REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS.9049-9051 OF 2003

COMMISSIONER OF CENTRAL EXCISE,
HYDERABAD …APPELLANT

VERSUS

M/S. DETERGENTS INDIA LTD. & ANR. ...RESPONDENTS

WITH

CIVIL APPEAL NOS.4645-4646 OF 2004

CIVIL APPEAL NOS.6166-6168 OF 2004

CIVIL APPEAL NO.7495 OF 2004

J U D G M E N T

R.F. Nariman, J.

1. These four sets of appeals relate to the correct construction of Section 4(1)(a) proviso (iii) and Section 4(4)(c) of the Central Excise and Salt Act as they stood prior to the 2000 amendment of Section 4. In short, these appeals deal

with the definition of "related person" and the price at which valuation is to take place if sales are made to "related persons" in the course of wholesale trade.

2. It is important to note that the assessee, M/s Detergents India Limited, is the same in all the appeals, which arise out of different show cause notices for periods ranging from 1.3.1992 to September 1997. Detergents India Limited later changed its name to Henkel Marketing India Limited.

3. The facts of Civil Appeal Nos.9049-9051 of 2003 are as follows:

A show cause notice dated 8.12.1995 was issued demanding an amount of Rs.3,21,450/- for the period 20.7.1995 to 30.7.1995. The demand made under this notice was dropped *vide* order dated 11.3.1997 by the Deputy Commissioner, Hyderabad. An appeal against this order was dismissed by the Commissioner (Appeals), Hyderabad, by an order dated 5.1.2000. The appeal filed before CEGAT was also dismissed by the impugned judgment dated 22.4.2003.

4. By a separate show cause notice dated 26.3.1997 for the period 1.3.1992 to 31.3.1995, the Commissioner by an order dated 31.8.1999 confirmed a demand of Rs.1,12,42,499/- and also confiscated land, building, plant and machinery, and further ordered redemption of the same in lieu of confiscation on payment of a fine of Rs.5,00,000/-. Penalties of Rs.5,00,000/- each were imposed on the assessee, namely, DIL and on its holding company Shaw Wallace Company Limited. An appeal was filed against the order dated 31.8.1999 by the assessee and by its holding company Shaw Wallace. Three judgments were delivered by CEGAT in the aforesaid appeals. The learned Technical Member on a consideration of the facts came to the conclusion that during search operations goods from the subsidiary company were cleared from the factory premises to the depot of Shaw Wallace at a much lower price as compared to the price at which these goods were sold by the assessee in the market to wholesale purchaser Hindustan Lever and another. The Technical Member, therefore, remanded the matter for a proper adjudication on facts. The Legal Member, on the other hand, found in favour of

the assessee finding that the issue in the present appeals was covered by the judgment of **Union of India v. Atic,** (1984) 3 SCC 575 and **Raliwolf Limited v. Union of India,** 59 ELT 220 Bombay (1992). In view of the difference of opinion between the members, the points of difference were placed before a third Member, who then decided in favour of the assessee in the following terms:

> "6. Having thoroughly compared the facts of the present case with that of the above case, I am of the view that the ratio of the Apex Court's decision can squarely be followed in the instant case. Accordingly, it has to be held that the price at which the goods were sold by DIL to SWCL should be the basis for determination of the assessable value of the goods, and not the price charged by the latter to their dealers. SWCL cannot be said to be "related" to DIL within the meaning of this expression as used in Section 4(1)(a) as no "mutuality of interest" between the two companies has been established in this case. None of the "commonalities" suggested by the Ld. SDR in his bid to set up a "relation" between the two companies would, individually or collectively, amount to "mutuality of interest" expounded by the Apex Court. The decisions cited by him are easily distinguishable. On the other hand, the decisions cited by the counsel are largely supportive of the assessee's stand in this case. I do not think it necessary to elaborate this aspect as a detailed discussion has already been made in this behalf by Ld. Member (J). I am in full agreement with him on the issue.

> 7. As DIL and SWCL have already been found not to be "related persons", it cannot be said that the former suppressed (in their price lists filed with the department) any "relationship" before the department with an intent to evade payment of duty. The fact is that there was no mutuality of interest between DIL and SWCL and hence they were not "related persons" within the meaning of Section 4(1)(a) of the Act. The fact alleged by the department in the show cause notice did not exist at all to be suppressed by the notice. Therefore, the extended period of limitation was not invocable in this case. I agree with Ld. Member (J) on this score also.
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> 8. In the result, the appeals filed by DIL and SWCL have to be allowed and the Revenue's appeal to be rejected."

It is this impugned judgment that has merely been followed in the other appeals.

5. The facts further show that Detergents India Limited, now Henkel Marketing India Limited, was at the relevant time a subsidiary of Shaw Wallace and Company Limited. Both were public limited companies. Shaw Wallace's subsidiary companies held 57% of the paid up share capital of Detergents India Limited, making Detergents India Limited a subsidiary of Shaw Wallace as understood by the definition of "holding company" and "subsidiary company" contained in the

Companies Act, 1956. 90% of the manufacturing capacity of Detergents India Limited was to manufacture various products for Hindustan Lever Limited which were then branded with Hindustan Lever names in small packs. A processing charge was paid by Hindustan Lever Limited for this job work, and it is clear that different processing charges were paid depending upon the size of the product and the product itself. The excess 10% capacity which was not mopped up by Hindustan Lever was sold to Shaw Wallace, its holding Company. Various other manufacturers/sellers also sold the same and similar products to Shaw Wallace and Company. A large number of these manufacturers were not subsidiary companies of Shaw Wallace and indeed had no business relationship with Shaw Wallace other than the sale of these products. It was pleaded as a fact that the price paid by Shaw Wallace and Company for the purchase of the same/similar products from the other firms/companies was less than the price paid to Detergents India Limited. This can be found as a fact in the Commissioner's order dated 7.11.2000 in Civil Appeal

Nos.6166-6168 of 2004 in which the following fact was pleaded before the learned Commissioner:-

> "SWC procures only a part of its requirement from DIL and there are various other independent manufacturers like M/s Deepti Chemicals, Kanpur, M/s Geeta Chemicals, Unnao, M/s Kari Detergents, Muzaffarnagar, M/s Standard Surfactants, Kanpur, M/s Jaina detergents, Kanpur, M/s Sara Soaps, Kanpur, M/s Venkteshwar Detergents (P) Limited, Hyderabad and M/s Varuna Detergents, Kanpur. There is no allegation that any of these companies are related to SWC. In fact, the price charged by these independent manufacturers to SWC is lower than the price charged by DIL. As held in 1989 (43) ELT 401 (Bom) in Dawn Apparels Limited, the price charged by the subsidiary company to the holding company is not rejectable merely on the ground of such relationship of subsidiary and principal in the absence of any evidence of low price having been charged or any favourable treatment accorded. In the present case, the Department has not produced any material to show that their price to SWC is not the normal price."

6. It was also pleaded that processing charges of different products were different. This is to be found in the very show cause notice dated 26.3.1997 with which we are concerned as follows:-

> "3.6 File bearing Nos. 45 and 71 seized from the factory at Kodur on 16.5.1995 were shown to him and he was asked to explain in detail about the

audit reports of M/s. SWC available in that file. He explained that he had seen the internal audit report of M/s. SWC dated 2.4.1993 from page No.37 to 58 in file No.45 and added that M/s. SWC were periodically conducting audit (M/s. SWC being the holding company) of the functioning of M/s. DIL, Kodur which was its subsidiary to control and monitor the activities of its subsidiaries. When enquired he stated that the processing charges paid by M/s. HLL to M/s. DIL is Rs.1,200 per MT upto 1994 and later M/s. HLL reduced the processing charges to Rs.1125 per MT: that for the goods supplied to M/s. SWC, M/s. DIL used to file the price list with the Central Excise Department after mutually agreeing with M/s. SWC taking into account the raw material landed cost and the processing charges; that every month M/s. DIL were sending landed cost of raw material and packing material monthwise to M/s. SWC; that the processing charges was mutually agreed to be Rs.800 per MT during 1992 and 1993 and it was Rs.900 per MT during 1994, Rs.950 per MT during 1995, Rs.1125 per MT during 1996 for detergent cakes; that the processing charges for Hand Mix Check Powder to M/s SWC was Rs.400 per MT, Rs.1850 for Spray dried powder during 1992 to 1996; that the processing charges charged to M/s. HLL for spray dried sunlight detergent powder was Rs.2,100 per MT; that the processing charges for both Chek detergent powder and sunlight detergent powder are similar; that the packing style for Sunlight detergent powder varies from packing of Chek detergent powder, the difference being Chek Powder was packed in bulk quantities more and in the case of Sunlight powder the entire packing was in 500 Gms. Only; that in respect of detergent cakes made for M/s. SWC and M/s. HLL, the processing is similar and the size of the cake was given according to the requirement; that however, in the agreement with M/s. HLL for processing on job work basis

there was no mention about the size of the detergent cake or powder."

It is on these facts that the present appeals have to be decided.

7. Learned counsel on behalf of the Revenue argued that there can be no doubt, in view of a number of factors, that Shaw Wallace and DIL are related persons within the meaning of Section 4(4)(c) of the Act and stated that some of these factors are that advertisement expenses of DIL brands had been borne by the holding Company Shaw Wallace; processing charges paid by Shaw Wallace to DIL is less than processing charges paid to Hindustan Lever; employees of Shaw Wallace and its subsidiaries were freely transferred from one company to another; depots of Shaw Wallace and DIL were in the same premises; DIL sends monthly newsletters to Shaw Wallace showing production, despatches, purpose, technical problems, quality problems, details of power consumption etc. - and Shaw Wallace fixes the price of DIL products; and unsecured loans of approximately Rs.55 lakhs were given by Shaw Wallace to its subsidiary DIL. It is argued that all these facts would show that Shaw Wallace and DIL were related persons and that the price

paid by Shaw Wallace to DIL was a depressed price and would, therefore fall within proviso (iii) of Section 4(1)(a) as it stood prior to 2000. Learned counsel for the Revenue also argued that the moment there is a holding/subsidiary company relationship, the definition of "related person" under Section 4(4)(c) gets attracted and proviso (iii) to Section 4(1)(a) in turn gets attracted and therefore it is the price at which Shaw Wallace and Company sells the self same goods to its customers that is the price that is to be taken into account on the facts of the present case.

8. Shri Lakshmikumaran, learned counsel for the appellants has argued that even though Shaw Wallace and DIL may be holding and subsidiary companies, yet on a true construction of Section 4(4)(c) they are not related persons within the meaning of the definition clause. Further, he argued that on a true construction of proviso (iii) to Section 4(1)(a), it is necessary that the assessee must first enter into an arrangement with the related person, which arrangement leads to a price being charged which is lower than the normal price. Further, the proviso only gets attracted when such arrangement is

predominantly a sale to or through a related person. According to him, on the facts of the present case, there is no arrangement between Shaw Wallace and DIL which has led to any depression in the normal price at which such goods are sold. Also, since only 10% of the production of DIL is sold to Shaw Wallace, the goods are not "generally" sold to Shaw Wallace.

9. To appreciate the aforesaid controversy, it is necessary to set out Section 4 as it existed before its amendment in 1973. Section 4 then read:

> "4. *Determination of value for the purposes of duty.* — Where, under this Act, any article is chargeable with duty at a rate dependent on the value of the article, such value shall be deemed to be—
> (*a*) the wholesale cash price for which an article of the like kind and quality is sold or is capable of being sold at the time of the removal of the article chargeable with duty from the factory or any other premises of manufacture or production for delivery at the place of manufacture or production, or if a wholesale market does not exist for such article at such place, at the nearest place where such market exists, or
> (*b*) where such price is not ascertainable, the price at which an article of the like kind and quality is sold or is capable of being sold by the manufacturer or producer, or his agent, at the time of the removal of the article chargeable with duty from such factory or

other premises for delivery at the place of manufacture or production, or if such article is not sold or is not capable of being sold at such place, at any other place nearest thereto.

Explanation.—In determining the price of any article under this section, no abatement or deduction shall be allowed except in respect of trade discount and the amount of duty payable at the time of the removal of the article chargeable with duty from the factory or other premises aforesaid."

The period involved in the present appeals being 1992 to 1997, we would have to advert to Section 4 as it stood after the Amendment Act of 1973 but before the Amendment Act of 2000. Section 4 reads as follows:-

"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 value, such value shall, subject to the other provisions of this section, be deemed to be—

(*a*) the normal price thereof, that is to say, 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, where the buyer is not a related person and the price is the sole consideration for the sale:

Provided that—

(*i*) where, in accordance with the normal practice of the wholesale trade in such goods, such goods are sold by the assessee at different prices to different classes of buyers (not being related persons) each such price shall, subject to the existence of the other circumstances specified in clause (*a*), be

deemed to be the normal price of such goods in relation to each such class of buyers;

(*ii*) where such goods are sold by the assessee in the course of wholesale trade for delivery at the time and place of removal at a price fixed under any law for the time being in force or at a price, being the maximum, fixed under any such law, then, notwithstanding anything contained in clause (*iii*) of this proviso, the price or the maximum price, as the case may be, so fixed, shall, in relation to the goods so sold, be deemed to be the normal price thereof;

(*iii*)where the assessee so arranges that the goods are generally not sold by him in the course of wholesale trade except to or through a related person, the normal price of the goods sold by the assessee to or through such related person shall be deemed to be the price at which they are ordinarily sold by the related person in the course of wholesale trade at the time of removal, to dealers (not being related persons) or where such goods are not sold to such dealers, to dealers (being related persons) who sell such goods in retail;

(*b*) where the normal price of such goods is not ascertainable for the reason that such goods are not sold or for any other reason, the nearest ascertainable equivalent thereof determined in such manner as may be prescribed.

(2) Where, in relation to any excisable goods the price thereof for delivery at the place of removal is not known and the value thereof is determined with reference to the price for delivery at a place other than the place of removal, the cost of transportation from the place of removal to the place of delivery shall be excluded from such price.

(3) The provisions of this section shall not apply in respect of any excisable goods for which a tariff value has been fixed under sub-section (2) of Section 3.

(4) For the purposes of this section,—

(*a*) 'assessee' means the person who is liable to pay the duty of excise under this Act and includes his agent;

(*b*) 'place of removal' means—

(*i*) a factory or any other place or premises of production or manufacture of the excisable goods; or

(*ii*) a warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty,

from where such goods are removed;

(*c*) 'related person' means a person who is so associated with the assessee that they have interest, directly or indirectly, in the business of each other and includes a holding company, a subsidiary company, a relative and a distributor of the assessee, and any sub-distributor of such distributor.

Explanation.—In this clause 'holding company', 'subsidiary company' and 'relative' have the same meanings as in the Companies Act, 1956;

(*d*) 'value' in relation to any excisable goods,—

(*i*) where the goods are delivered at the time of removal in a packed condition, includes the cost of such packing except the cost of the packing which is of a durable nature and is returnable by the buyer to the assessee.

Explanation.—In this sub-clause "packing" means the wrapper, container, bobbin, pirn, spool, reel or warp beam or any other thing in which or on which the excisable goods are wrapped, contained or wound;

(*ii*) does not include the amount of the duty of excise, sales tax and other taxes, if any, payable on such goods and, subject to such rules as may be made, the trade discount (such discount not being refundable on any account whatsoever) allowed in accordance with the normal practice of the

wholesale trade at the time of removal in respect of such goods sold or contracted for sale;

(*e*) 'wholesale trade' means sales to dealers, industrial consumers. Government, local authorities and other buyers, who or which purchase their requirements otherwise than in retail."

The first thing that one notices on a reading of Section 4(1)(a), as it then stood, is that a duty of excise is chargeable with reference to "normal price", that is to say the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade. The price should be the sole consideration for the sale. If the buyer is a related person, there is a presumption that a sale to a related person would be at a price which is not the sole consideration for the sale.

10. Proviso (iii) then deals with the price that is to be taken into consideration in case sales are made to related persons. Three basic ingredients are necessary before proviso (iii) gets attracted. The first ingredient is that the assessee must "arrange" that goods are sold by him in a particular manner. The second ingredient is that such arrangement must be such that the goods are "generally" sold by the assessee in the course of wholesale trade to or through a related person. And

thirdly, such sale need not be to the related person – it can even be through the related person.

11. We are of the view that the "arrangement" spoken of in the proviso must be something by which the assessee and the related person "arrange" that the goods are sold at something below the normal price, so that tax is either avoided or evaded by such arrangement. Secondly, the expression "generally" also shows that such goods must predominantly be sold by the assessee to or through the related person – in mathematical terms, sales that are to or through a related person must consist of at least 50% of the goods that are manufactured and sold. The expression "to or through a related person" again goes back to the "arrangement" and is another way of saying that such sale can be effected directly to or indirectly through such related person. It is only when all three considerations are cumulatively met that proviso (iii) can be said to be attracted.

12. When we come to the definition of "related person" the legislature has used a well known technique. It first employs the expression "means" and states that persons who are associated with the assessee so that they have a direct or

indirect interest in the business of each other would get covered. The definition then goes on to use the expression "and includes" thereby indicating that the legislature intends to extend the definition to also include various persons that would not otherwise have so been included. These include a holding company, a subsidiary company, a relative and a distributor of the assessee and any sub-distributor of such distributor. The necessity for including holding and subsidiary companies as defined under the Companies Act, 1956 is to lift the corporate veil in order to get to the economic realities of the transaction.

13. Now to the case law. In **Union of India v. Bombay Tyre International Ltd.**, (1984) 1 SCC 467, Section 4 as amended by the 1973 Amendment Act was challenged before this Court. This Court repelled the challenge. It held that even under Section 4 prior to the 1973 Amendment, the wholesale cash price would consist of a sale by a manufacturer in the course of wholesale trade to a wholesale dealer, which sale would have to be at arm's length and in the usual course of business. The court held:

"32. It will be noticed that the basic scheme for determination of the price in the new Section 4 is characterised by the same dichotomy as that observable in the old Section 4. It was not the intention of Parliament, when enacting the new Section 4 to create a scheme materially different from that embodied in the superseded Section 4. The object and purpose remained the same, and so did the central principle at the heart of the scheme. The new scheme was merely more comprehensive and the language employed more precise and definite. As in the old Section 4, the terms in which the value was defined remained the price charged by the assessee in the course of wholesale trade for delivery at the time and place of removal. Under the new Section 4 the phrase "place of removal" was defined by Section 4(*b*) not merely as "the factory or any other place or premises of production or manufacture of the excisable goods" from where such goods are removed but was extended to "a warehouse or any place or premises wherein the excisable goods have been permitted to be deposited without payment of duty" and from where such goods are removed. The judicial construction of the provisions of the old Section 4 had already declared that the price envisaged under clauses (*a*) and (*b*) of that section was the price charged by the manufacturer in a transaction at arm's length. After referring to several cases, some of which have already been mentioned here earlier, this Court pointed out in *Voltas Limited* [(1973) 3 SCC 503 : 1973 SCC (Tax) 261 : AIR 1973 SC 225 : (1973) 2 SCR 1089] *:* (SCC p. 509 para 20)

"the 'wholesale cash price' has to be ascertained only on the basis of transactions at arm's length. If there is a special or favoured buyer to whom a specially low price is charged because of extra-commercial considerations, e.g., because he is a relative of the manufacturer, the price charged for those sales would not be the 'wholesale cash price'

> for levying excise under Section 4 (*a*) of the Act. A sole distributor might or might not be a favoured buyer according as terms of the agreement with him are fair and reasonable and were arrived at on purely commercial basis."
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> 33. That was also the view taken in *Atic Industries Ltd.* [(1975) 1 SCC 499 : 1975 SCC (Tax) 135 : AIR 1975 SC 960 : (1975) 3 SCR 563] The new Section 4 makes express provision in that behalf. Under the new Section 4 also, it is necessary to take the price charged by the manufacturer as one which is unaffected by any concessional or manipulative considerations, and therefore the "normal price" mentioned in the new Section 4(1)(*a*) speaks of a price "where the buyer is not the related person and the price is the sole consideration for the sale". The expression "related person" has been specifically defined in the new Section 4(4)(*c*), and transactions in which a "related person" is involved are covered by the third proviso of Section 4 (1)(*a*)."

14. These observations have a vital bearing on the construction of Section 4(1)(a). Section 4, before the amendment of 1973, did not contain the expression "where the buyer is not a related person and the price is the sole consideration for the sale". The pre-amended Section 4 was understood in Voltas's case by this Court to mean that the wholesale cash price can only be ascertained on the basis of arm's length transactions. If there is a special or favoured buyer like a relative of the manufacturer to whom a specially low price

is charged because of extra commercial considerations, such price cannot be the price referred to in Section 4(1)(a). Taking a cue from the fact that the post-amendment Section 4 makes no change in the law laid down in Voltas's case, as far as arm's length transactions are concerned, it is clear that where the price is the sole consideration for the sale and is not a specially low price because of extra commercial considerations, even where a buyer is a related person, the normal price mentioned in Section 4(1)(a) post the 1973 amendment would apply. Read in accordance with the object of the pre-amended Section 4 as explained in Voltas's case it is clear that the expression "where the buyer is not a related person and the price is the sole consideration for the sale" is to be read conjunctively as meaning that because the buyer is a related person, the price usually ceases to be the sole consideration for the sale. This merely raises a rebuttable presumption. Once the presumption is rebutted and it is shown that even in the case of a buyer who is a related person, the price is the sole consideration for the sale and is not a specially low price because of extra commercial considerations, such price would fall within Section

4(1)(a) as the price of the taxable goods to be taken into consideration for arriving at “normal price”. Of course, where the three pre-requisites for the application of proviso (iii) to Section 4(1)(a) all apply, an irrebuttable presumption is raised so that it is not necessary thereafter to go to any other facts.

15. On a reading of the aforesaid judgment, it becomes clear that the object of enacting Section 4 is that transactions at arm’s length between manufacturer and wholesale purchaser which yield the price which is the sole consideration for the sale alone is contemplated. Any concessional or manipulative considerations which depress price below the normal price are, therefore, not to be taken into consideration. Judged at from this premise, it is clear that arrangements with related persons which yield a price below the normal price because of concessional or manipulative considerations cannot ever be equated to normal price. But at the same time, it must be remembered that absent concessional or manipulative considerations, where a sale is between a manufacturer and a related person in the course of wholesale trade, the transaction being a transaction where it is proved by evidence that price is

the sole consideration for the sale, then such price must form the basis for valuation as the "normal price" of the goods. A literal reading of the Section would otherwise lead to an absurdity. Where it is proved that the same price is paid by related persons as well as arm's length purchasers (who are unrelated) for the same goods, in the case of the former the higher price paid by purchasers from the related person would be the price on which excise duty would be calculated which would be more than the "normal price" under Section 4(1)(a). Such a result is not contemplated by the amended Section 4(1)(a), which must therefore be read in the manner indicated above.

16. So far as "related persons" are concerned, the Court in the **Bombay Tyre International Limited** case stated:

> "43. Learned counsel for the assessees contends that the provisions regarding related persons are wholly unnecessary because to counteract evasion or avoidance any artificially arranged price between the manufacturer and his wholesale buyer can be rejected in any case under Section 4, and we are referred to the observations of this Court in *Voltas Limited* [(1973) 3 SCC 503 : 1973 SCC (Tax) 261 : AIR 1973 SC 225 : (1973) 2 SCR 1089] and *Atic Industries Ltd.* [(1975) 1 SCC 499 : 1975 SCC (Tax) 135 : AIR 1975 SC 960 : (1975) 3 SCR 563] It is

true, we think, that the new Section 4(1) contains inherently within it the power to determine the true value of the excisable article, after taking into account any concession shown to a special or favoured buyer because of extra-commercial considerations, in order that the price be ascertained only on the basis that it is a transaction at arm's length. That requirement is emphasised by the provision in the new Section 4(1)(*a*) that the price should be the sole consideration for the sale. In every such case, it will be for the Revenue to determine on the evidence before it whether the transaction is one where extra-commercial considerations have entered and, if so, what should be the price to be taken as the value of the excisable article for the purpose of excise duty. Nonetheless, it was open to Parliament to incorporate provisions in the section declaring that certain specified categories of transactions fall within the tainted class, in which case an irrebuttable presumption will arise that transactions belonging to those categories are transactions which cannot be dealt with under the usual meaning of the expression “normal price” set forth in the new Section 4(1)(*a*). They are cases where it will not be necessary for the Revenue to examine the entire gamut of evidence in order to determine whether the transaction is one prompted by extra-commercial considerations. It will be open to the Revenue, on being satisfied that the third proviso to the new Section 4(1)(*a*) read with the definition of “related person” in Section 4(4)(*c*) is attracted, to proceed to determine the “value” in accordance with the terms of the third proviso.

44. It is urged on behalf of the assessee that the provisions are whimsical and arbitrary, and cannot be said to be reasonably calculated to deal with the issue of evasion or avoidance of excise. It is said that the assessment on the manufacturer by

reference to the sale price charged by his distributor is “wholly incompatible with the nature of excise”, and we are referred to *Atic Industries Ltd.* [(1975) 1 SCC 499 : 1975 SCC (Tax) 135 : AIR 1975 SC 960 : (1975) 3 SCR 563] Now, it is a well known legislative practice to enact provisions in certain limited cases where an assessee may be taxed in respect of the income or property truly belonging to another. They are cases where the Legislature intervenes to prevent the circumvention of the tax obligation by taxpayers seeking to avoid or reduce their tax liability through modes resulting in the income or property arising to another. The provisions of the law may indeed be so enacted that the actual existence of such motive may be wholly immaterial, and what has been done by the assessee may even proceed from wholly bona fide intention. With the aid of legal fiction, the Legislature fastens the liability on the assessee. When the Legislature employs such a device, and the liability is attached without qualification, it is reasonable to infer that an irrebuttable presumption has been created by law. Such provisions have been held to be within the legislative competence of the Legislature and as falling within its power of taxation, and reference may be made to *Balaji* v. *ITO* [AIR 1962 SC 123 : (1962) 2 SCR 983 : (1961) 43 ITR 393] ; *Navnitlal C. Javeri* v. *CIT* [AIR 1965 SC 1375 : (1965) 1 SCR 909 : (1965) 56 ITR 198] and *Punjab Distilling Industries Ltd.* v. *CIT.* [AIR 1965 SC 1862 : (1965) 3 SCR 1 : (1965) 57 ITR 1 : 35 Com Cas 541]

45. It is contended for the assessees that the definition of the expression “related person” is so arbitrary that it includes within that expression a distributor of the assessee. It is urged that the provision falls outside the ambit of Entry 84 of List I of the Seventh Schedule to the Constitution inasmuch as it is wholly inconsistent with the levy of

excise, and if it is attempted to seek support for the provision from the residuary Entry 97 of List I as a non-descript tax the attempt must fail because there is no charging section in the Central Excises and Salt Act empowering the levy of such non-descript tax nor any machinery provision in the Act for collecting such a tax. The charging provision and the machinery provisions of the Act, it is pointed out, deal exclusively with excise duty and not with any other tax. The validity of the provision is assailed also on the ground that it violates Articles 14 and 19 of the Constitution. The challenge made on behalf of the assessees is powerful and far-reaching. But it seems to us unnecessary to enter into that question because we are satisfied that the provision in the definition of "related person" relating to a distributor can be legitimately read down and its validity thus upheld. In our opinion, the definition of related person should be so read that the words "a relative and a distributor of the assessee" should be understood to mean a distributor who is a relative of the assessee. It will be noticed that the Explanation provides that the expression "relative" has the same meaning as in the Companies Act, 1956. As regards the other provisions of the definition of "related person", that is to say, "a person who is so associated with the assessee that they have interest, directly or indirectly, in the business of each other and includes a holding company, a subsidiary company. . .", we think that the provision shows a sufficiently restricted basis for employing the legal fiction. Here again, regard must be had to the Explanation which provides that the expression "holding company and subsidiary" have the same meanings as in the Companies Act, 1956. Reference in this connection may be made to *Tata Engineering and Locomotive Co. Ltd.* v. *State of Bihar* [AIR 1965 SC 40 : (1964) 6 SCR 885 : 34 Com Cas 458] where the principle was approved by this Court that the corporate veil could be lifted

> where the companies shared the relationship of a holding company and a subsidiary company, and to *Juggi Lal Kamlapat* v.*C.I.T.* [AIR 1969 SC 932 : (1969) 1 SCR 988 : (1969) 73 ITR 702] where this Court held that the veil of corporate entity could be lifted to pay regard to the economic realities behind the legal facade, for example, where the corporate entity was used for tax evasion or to circumvent tax obligation."

17. On a reading of the aforesaid paragraphs, it is clear that proviso (iii) would be referable only to tainted transactions. Only such cases would raise an irrebuttable presumption which will then be governed by the said proviso. It is also interesting to note that the definition of "related person" was read down by this Court to make the distributor covered by it to be a relative of the assessee. When "holding company" and "subsidiary company" was spoken of, the Court held again that the idea of including these two types of companies within the definition of related person is only so that the corporate veil of such companies can be lifted so that economic realities behind the legal façade can be looked at so that tax is not evaded or avoided.

18. Some other decisions may be taken note of at this stage. In **Flash Laboratories Limited v. Collector of Central Excise, New Delhi,** (2003) 2 SCC 86, the appellant was a subsidiary company of M/s Parle Products Limited. M/s Parle Biscuits Limited is also a subsidiary company of M/s Parle Products Limited. What was in question in that case was the relationship between two subsidiary companies. It is clear that the relationship between a subsidiary company and another subsidiary company would not be governed by the second part of Section 4(4)(c). In order that the second part of Section 4(4)(c) be attracted, it must be shown that the related person must either be a holding company or a subsidiary company of the assessee. In the facts of that case, the related person, namely, M/s Parle Biscuits Limited was neither a holding company nor a subsidiary company of the assessee i.e. M/s Flash Laboratories Limited. This being the case, this Court held:

> "7. Having regard to the above decision and the plain meaning of the definition of "related person", it is to be noticed that the appellant is a subsidiary company of Messrs Parle Products Limited and Messrs Parle Biscuits Limited is also a subsidiary company of Messrs Parle Products Limited. Therefore, the relationship between the appellant

> and Messrs Parle Biscuits Limited, though indirect, they have mutual interest in the business of each other. The facts and circumstances of the case show that there is mutuality of interest between the three companies as sixty per cent of the products of the appellant are sold to Messrs Parle Products Limited and the remaining forty per cent of the total product of toothpaste is being sold to Messrs Parle Biscuits Limited. Moreover, Messrs Parle Products Limited are incurring the expenses for sales promotion and advertisement for the sale of the appellant's product, namely, "Prudent toothpaste"."

This judgment, therefore, is an authority only for the application of the first part of Section 4(4)(c). It is in this context that the Court held in paragraph 5 that there must be mutuality of interest between two persons who are both subsidiaries of a particular holding company.

19. In **Commissioner of Central Excise Bombay v. Universal Luggage Manufacturing Company Limited**, (2005)190 ELT 3, this Court found as a matter of fact that the assessee (holding company) was selling its products through its wholly owned subsidiary at the same price at which it was selling the same goods to other buyers at arm's length, in which the subsidiary company had no role to play. This being the case, this Court agreed with the Tribunal that the price at which

sales have been effected through the subsidiary, not being a depressed price, would be the price that would be taken into consideration for valuation under Section 4(1)(a).

20. Similarly, in **CCE, II, Chennai v. Beacon Neyrpic Ltd.,** 2006(193) ELT 16, this Court in a short two paragraph order held:

> "1. Assuming that the assessee was related to its subsidiary company i.e. M/s Best & Crompton Ltd. (BCL), this by itself would not be sufficient for the purpose of invoking the Central Excise (Valuation) Rules, 1975 read with Section 4(1)(*a*) of the Central Excise Act, 1944. The Department would have to go further and show that the relationship has introduced an element other than purely commercial consideration in effecting the sale by the assessee to BCL. No such evidence has been produced by the Revenue.
>
> 2. In the circumstances, the appeal is dismissed."

21. In **Commissioner Central Excise, New Delhi v. India Thervit Corporation, Ltd.,** (2008) 17 SCC 374, ATL a subsidiary of ITCL, sold all goods manufactured by it to ITCL. Despite the fact that on facts ATL and ITCL may be taken to be related persons, (though this Court did not hold so), since there is no under valuation as the price paid by the Railways (an

arm's length purchaser) was the same as the price paid by ITCL, the price paid by the holding company to its subsidiary was taken to be a price on which excise duty would be calculated.

22. Since the Tribunal in the judgment under appeal has referred to and relied upon **Raliwolf v. UOI,** 59 ELT 220 Bombay (1992), we must refer to the same. The Bombay High Court in that judgment construed Section 4(4)(c) as follows:

> "31. We are not inclined to accept the contention of the Department as submitted by Mr. Sethna, the learned counsel appearing for the respondents for the following reasons :-
>
> (a) that Section 4(4)(c) is a defining section of the expression "related person" and the said section must be read and seen in the context of third proviso to Section 4(1)(a). If one, therefore, reads the entire section, it is clear that three conditions are required to be satisfied before invoking the third proviso :
>
> Firstly, there should be mutuality of interest.
>
> Secondly, the price charged should not be normal price but the price lower to the normal price, and that extra-commercial considerations have reduced the normal price.
>
> Thirdly, the alleged related person should be related to the assessed as defined in Section 4(4)(c) of the said Act. It is only if the above three conditions are

satisfied, then alone it can be said that the third proviso to Section 4(1)(a) is applicable.

(b) The first part of the definition of related person as mentioned in Section 4(4)(c) of the said Act lays down that a person who is sought to be branded as a related person must be a person who is so associated with the assessed, that they have interest directly or indirectly in the business of each other. The inclusive part of the definition is merely an extension of the first part. Both the parts must be read conjunctively. If the argument of the learned counsel for the respondent is accepted, then the word "and" which joins the two parts of the definition would be rendered meaningless. It is well-settled rule of interpretation that the Legislative mandate should be so read that no word used by the Parliament should be rendered nugatory. Reading the section as a whole it is clear that merely because a company is the subsidiary of holding company, ipso facto, it cannot attract Section 4(4)(c). It must be further established that each has interest in the business of the other. It must be further established that the transaction in question is not based on principal to principal and that extra-commercial considerations have lowered the normal price. It is only then the third proviso to Section 4(1)(a) is attracted. The view which we have taken is also supported by the judgment of the Supreme Court in the case of Atic Industries (supra) as well as the judgment of the Supreme Court in the case of Moped India Ltd. v. Collector of Central Excise reported in1986(23)ELT8(SC) .”

23. We find it difficult to agree with some of the conclusions reached in the aforesaid paragraph. As has been stated by us above, “means” “and includes” is a legislative device by which

the “includes” part brings by way of extension various persons, categories, or things which would not otherwise have been included in the “means” part. If this is so, obviously both parts cannot be read conjunctively. What is in the “includes” part is relatable only to the subject that is to be defined and takes within its sweep persons, objects, or things which are not included in the first part. We have already pointed out that the reason for including holding and subsidiary companies in the “includes” part is so that the authorities may look behind the corporate veil. To say that the holding and subsidiary companies must in addition have a mutual interest in the business of each other is wholly incorrect. Further, the word “and” which joins the two parts of the definition is not rendered meaningless. It is necessary because it precedes the word “includes” and brings in to the definition clause persons, objects, or things that would not otherwise be included within the “means” part.

24. The High Court is also wrong in saying that its view is supported by the judgment of this Court in **Union of India v. Atic Industries Ltd.,** (1984) 3 SCC 575. On facts, Atic’s case

did not deal with holding and subsidiary companies. Atul Products Limited held 50% of the share capital of Atic Industries which would not enable Atul products to be called the holding company of Atic Industries. Further, this Court held:-

> "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 rely 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."

25. It is clear therefore that the Bombay High Court judgment does not lay down the law correctly insofar as the correct construction of Section 4(4)(c) of the Act is concerned.

26. Section 4(4)(c) is in two parts. The first part requires the department to apply a de facto test, whereas the second part requires the application of a de jure test. "Relative" in the Companies Act, 1956 is defined as follows:-

"6. **Meaning of "relative"**.—A person shall be deemed to be a relative of another if, and only if,—

(*a*) they are members of a 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 I-A."

"Schedule I-A.

[*See* Section 6(*c*)]

LIST OF RELATIVES

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

A reading of the definition of “relative” would show that the relative need not be a person who is so associated with the

assessee that they have mutual interest in each other's businesses. If that were the case, the expression "relative" in the second part would be otiose inasmuch as a relative would be subsumed within "person" in the first part. Thus, "relatives" would also be "persons" who are so associated with the assessee that they have a mutual interest in each other's businesses. The legislature by application of a de jure test has extended the meaning of "related persons" to include the entire list of relatives per se without more as related persons. Similarly, holding companies and subsidiary companies by virtue of the exercise of control by a holding company over a subsidiary company are similarly included by application of a de jure test.

27. We have indicated that the assessee argued that the price paid by Shaw Wallace and Company for the same/similar products as was sold by unrelated entities to it was even lower than the price paid by Shaw Wallace to Detergents India Ltd. This being the case, it is clear that on facts here there is no "arrangement" between Shaw Wallace and Detergents India Limited to depress a price which is otherwise at arm's length.

Though this fact is pleaded expressly before the Commissioner as pointed out above, the Commissioner's order does not contain any finding based on this fact. On the other hand, there are copious findings as to how Shaw Wallace and Detergents India Limited are related persons because of a multitude of factors pointed out in the Commissioner's order.

28. That Shaw Wallace and Detergents India Limited are "related persons" is made out by their holding/subsidiary relationship. However, from this, it does not follow that there is any arrangement of tax avoidance or tax evasion on the facts of this case. This being the case, proviso (iii) to Section 4(1)(a) would not be applicable. Further, it would also not be applicable for the reason that there is no predominance of sales by Detergents India Limited to Shaw Wallace. As has been pointed out above, only 10% of its manufacturing capacity has been sold to Shaw Wallace, 90% being sold to Hindustan Lever Limited. For this reason also, proviso (iii) does not get attracted. This being the case, on facts here Section 4(1)(a) and not proviso (iii) is attracted inasmuch as on facts the presumption of a transaction not being at arm's length has been

rebutted. Revenue's comparison of price paid by Hindustan Lever to DIL with price paid by Shaw Wallace to DIL is unwarranted as the products sold and processing charges are wholly different. The basis of the Commissioner's orders thus goes. Further, the single most relevant fact, namely, that Shaw Wallace paid for the same/similar goods to unrelated suppliers at a price lower than the price paid by Shaw Wallace to DIL, has not been adverted to at all by the Commissioner.

29. Mr. Bagaria, learned counsel appearing on behalf of Shaw Wallace, is aggrieved by penalties levied upon Shaw Wallace by the orders of the Commissioner. These penalties have been set aside by CEGAT. He pointed out to us that the ingredients necessary to attract Rule 209A were not mentioned in any show cause notice against Shaw Wallace and that the Commissioner's finding as a result thereof would have to be held to be beyond the show cause notice. He cited a number of judgments in support of this proposition. In view of the judgment delivered by us on merits, we do not think it necessary to go into the contention raised by Shri Bagaria. Suffice it to say that we are dismissing Revenue's appeals. CEGAT's judgment

itself set aside all penalties imposed on Shaw Wallace as well as DIL. That part of CEGAT's judgment will remain undisturbed.

30. The appeals by Revenue are devoid of merit and are accordingly dismissed. There shall be no order as to costs.

…….……J.
(A.K. Sikri)

……..J.
(R.F. Nariman)

New Delhi,
April 8, 2015