.2012 passed by the Commissioner of Central Excise, Mumbai-II)

M/s. Larsen & Toubro Ltd. **Appellant**
Corporate Indirect Taxes, North Block-II,
3rd Floor, Gate No.1, Powai Campus,
Saki Vihar Road, Mumbai 400 072.

Vs.

Commissioner of Central Excise, Mumbai-II **Respondent**
9th Floor, Piramal Chambers, Jijibhoy Lane,
Lalbaug, Parel, Mumbai 400 012.

Appearance:

Shri V. Sridharan, Senior Advocate, with Shri Prakash Shah, Advocate, for the Appellant
Shri Sydney D'Silva, Additional Commissioner, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO. A/85098-85099/2022

Date of Hearing: 09.02.2022
Date of Decision: 09.02.2022

PER: SANJIV SRIVASTAVA

These appeals by Appellant 1 (M/s EWAC Alloys Limited) and Appellant 2 (M/s. Larsen & Toubro Limited) are directed against the order in original No 01/Commr/M-II/2012 dated 11.05.2012 of the Commissioner of Central Excise, Mumbai- II. By the impugned order Commissioner has held as follows:

"ORDER

1. I confirm the demand of Rs. 21,47,35,943/- demanded for period from July, 2006 to March, 2010 and the demand of Rs. 3,64,91,670/- demanded for period from 01.04.2010 to 13.12.2010 totally amounting to Rs.25,12,27,613/- (Rupees Twenty Five Crores Twelve Lakhs Twenty Seven Thousand Six Hundred and Thirteen only) under Section 11A(2) of Central Excise Act, 1944.

2. I Order recovery of interest under Section 11AB of Central Excise Act, 1944 in respect of the demands confirmed at Sr. No.1.

3. I also impose a penalty of Rs. 25,12,27,613 (Rupees Twenty Five Crores Twelve Lakhs Twenty Seven Thousand Six Hundred and Thirteen only) under Section 11 AC of Central Excise Act, 1944 read with Rule 25 of Central Excise Rules, 2002.

4. I also impose a penalty of Rs. 5,00,00,000 (Rupees Five Crores only) on M/s. L&T Limited (Noticee No. 2) under Rule 26 of Central Excise Rules, 2002."

2.1 Appellant 1 undertakes the manufacturing activity from the manufactory located in premises of Appellant 2 to manufacture of Fills, Welding Powder Alloys, Flux for welding, coated welding electrodes and coated / uncoated gas welding rods falling under Chapters 38 and 83 of the first schedule of the Central Excise Tariff Act, 1985.

2.2 Prior to 01.07.2006, Appellant 1 discharged the Central Excise Duty on their goods sold to Appellant 2, with reference to the price at which later sold the goods.

2.3 Vide letter dated 21.06.2006 Appellant 1 informed the jurisdictional Assistant Commissioner of Central Excise that, from 01.07.2006 the Central Excise duty on all clearances of final product to the Appellant will be discharged on the transaction value contracted between them.

2.4 Assistant Commissioner vide letter dated 13th February, 2007 and requested Appellant 1 to pay the differential duty for the period from 01.07.2006 in the same manner as it was paid prior to 01.07.2006 for reason Appellant 1 and Appellant 2 are inter connected undertaking in terms of the provisions of Section 4 (3)(b)(iv) of the Central Excise Act, 1944 read with Section 2(g) of the Monopolies and Restrictive Trade Practices Act, 1969 (hereinafter referred to as MRTP) and therefore they are related parties.

2.5 Appellant 1 challenged the said direction of the Assistant Commissioner by way of writ (WP No 423/2007) before Hon'ble Mumbai High Court. Vide their order dated 31.03.2007 Hon’ble High Court dismissed the Writ Petition as withdrawn and allowed the department the liberty to conduct investigation, issue show cause notice and adjudicate the matter as per law.

2.6 Investigations were thus undertaken by the jurisdictional officers and revenue was of the view that:

- Appellant 1 and Appellant 2 are interconnected undertakings as per Monopolies and Restrictive Trade Practices Act, 1969. They are having mutuality of interest in business of each other as per Hon’ble Supreme Court decision in case of Atic Industries Ltd [1984 (17) ELT 323 (SC)], therefore they are related persons within the meaning of sub-clause (iv) of clause (b) of sub-section (3) of section 4 of the Central Excise Act, 1944.
- The Selling Agency Agreements between them also establishes the mutality of interest as
    - Appellant 2 is under contractual obligation to use its best endeavors to foster the interest and trade of the Appellant 1 and barred in engaging in any business of the same nature. Thus, the Appellant 2 has interest in the business of Appellant 1.
    - They share expenses in respect of advertisements, trade fairs & exhibitions amongst others. Here, though the transaction may be on principal to principal basis, the wholesale price charged is not the sole consideration. These advertisements, trade fairs & exhibitions promote the business of both
- They have mutually agreed to share the expenses on these accounts so that the part expenses incurred by the Appellant 2 is not loaded on the transaction value of the

Appellant 1 with the intention of evading payment of central excise duty.

- Mutuality is also established by the fact that Appellant 2 has to employ and remunerate qualified persons at Appellant 1 Institute which is also located in the same premises of the Appellant 2.
- Appellant 2 purchases the products from the Appellant 1 at their list price and sell these to customers at such prices as the Appellant 2 fixes in conjunction with the Appellant 1. However Appellant 2 has liberty to sell at prices lower than the prices stipulated jointly for sale.
- The Selling Agency Agreement - Domestic Sales dated 28.12.1998 does not stipulate any commission or remuneration for the said selling agency service of the Appellant 2, instead they pocket huge profit earned on sale of the goods of Appellant 1. The Selling Agency Agreement For Exports dated 28.12.1998, provides for commission as a percentage of export price. The intention of evasion of central excise duty in respect of domestic sales is obvious.
- Though the Selling Agency Agreement - Domestic Sales does provide that the Appellant 1 has the right to sell the products directly to customers, but in fact no sales to customers in domestic market have been made by the them directly.
- Appellant 2 was the sole selling agent during the currency of the Agreement or thereafter. As per Companies Act, a company shall not appoint a sole selling agent for any area for a term exceeding five years at a time. Re-appointment or extension has to be made by further period not exceeding five years on each occasion.
- As Appellant 2 is bearing the expenses of advertisement, trade fair, exhibitions and salaries and various other expenses of the Directors and officers of the Appellant 1, and is pocketing the huge price differential on the sale of the goods of appellant 1. Thus, the transactional value of the Noticee No. 1 does not represent the true and intrinsic measure of the value of products for the purpose of chargeability to excise duty.

- As Appellant 1 and Appellant 2 are related and having mutuality of interest, the transaction value between them do not qualify to be transaction value as under sub-section (a) of section 1 of section 4 of the Central Excise Act, 1944. The assessable value thus needs to be determined in terms of sub-clause (iv) of clause (b) of sub-section (3) of Section 4 of the Central Excise Act, 1944 read with the provisions of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000.
- Appellant 1 have intentionally and willfully suppressed the facts that they and Appellant 2 are related having mutuality of interest in the business of each other in spite of their being inter connecting undertaking, therefore being their related person in terms of Sub- Section (3)(b)(iv) of Section 4 of the Central Excise Act, 1944 read with Rule 10 (a) and Rule 9 of Central Excise (Valuation) Rules, 2000, instead of paying duty on the basis of sale price/transaction value of the Appellant 2 they paid central excise duty based on their sale value to the Appellant 2 during the period July, 2006 to 13.12.2010 with intention to evade the Central Excise duty in as much as;
- Appellant 2 have actively involved themselves in acquiring, possessing, keeping and purchasing of the goods on which Central Excise Duty was short paid and thereby they the Noticee No. 2 made themselves liable to imposition of penalty under Rule 26 of Central Excise Rules, 2002.

2.7 By show cause notice dated 03.02.2011, Appellant 1 was called to show cause, as to why:

(a) The Central Excise duty amounting to Rs. 21,47,35,943/- (Rupees Twenty One Crore Forty Seven Lakh Thirty Five Thousand Nine Hundred Forty Three) short paid on the goods manufactured and cleared for the period from July, 2006 to March 2010 (as detailed in Annexure 'A' to the show cause notices) should not be demanded and recovered from them under the proviso to sub section (1) of Section 11A of Central Excise Act, 1944;

(b) Interest at appropriate rate should not be demanded and recovered from them under the provisions of Section 11AB of the Central Excise Act, 1944.

(c) Penalty should not be imposed on them under Section 11AC of the Central Excise Act, 1944 read with Rule 25 / Rule 27 of the Central Excise Rules, 2002.

2.8 By show cause notice dated 04.05.2011, Appellant 1 was called to show cause, as to why:

(a) Central Excise duty amounting to Rs. 3,64,91,670/- (Rupees Three Crores Sixty Four Lakhs Ninety One Thousand Six Hundred Seventy only) short paid on the goods manufactured and cleared for the period from April, 2010 to 13.12.2010 under the proviso to sub section (1)Section 11 A of the Central Excise Act, 1944.

(b) Interest at appropriate rate should not be demanded and recovered from them under the provisions of Section 11AB of the Central Excise Act, 1944.

(c) Penalty should not be imposed on them under Section 11AC of the Central Excise Act, 1944 read with Rule 25 / Rule 27 of the Central Excise Rules, 2002.

2.9 Appellant 2 were also required to show cause, as to why penalty should not be imposed on them under Rule 26 of Central Excise Rules, 2002.

2.10 Both the Show Cause Notices were adjudicated by the Commissioner as per the impugned order referred in para 1 above.

2.11 Aggrieved by the impugned order both Appellant 1 and Appellant 2 have filed these appeals.

3.1 We have heard Shri V Sridharan, Senior Advocate along with Shri Prakash Shah, Advocate for the Appellants and Shri Sydney D'Silva, Additional Commissioner, Authorized Representative for the revenue.

3.2 Arguing for the appellants learned Counsel submitted that-

- Undisputedly they are interconnected undertaking with Appellant 2 having 50% share in the Appellant 1, as per MRTP Act and Section 4 of the Central Excise Act, 1944.
- However the mere fact of them being interconnected undertaking cannot be a reason for rejection of the transaction value between them and determining the assessable value on the basis of the sale price of the Appellant 2 to their customers;

- Section 4 of The Central Excise Act, 1944 was amended and substituted by new section 4. Also Central Excise Valuation Rules, 2000 replaced the earlier valuation rules. Explaining the changes so made Board has vide its Circular dated 30.06.2000, vide para 24 clarified that even if they were interconnected undertakings they could be held as related only if they were:
    - Holding and Subsidiary Companies; or
    - They are related as per (ii), (iii) or (iv) of Section 4 (3)(b)
- Thus even if they are interconnected they can be held as related only if there is mutuality of interest in business of each other. In absence of mutuality of interest they cannot be said to be related and the transaction value between them cannot be rejected.
- It has been throughout held by various authorities that mutuality of interest has to be two sided and both buyer and seller should be interested in the business of each other.
- Revenue has sought to rely upon the various clauses of the sale agreement to prove the mutuality of interest. These clause do not establish mutuality of interest between them in terms of the judicial pronouncements on the subject, referred below:
    - Atic Industries Ltd [1984 (17) ELT 323 9SC)]
    - Lloyds Metal & Engineers Ltd [2008 (222) ELT 84 (T)]
    - Pepsi Foods (P) Ltd [1993 (64) ELT 426 (T)]
    - Besta Cosmetic Ltd [2005 (183) ELT 132 (SC)]
    - Xerographi Ltd [2010 (357) ELT 11 (SC)]
    - Alembic Glass Industries Ltd. [2002 (143) ELT 244 (SC)]
    - Jay Formulations Ltd [2010 (261) ELT 641 9T-Ahmd)]
    - Kanchan Industries [2005 (186) ELT 302 (T-Del)]
    - South Asis Tyres Pvt Ltd. [2003 (152) ELT 434 (T-Mum)]
    - Goodyear South Asia Tyres Pvt Ltd. [2015 (322) 389 (SC)]

    - Vinny Overseas Pvt Ltd [2009 (245) ELT 759 (T-Ahmd)]

- In absence of the mutuality of interest between them, they cannot be held to related person and the transaction value between them would be the basis for the determination of assessable value as per Section 4. Since they have paid the duty accordingly the demand as per the impugned order cannot be sustained.
- Demand made by the notice dated 03.02.2011, issued beyond the normal period of limitation cannot be sustained.
- Penalties as imposed cannot be sustained.

3.3 Arguing for the revenue, learned authorized representative, while reiterating the findings as per the impugned order submits that:

- Appellant 1 for the period prior to 01.07.2006 was discharging duty on the basis of sale price of Appellant 2 to their customer. Without sufficient cause they changed the practice and started paying the duty on the basis of their sale price to Appellant 2.
- Admittedly Appellant 1 and Appellant 2 are interconnected undertaking and Commissioner have by referring to various clauses of the sale Agreement – for Domestic Sale and Sale Agreement – for exports concluded that they had mutuality of interest in the business of each other. For this purpose reference is made to following authorities
    - Dipareena Investment Pvt Ltd [2014 (314) ELT 571 (T-Mum)]
    - Karan Engineers Pvt Ltd. [2017 (357) ELT 241 9T-Del)]
- Since they had mutuality of interest they are related persons and the value needs to be determined on the basis of the sale price of the Appellant 2 to their customers.
- On the issue of limitation the issue needs to be decided taking into account the decision of Hon'ble Supreme Court in the case of Mehta & Co [2011 (254) ELT 481 (SC)]

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments.

4.2 Commissioner has in the impugned order while confirming the demand observed as follows:

"I have carefully gone through the case records and submissions made by the assessee. The basic issue before me for consideration is whether M/s EWAC Alloys Ltd.,(Noticee No.1) and M/s L &T Ltd., (Noticee No. 2) are related persons within the meaning of sub section 3(b) of the section 4 of the Central Excise Act, 1944.

As per terms of the sub-section 3(b) of the Section 4 of the Act, 1944 "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 clause (g) of section 2 of the Monopolies and Restrictive Trade Practices Act, 1969 (54 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);*

A plain reading of the provisions of sub-section 3(b) of section 4 of the Central Excise Act, 1944 indicate that persons shall be deemed related if they are inter connected undertakings, relative, amongst them the buyer is a relative and a distributor of the assessee, or a sub-distributor of such distributor OR they are so associated that they have interest, directly or indirectly in the business of each other. In a way it states that if these persons falls under any of the categories listed at (i) to (iii), they shall be deemed as 'related persons' or they should be so associated that they have interest, directly or indirectly in the business of each other to term them related persons under the section. The condition of having a interest in the business of each other is not called for/required in the event circumstances, if they are inter-connected undertakings, relative, amongst them the buyer is a relative and a distributor of the assessee, or a *sub-distributor of such distributor. The intent of these provisions also get spelt out from the fact that no condition need to be fuffilled in the case of persons of the categories (0) to (iii), they are deemed 'related' under the Act. whereas in the case category of persons at (iv), the condition of having interest in the business of each other is essential and need to be fulfilled to term them related persons under the Central Excise Act.*

Further, the Valuation Rules, 2000 signify that for the method of valuation of the goods and assessment in the cases, where the transactions are between inter connected undertakings. The provisions of Rule 10 of the valuation Rules, 2000 requires that 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), 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.

(b) Thus, to assess and collect the Central Excise duty under Rule 9 of the Valuation Rules, 2000, it is essential that the excísable goods under assessment 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, or the buyer is a holding company or subsidiary company of the assessee. In such cases only 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, besides being inter connected undertakings. In the nut shell to assess the goods and to collect Central Excise duty in terms of Rule 9, the persons

need to be 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.

Having discussed about the persons to be deemed as 'related in terms of the provisions of the Act and provisions of valuation, I proceed to examine whether Noticee no.1 and Noticee no.2 are related persons in the facts and circumstances of the case.

The facts of the case in brief are that M/s EWAC Alloys Ltd., (Noticee no. 1) are engaged in the manufacture of Fills, welding powder Alloys, Flux for welding, Coated welding electrodes and coated/uncoated gas welding roads of chapter 38 & chapter 83 of the first schedule of the Central Excise tariff Act, 1985. M/s EWAC incorporated on 4.4.1962, was formed by joint venture of M/s L&T and a non-resident on 50-50 basis. M/s L & T enhanced the equity base to 60% and M/S EWAC became a subsidiary of L&T in 1979. M/s EWAC issued 51200 equity shares to Eutectic corporation ,USA and as a result the holdings of M/s L&T reduced to 50% and consequently became an associate company of M/s L &T with effect from 18.05.93. The goods manufactured by M/s EWAC are cleared to depots or branch offices of M/s L &T situated across India and number of factories of L &T for their own consumption. On 28.12.98 M/s EWAC entered into selling agency agreement with M/s L&T Ltd., and appointed M/s L&T LTD., as selling agent for domestic as well as export purposes. As no other selling agent was appointed, M/s L&T Ltd., became sole selling agent. Till 1.07.2006 M/s EWAC were discharging the central Excise duty liability on the selling price of M/s L&T Ltd. From 01.7.2006 , M/s EWAC changed the pattern of assessment and started discharging the duty liability on the transaction value contracted between them and M/s L&T Ltd. Therefore, a show cause cum demand notice was issued, which is before me for adjudication.

……..

The facts and circumstances narrated above explicitly indicate that M/s L&T Ltd., and M/s EWAC are not only interconnected undertakings but also under the same management. Further, the assessee has also not denied this fact in their written submission. In such cases, the valuation of transacted goods between two interconnected undertakings has to be done in *terms of the provisions of Rule 10 of the valuation Rules, 2000. However, as per the provisions of the Rule 10 to assess the goods and to collect the duty in terms of Rule 9, it is not sufficient that the persons are interconnected undertakings and under the same management but they should also be 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.*

....

As such I proceed to examine the case on the other remaining/surviving condition i.e. as to whether M/s L & T Ltd., and M/s EWAC are so associated that they have interest, directly or indirectly, in the business of each other. As discussed above it is clearly seen that M/s L &T Ltd., and M/s EWAC are interconnected undertakings and under the same management. Accordingly the valuation of the transacted goods between them need to be done under the Rule 10 of the Central Excise valuation Rules, 2000. The question of the valuation and assessment of the goods under Rule 10(a) i.e. in the manner prescribed in Rule 9 or under Rule 10(b) rest upon their association and their interest, directly or indirectly, in the business of each other.

....

The Corporate Management of M/S. L&T Ltd nominates its employees as Directors of EWAC and decision of the appointment is taken by the Board and Shareholders of EWAC;

M/s. L&T Ltd is bearing the salary and other expenses of officers and Directors of M/s. EWAC. Inter Unit Debit Advices are issued by M/S. L&T Ltd Headquarter Corporate Accounts Section to Machinery and Industrial Products Division, Powai (MIPD) which show overheads charges including Administrative and Management expenses of the Corporate department of M/S. L&T Ltd allocated to MIPD. Shri P.N. Muigund, Senior Deputy General Manager, Corporate Accounts of M/S. LARSEN & TOUBRO LTD in his statement dated 27.2.07 revealed that the said Debit advices show the total expenses budgeted and incurred by the company's corporate department, which are not otherwise directly allocated to the Business Divisions. He further revealed *that salaries and certain other expenses of Officials and Directors of M/s EWAC are also included in the above head. He also clarified that the said overhead is debited to MIPD since the services of the Corporate Department are availed by the said Divisions and the trading activities relating to products manufactured by M/s EWAC is carried out under the said Division.;*

As per Selling Agency Agreement - Domestic Sales dated 28.12.1998 and Selling Agency Agreement for Exports dated 28.12.1998,

1. *M/S. L&T Ltd. has been appointed as Selling Agent for M/s EWAC. As no other Selling Agent has been appointed by M/S. EWAC, M/S. L&T LTD has in effect become the Sole Selling Agent for M/s EWAC.*
2. *Though the Selling Agency Agreements expired after five years of its existence, both M/s. EWAC and M/S. L&T Ltd. have continued the sale and purchase of the goods as before.;*
3. *M/s. EWAC clear their final product to the Depots, Branch offices of M/S. L&T Ltd situated all over India for stock and sale to stockiest/Dealer or the end users, to the factories of M/S. L&T Ltd. for consumption in manufacture of its final product, to its own factory for captive consumption and to other buyers in foreign countries.;*

M/S. L&T Ltd is under contractual obligation to foster the interest and trade of M/s. EWAC. The conditions stipulated in the Selling Agency Agreement - Domestic Sales dated 28.12.1998 are as follows:

a) *M/S, L&T Ltd has been appointed as M/s EWAC's Selling Agents within the territory of India, Nepal and Bhutan for sale of the products for a period of 5 years from 01.10.1998;*

b) *M/S. L&T LTD has to purchase the products from M/s. EWAC at the list price,*

c) *M/S. L&T LTD shall use its best endeavors to foster the interests and trade of M/s. EWAC and except with the prior consent of M/s. EWAC (which consent shall not be unreasonably withheld), will not directly or indirectly be* *concerned or engaged in any business of the same nature as that of M/s. EWAC and competing therewith other than products of companies entitled to use the "EUTECTIC"/"CASTOLIN' trade mark;*

d) The cost of advertisements in the technical press or elsewhere, cost of preparation of product industrial films/slides, and participation in trade fairs and exhibitions in India shall be borne equally by Ms EWAC and M/S. L&T LTD. The amount of such advertising and other expenses shall be decided in advance by mutual agreement by M/S L & T LTD and M/s EWAC.

e) The cost of printing the sales literature, direct mailers and technical publications like Modern Maintenance Welding viz cost of paper, art work, photography, design typesetting, block and film amking etc., shall be borne equally by M/s EWAC and M/s L & T LTD.

f) All sales literature requirements shall be decided in advance by mutual agreement between M/S L & T LTD and M/s EWAC

g) M/S. EWAC would provide to M/S. LARSEN & TOUBRO LTD, all reasonable requirements of demonstration samples, including feeders, torches and other accessories required by salesmen for demonstration, at 25% of the list price and full excise duty and sales tax payable thereon. M/s. EWAC and M/S. L&T Ltd will ensure that such materials are drawn only for bona fide use and in reasonable quantities;

h) M/S. L&T Ltd shall employ and remunerate suitably qualified persons to conduct training courses at EWAC Institute in Mumbai.

The conditions stipulated in the Selling Agency Agreement for Exports dated 28th December, 1998 are as follows:

(a) M/S. L&T LTD has been appointed as selling Agent of EWAC for sales on Exports outside India against remuneration,

(b) The commission/discount of 45% on the Export price to be paid to selling agent by EWAC. M/S. L&T LTD shall use its best endeavors to foster the interests and trade of the Company and, except with the prior consent of the

Company (which consent shall not be unreasonably withheld), will not directly or indirectly be concerned or engaged in any business of the same nature as that of the company and competing therewith other than products of companies entitled to use the "Eutectio"/"Castolin" trade mark.

Further, I also find that the statements recorded of various officials of M/s L &T Ltd., and M/s EWAC are very much relevant as they indicate the nature of the relationship between the two bodies corporate. The above narrated facts and depositions of various officials of the two corporate bodies during the investigation clearly indicate that;

1. *the role played by the of Common Directors in the meetings of Board of Directors of M/s L&T. Ltd., and in the Board of Directors of M/s EWAC. They were instrumental in deciding even the allotment of shares to M/s L&T Ltd., and M/s Eutectic Corporation.*
2. *Among other understandings and contractual obligation, under the Domestic Sales dated 28.12.1998 and Selling Agency Agreement for Exports dated 28.12.1998, M/S. L&T Ltd., was also under contractual obligation to foster the interest and trade of M/s. EWAC. As per the conditions stipulated in the Selling Agency Agreement - Domestic Sales dated 28.12.1998,M/S. L&T LTD has to purchase the products from M/s. EWAC at the list price and M/S. L&T LTD shall use its best endeavors to foster the interests and trade of M/s. EWAC and except with the prior consent of M/s. EWAC (which consent shall not be unreasonably withheld), will not directly or indirectly be concerned or engaged in any business of the same nature as that of M/s. EWAC and competing therewith other than products of companies entitled to use the "EUTECTIC","CASTOLIN" trade mark. M/S. L&T Ltd shall employ and remunerate suitably qualified persons to conduct training courses at EWAC Institute in Mumbai. The commission/discount of 45% on the Export price to be paid to selling agent by EWAC, M/S. L&T LTD shall use its best endeavors to foster the interests and trade of the Company and, except with the prior consent of the Company (which consent shall not*

be unreasonably withheld), will not directly or indirectly be concerned or engaged in any business of the same nature as that of the company and competing therewith other than products of companies entitled to use the "Eutectic"/"Castolin" trade mark. It is also seen that though the Selling Agency Agreements expired after five years of its existence, both M/s. EWAC and M/S. L&T Ltd. have continued the sale and purchase of the goods as before. Apart from these M/s L &T Ltd., has provided land and looked after marketing of the goods also.

3. *The depositions of various officials and the selling arrangements confirm that not only M/s L & T Ltd., was having an interest in the business of M/S EWAC but M/s EWAC was also interested in the business of M/s L&T Ltd., as it shall enhance the brand value and share in market of Welding electrodes etc.*

The assessee have in their reply primarily contended that it is not in dispute that 50% of the share holding of EWAC is held by L&T but there is no material to show that EWAC holds any share in L & T and as such cannot be termed as related persons' MS EWAC is neither a subsidiary of L&T nor subsidiary of any company, which is the subsidiary of L&T nor 'relative' in terms of companies Act 1956 and as such they are not related persons within the meaning of clause (ii)&(iii) of section 4(3)b) of the Central Excise Act. Relying upon the decisions of tribunal, it has been also emphasized that mere inter connected undertaking are not sufficient to treat the seller and buyer related within the meaning of Section 4(3)(b) of the Central Excise Act, 1944 Therefore the valuation of transacted goods company, cannot be done in terms of provisions of Rule 9 of the Valuation Rules, 2000, though they are interconnected undertakings and under the same management. In support they have relied upon the decisions of tribunal and CBEC circular No. 354/81/2000-TRU dated June 30, 2000.

They have also submitted in any event there is no mutuality of interest between EWAC and L&T and unilateral share holding or common directors are not relevant. The assessee has in support relied upon the decision of Hon'ble Supreme Court in case of M/s Besta Cosmetics Ltd., and in the case of M/s Alembic Glass *industries Ltd., and decisions of Tribunal on the matter. In this regards, i find with due respect to judicial bodies, that the decisions /findings shall apply with reference to facts and circumstances of each case. While deciding the aspect of related persons, the whole facts and circumstances has to be taken into the consideration and the scenario emerges thereof and cannot/should not be in isolation as it is likely that the issue or the concept of related person may not be properly addressed or appreciated.* ***It is explicit from the annual financial report that M/s L &T Ltd. is a related party as associated Company. They are interconnected undertakings in terms of MRTP Act. The terms and condition of the sale agreements and arrangement of sale there under indicate that M/s L & T Ltd. should ensure to foster the interests and trade of M/s EWAC and, except with the prior consent of M/s EWAC (which consent shall not be unreasonably withheld), will not directly or indirectly be concerned or engaged in any business of the same nature as that of the company and competing therewith other than products of companies entitled to use the "Eutectic"/"Castolin" trade mark. Further, the statements of the various officials of M/S EWAC and M/S L & T Ltd., also strengthen the fact that M/s EWAC and M/s L&T are having interest in the business of each other. Since, it is apparent in the facts and circumstances and discussion that M/S EWAC and M/s L & T are having interest in the business of each other, both bodies of corporate are 'related persons within the meaning of Section 4 of the Central Excise Act, 1944, and therefore, the assessment of the goods are required to be done under Rule 9 of the Valuation rules, 2000.***

.........."

4.3 Interestingly the impugned order which runs into nearly 43 pages, discussions and findings have been recorded by the adjudicating authority in 7 pages most of which has been reproduced by us in para 4.2 above. The consideration of the submissions made by the appellant is only in the last para and what can be said to be findings on the mutuality of interest is portion indicated in bold by us. All other are statement of facts and is verbatim repetition of the show cause notice.

4.4 Having observed so, we proceed to examine the matter. Appellants do not dispute that they are “inter connected undertaking” as defined by the MRTP Act and Central Excise Act, 1944 but they state that they being not “holding and subsidiary companies” cannot be said to related in terms of Section 4, ibid as they do not have mutuality of interest in the business of each other. Board has in para 24 of the Circular dated 30.06.2000 clarified as follows:

“Thus the term inter-connected undertakings covers large categories of legal entities/undertakings to whom goods are sold by the assesses 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 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 assessees and the buyer are inter-connected undertakings, the transaction value will be "rejected" only when they are "related" in the sense of any of clause (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.”

In case of South Asia Tyres Pvt Ltd. [2015 (322) ELT 389 (SC)] Hon’ble Apex Court has in respect of the amended Section 4, observed as follows:

Civil Appeal No. 4370 of 2003

13. *The period involved in Civil Appeal No. 4370 of 2003 is from 1-7-2000 to 26-9-2000. It so happened that the joint venture agreement between the parties was terminated and the CEAT transferred its entire shareholding in the Goodyear group of which 97 per cent is held by Goodyear USA and 3 per cent is held by Goodyear India Private Limited. Thus, the assessee became the subsidiary of Goodyear USA. On this basis, show cause notice was issued for the aforesaid period treating the assessee and Goodyear as related persons having mutuality of interest.*

14. *No doubt that the assessee became the fully owned company of Goodyear, the relationship between the two would be that of related persons as they became “inter connected undertaking” and are covered by the provisions of amended Section 4(4)(3)(b) of the Act which provides that the person would 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 they have interest, directly or indirectly, in the business of each other.”

15. *This position was not denied even by the assessee. However, their submission was that provisions of Rule 9 of the Valuation Rules are not attracted as this Rule applies only when assessee so arranges its affairs that the excisable goods are not sold by it except to or through a person who is related in the manner specified in either of the sub-clauses (ii), (iii) or (iv) of Section 4(3)(b) of the Act. [Rule 9 does not cover clause (i)].*

16. *This contention of the assessee is accepted by the CEGAT and the CEGAT is justified in adopting this course of action. It is clear that the two are companies and therefore, they are not relatives and therefore, clauses (ii) and (iii) are not applicable on the basis of it. Insofar as clause (iv) is concerned, what is to be shown is that they have interest, directly or indirectly, in the business of each other. The expression "each other" would signify the element of mutuality and we have already held above that this mutuality principle has not been satisfied in the instant case."*

4.5 The terms of sale agreement have been reproduced by the Commissioner in the impugned order. Learned Authorized Representative submits that Appellant 1 and Appellant 2 are having mutual interest in the business of each other for the reasons as follows:

a) There are two common directors in both the companies.
b) The purchase price of the Appellant 2 is based on the list price declared by the Appellant 1, however the sale price of the Appellant 2 is the price which is determined by the Appellant 2 in consultation with appellant 1, though Appellant 2 can sell the goods at price less than the price so determined.
c) Appellant 1 sells his entire goods to Appellant 2 and has not appointed any other distributor.
d) Appellant 1 and Appellant 2 equally participate in the promotion of the sale of the goods of Appellant 1 to the customers of Appellant 2. They contribute equally by the way of sharing the expenses towards such sale promotion.
e) Expenditure incurred by Appellant 2 on the advertisement of the goods of Appellant 1, clearly show the interest of Appellant 2 in the business of Appellant 1, as this promotes the brand of Appellant 1.
f) Appellant 2 conducts training programs for its employees from the training institute of Appellant 1.
g) Appellant 2 is not permitted to undertake the business of trading of the same/ similar goods of competitors, without prior consent of Appellant 1.

4.6 We do not find that any of such reasons will establish mutuality of interest. In case of Atic Industries [1984 (17) ELT

323 (SC)] Hon'ble Apex Court has clearly laid down the concept of mutuality of interest stating as follows:

"5. The second ground on which the assessee assailed the validity of the demand made by the Assistant Collector for differential duty related to the applicability of the definition of "related person" in clause (c) of sub-section (4) of section 4 of the amended Act. The Assistant Collector took the view that the assessee on the one hand and Atul Products Limited and Crescent Dyes and Chemicals Limited on the other were related persons within the meaning of the first part of the definition of the term "related person" and the assessable value of the dyes manufactured by the assessee for the purpose of excise duty was, therefore, liable to be determined with reference to the price at which the dyes were ordinarily sold by Atul Products Limited and Crescent Dyes and Chemicals Limited. This view taken by the Assistant Collector was set aside by the High Court on the ground that the assessee on the one hand and Atul Products Limited and Crescent Dyes and Chemicals Limited on the other were not "related persons" and the wholesale cash price charged by the assessee to Atul Products Limited and Crescent Dyes and Chemicals Limited and not the price at which the latter sold the dyes to the dealers or the consumers, represented the true measure of the value of the dyes for the purpose of chargeability to excise duty. This conclusion reached by the High Court was assailed before us by the learned Attorney General appearing on behalf of the Revenue. He fairly conceded that the only part of the definition of "related person" in clause (c) of sub-section (4) of section 4 on which he could reply was the first part which defines "related person" to mean "a person who is so associated with the assessee that they have interest directly or indirectly in the business of each other". The second part of the definition which adds an inclusive clause was admittedly not applicable, because neither Atul Products Limited nor Crescent Dyes and Chemicals Limited was a holding company or a subsidiary company nor was either of them a relative of the assessee, so as to fall within the second part of the definition. But we do not think that even the limited contention urged by the learned Attorney General on behalf of the Revenue based on the first part of the definition can

succeed. What the first part of the definition requires is 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 the person alleged to be a related person has an interest, direct or indirect, in the business of the assessee. It is essential to attract the applicability of the first part of the definition that the assessee and the person alleged to be a related person must have interest, direct or indirect, in the business of each other. Each of them must have a direct or indirect interest in the business of the other. The equality and degree of interest which each has in the business of the other may be different; the interest of one in the business of the other may be direct, while the interest of the latter in the business of the former may be indirect. That would not make any difference, so long as each has got some interest, direct or indirect, in the business of the other. Now, in the present case, Atul Products Limited has undoubtedly interest in the business of the assessee, since Atul Products Limited holds 50 per cent of the share capital of the assessee and has interest as share holder in the business carried on by the assessee. But it is not possible to say that the assessee has any interest in the business of Atul Products Limited.*** *There are two points of view from which the relationship between the assessee and Atul Products Limited may be considered. First, it may be noted that Atul Products Limited is a shareholder of the assessee to the extent of 50 per cent of the share capital. But we fail to see how it can be said that a limited company has any interest, direct or indirect, in the business carried on by one of its shareholders, even though the shareholding of such shareholder may be 50 per cent. Secondly, Atul Products Limited is a wholesale buyer of the dyes manufactured by the assessee but even then, since the transactions between them are as principal to principal, it is difficult to appreciate how the assessee could be said by virtue of* *that circumstance to have any interest, direct or indirect, in the business of Atul Products Limited. Atul Products Limited buys dyes from the assessee in wholesale on principal to principal basis and then sells such dyes in the market. The assessee is not concerned whether Atul Products Limited sells or does not sell the dyes purchased by it from the assessee nor is it concerned whether Atui Products Limited sells such dyes at a profit or at a loss. It is impossible to contend that the assessee has any direct or indirect interest in the business of a wholesale dealer who purchases dyes from it on principal to principal basis. The same position obtains in regard to Crescent Dyes and Chemicals Limited. Perhaps the position in regard to Crescent Dyes and Chemicals Limited is much stronger than that in regard to Atul Products Limited. Crescent Dyes and Chemicals Limited is not even a shareholder of the assessee and it has, therefore, no interest direct or indirect in the business of the assessee. It is Imperial Chemical Industries Limited, London which holds 50 per cent of the share capital of the assessee and this foreign company also holds 40 per cent of the share capital of Crescent Chemicals and Dyes Limited. Imperial Chemicals Industries Limited, London would admittedly have an interest in the business of the assessee in its capacity as a shareholder, but how can Crescent Dyes and Chemicals Limited of which 40 per cent of the shares are held by Imperial Chemical Industries Limited, London which in its turn is a shareholder of the assessee, can be said to have any interest, direct or indirect, in the business of the assessee. Equally the assessee has no interest direct or indirect in the business of Crescent Dyes and Chemicals Limited, which is just a wholesale dealer purchasing dyes from the assessee in wholesale on principal to principal basis. It is obvious that for the same reasons which have prevailed with us while discussing the case of Atul Products Limited, the assessee has no direct or indirect interest in the business of Crescent Dyes and Chemicals Limited. The first part of the definition of related person in clause (c) of sub-section (4) of section 4 of the amended Act is, therefore, clearly not satisfied both in relation to Atul Products Limited as also in relation to Crescent Dyes and Chemicals Limited and neither of them can be said to be a "related person" vis-a-vis the assessee* *within the meaning of the definition of that term in clause (c) of sub-section (4) of section 4 of the amended Act. We, therefore, affirm the view taken by the High Court and hold that the assessable value of the dyes manufactured by the assessee cannot be determined with reference to the selling price charged by Atul Products Limited and Crescent Dyes and Chemicals Limited to their purchasers but must be determined on the basis of the wholesale cash price charged by the assessee to Atul Products Limited and Crescent Dyes and Chemicals Limited. The demand made by the Assistant Collector for differential duty must, therefore, be held to be rightly quashed by the High Court."*

Thus for the reason common director and 50 % share holding of the Appellant 2 in the Appellant 1 cannot be reason for establishing the appellants as related person. Further in case of Pepsi Food (P) Ltd {1993 (64) ELT 426 (T) by majority tribunal has held as follows:

"43. The submissions made by the Ld. Counsel and the Ld. SDR, have been carefully considered. It is seen that the Ld. Member (T), in his order, has noted one odd fact, which is peculiar to this case and not present in the cases cited before the Bench or are not noticed by the judgments which changes the complexion of the case. This is the fact that the appellants sell the goods of their own brand name to M/s. Voltas, who are the exclusive marketers of the goods. Better the business of M/s. Voltas greater is the goodwill in the trade market of the appellant company goods. Hence, the Ld. Member (Technical) is of the view that the appellants also have an interest in the business of Voltas. The Ld. Member (Judicial), however, after analysing the submissions, has expressed the opinion that the facts of the present case are exactly, on all fours, with the judgment of the Supreme Court in Atic Industries (supra) and that Voltas cannot be held to be related persons. In this context, it is seen that there have been certain judicial pronouncements in cases which are similar wherein like situations under Sec. 4(4) (c) sought to be brought in by the Department. In the case of Sylvania & Laxman Ltd. (supra), the Hon'ble Delhi High Court considered the issue. In that case the petitioners, Sylvania & Laxman, manufactured electric tube lights for Philips India under a

contract with the Philips brand name and the Department sought to treat Philips as related person under Section 4(4)(c). The Delhi High Court held that "The only question is whether there is inter se between the first petitioner and M/s. Philips India Ltd. any 'interest, directly or indirectly, in the business of each other' proved on the record. There is none. The mere purchase of goods by M/s. Philips India Ltd. from the first petitioner or manufacture of goods by the first petitioner for M/s. Philips India Ltd. does not create inter se interest between the two companies, directly or indirectly in the business of each other. The only interest that M/s. Philips India Ltd. has is to ensure that it gets the goods it has ordered in time and of the specifications required. The only interest in the transaction which the first petitioner has is to get the price of the goods it manufactures for M/s. Philips India Ltd. It is a pure transaction of sale. The interest in the business of each other contemplated by the section is something more than the fulfilment of one single commercial transaction entered into between the parties. M/s. Philips India Ltd. are not concerned whether the first petitioner makes a profit or loss in the transaction covered by the contract between the two. Likewise, the first petitioner is not interested as to whether M/s. Philips India Ltd. sells or does not sell or sells at a profit or loss the goods purchased by it from the first petitioner. Indeed, the two companies are competitors in the trade of manufacturing and selling electric bulbs and electric tube-lights. They cannot have any interest in the business of each other, their interest being confined only to successful fulfilment of one contract in question."

44. Again the Delhi High Court considered the issue in its decision in the case of Jay Engg. Works Ltd. & Another v. Union of India & Others reported in 1981 (8) E.L.T. 284 (Del.) which was cited with the approval by the High Court in the above decision also. It was held that it is very difficult to say that a mere purchaser or even a sole-selling agent would be a related person within the meaning of the definition. Para 7 of this decision is reproduced below:

"So far as the first question is concerned it appears to us that the answer is obviously and patently in the negative. There is no material on record to indicate that Usha and the Petitioner are so

associated with each other that they can be said to have an interest directly or indirectly in the business of each other. We shall refer later on to the terms of the arrangement between the petitioner and Usha while discussing the second aspect referred to above. It will be seen therefrom that primarily the arrangement between the parties is that Usha should purchase a substantial part of the petitioner's production and sell the goods at a price not higher than the maximum price stipulated by the petitioner. Assuming that the term of the agreement create an interest in Usha vis-a-vis the business of the petitioner there is nothing to indicate and no material to justify the conclusion that the petitioner has any interest in the business of Usha. As will be seen later, the petitioner sells its goods to Usha and receives the price therefor within 90 days. It has no doubt certain responsibilities for servicing the goods sold by Usha but there is no manner of interest direct or indirect in the business of Usha so far as the petitioner is concerned. The terms of the above definition contemplate two persons who are so associated that they are mutually interested in the business of each other. Examples of the kind may be two companies or persons associated as the company and its managing agent or the company and its Secretaries and Treasurers, firms having related partners, companies having common shareholders in the majority and the like. It is very difficult to say that a mere purchase or even a sole selling agent (if Usha could be said to be one) would be a related person within the meaning of the first part of the definition. We are, therefore, unable to accept the contention of learned counsel for the respondents that Usha will be a related person under the above portion of the definition clause. Certain judicial decisions to which we shall be referring later also touch upon this aspect of the matter and reinforce our conclusion."

45. This decision was again followed by the Delhi High Court in its subsequent judgment in Straw Products Ltd. (supra) and the Court observed that mere commercial contract between two independent parties for the purchase and sale of the goods manufactured by one party cannot ipso facto lead to the conclusion that the two of them are so associated as to have interest in the business of each other. This association, the Court *observed, has to be of financial or managerial interest in the business of each other and not mere business connection between two persons. In the present case, the perusal of the clauses in the Agreement, shows that the transaction is one of outright sale of the goods by the appellants to M/s. Voltas and on such sale, the ownership of the goods vests with Voltas who are free, according to the Agreement, to fix their own sale price and clause 12 of the Agreement, specifically, lays down that the transaction is on a principal to principal basis and the Agreement also has a provision for termination of the contract for any failure to discharge obligations. These features of the Agreement make the facts of this case more akin to those dealt with by the Delhi High Court cited supra [1982 (10) E.L.T. 463 (Del.) and 1981 (8) E.L.T. 284 (Del.)] and dissimilar to the facts of the case dealt with by the Supreme Court in the case of Snow White Industrial (supra) relied upon by the Ld. SDR. The ratio of the High Court judgments (supra) also would support the view that the exclusive marketeering of goods through M/s. Voltas by the appellants with their brand name, may not be sufficient circumstances having regard to the factual background of the case and the features of the Agreement between the two parties to come to the conclusion that the appellants and M/s. Voltas can be held to be related persons in terms of the definition under Sec. 4(4)(c) of the Central Excises and Salt Act, 1944."*

4.7 Further in the case of Kanchan Industries [2005 (186) ELT 302 (T-Del)] maintained by the Hon'ble Apex Court as reported at [2006 (191) ELT A91 (SC)], argument as sale to single person who undertakes advertisement also has been rejected stating as follows:

"5. We have considered the submissions of both the sides. As the learned Advocate has contended that even if the value of clearances of goods manufactured and cleared by the three Appellants is clubbed, they would remain within the exemption limit as M/s. Meghal Enterprises are not their "related person". As per Section 4(4)(c) of the Central Excise Act at the relevant time, related person -

(i) means a person who is so associated with the assessee that they have interest, directly or indirectly, in the business of each other and

(ii) includes a holding company, a subsidiary company, a relative distributor of the assessee and any sub-distributor of such distributor.

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 person 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."*

4.8 In the case of Dipareena Investment Pvt Ltd [2014 (314) ELT 571 (T-Mum)], it has been held as under:

5.4 The definition of 'related person' has undergone substantial change w.e.f. 1-7-2000 when the new Section 4 came into existence. As per the definition of related person in the new Section 4, a person shall be deemed to be related if they are (i) 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. As per the new Section 4, if two persons are inter-connected undertakings, they would be deemed to be related persons. In the instant case, M/s. Legrand and M/s. DIPL are inter-connected as per sub-clauses (c), (d) and (g) of Section 2 of the MRTP Act. Therefore, the decisions relied upon by the respondent in the case of Kanchan Industries; Playworld Electronics Pvt. Ltd.; Sanghi Organization; Alembic Glass and Kaira Dist. Co-Op. Milk Producers Union (supra) would not help them as all of them dealt with a situation in respect of Section 4 as it stood prior to 1-7-2000. In view of the amended definition of related person, so as to include inter-connected undertakings within the purview of related person, these decisions have no relevance. Since in the present case, the two persons, namely, M/s. Legrand and M/s. DIPL are inter-connected and M/s. Legrand exercises control over M/s. DIPL as discussed above, which fact is clearly brought out from the admissions made in the statements of Mrs. U.D. Morarji, Mr. A.P. Subedar and Mr. J.C. Tharud, both the entities have to be deemed as related. Therefore, the findings of the adjudicating authority that they are not related is unsustainable in law. As per the definition of inter-connected undertakings "mutuality of interest in the business of each other" is not required. As per item (d) of sub-clause (iii) of clause (g), if "one body corporate exercises control over the other body corporate in any manner" would suffice to hold them as inter-connected. The fact that M/s. Legrand controlled the activities of DIPL is clearly established from the facts available on record.*

5.6 In the case before us, we have clearly held that M/s. DIPL and M/s. Legrand are related as they are inter-connected undertakings and hence related as defined in law. Further, since DIPL has been selling its products to Legrand at a price lower than its manufacturing cost, the sale price cannot be held to be the sole consideration for sale. Therefore, the Central Excise Valuation Rules, 2000, would come into play. Since both DIPL and Legrand are inter-connected undertakings, Rule 10 of Central Excise (Valuation) Rules, 2000 would be relevant. Rule 10 of the said Rules reads as follows :-

“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 meanings as in the Companies Act, 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.”

Sub-clauses (ii), (iii) and (iv) of clause (b) deals with when they are relatives, amongst them the buyer is a relative and distributor of the assessee; or they are so associated that they have interest, directly or indirectly in the business of each other. ***In the present case M/s DIPL and Legrand are not relatives as defined in the Companies Act nor is there any distributor relationship between the two. While Legrand has interest in the business of DIPL as discussed in the preceding paragraphs, there is no evidence available on record to show that DIPL has interest in the business of Legrand except that between a seller and buyer. Therefore, mutuality of interest in the business of each other is not established and therefore, the provisions of clause (b) of Rule 10 shall apply and the valuation has to be done by treating them as not related persons. Therefore, the selling price of Legrand cannot be taken as the assessable value of DIPL in respect of the goods sold by the latter to the former.***

5.7 Then the question is whether the sale price of DIPL can be taken as the assessable value? The answer is obviously ‘NO’. As discussed in the preceding paragraphs, the sale value is below the cost of production of DIPL and does not include the cost of tools, dies, moulds, drawings, etc. used in the production of the goods sold and the sale value also does not include the cost of

R&D work undertaken by Legrand for the goods manufactured by DIPL and the staff cost of Legrand deputed to DIPL for supervising the operations and providing technical assistance. These are additional considerations flowing from Legrand to DIPL. Therefore, the provisions of Rule 6 of the Central Excise Valuation Rules would come into play and the ratio of the decision of the Hon'ble Apex Court in the Fiat India case (supra) would squarely apply. Rule 6 provides for inclusion of money value of additional consideration flowing directly or indirectly from the buyer to the assessee and the following elements of cost have to be added to the sale value, namely :-

(i) value of materials, components, parts and similar items relatable to such goods;

(ii) value of tools, dies, moulds, drawings, blue prints, technical maps and charts and similar items used in the production of such goods;

(iii) value of material consumed, including packaging materials, in the production of such goods;

(iv) value of engineering, development, art work, design work and plans and sketches undertaken elsewhere than in the factory of production and necessary for the production of such goods.

Thus the money value of goods and services, whether supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale of such goods, to the extent that such value has not been included in the price actually paid or payable has to be included under the provisions of Rule 11 read with Rule 6 of the Valuation Rules. Since in the present case, the money value of additional consideration received has not been included, the matter has to go back to the adjudicating authority for fresh consideration of these issues and we order accordingly."

In absence of the mutuality of interest in this case also tribunal has held the parties not to be related. However on the basis of other consideration that the sale price was below the cost of production they have rejected the transaction value as claimed. In present case there is not even whisper of such a thing. Hence this decision does not advance the case of revenue.

4.9 In the case of Karan Engineers {2017 (357) ELT 241 (T-Del)] relied upon by the authorized representative following has been held:

*"**10.** On careful consideration of the facts and findings recorded by the original authority, we find no reason to come to a different conclusion than the one arrived at by the original authority. We find no merit in appellant's plea that there is no financial flow back or mutuality of interest among the legal entities. **It is apparent that when the affairs of these 3 units were managed by overall control, the benefit accrue to the closely connected family member.** There is no need to show, demonstratively, cash flow or a specific monetary consideration from one entity to another entity. The arrangements are so, that ultimately the monetary benefit should accrue to a closed group of people in a family. The arrangement is beneficial to the persons while adversely affected the proper valuation and duty payment by the manufacturing unit."*

This case is the case were the benefits accrued to closely connected family members, this is not the fact in present case and hence this decision too is distinguishable.

4.10 The fact that Appellant 1 and Appellant 2 were not related person has been brought out in the cost auditor report received by the department on 31.12.2007, as recorded while recording the submissions of the appellant in the impugned order as follows:

"In any event, once the department received the report of cost auditor on 31st December 2007, the department was fully aware of all facts. It appears from the record it appears that the department accepted the position that EWAC and L & T are not related. It appears that there is change of opinion within the department ..."

This cost auditor report has not been placed on record by either side but if the cost auditor report had concluded that the Appellants were not related then definitely Commissioner should have recorded the reasons for rejecting the said report.

4.11 In view of the discussions as above we are not in position to sustain the impugned order on merits. Since we decide the appeal on merits we do not intend to discuss the issue on limitation and imposition of penalties.

5.1 The impugned order is set aside and the appeals allowed.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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