Dagger Die Cutting and Nilanjan Vs. Cce

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Tamil Nadu

Decided On : May-03-2002

Reported in : (2002)(83)ECC669

Judge : S Peeran, R K Jeet

Appellant : Dagger Die Cutting and Nilanjan

Respondent : Cce

Judgement :

1. Both these appeals arise from a common order passed by the Commissioner of Central Excise, Chennai by Order-in-Original No. 5/2001 dated 10.4.2001 by which the Commissioner has confirmed the demands raised in the show cause notice No. 14/2000 dated 19.5.2000 by confirming the demand of Rs. 47,73,201 against M/s. Dagger Die Cutting (for short DDC) in terms of proviso to Section 11A of Central Excise Act, besides, penalty of an amount of Rs. 42,62,314 under Section 11 AC and penalty of Rs. 20 lakhs under Rule 173Q. There is an order of confiscation of 29 numbers of cutting knives seized under Rule 173Q of Central Excise Rules. However, the same have been ordered to be released on payment of fine of Rs. 3,500 and penalty of Rs. 10 lakhs has been imposed on Shri Nilanjan Deshpande, Proprietor of M/s. Dagger International (for short, DI) and the Chief Executive of M/s. DDC under Rule 209A.2. The short facts, which to a large extent are not disputed by the appellants, are that M/s. DDC is a proprietorship concern of Smt.

Rukshana Deshpande who is the wife of the Chief Executive Officer of the company namely, her husband, Shri N. Deshpande. M/s. DDC was carrying out the manufacturing process of Die cutting machines which were totally sold to another trading unit known as M/s. Dagger International in which the husband Shri N. Deshpande was the Proprietor. The purchase orders on M/s. DDC were supplied by different customers in the name of Nilanjan Deshpande pertaining to M/s. DDC was negotiated by N. Deshpande. The correspondence to the bank was done by Shri N. Deshpande on behalf of the unit of the wife of M/s. DDC. There was no agreement between these two units with regard to fixation of price for sale of the goods manufactured by the wife's unit. There was huge outstanding of the amounts due by DI to DDC. The same was said to have been maintained in a running account and the show cause notice alleged that the outstanding dues of M/s. DI to DDC are as herein below: 3. It was alleged that there was no written agreement/contract for all these financial transactions. Further, the advertisement given in the internet show that technical assistance and guidance has been given by Shri N. Deshpande to M/s. DDC for providing the technical assistance but no payment or salary has been made to N. Deshpande by DDC for his services. Further, the declared address of DI is nothing but the residential address of the Deshpande family and all the records of DI which were seized on 13.3.2000 were available in the factory premises of DDC. A joint account No. 28040838 in the name of N. Deshpande and Smt. Rukmani Deshpande is maintained in M/s. ANZ GrinDIays Bank, where part of the profits earned by M/s. DI are deposited. The computers and xerox machines which were actually owned by DDC were shown as assets of DI. It is stated that the expenditure for maintenance were incurred by M/s. DDC and the xerox machine was installed and used in the office of M/s DDC. (a) M/s. DDC, a proprietary concern of Smt. Rukshana Deshpande and M/s. DI, also a proprietorship concern of Shri N. Deshpande, who is the husband of Smt. R. Deshpande are related persons according to Section 6 to the Companies Act 1956 which states that" a person shall be deemed to be a relative of other if any only if (b) The allegation is that in terms of the Apex Court judgment rendered in the case of Bombay Tyre International 1983 (14) ELT 1896 (SC) that relates persons in under the Companies Act will also be related persons under Central Excise Act and thus, according to Section 4(4)(c) of the Central Excise Act read with Section 6 of the Companies Act, M/s. DDC and M/s. DI are related persons. Further reference was drawn to the observation of the Tribunal rendered in the case of Avon Scales Co. v. CCE Delhi wherein it has been held that "whether a person is related person or not for the purposes of Section 4 of CETA has to be determined in terms of provisions of Section 4 itself. Once a person is a related person for the purposes of Section 4 of the Act, then the natural consequences as stipulated in law will follow. We consider that as the two persons were related persons, the duty has been correctly demanded based on the prices at which the related concern sold the goods for the first time in the open market" (para 7 of the judgment).

(c) Further, it was alleged that the following activities of both DDC and DI were also evidenced by the statements of Shri N. Deshpande and Smt. R. Deshpande clearly pointed out that they were related persons. Shri N. Deshpande also acted as the Chief Executive of M/s. DDC and controls various business transactions of DDC and the following observations have been brought out in Order-In-Original on the basis of statements to adopt the value of the goods in terms of the sale price of DI to their customers for the purpose of confirmation of duty: (a) Purchase orders on M/s. DDC were placed by different customers in the name of Shri N. Deshpande.

(b) Purchase of machinery pertaining to M/s. DDC were negotiated by Shri N. Deshpande.

(c) Correspondences were made to the Bank by Shri N. Deshpande on behalf of M/s. DDC. (d) There is no agreement regarding the sale price between M/s. DI and M/s. DDC and prices have not been revised for the last five years, (as per statement dated 3.4.2000 of Smt. R. Deshpande).

(e) M/s. DI does not pay for the goods purchased from M/s. DDC immediately on bill-to-bill basis and enjoys indefinite credit period and pays as per its convenience, in a running account. The outstanding dues of M/s. DI to M/s. DDC were substantial and not part of the normal trade and there were no written agreements/ contracts etc. for all these financial transactions.

(f) The advertisements given in the Internet showed that technical assistances and guidance have been given by Shri N. Deshpande to M/s. DDC and for providing technical assistance, no payments or salary were given to Shri N. Deshpande by M/s. DDC for his services.

(g) The declared address of M/s. DI i.e. No. 5, Thangam Colony, First Street, Anna Nagar West, Chennai-40, is nothing but the residence of Deshpande family and all the records of M/s. DI which were seized on 13.3.2000, were available in the factory premises of M/s. DDC. (h) A Joint Account in the names of Shri & Smt. Deshpande is maintained in the ANZ GrinDIays Bank, where part of the profits earned by M/s. DI were deposited.

(i) The computers and xerox machine were shown as assets of M/s. DI. However, the computers were actually owned by Smt. Rukshana Deshpande and M/s. DDC have also incurred expenditure for maintenance of computer. Xerox machine of M/s. DI was installed and used in the office of M/s. DDC. (d) Therefore, it was alleged that transactions between M/s. DDC and M/s. DI were not at arms length and inasmuch as all the goods were not sold by DDC and in the course of wholesale trade except through a related person (i.e. M/s. DI), the normal price of the goods sold by M/s. DDC through M/s. DI (related person) shall be deemed to be the price at which they are ordinarily sold by the related person (M/s. DI) in the course of wholesale trade, at the time of removal, in terms of Section 4(1)(a)(iii) of Central Excises Act, 1944.

5. Therefore, M/s. DDC were called upon to pay the Excise duty of Rs. 47,73,201 for the value of clearances of Rs. 6,35,35,691 during the period of 1995-96 to 1999-2000 (up to 31.3.2000) for having contravened the provisions of Rule 9(1), 52A, 53, 173B, 173C, 173F, 173G and 174 read with Rule 226 of Central Excise Rules, 1944 inasmuch as they: (i) had not applied for and obtained a Central Excise Registration Certificate for the manufacture and clearance of excisable goods; immediately after crossing the prescribed exemption limits under Notification No. 1/93-CE dated 28.2.93 as amended during the above period.

(ii) had failed to issue Central Excise invoices for the clearances of excisable goods manufactured, (iii) had failed to account for the production and clearance of excisable goods in the statutory Central Excise records, (iv) had failed to declare the appropriate classification and value of the excisable goods, (v) had cleared excisable goods without determining the appropriate excise duty leviable thereon and without payment of excise duty.

6. It further appeared that M/s. DDC had suppressed the facts with an intention to evade payment of duty and hence the extended proviso to Section 11-A of Central Excise Act, 1944 is invokable and also it appeared that the above contraventions attracted the penal provisions of Rule 173Q and under Section 11 AC of Central Excise Act, 1944 and also interest liability under Section 11AB of Central Excise Act, 1944.

7. From the above facts and evidences on record, it appeared that Shri N. Deshpande, proprietor of M/s. Dagger International, Chennai-40 has concerned himself in removing excisable goods which he knows or has reason to believe are liable to confiscation under the Act or these rules and therefore liable to penalty under Rule 209 A of Central Excise Rules, 1944.

8. On the above grounds, a S.C.N. No. 14/2000 dated 19.5.2000 was issued to M/s. Dagger Die Cutting, Chennai-98n (sic) requiring them to show cause to the Commissioner of Central Excise, Chennai-II Commissionerate, MHU complex, 473, Anna Salai, Nandanam, Chennai-35 as to why: (i) the duty of excise payable on the value of clearances of Rs. 6,35,35,691 effected during the years 1995-96 to 1999-2000 over and above the exemption amounting to Rs. 47,73,201/should not be demanded from, them under the provisions of Section 11A(1) of Central Excise Act, 1944 read with Rule 9(2) of Central Excise Rules, 1944, (ii) a penalty should not be imposed on them under Section 11AC of Central Excise Act, 1944 and Rule 173Q of Central Excise Rules, 1944.

(iii) interest at appropriate rate on the duty amount mentioned at (i) above should not be paid by them till the date of payment of the above duty in terms of Section 11AB of Central Excise Act, 1944.

(iv) the seized goods (29 Nos. of Leather cutting knives) approx.

valued at Rs. 7000 as shown in the seizure mahazar dated 13.3.2000 should not be confiscated under Rule 173Q(1) read with Rule 209 of Central Excises Act, 1944.

(v) the land, building, plant and machinery used in connection with the manufacture and removal of the above said excisable goods valued at Rs. 55,70,400 approximately should not be confiscated under the provisions of Rule 173Q(2) of Central Excise Rules, 1944.

Further, Shri N. Deshpande, proprietor of M/s. DI was asked to show cause as to why a penalty should not be imposed upon him under Rule 209A of Central Excise Rules, 1944.

9. M/s. DDC filed an application with the Settlement Commissioner on 12.10.2000 stating that they were ready to pay an amount of Rs. 16,44,496 calculated on the basis of the price at which they were selling the goods to M/s. DI and after taking into account the SSI exemptions from time to time. They also submitted that the applicant (M/s. DDC) is an independent manufacturer and the marketing company M/s. Dagger International cannot be treated as a related person within the meaning of Section 4(1)(a)(iii) read with Section 4(4)(c) of Central Excise Act, 1944 merely because the applicant is the proprietrix and her husband is the proprietor of M/s. DI. They also quoted the judgment of Hon'ble Supreme Court in the case of M/s. Bombay Tyre International to say that it is not merely the relationship but mutuality of interest has to be established. They also prayed that no amount in excess of Rs. 16,44,496 be recovered from them, no penalty be imposed on them either under Section 11 AC or Rule 173Q. No interest be recovered from them under Section 11AB, No confiscation whatsoever be ordered of the land, building, plant, machinery etc. under Rule 173Q(2) of Central Excise Rules, 1944, or otherwise and the 29 nos. of cutting knives seized from the applicant be returned to them and no prosecution be ordered/ launched against them.

10. The defence taken by M/s DDC in the reply dated 26.2.2001 is that M/s. DCC and M/s. DI were independent concerns holding separate premises, separate registrations under different laws, and were separately assessed to income tax,

and sales tax and the transactions between them were at arms length and were based upon purely commercial considerations. Thus, the consideration received by M/s. DDC from M/s.

DI was deposited in its own account by M/s. DDC while the sales proceeds received by M/s. DI from its customers, was deposited by M/s.

DI in its own account. M/s. DI made payments to M/s. DDC only after M/s. DI itself received payments from its customers. There was a time lag of 60 to 90 days before M/s. DDC received payments from M/s. DI.This was because M/s. DI itself did not receive payments from its own customers for about 60 to 90 days. As there was a running account between M/s. DDC and M/s. DI there would be substantial outstanding payable by M/s DI to M/s DDC at any given point in time. Since, the footwear industry is seasonal in nature, the demand for dies would fluctuate and, therefore, depending upon the time of the year, the outstanding amount between M/s. DDC and M/s. DI was correspondingly high or low. They also denied that M/s. DI did not pay for the goods purchased from M/s. DDC immediately on a bill-to-bill basis, and enjoyed indefinite credit, and paid as per its convenience, in a running account. The non-charging of interest on delayed payments as per settled law does not justify the clubbing of units, particularly when the units are closely related. Regarding the subject of non-charging of interest on delayed payment, they submitted that M/s.

Dagger International itself did not charge or receive interest on delayed payments in respect of its sales to it customer as is apparent from the evidence which will be produced at the time of personal hearing. It was also submitted that both the proprietors were embracing the Islamic faith and cannot charge interest. They further submitted that any point of time, the dues from the customers of M/s. Dagger International were substantially greater than the amounts which were due to be paid by M/s. DI to M/s. DDC. It was also submitted that M/s.

DDC during the relevant period had its own employees while M/s. DI also had its own employees and both M/s. DDC and M/s. DI had its own computers. They also submitted they had documentary evidences for the above said submissions. Regarding the allegations in the S.C. N, that M/s DDC and M/S. DI are related persons, they submitted that the burden is on the department and the show cause notice makes only bald allegations e.g. , the allegations regarding the computer purchased by M/s. DDC. Regarding the allegation that the purchase orders were placed in the name of Shri N. Deshpande, it was submitted that majority of the purchase orders were placed by customers on M/s. DI, who in turn placed orders on M/s. DDC. The allegation that in some correspondence and letters addressed to M/s. DDC, the name of Shri N. Deshpande was mentioned has been explained by him in his statement dated 12.3.2000 that this was purely due to error and these goods were supplied by M/s.

DI even though they were addressed to M/s. DDC. which he can prove by showing connected invoices. The test of financial flow back to establish mutuality of interest as laid down by the Courts and the Tribunals to establish the related persons concept has not been satisfied. In fact, this has been answered by Shri N. Deshpande in his statement. A one time advertisement in the Internet and the absence of a written agreement do not justify the clubbing of units as these are stray instances and innocuous circumstances. The purchase of machinery was negotiated by Shri N. Deshpande in view of his experience in the die industry and moreover, if family members helped one another in the course of business, such a fact by itself could not lead to a conclusion that the clearances of two concerns inter se were not at arms length. The allegation that Shri N. Deshpande addressed certain correspondence to the bank on behalf of M/s. DDC has been explained by Smt. Rukshana Deshpande as possibly during the time she was out of Chennai. They submitted even if there was no agreement regarding sale prices between M/s. DDC and M/s. DI, it was also a fact that M/s. DI itself did not revise its own prices upward during the said period, but in fact, reduced them at certain times thus establishing the arms length transactions between M/s. DDC and M/s. DI. Regarding the allegation that Shri N. Deshpande rendered technical assistance to M/s.

DDC for which no payment was made to him, it was submitted that Shri N.Deshpande gave technical assistance before M/s. DI came into existence and is supported by his statement dated 3.4.2000 wherein he had stated that in the initial stages, he had given technical assistance.

Similarly, the declared address of M/s. DI was the residential address of the Deshpande family because the said premises were residential-cum-office premises, as far as M/s. DI was concerned.

Although a joint account in the names of Shri and Smt. Deshpande is maintained at M/s. ANZ GrinDIays Bank, this account was originally opened in 1984 before M/s. DI came into existence and Shri Deshpande deposits only individual drawings from M/s. DI in the said joint account towards household expenses. It was also submitted that the individual concerns had their own accounts as stated earlier. Regarding the allegation that the computer was shown as the assets of M/s. DI, the show cause notice has failed to notice that there were two computers, one owned by M/s. DDC and another by M/s. DI, which is reflected in the independent books of accounts as well as bills and bank payment details. While admitting that M/s. DI owns the xerox machine, the said xerox machines was located at M/s. DDC's premises in view of the renovation taking place at the Deshpande residence-cum-DI office as aforesaid. Regarding the adoption of normal price at which they are ordinarily sold by M/s. DI as the normal price of the goods sold by M/s. DDC, they submitted that (i) mutuality of interest is required to be established by the department, before the first stage price is rejected by the department, (ii) any technical/financial assistance is rendered by family members to one another, this fact by itself does not taint the transactions between the two concerns, (iii) use of common facilities, machinery etc., also does not vitiate such transactions, (iv) the reliance upon the decision of the Tribunal in the case of M/s. Avon Scales is misplaced. Regarding the limitation of period it was submitted that inasmuch as the transactions between M/s.

DDC and M/s. DI were at arms length, no question arises of their client having suppressed facts with an intent to evade payment of duty and consequently, the extended period of limitation in terms of the proviso to Section 11A is not attracted. Therefore, the penalty under Section 11AC is also not invokable and in any case, the same is not applicable up to 28.9.96 as the same cannot be applied retrospectively. No penalty under Rule 173Q can also be imposed as there is no contravention of the Act or the Rules. The seized knives were also required to be returned to them. As regards the proposed confiscation of the land and the building, they submitted that the same does not even belong to their client, but has been leased from one M/s. GKC Clothing and, therefore, no question arises regarding the confiscation. Regarding the proposed confiscation of plant and machinery, their client submitted that they had not submitted any breach whatsoever of any provision of the Act or the Rules, so as to warrant confiscation.

16. Shri N. Deshpande in his reply dated 26.2.2001 through M/s.

Shailaja Kher & Associates submitted that he has not contravened any provisions of Rule 209A. He also submitted that the department is required to establish that the person charged with infringement of Rule 209A is required to have personal knowledge that the excisable goods in question were liable to confiscation and in the present case, the department has completely failed to establish the above by not even producing prima facie material in support and submitted that case laws in support will be subjnitted at the time of personal hearing.

18. Accordingly, M/s. DDC filed their written submission dated 16.3.2001 through their counsel stating that both M/s. DDC and M/s.

DI had their own separate office premises, separate Bank accounts separate employees, separate electricity connections, separate registrations under various statutes etc. They also placed reliance on the judgment of the Hon'ble Bombay High Court in the case of Ralliwolf Limited v. UOI specifically relying on Paras 29, 30 and 31 of the said judgment. It was submitted that the Hon'ble Bombay High Court had held that to invoke the third proviso to Section 4 of the said Act, three conditions had to be satisfied.

Viz., (2) The price charged should not be the normal price but a price lower to the normal price and that extra commercial considerations have reduced the normal price; (3) The alleged related person should be related to the assessee as defined in Section 4(4)(C) of the said Act.Cooling Systems v. Collector of Central Excise wherein it was inter alia held that if two units are owned by a husband and wife respectively, being independent and having actual existence and not having mutual interest in the business of each other, are not to be regarded as related persons under Section 4(4)(C) of the said Act. The decision of Sarpin Pharmacal

v. Collector of Central Excise was also relied on wherein it was held that as there was no evidence on record to show that additional consideration was flowing from one unit to another and that one unit was not funding the other unit, the two units could not be held as related persons. In the instant case, M/s. DDC was the manufacturer and M/s. DI only carried on the trading activity. There was no evidence to show that the profits of M/s. DI flowed back to M/s. DDC and vice-versa. The Hon'ble Bombay High Court in the case of Chetan B. Thadani v. UOI , held that despite the fact that the goods were manufactured with the customers brand name and the entire production was sold to him, advertisement expenses were borne entirely by the buyer and there was no written agreement between the parties, the dealings were still held to at arms length and the sale price of Section 4 of the Act. relying on para 5 of the said judgment. The case of Chloride Industries v. Collector of Central Excise and the Plus Cosmetics limited v. Commissioner of Central Excise was also relied upon in support of their case. The Tribunal's decision in the case of Jagjivandas & Co. v. Collector of Central Excise and the decision of the Hon'ble cited to show that the test to establish that two units were related was mutuality of business interests between the two units or that they have common funding and financial flow back. The decision of the Tribunal in the case of Rang Udyog v. Collector of Central Excise was also cited wherein it was held that if two units have separate income tax and sales tax registrations and are also registered as SSI units, and the expenses of both units are from different sources without any flow back of funds from one to the other, then even if there is inter-relationship of partners, common workers, common machinery and stock of raw material and one person controls both the units, clearances of the two units cannot be clubbed together. In response to the allegation that there was only one joint account in the names of Shri N. Deshpande and Smt.

Rukhsana Deshpande, bearing No. 28040848 where the profits earned by M/s. DI were allegeDIy deposited, it was submitted that the aforesaid allegation was false and a list of all the bank accounts (seven in all) were submitted. The said account was being used only for household expenses and Shri N. Deshpande was not depositing the profits earned by M/s. DI in that account. It was further submitted that the.bank account of M/s. DDC in GrinDIays Bank contains all the amounts received by M/s. DDC from M/s. DI on account of M/s. DDC's sales proceeds. A copy of the letter addressed by GrinDIays Bank to the Commissioner of Central Excise, showing that the joint account has been in operation for two decades was produced. The documentation on which the reply to the show cause notice was based was also produced. In particular, extracts of the Ledger account book of M/s. DI in respect of two of M/s. DI's customers viz. M/s.

P.A. Footwear and M/s. Marina Shoes, established that both the said customers had a running account with M/s. DI and were not taking payments to M/s. DI on a bill-to-bill basis. At any given point of time, the said customers owed large amounts to M/s. DI and were not being charged any interest whatsoever on the delayed payments. In support of the submission relating to non-charging of interest between Muslims, passages from the Holy Koran were read out by the proprietress, Smt. Rukhsana Deshpande to establish Islamic indictment on charging interest. An affidavit of Shri N. Deshpande made in October 1984 embracing Islam, was handed over. In view of the submissions made, it was pleaded that the subject show cause notice be withdrawn.

11. Mr. N. deshpande also filed a written statement dated 16.3.2001 before the Commissioner in which he stated that the proposed penalty under Rule 209A of C.E. Rules is misconceived. He submitted that Rule 209A would only apply in a case (a) where the person concerned physically deals with the goods in the manner specified in Rule 209A, (b) the person deals with the goods with the knowledge that the goods are liable to confiscation, and (c) the department can establish on evidence, the existence of such knowledge on the part of such person.

It was submitted that all the above conditions were required to be fulfilled, if an assessee is to be penalised under the above rule. In the present case, it was denied that Shri N. Deshpande had knowledge that the goods were liable to confiscation and in any event, the department had led no evidence to establish that Shri N. Deshpande had knowledge that the goods he was dealing with were liable to confiscation. It was therefore, submitted that no penalty whatsoever could be imposed on Shri N. Despande and the show cause notice proposing imposition of penalty on him should be withdrawn.

12. Ld. Commissioner (Appeals) in the impugned order has upheld the allegation that M/s. DDC had indulged in clandestine manufacture and removal of excisable goods without payment of duty amount beyond the excess limit under SSI exemption notification. On this point not much of argument has been raised before us and it is admitted by Ld. Senior Counsel appearing for the appellants submitted that although there was an aberration on the part of DDC in not obtaining licence and filing declarations and in not paying duty beyond the exemption limit, as they were misguided by their Accountant. However, it is his contention that merely because they have not taken out the licence and filed declaration to the dept. that by itself will not absolve them from seeking the benefit under the legislation and law i.e. with regard to (a) modvat credit (b) cum duty (c) the fact that though they are husband and wife but yet transaction is at arms length and there is no mutuality of interest inasmuch as that although husband N. Deshpande of M/s. DI had worked for the affairs of wife as Chief Executive without receiving any payment but he had no interest or had not taken any sum from the wife's concern. It is his contention that in order to take the sales value of DI for the purpose of valuation under Section 4(4)(c) of C.E. Act, there has to be mutuality of interest in each other's firm and there should be flow of profits from each other's firm which is not the case. It is his contention that both the husband and wife, for a long time, even prior to starting of the business had a joint saving account. The husband out of his earning was transferring Rs. 15,000, to the joint saving account for domestic expenditure. This by itself will not show that there is sharing of profit mutually and that the value of sole selling agent i.e. the husband who was acting on behalf of his wife should be adopted for valuation purposes. It is his contention that husband Shri N. Deshpande was for a long time working for M/s.

Goyandethonde and had been helping his wife to secure orders from the customers; M/s. DDC was in existence before setting up of DI. Mr.

Deshpande rendered technical assistance to DDC for which no payment was made to him and merely because such assistance was given that by itself will not make the firm M/s. DI as a related person to adopt their sale value although there is no dispute that 100% sales were made to M/s.

DI. He submitted that they had a running account and mutually account and he demonstrated it from the bank statements that as soon as M/s. DI received sums from their customers, the same was transferred to the account of DDC and the amounts were not retained by DI for taking any mutual benefit from the amounts. There might have been no interest charged for the delayed payment to DDC on account of religious sentiments but that by itself will not lead to the conclusion that DI has taken mutual benefit from the wife's firm. It is his contention that even the fact that there was some sharing of premises or giving security on immovable properties for the purpose of loan that by itself will not give a presumption of mutuality of interest. He pointed out that the findings arrived at by the Commissioner that they had taken loan of Rs. one crore on the immovable property is not correct. The account sheet had even a slogan to the effect that a constituent or customer can avail of the benefit of loan up to Rs. 1 crore but it did not mean that they had taken loan and to this effect a certificate has been given by the bank that no loan of Rs. 1 crore has been advanced to the units on the security of the immovable property. He submitted that the price although was constant for several years but DDC was also keeping the price constant with their customers in view of stiff competition in the trade. The price was a negotiated price and the Commissioner had accepted this point. He filed a summary of allegations and the findings recorded to show that there was no specific finding on every point and some of the submissions had been accepted. The said sheet is reproduced for the purpose of analysis of the findings and on the main question in his appeal as below:---ALLEGATIONS SUBMISSIONS FINDINGS IN ORDER---There is no agreement There is no written Submission accepted.between DDC & DI agreement.Purchase---Purchase Orders on DDC These were stray cases. Submission accepted.placed by customers in Majority of Purchase---Purchase of machinery This was in view of No specific findingof DDC negotiated by his experience in the on this point.Nilanjan Deshpande die making industry.---Correspondence with Bare allegation not Evident that NilanjanBank of behalf of supported by any Deshpande was hanDIing DDC made by evidence.Explained by the may businessNilanjan Deshpande Mrs. Deshpande that affairs of DDC she may have possibly in the capacity--DI does not pay DDC DI made regular No specific finding onbill to bill basis payments of DDC and this on point,and enjoys indefinite did not enjoy---Advertisement on When Nilanjan Deshpande Submission accepted,Internet shows that provided technical---DCC does not pay any If family members help DDC favours DI with lowsalary to Nilanjan each other in business, prices and DI favoursDeshpande that by itself does not DDC with freetaint transactions services of Nilanjan--Records of DI found As the residential-cum- Submission accepted,in factory premises office premises of DI---Joint Account in names Joint Account was Rs. 6,000 was transferredof Mr. & Mrs. Deshpande opened 11 years from Joint Account to DDC'smaintained in GrinDIays before DI came into current Account andBank where part of existence. DDC and DI subsequently, Rs. 3,000profits earned by DIare have individual transferred fromdeposited businesswas accounts.

DDC's current account Details of all accounts to the Joint Account.---Computer shown as asset There are two computers,Submission accepted,of DI whereas computer one owned by DDC and--DDC has incurred As explained above, Submission accepted.expenditure for DDC had its own---Xerox machine of DI Xerox machine of DI in Submission acceptedinstalled and used DDC's premises because 13. Ld. Senior Counsel further filed a written submission on the point pertaining to admission before the Settlement Commission and also several judgments on this point alone made out which is reproduced herein below: (1) The Settlement Commission acts as a Tribunal and the proceedings before it are judicial proceedings.

(2) The Settlement Commission acts as a Tribunal "while it settles the case moved before it Swadeshi Industries v. Income Tax Settlement Commission (3) The jurisdiction of the Settlement Commission under Section 32E and 32F of the Central Excise Act, 1944. from the language of Section 32E itself and on a true construction thereof, is "to have the case settled". Therefore, the jurisdiction of the Settlement Commission is not to adjudicate or decide a case moved before it under Section 32E. The Applicant cannot raise issues for determination nor can the Settlement Commission make findings on the issues raised in the Show Cause Notice. There can be therefore, be no question of praying that (a) the Show Cause Notice be set aside, or (b) an Order passed by a Central Excise Officer be set aside.

(4) The prescribed printed Proforma does not contain any provision for the Show Cause Notice/Order to be set aside. Serial No. 10 of the Proforma in fact only speaks "of the issues to be settled". If the Settlement Commission at the threshold does not entertain an application under Section 32E, as in the present case, the application is void ab initio and there can be no admission of facts or the duty liability, whichjs binding on either the assessee or on the Commissioner (5) On the rejection of an application under Section 32E read with Section 32F. the dispute reverts to the forum before which it was pending i.e. (in the present case, before the Commissioner), and the Central Excise Officer has to then proceed with the dispute as if no application was filed i.e. the application was non-est.

(6) Any interpretation that on the rejection of an application filed before the Settlement Commission at the threshold, the facts and the duty liability become admitted by the assessee precluding him from taking any other stand, would result in an absurdity, as no assessee would go before the Settlement Commission and take a chance.

(7) The Settlement Commission is a Tribunal. Its Order is subject to judicial review under Article 226 or 227 or Article 136 of the Constitution of India. N. Krishnan v. Settlement Commission Also See-Swadeshi Industries (supra) 14. He also filed the balance sheets to show that there was no transaction between DI and DDC to show non-flow of funds. He pointed out from the balance sheets that Shri R.Y.

Gaitonde was due to DI of Rs. 15,60,198.62 and in view of this huge amount due to them, DI could not make payment to DDC. The mere fact that no interest was charged by DDC on such outstanding that by itself will not give a cause to hold that there was mutuality of interest and that transactions were not at arms length. He submits that failure to enter into an agreement for negotiated price also cannot be considered as a point against them to hold that there was mutuality of interest. He submitted that DDC had sold the goods to DI by keeping the margin of 20% and that there was no indefinite credit as it was a running account and DI was making payment as and when his customers were discharging their dues to him on the very day without retaining any amount to draw any benefit from them.

The statement of wife Smt. Deshpande that she had full confidence in her husband and her money was secure in his hands cannot be a basis for holding the mutuality of interest. Any sound business man will seriously look for a secured dealer who will deal with the manufacturer safely. As there was a goods arrangement made by N. Deshpande from purchasers who placed orders for Dies which were manufactured as per their specifications and dies were returned to customers, therefore, such statement of N. Deshpande or Smt. Deshpande cannot be a basis to conclude that there was mutuality of interest and that there was flow back of funds. He submits that even if there is 100% sale to a unit that by itself will not be a ground to hold that there is mutuality of interest and transaction is not at arms length. There has to be mutual flow of funds from one unit to another unit thereby to establish flow of profits as well as to consider that units are related and are having mutuality of interest. He contended that DDC was not transferring her profits for her own business and some portion of money was transferred to the personal account of the proprietrix. He pointed out to the Tribunal decision rendered in Cooling Systems v. CCE, Ahmedabad it has been held that merely because there is relationship of husband and wife between two units that by itself will not make them a related person but the department has to show that each had interest in other's affairs in terms of mutual flow of funds. He submitted that this judgment would clinch the issue in his favour. He contended that the decision of Sarpin Pharmical v. CCE, Ahmedabad also would apply, more particularly, the findings rendered in para-13. It has been held that when there is no flow back or mutuality of interest and that there is common funding, then the transaction value of the seller has to be adopted. He also relied on the judgment rendered in the case of Chloride Inds. LTD. v. CCE, Pune more particularly paras-2, 7 & 8 which he read out to persuade the Bench to accept the same. Likewise, he relied on the judgment of Plus Cosmetics Pvt. Ltd. v. CCE, Kanpur wherein it has been held that merely because there is 100% sales and some interest-free loan given to one unit that by itself will not make both the units as one and the same to hold that there is mutuality of interest. He further relied on the judgment rendered in Ralliwolf Ltd. v. UOI which lays down three tests for holding a unit to have mutuality of interest in the other unit. It laid down that it is for the department to show that there was mutuality of interest. The three factors are (a) mutuality of interest (b) price charged should not be the normal price (c) alleged related person should be related to the assessees as defined in Sec.4(4)(c) of the Act. He contended that these factors are not satisfied. He also relied on the Apex Court judgment rendered in the case of UOI v. Atic Industries Ltd. besides relying on the Tribunal's Larger Bench judgment of Samtel Electron Devices Ltd. v. CCE Meerut wherein it has been clearly laid down that there has to be mutual transfer of funds and sharing of profits for the purpose of rejecting the transaction value. He relied on the judgment rendered in Beacon Neyrpic Ltd. v. CCE Madras appellant's filing declaration before the Settlement Commission seeking settlement of the matter admitting the liability to the tune of Rs. 15 lakhs. However, Ld. Senior Counsel contended that it was only to buy peace they had approached setlement Commission and it does not take away the right of individuals to contest the case on merits in terms of law before the appellate forum. Although, there was some aberration in not taking out the licence and paying duty and that they had approached the Settlement Commission but that by itself will not prove the mutuality of interest and reject the transaction value. There is no admission to this effect that there was mutuality of interest and that the sale price of the DI should be adopted.

15. Ld. Senior Counsel, in support of his case, seeks for application of the ratio of the judgment of the Apex Court rendered in the case of Calcutta Chromotype Ltd. v. CCE Calcutta to this case also wherein the Apex Court held that once it is found that persons behind the manufacture of the buyer are same, it is apparent that buyer is associated with the manufacturer, and then regard being had to the

common course of natural events, human conduct and public and private business it can be presumed that they have interest, directly or indirectly, in the business of each other. (Ref. Section 14 of the Evidence Act). He pleaded that this test laid down is to see the relationship between the manufacturer and the buyer as applied in the above case by the Apex Court is required to be applied to the facts of the present case as there was interest directly or indirectly in the business of each other Ld. Sr. Counsel relied on the judgment of Samtel Electron Devices Ltd. . The facts of this case disclosed that the relationship between the parties was principal to principal and there was no flow of funds and therefore have held that evidence produced was sufficient to grant benefit and to accept the transaction value of the manufacturer. Ld. Sr. Counsel contends that such evidence is not available in the present case for its applicability.

16. Countering the argument of Ld. Sr. Counsel, Ld. SDR reiterated the statements made by both the persons in the case wherein there is a very clear admission that much benefit was drawn by both the husband and wife with each other. Such benefit drawn would clinch the issue and the Tribunal has to hold that there is mutuality of interest and that there is flow of profits in terms of services given by the husband to wife's unit. He also relied on the admissions made before the Settlement Commission and the declarations made therein which, according to him, can be demonstrated as acceptance of facts before the Tribunal also. He contended that there is no sale agreement between DDC and DI. There was no purchase order or agreement. The balance sheet clearly indicated huge dues for more than Rs. 54 lakhs per annum by DI to DDC which has not been answered till date. Even when questions were put to him on this point while recording the statement, Shri N.Deshpande could not give explanation but, however, sought time to furnish explanation later which has not been done so till date, including in the appeal memo, Ld.SDR contended that the fact that the credit period is so long and that no interest is being paid also clearly show that the transaction was not in terms of business practice. He contended that no unit can survive by supplying the goods to their distributor and wait enDIessly as the manufacturer is also liable to pay interest to the loans taken from the bank and requires funds for purchase of raw material.

Therefore, the fact that husband's unit had retained the sums for a long time clearly show that he was doing his business and continuing to do so with the regular supplies made by wife's unit.

17. Ld.SDR relied on the following case-laws to support departmental view:Pious Pharmaceuticals Pvt. Ltd. v. CCE (6) Shree Baidyanath Ayurved Bhawan P. Ltd. v. CCE Calcutta 2000(126) ELT 879N.P. Textile Mills v. CCE Bombay 18. Ld.SDR again submitted that as long as the fact that they had not taken out the licence is not disputed, then the question of grant of modvat credit does not arise. He submitted that non-observation of procedure is not condonable and for such non-observation of relevant rules under the Act, the benefit has to be denied as held in the case of Indian Aluminium Co. Ltd. v. Thana Municipal Corporation . He also relied on the judgment of SomaniIron & Steels Ltd. v. CCE Kanpur . He submitted that penalty under Section 11 AC and Rule 173Q is justified and requires to be imposed as there was clear violation of law. He relied on the judgment of Mcdowell & Co. Ltd. v. Commercial Tax Officer 1997 (69) ECR 29(SC): UOI v. A.V. Narasimhalu 1983 ELT 1534 (SC) and that of Jain Exports Pvt. Ltd. v. UOI .

19. In counter, Ld. Senior Counsel was at pains to explain that the relationship between the husband and wife was purely commercial and there was no mutuality of interest so as to take profits from each other's business. They were doing the business independently and countered the arguments of Ld. SDR with regard to letter heads of two firms having common logo He contended that merely because any dealer used the brand name or logo of major companies like, MRF or DUNLOP etc., that by itself will not make the dealer, who put the logo on their shop, a related person and that there is mutuality of interest.

He submitted that department miserably failed to prove any evidence of financial flow back and that merely the husband had given his services to wife's unit without any remuneration and there was delayed payment in the accounts and there was no increase in the price and there was no charge on this point in the SCN for holding against them. DI had not revised the price due to competition and that DDC had sold the goods outright on 20% profits. He contended that value of the DDC has to be taken and his prayer for reworking out the duty by granting cum duty price in terms of larger period rendered in the case of Sri Chakra Tyres, and also benefit of modvat credit in terms of Apex Court judgment Formica India Division has to be extended. He contended that appellants had given calculation of about Rs. 16 lakhs and before the Settlement Commission for the purpose of availing modvat credit: that M/s. DDC was importing the raw material by which the CVD was paid; that they will be entitled for modvat credit for more than Rs. 15 lakhs. They are also entitled for benefit of SSI exemption up to the limit of Rs. 30 lakhs and hence their legitimate benefit cannot be denied. He contended that although DDC admits their liability, there cannot be mandatory penalty of equal amount as it was due to bonafide belief, the clearances were made that there was no excess clearance. Likewise, the husband also had given assistance to his wife without drawing profits from the wife's unit and there was no liability for penalty under Rule 209A as held by the Commissioner and matter has to be decided in terms of law.

20. We have carefully considered the submissions made by both sides and have perused the entire order and the documents produced before us besides the statements recorded by the department from the husband and wife i.e. Proprietrix of M/s. DDC and Mr. N. Deshpande Proprietor of DI. There is no dispute with regard to manufacture of excisable goods made by DDC and removal of the same without payment of duty beyond the SSI unit. There is no argument raised by Sr. Counsel about suppression of facts with regard to manufacture and clearances and he admitted that there was an aberration on the part of DDC in not taking out the licence and paying the duty beyond the exemption limit. However, for the first time, it is stated before us that they were misguided by their Accountant. Be that as it may, the law requires that the unit should file declaration and take out licence and pay duty when they have crossed the exemption limit. On that score, the proceedings initiated by the department cannot be set aside. The only question is as to the assessable value which is to be considered in this case. The main allegation of the department is whether the value of the DI, who has sold the goods to their customer, should be adopted in the event of proving the mutuality of interest and DI owned by the husband being related person. The Ld. Senior Counsel was at pains to show that merely because they are husband and wife and that there is 100% sales to DI by DDC and that there is no revision of price and

that delayed payment by DI to DDC did not carry interest will not be a factor for holding that transaction value is not at arms length. We are required to examine this issue and see as to whether the transaction has been at arms length and whether there was any mutuality of interest. If the answer is in negative, then the clearance value of DI is required to be adopted. The other question is as to whether there has to be grant of benefit of modvat credit and whether duty is to be required to be considered as cum duty. On this point, there has been not much argument raised before us and, therefore, it stands to reason that the larger bench judgment rendered in Sri Chakra Tyres (Supra) has now well laid down that duty has to be considered as cum duty even in cases where there has been clandestine removal. The second ground for modvat credit is now also settled by the judgment by the Apex Court rendered in the case of Formica India Division (supra). Both the citations are being applied by the Tribunal in number of matters coming up before this Bench while confirming the duties. The relief pertaining to modvat credit and the plea of duty to be considered as cum duty now settles the issue and to that extent we uphold their contention.

21. As regards the question pertaining to penalty on the appellants for the alleged contraventions is required to be reconsidered by the appellate authority after arriving at the exact amounts due by the appellants and on rehearing them with regard to the fact that appellant DDC cannot be imposed with equivalent amount of penalty in terms of Apex Court judgment rendered in Escorts JCB Ltd. v. CCE 2000 (118) ELT 656 and similar judgments given by the Tribunal. As regards the contraventions of Rules 173Q and 209A, the matter is required to be reheard by the Commissioner for fixing up the amounts after due hearing and after due calculation of duty in the matter.

22. We take up the matter pertaining the issue as to whether M/s. DDC and DI are related persons in terms of Sec. 4(4)(c) of Central Excise Act, 1944. On this issue, the Commissioner's finding is extracted herein below: II. Whether Or Not M/s. DDC And M/s. DI Are Related Persons in Terms of Section 4(4)(c) of Central Excise Act. 1944 M/s. DDC in support of their defence, against the allegation contended that both M/s. DDC and M/s. DI were separately assessed to income tax and sales tax as independent concerns. Therefore, the assessment under excise law should

be no different. It was also contended that both M/s.

DDC and M/s. DI operated independent bank accounts, wherein they deposited their respective sale proceeds. They produced the bank statements in support of their defence. On the allegation of Shri N.Deshpande corresponding with customers of M/s. DDC, they argued that Shri N. Deshpande himself stated in his statement dated 23.3.2000, as "an error". They also contended that no financial flow back or sharing of any technical know how took place between M/s. DDC and M/s. DI besides having any kind of common management control. They contended that it is settled law, if family members helped one another in the course of business, such fact by itself could not lead to a conclusion that clearances of the two concerns inter se were not at arms length.

On the question of non-charging of interest on delayed payments, it was contended that Islam, the religion of Shri N. Deshpande prohibits receipt of interest, besides the fact that they do not receive any money on bill-to-bill basis, but on a running account, where certain amounts are received in lump sum. Finally, it was contended that they do not pool their profits in the joint bank account maintained with the ANZ GrinDIays Bank but only Shri Deshpande deposits money for household expenses. They merely brushed aside the Tribunal's decision in the case of Mis. Avon Scales Co. as misplaced while relying on other case laws as mentioned in the brief facts (Para 18) in support of their defence. It is an admitted fact that Shri N. Deshpande and Smt.

Rukhsana Deshpande are husband and wife. Therefore, they come within the definition of "relative" under Section 6 of the Companies Act, 1956 as borrowed in Section 4 of Central Excise Act, 1944. It is also admitted that M/s. DDC who manufactured the cutting knives, sold them to M/s. DI, a concern floated for distribution of the goods in question. It has also been admitted that Smt. Rukhsana Deshpande is the Proprietrix of M/s. DDC, the manufacturing concern while Shri N.Deshpande is the proprietor of M/s. DI, who distributes the goods. It is also an admitted fact both by Shri N. Deshpande and Smt. Rukhsana Deshpande in their statements, that Shri N. Deshpande acted as a Chief Executive of M/s. DDC gratuitously without taking any salary. As could be seen from Smt. Rukhsana

Deshpande's statement dated 3.4.2000, both M/s. DDC and M/s. DI share a common auditor whose fees are paid by M/s.

DI for both concerns. It is also an admitted fact that no interest was charged for commercial transactions, even though religious grounds are ascribed, between M/s. DDC and M/s. DI. It is also an admitted fact that Shri N. Deshpande provided technical assistance to M/s. DDC, besides acting on behalf of M/s. DDC with customers and bankers, although it was claimed by M/s. DDC as an innocuous error. It is pertinent to note that none of these facts were retracted or denied by M/s. DDC and M/s. DI and the individuals concerned.

From the above facts, it is evident that Shri Deshpande was hanDIing the business affairs of M/s. DDC, in his capacity as the Chief Executive, and M/s. DI in his capacity as the proprietor. It is an admitted fact that both M/s. DDC and M/s. DI are operating current accounts (M/s. DDC-No. OIC/NP/20977/0 and DI/OIC/BP/36573/00) with ANZ GrinDIays Bank, Haddows Road Branch and Rajaji Salai Branch, Chennai.

As could be seen from the bank statements submitted by M/s. DDC and Shri N. Deshpande (for M/s. DI) both M/s. DDC and M/s. DI. have been given limits upto Rs. 1 Crore, against the residential property belonging to Shri N. Deshpande situated at No. 5, Thangam Colony, 1st Street, Anna Nagar West, Chennai--40. From this, it is evident that both M/s. DDC and M/s. DI were commonly funded and managed by Shri N.Deshpande, who placed his house as a collateral security for the bankers to release the loan amounts.

A cursory glance at the following table reveals the extra-profit margin generated for M/s. DI by M/s. DDC for the financial and administrative services provided by Shri N. Deshpande.--S.No. Description DDC Invoice No. Value DI Invoice Value (excl. Diff.in Profit ofitems &dt No. & dt.

of ST paid) value margin--1 AT5007

121/13.5.97 16194.3 122/13.5.97 22510 6315.70 39%---2 Drivein 3751/ 25.11.97 3509.40 5/25.11.97 4954.20 1444.80 41% Shoes---3 Cutting 1655/8.3.00 16103.78 1655/8.3.00 25347.00 9243.40 57% knives---4 Cutting 1674/10.3.00 2908.70 1674/10.3.00 4610.64 1701.34 58% knives--- From the above random comparison of prices of M/s. DDC and M/s. DI, it can be seen 40% to 50% of the extra profit margin has ben generated by M/s. DDC, by selling the goods at a low price to M/s. DI in favour of the seemingly gratuitous services provided by Shri N.Deshpande as their CEO. This extra profit margin goes untaxed both under excise law as well as sales tax law. So, M/s. DDC favours M/s. DI with the low prices, while M/s. DI favours M/s. DDC with free services of Shri N.Deshpande, Chief Executive in return. Therefore, it is apparent that none of these transactions between M/s. DDC and M/s. DI can be construed on a principal to principal basis and at arms length. This kind of extra commercial quid pro quo transaction clearly establish the mutuality or rather commonality of interest between M/s. DDC and M/s.

DI in each other's business. In fact, Shri N. Deshpande, the only person who as a de facto/ de jure owner of M/s. DDC/M/s. DI has a common interest in both the concerns. It is seen from the S/B account statement jointly held by Shri and Smt. Deshpande that interest accrued on the balances has been periodically credited to their account. They did not forego the interest carried on the S/B account. Therefore, their argument that no interest has been collected on the commercial transaction between M/s. DDC and M/s. DI as per the dictates of Islam lacks conviction.

Furthermore, the invoices of both M/s. DDC and M/s. DI sport the same logo "Dagger--a cut above the rest", indicating the commercial relationship between the two concerns. Moreover, as could be seen from the statement of M/s. ANZ GrinDIays Bank in respect of Savings Account jointly hold by Shri and Smt. Deshpande, transfers of amounts both from and to the Current Account No. OIC/

NP/20977/00 held by M/s. DDC, with the same bank, were made. To illustrate, on 28.8.98, Rs. 3000 was transferred from M/s. DDC's current account to the S/B account and on 4.6.98. Rs. 6,000 was transferred to the aforesaid current account from the said S/B account. This is contrary to the assertion of M/s. DDC that only Shri N. Deshpande deposited in the joint account towards household expenses. The fact the aforesaid current account belongs to M/s. DDC, proves the fact that Smt.

Rukhsana Deshpande operated the account transferring amounts to and from the said joint account to the current account of M/s. DDC, indicating pooling of the incomes of Shri and Smt. Deshpande in the said joint account. The fact that the joint account was opened 11 years prior to start of their business venture has no bearing on the reality that the funds from the current account of the business flow into the private joint S/B account and vice-versa. This fact is apparent on record showing that funds of both the businesses lose their identity once they enter into the joint savings bank account of the husband and wife. All these facts clearly prove that M/s. DDC and M/s. DI are related persons. Furthermore, the case laws cited by M/s. DDC pertains either to the relationship between two public/private limited companies or to the relationship between two manufacturing units where their value of clearances were sought to be clubbed in order to determine their eligibility for SSI exemption. In the present case, wife and husband were involved in manufacture and distribution of excisable goods. In none of the case laws cited above, mutuality or commonality of interest between the businesses of the manufacturers and the buyer/distributor was proved conclusively, as in the present case. So, the facts in those cases are distinguishable from the facts of the present case. Therefore, the case laws cited by M/s. DDC do not come to their rescue.

Furthermore. The Hon'ble Supreme Court in the case of M/s. Bombay Tyre International had held that when the manufacturer sells to a trader who is also the blood relative of the manufacturer, then the goods are to be assessed at the price the trader sells it to the customer. M/s. DDC never contested this proposition cited in the Show cause notice and instead side-stepped this case law pronounced by the Apex Court.

Further, they merely dismissed the Hon'ble Tribunals decision in the case of M/s. Avon Scales Co. as misplaced without giving any valid arguments against it. In that case. The Tribunal held that when the manufacturing firm and trading firm are run by blood relatives, they should be held as "related person" in terms of Section 4(4)(c) of Central Excise Act, 1944 and the price at which the related concern sold the goods in the open market would determine the assessable value of the goods. The Hon'ble Tribunal in the case of M/s.

PrabhatZarda Factory Limited , had held that when there is overwhelming evidence of mutuality of interest between the manufacturer and buying trading concern, the separate registration of the firm for Income-tax assessment purpose is not material for assessment under excise law. The Tribunal in the case of M/s Vikrama Engineering Company took a similar view and said separate I.T. and ST. assessments are of no consequence for excise purposes and the degree of mutuality of interest is also no material.

The Tribunal in the case of Pilco Pharma v. Collector and Rakesh Bulb Industries v. Collector 1987 (31) ELT 156 held that when all the partners of manufacturing firms are related to the partners of trading firms, then they should be regarded as "related persons".

Considering the aforesaid facts and the law, I hold that M/s. DDC and M/s. DI are related persons in terms of Section 4(4)(c) of Central Excise Act, 1944, and the price at which M/s. DI sold the goods to customers has to be regarded as the assessable value and the goods assessed accordingly.

23. The above findings are assailed by Sr. Counsel appearing on behalf of appellants on the ground that there are no factors available to hold that transaction is not at arms length and that there was financial flow back between them. Revenue's main contention is that the Chief Executive of DI i.e. the husband has been master minding the whole work on behalf of his wife and that the wife could not continue to do business without expertise given by the husband and in arranging purchases and selling it through DI. The Revenue contends that this has created a commercial transaction, mutuality of interest and as such being also related as husband and wife and that there has been joint operation and joint

interest shown in the business of each other, it has to be held that the transaction is not at arms length.

24. We have examined the entire records and also the submissions and are of the considered and irrevocable conclusion that the relationship between DDC and DI was not at arms length and there is mutuality of interest. The reason to arrive at this conclusion is not far to seek.

In the statement given by both the parties, they have not come out clear and given all the required information but have only stated that they would do so at a later point of time but they never did so till date, with regard to the manner in which the funds being used and explained as to how there was a delayed payment. Although, Ld. Sr.

Counsel attempted to show through statement of bank accounts that DI was transferring the amounts immediately on receipt from the customers to DDC and he did not return the amount and that the account was a merely running account and it is the usual business practice. We are not impressed with this explanation. The usual business practice is to give a specific period of time to the dealer to make the payments and not to wait enDIessly for the payments to come. The proprietrix of DDC has clearly stated in her statement that she had full faith in her husband and that her amounts were secure in his hands. This admission of fact itself clearly shows that there was no interest on DDCs part for recovering the amount and they were in position to carry on the business even if the recoveries were delayed. The plea that there was stiff competition in the business and there was common logo maintained and that DI procured business on the basis of specifications and dies were manufactured, according to the said specifications on request are not of any help to appellants to show that the transaction was at arms length. It is not possible these days for any person to work without any remuneration. The act of Chief Executive and to completely work on behalf of DDC and giving his expertise to Mrs. Deshpande itself shows that DDC was not alone in working as manufacturer; DDC has derived advantage by not appointing a Chief Executive. Otherwise they ought to have spent huge salary amounts besides not getting proper services. The fact that profits can be computed in terms of services which is rendered shows that there is extraction of free services, rendered by a person who is related to the other person. The Chief Executive being the main purchaser of 100% goods manufactured by DDC and also finds her the customers; Besides the Chief Executive also gives the customers enough latitude to return the sums as and when they want. He allows them to keep the amounts outstanding and also does not return the amount in a specific period to DDC. This clearly shows that the entire affairs of the firm was being maintained by Shri Nilanjan Deshpande. It is not the case of Mrs. Rukshana Deshpande that no benefit of expertise or work is being taken from N. Deshpande and that her husband & proprietor of DI was not the channel for her entire business. Though she has explained that due to bad debt problems initially with M/s.

Gaithundaefrom 1996 onwards all their sales were routed through M/s.

DI, however, she admitted that otherwise there was no written agreement between M/s. DDC and DC, as she felt safe for her investment in DI The safe security of money in the hands of DI clearly shows that DDC was having a clear understanding in the business of DI and DI also assisted in the affairs of DDC. Therefore, both husband and wife have jointly engineered in carrying out the business for manufacture of die cutting items as per customer's requirement and selling the same in the manner designed and adopted by DI. Although, DI have attempted to explain that no interest was being paid due to religious sentiments yet religious sentiments cannot be restricted to payments to be made to DI. This admission very clearly shows that both DDC or DI have not proved that they ever took interest-free loan in their lives from any bank. This explanation is too far effected and this only shows that the answers were given just to get over the difficult questions posed by the department. The manner in which they functioned showed that there was mutuality of interest in these arrangements. Smt. Rukshana Deshpande was confronted with the figures of amounts due from 1995-96 to 1998-99 in terms of questions posed by the investigating officers and also asked as to whether she charged interest for delayed payment and that whether she had taken any steps to realise the outstanding amounts which resulted in used financial accommodation for M/s. DI. For this specific question, she has answered as follows: No steps have been taken to collect these outstanding amounts and interest also has not been charged because, I know that my money is saved with my husband and Islam prohibits charging of interest.

However, I do get payments even though not on bill to bill basis but in running account and payments are made in a lump sum manner periodically. These are no written agreements contracts regarding these financial transactions.

A.7 We have a common auditor, Shri Nayagam and M/s. Dagger International pays the fees.

A.8 There is no such accountant. My daughter is assisting in my day to day work.

Q. 10 You have joint Account in the ANZ GrinDIays Bank alongwith your husband, Shri Deshpande, what is the source of these deposits? A. 10 The joint account started during 1980s and it is a purely a personal account. The deposits are made by Mr. Deshpande may be from the profit he earns from his earnings of M/s. Dagger International.

Q. 12 On which basis, the sale price of your goods worked out. Was costing done, when was it done last. Do you have cost sheets/work sheets for this purpose? A.12 In the beginning, costing was done with the help of a professional auditor in 1994 and the price was worked out on the basis of cost of raw materials, manufacturing cost, overheads and profit margin. After 1994 there was no necessity for fresh costing as we have not revised our prices since then. Same prices prevailed even today.

Q. 13 What are your administration expenses? Why there is fluctuation from year to year? A.13 Detailed schedules will be submitted in this regard.

Q 14 Computer and xerox machine which are shown as assets of M/s Dagger International However, you have incurred expenditure for the maintenance of computer according to your balance sheet and on 13.3.2000 when the Central Excise Officers were visited, the xerox machine was installed and used in your premises. Please explain? A. 14 Computer is owned by me and therefore, I incurred expenditure for its maintenance. Regarding the question as to why was the computer has shown as the asset of M/s. Dagger International you may obtain answer from M/s. DI only.

25. From the above answers, the point is very clear that they had common auditors and amount was being paid by DI towards the accounting fees of DDC. The question No. 9 has remained unanswered and so also with regard to sundry creditors and Q.No. 12 with regard to costing of the goods, she has explained that they have not revised the prices from 1994 as there was no necessity for fresh costing and that the same prices was prevailing till date. It is difficult to believe this proposition as to how there might have been no fluctuation in the business with consistent change of cost of raw materials. Had there been any change in cost of raw material due to various factors, and the appellant DDC charged interest for his amounts due to them from DI, then DI would not have been able to sell the goods at the same price.

Therefore, the fact that interest is not being paid from DI on deposits as per usual business transactions indicates that both had interest in each other. Had DDC charged interest then the DI would not have been able to continue business. The buyers of DI have delayed in payments.

Had M/s. DDC as per business practice collected interest on delayed payments, then DI would not have retained the amounts for so long and the business would have come to an end, as DI has clearly admitted that he had no capital for investment and continued his business by this arrangement with M/s. DDC. These financial transactions does bring about financial arrangement and does create business interest in each other. Further, from Questions 9 to 14, it is seen that there is also common use of computers and other items for which DI does not pay and DI is sharing the premises and use of items which are owned and used by DDC. Therefore, these evidences clearly establish mutuality of interest.

26. Further, on going through the statement of N.Deshpande also, it is seen that he had admitted that there is no agreement between them for the transactions carried out. Even he has not answered to a number of questions posed to him, more particularly, with regard to amount of Rs. 54,35,624.90 which is a credit account from DDC. He has clearly admitted about buying of goods on credit basis from DDC depending on the money that he receives from customers as per his

convenience from time to time. He has admitted that he would pay invoice wise and some lump sum payment will be made on running account. When a question was posed as to from where he would get the working capital, for which he replied that he required time to answer this question. Thus, this clearly shows that DI did not have funds and he has not brought forth any evidence to show that he had any working capital for running the business; DI is doing his business with the assets and the monies which are due to DDC and which are not pressed by DDC for payment. It clearly shows that there is financial interest in each other and the persons involved being husband and wife adds to the allegation that the transaction is not at arms length for the purpose of granting benefit of transaction value as claimed by the appellant M/s. DDC.27. The expression "related person" as defined under Section 4(4)(c) reads thus: related person" means who is so associated with the assessees 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 assessees, and any sub-distributor of such distributor".

"Mutuality of interest" in relation to 'related person' (first limb of definition as set out) assumes great importance. This is primarily due to two reasons which are: (a) mutuality of interest is an ingredient contemplated in a case wherein the assessee and the buyer (sought to be branded as related person) are not connected as holding company, subsidiary company or blood relative.

(b) Inclusive part of the definition of a related person (second limb of definition) automatically engulfs the holding company, subsidiary company and blood relative of the last mentioned persons, distributor etc; Even without persons of mutual interest.

In the case of UOI v. Atic Industries , it was held that trading customer as a related person is first part of definition of 'related person' as given in Section 4(4)(c) requires that the person who is sought to be branded as a 'related person' must be a person who is so associated with the assessees that they have interest directly or indirectly in the business of each other. It has been held that it is not enough that the assessees has an interest directly or indirectly 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 any interest directly or indirectly in the business of the assessees. It has been held that 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. 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, but that would not make any difference so long as each has not some interest direct or indirect in the business of the other.

28. By applying the above test, we have held that Shri Nilanjan Deshpande has not shown that he had enough capital with him to carry on his business in the sense that he would pay within a reasonable period of DDC for all purchases made. As has been shown from the accounts itself, as and when customers made payment to DI, the said payments were made over to DDC. DDC due to trust and mutual interest neither charged interest nor pressed for payment and the link was maintained.

Thus, there is interest both direct and indirect in the business of each other inasmuch as that the DDC were looking up to DI for technical advice and for supervision. So also for the purpose of audit and for purposes of procuring business from the customers. There was also meeting of mind in common interest for furtherence of their business.

Both Proprietor and Proprietrix were working mutually towards their interest of business of manufacture and procuring orders for sale. The chain is being maintained and business is getting prospered and hence there is clear mutuality of interest and it has been established. As has been held in the case of Promode Lal Moitra v. Ad DI. Dist Magistrate the expression "interest" has been defined to mean that it must be something more than a sentimental interest, such as arises from the natural love and affection of a father or his son. It need not, however, be only the possibility of a pecuniary advantage, it may equally be the likelihood of a pecuniary loss. The accruing benefit need not be direct. The possibility of an actual resulting benefit will be sufficient.

29. In Emperor v. Cholappa Malharappa AIR 1937 Oudh 35(F.B) their Lordships held that the phrase "interest" does not imply mere intellectual interest, but something of the nature of an explanation of advantage to be gained or of a loss some disadvantage to be avoided by the person who is said to be interested in the case. Thus the mutuality of interest would mean that the two persons share a common or prearranged relationship with a prior meeting of minds. Thus the observations and analysis of the definition of 'related person' a laid down by the Apex Court in the case of UOI v. Bombay Tyre International 1983 (14) 1896 SC would apply to the facts of this case.

30. We notice in this case, N. Deshpande has been acting on behalf of his wife, who is the proprietrix of DDC , as Chief Executive. He again assumed responsibility for procuring orders, supervision of manufacture and sale through DI acting as business agent both for himself in DI as well as Chief Executive Officer on behalf of his wife in DDC. Thus he played major role for creation of a financial arrangement and also fulfilled the terms of the contract for manufacture and supply of Die cutting to customers as per orders which he procured. The relationship is over and above and ordinary relationship and the relationship is not at arms length. There is proximity in the business carried out by them and therefore the observations made by the Apex Court in Snowhite v.CCE 7989 (41) ELT 360 in a similar situation applies to the facts of the case. The observations made by the Apex Court in paras-8 to 14 of the said judgment is reproduced herein below:Gordon Woodroffe & Co. v. Sheikh M.A. Majid & Co. 1966 SCR Supp. 1. In that case the respondent was a trader in hides and skins and the appellant was an exporter. During the period January to August, 1949, there were several contracts between them. The contracts mentioned that the appellant was buying the goods for resale in U.K. The price quoted was C.I. F. less 2-1/2%. The contracts also provided that time should be the essence of the contract, that the sale tax was on respondent's account, that the respondent was answerable for weight as well as quality, that should be a lien on the goods for moneys advanced by the appellant, and that any dispute regarding quality should be settled by arbitration according to the customs of the trade in the U.K. The course of dealing between them showed

that before the goods were shipped these were subjected to a process of trimming and reassortment in the godowns of the appellant with a view to make these conforming to London standards, that the goods were marked with the respondent's mark and that premiums were paid to the respondent in case the goods supplied were of special quality. The respondent filed a suit on the original side of the High Court praying that an account should be taken of the dealings between himself and the appellant on the ground that the appellant was his agent. The appellant's case was that there was an outright purchase of the respondent's goods and that the appellant was not an agent of the respondent. The trial Judge dismissed the suit. On appeal, the High Court held that the appellant acted as a del credere agent of the respondent and directed the taking of accounts.

In appeal to this Court, it was contended by the appellant that the terms of the contracts and the course of dealing between the parties showed that the appellant was not the agent of the respondent but was an outright purchaser of the goods and that there was a settled account between the parties which the respondent could not reopen.

This Court held that the appellant was the purchaser of the respondent's goods under the several contracts and not his agent for sale, and therefore, the view taken by the High Court was not correct. It was reiterated that the essence of sale is the transfer of the title to the goods for price paid, or to be paid, whereas the essence of the agency to sell is the delivery of the goods to a person who is to sell them, not as his own property but as the property of the principal who continues to be owner of the goods, and the agent would be liable to account for the proceeds. On the terms of the contract and the course of dealing between the parties, the contract was not one of agency for sale put was an agreement of sale. The appellant purchased the goods from the respondent at 2.5% less and sold them to the London purchasers at the full price so that the 2.5% was its margin of profit and not its agency commission. This point was emphasised by Shri Rao as a point similar to the instant case. This Court held therein that the fact that the goods were sent with the respondent's mark, that the premium was paid outside the terms of the contract, that the appellant considered it fair and just to pay the whole of the premium to the respondent or to share it with him, and that additional burden with respect to weight and quality was thrown on the respondent had no significance in deciding the nature of the contract. This Court was also of the opinion that the clause with regard to lien was consistent with the transaction being an outright sale, because the appellant was acting as creditor of the respondent and charged interest on advances only till the date of shipment of the goods when it became the purchaser of the goods from the respondent. It was held that an agent could become a purchaser when the agent paid the price to the principal on his own responsibility. This was another aspect which was emphasised in the facts of the present case by Shri Rao. In that case, however, before the goods were shipped to London, these were subjected to a process of trimming and reassortment in the godowns of the appellant with a view to make them conform to London standards. In that process, the defendants often called upon the plaintiff to replace to pieces found defective. It the defendants were merely acting as agents, this Court observed, the process of trimming and reassorting in the godowns to make the goods conform to London standards and specifications would be unnecessary, for in that case the defendants were merely bound to ship the goods, as these were delivered to them. Another important feature of the transaction was that in several contracts, time was fixed for delivery of the goods. This Court found that the defendants were acting only as the agents for the sale, there was no reason why there should be a stipulation that time should be the essence of the contract. On behalf of the plaintiff, reference was also made to the fact that the contract provided for a lien on all the goods covered by the contracts for all moneys advanced by the defendants, including expenses incurred and interest thereon. But it was emphasised that in making such advances, the defendants were only acting as creditors of the plaintiff and were therefore, entitled to charge interest on such advances till they actually purchased the goods from the plaintiffs.

The Court found that primary object of the contract was that there was a purchase by the defendants from the plaintiff of the goods for resale in the U.K. and in keeping with that object, the buyer stipulated with the seller for delivery of the goods abroad and for that purpose adopted a c.i.f. form of sale. This Court referred to the principle that an agent could become a purchaser when an agent paid the price to the principal on his own responsibility. Reference was made to the passage from Black wood Wright, 'Principal and Agent Second Edn., Page 5, at page 10 of the Report, where it was stated that in commercial matters, where the real relationship was that of vendor and purchaser, persons were sometimes called agents when, as a matter of fact, their relations were not those of principal and agent at all, but those of vendor and purchaser. If the person called an agent' was entitled to alter the goods, manipulate them, to sell them at any price that he thought fit after these had been so manipulated, and was still only liable to pay them at price fixed beforehand, without any reference to the price at which he sold them, it was impossible to say that the produce of the goods so sold was the money of the consignors, or that the relation of principal and agent existed, according to this Court in that case.Tirumala Venkateswara Timber and Bamboo Firm v. Commercial Tax Officer, Rajahmundry , where the concept of 'sale' in the background of the Andhra Pradesh General Sales Tax Act, 1957 was considered. At page 480 of the report, this Court observed that as a matter of law, there is a distinction between a contract of sale and a contract of agency by which the agent is authorised to sell or buy on behalf of the principal and make over either the sale proceeds or the goods to the principal. The essence of a contract of sale is the transfer of title to the goods for a price paid or promised to be paid. The transferee in such a case is liable to the transferor as debtor for the price to be paid and not as agent for the proceeds of the sale.

The essence of agency to sell is the delivery of the goods to a person who is to sell these, not as his own property but as the property of the principal who continues to be the owner of the goods and will therefore be liable to account for the sale proceeds. The true relationship of the parties in each case has to be gathered from the nature of the contract, its terms and conditions, and the terminology used by the parties is not decisive of the legal relationship. Shri Mahajan, learned Counsel appearing for the respondent, drew our attention to Section 182 of the Indian Contract Act, and submitted and in the circumstances of this case, the clauses emphasised by the Tribunal clearly established that this was an agreement of agency and not a sale.

10. As mentioned hereinbefore, it depends on the facts and circumstances of each case to determine the true nature of the dealing between the parties. In the instant case the most important fact suggesting agency was the clause which enjoined

that the stocks left over unsold beyond two years from their receipt could be returned to the appellants who were bound to replace these. Shri Rao, however, suggested that appellants were manufacturing paint which was liable to loose its efficacy and quality after lapse of time and as the appellants were keen for its reputation, such clause was inserted to ensure that the bad quality goods or stale goods did not, through Gillanders, go to market and damage the reputation of the appellants. This should be considered with the fact that the appellants were to prefer all claims for recovery of damages from the carriers and any reduction in price during the currency of the agreement was to be duly reflected in the price of stock lying unsold with Gillanders and the obligation that on the termination of the contract by either the appellant or Gillanders, unsold stocks lying with the latter were to be returned to the former. In the aforesaid light we are of the opinion that the Tribunal was right in considering this agreement as the agreement for sole selling agency and not as an outright sale. If that is the position and that the first ground, in our opinion, taken by the Tribunal cannot be assailed.

11. Shri Rao had contended that the Tribunal was wrong in holding that Gillanders were related persons in terms of Section 4(4)(c) of the Act. He submitted that the concept of 'having interest directly or indirectly in the business of each other' has to be judged independently of the transaction in question. He drew our attention to the various authorities for the proposition that the purpose of introduction of definition of 'a related person' by the Central Excises and Salt (Amendment) Act, 1973 to contend that the distributors have to be related and that such relationship ought to be found out independently of the transaction in question. Our attention was drawn to the observations of this Court in A.K. Roy v. Voltas Ltd. 7973(2) SCR 1089, where at page 1093 of the report, this Court noted that the appellants had contended that the agreements with the wholesale dealers conferred certain extra-commercial advantages upon them, and so, the sales to them were not sales to independent purchasers. Our attention was also drawn to the observations of this Court that decisions cited before this Court in the above case were correct insofar as these held that the price of sales to wholesale dealers would not represent the 'wholesale cash price' for the purpose of Section 4(a) of the Act merely because the manufacturer had entered into agreements with them stipulating for commercial advantages. It was laid down that if a manufacturer

were to enter into agreements with dealers for wholesale sales of the articles manufactured on certain terms and conditions, it would not follow from that alone that the price for those sales would not be the 'wholesale cash price' for the purpose of Section 4(a) of the Act if the agreements were made at arms length and in the usual course of business. This, however, Mr. Rao related only in explaining the state of law.

12. Our attention was also drawn to the observations of this Court in Union of India and Ors. v. Bombay Tyre International Ltd. where this Court explained the purpose of the introduction of 'related person' in the new Section 4(4)(c) and the transactions of related person covered under Section 4(4)(c) of the Act after amendment. In that context, it was contended that where there was such relationship independent of the transaction in question which conferred certain additional or extra-commercial advantages only on the persons involved in such relationship could be considered to be related persons. It was submitted that in the instant case that was not so. Our attention was drawn to the observations of this Court in Union of India and Ors. v. Atic Industries Ltd. , at page 937 of the report, where this Court held that on a proper interpretation of the definition of 'related person' in Section 4(4)(c), the words "relative and a distributor of the assessee" did not refer to any distributor but they were limited only to a distributor who was a relative of the assessee within the meaning of the Companies Act, 1956. So read, the definition of 'related person' was not unduly wide and did not suffer from any constitutional infirmity. This Court explained the nature of relationship required by the persons to have "interest directly or indirectly in the business of each other" under Section 4(4)(c) of the Act. Our attention was also drawn to the observations of this Court in Collector of Central Excise, Madras v. T.I. Millers Ltd., Madras and T.I. Diamond Chain, Madras 13. Having regard however to the fact that we have come to the conclusion that the Tribunal was right in holding that the transaction with the Gillanders was not a transaction of sale but an agreement for agency, there was, therefore, no sale in favour of Gillanders as contended for by the appellants. If that is the position, then the first sale was by the Gillanders to the customers of the market. Then the price of that sale would be the assessable value under Section 4 in this case. The decision of the Tribunal is, therefore, right in any view of the matter, and this other aspect of the matter referred to by the

Tribunal is not necessary for us to determine to dispose of this appeal. In that view of the matter, the decision of the Tribunal must be upheld. 14. Shri Rao, however, further submitted that there were certain other claims like cost of transportation and other permissible deductions such as duty of excise and sales tax, which should have been deducted from the value subject to proof by the appellants.

Shri Rao submitted that apart from this, there were other permissible deductions as envisaged by this Court in Assistant Collector of Central Excise and Ors. etc. v. Madras Rubber Factory Ltd. . It may be observed that apart from cost of transportation excise duty and sales tax, other charges were not sought to be deducted by the appellants in the appeal and were not convassed before the Tribunal too nor in the grounds of appeal, there was any such claim. Shri Rao, however, submitted that inview of the decision of this Court in Madras Rubber Factory's case (supra), the appellants should not be denied the benefit of these deductions if they are otherwise entitled to. Though, strictly speaking that is beyond the scope of the appeal in view of the contentions raised in the appeal before the Tribunal and in view of the grounds of appeal taken by the appellants before us, but in the interest of justice, we permit the appellants to have these benefits as finally settled by this Court in Madras Rubber Factory's case (supra). We are informed that the said decision of Madras Rubber Factory is under review in this Court. Therefore, we are of the opinion that subject to the order passed in that review matter, such deductions, as may ultimately be held to be deductible be permitted to the appellants upon proof. With these observations, the appeal fails and is accordingly dismissed with no order as to costs.Pious Pharmaceuticals Pvt. Ltd. v. CCE, Mumbai 2000 (126) ELT 875 would also apply to the facts of this case. The Tribunal in this case held that various terms of the contract clearly beings out the fact that there is a total control of the process of the manufacture and of the material used in the manufacture and of their storage by the buyer. The whole quantity produced was exclusively sold to buyer and it is at their hands that the product entered main stream of wholesale trade. The tribunal held that the relationship in terms of the agreement was not principal to principal and at arms length.

32. A close scrutiny of the ratio of the judgment rendered in the case of Narendra Machine Works (P) Ltd. v. CCE, Rajkot would also apply to the facts of this case. The ratio of the judgment rendered in Pilco Pharma v. CCE, Kanpur on this issue also applies to the facts of the present case. Similar view was also expressed in Prompt Computer Services v. CCE, Bombay , wherein M/s. Computer Devices were held to be not separate entity involved in certain activities of its own. It was held that even though invoice declared them as an industrial consumer to justify the low price charged to them as to a different class of buyers, the activities of M/s. Computer Devices were not that of an 'industrial consumer' at all. It was held that in addition to the partners being wives of persons who run the manufacturing company, the record also showed that atleast partly the business of Computer Devices itself was being run by the Director of the manufacturing company. In these circumstances, the Tribunal held that allegation that true facts were suppressed and the buyer was mis-declared as unrelated industrial consumer is quite sustainable. The Tribunal ruling rendered in Prabhat Zarda Factory Ltd. v. CCE Patna also is on similar facts and the ratio of the Tribunal rendered therein would apply to the facts of the present case; so also, the judgment of Rakesh Bulb Industries and Ors.

v. CCE, PuneN.P. Textile Mills v.CCE, Bombay would also apply to the facts of the present case. The judgment of Avon Scales Co. v. CCE, Delhi is also applicable to the facts of the present case.

33. L.d. Senior Counsel has relied on large number of judgments but, however, on close scrutiny and examination, we find that all those facts of these cases are quite distinguishable and do not come nearer to the facts of the present case and therefore we are not in a position to apply the same. In the case of Rallifwolf Ltd. v. UOI , the test of mutuality of interest and extra commercial consideration was found to be absent and as the relationship was found to be principal to principal and there was no extra commercial consideration and the price had been normal price and it had not been lowered, therefore the transaction value of the manufacturer was upheld, the facts are distinguishable.

34. In the case of Plus Cosmetics Pvt. Ltd. v. CCE, Kanpur 1999 (109) ELT 71, the Tribunal held that merely because there was interest-free loan by buyer to seller, there was no other interest in each other business to make them as related persons. The Tribunal held that normal price was required to be accepted. The facts are totally not applicable to the present case.

35. In the case of Chloride Inds. Ltd. v. CCE, Pune , the Tribunal held that mere fact of sale of entire production of "Lucas" brand batteries to Lucas India Services Ltd. by itself is not sufficient reason to hold inter-relationship. In view of these facts, it was noticed that the goods were being sold at maximum consumer price and there was no other business interest and there was no mutuality of interest between the seller and the buyer. These facts are also distinguishable and not applicable to the present case.

36. Likewise in the case ofSarpin Pharmacal v. CCE, Ahmedabad , there was absence of mutuality of interest in the business and there was no financial flow back and the case had not been proved and hence benefit was granted to the assessee. The facts of the case are equally distinguishable.

37. In the case of Cooling Systems v. CCE, Ahmedabad , the unit owned by the husband and wife were found to be independent and having no mutuality of interest in the business of each other. On close scrutiny it was found that the relationship was at arms length and there was nothing to influence the price and that there was no other transaction or relationship in the case. In view of these facts, the units were held to be independent.

38. In view of the discussions as held above, we hold that the contention of Revenue that price of M/s. DI is required to be accepted is upheld. However, the matter is required to be remanded to the original authority for grant of benefit of modvat credit and to treat the price as cum duty in terms of judgments already noted (supra). The aspect pertaining to the imposition of penalty has to be reconsidered.

The appellants shall be given an opportunity to argue on the points raised by them and that there existed extenuating circumstances to scale down the penalty imposed under relevant Section 11 AC and Rule 173Q and Rule 209A. The authorities shall arrive at the exact amount of duty due on re-adjudication after giving on opportunity to appellants to produce the evidence in this regard. The original authority shall hear on the aspect pertaining to imposition of penalty and refix the same in terms of amounts due by them.