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

Decided On : Apr-22-2003

Reported in : (2003)(88)ECC165

Judge : S Peeran, R K Jeet

Appellant : Detergents India Ltd., Shaw

Respondent : Cce and Detergents India Ltd.

Judgement :

1. In all these three appeals, the issue being common, hence they are taken up together for disposal, as per law. Appeals No. E/1852/99 & E/160/2000 have been filed by the parties and Appeal No. E/685/2000 has been filed by the Revenue.

2. Appeal No. E/1852/99 & E/160/2000 have been filed against Order-in-Original No.19/99 dated 31.8.99 passed by the Commissioner of Central Excise, Chennai by which the Ld. Commissioner has confirmed differential duty amount of Rs. 1,12,42,499 on the appellant M/s.

Detergents India Ltd. for the period 1.3.92 to 31.3.95 under Rule 9(2) of CE Rules, 1944 read with proviso to Sub-section (1) of Section 11 (A) of the CE Act, 1944 besides imposing a penalty of Rs. 5,00,000 under Rule 173Q of CE Rules 1944 on them and also a penalty of Rs. 5,00,000 on M/s. Shaw Wallace & Company under Rule 209 A of CE Rules, 1944. However, the Commissioner has dropped the proposal to impose penalty under Section 11AC and interest under Section 11AB

on M/s.

Detergents India Ltd. Ltd. Commissioner has also ordered for confiscation of land, buildings, plant & machinery used in the manufacture of the dutiable goods under Rule 173Q (2) of CE Rules, 1944 belonging to appellant M/s. Detergents India Ltd. However, the appellant was given option to redeem the same in lieu of confiscation on payment of a fine of Rs. 5,00,000.

3. Brief facts of the case are that M/s. Detergents India Ltd. are manufacturers of soaps and detergents falling under Chapter 34 of the Central Excise Tariff Act, 1985 and that the goods manufactured by them had been cleared to depots of Shaw Wallace Company at much lower prices compared to the prices at which the said goods were sold to wholesale buyers by Shaw Wallace Company. Investigations carried out by officers attached to the Directorate General of Anti-Evasion wing, Chennai alongwith officials of Central Excise, Hyderabad revealed that (a) in the balance sheets, Shaw Wallace & Co. was shown as the holding company and Detergents India Ltd. and Calcutta Chemical Company as its subsidiaries. Majority of the shares of Detergents India Ltd. was held by subsidiaries of Shaw Wallace & Co. Unsecured loans were given by Shaw Wallace & Co. to Detergents India Ltd., (b) the brands of detergent soaps owned by DIL, were taken over by the SWC, on lease by paying certain royalty, (c) The major raw materials were purchased by DIL itself. The finished stock (various varieties of soaps) were transferred to the depots of DIL, on payment of duty and then sold to SWC, (d) DIL charged lesser processing charges for SWC, compared to that received from Hindustan Lever Ltd. (HLL); (e) DIL's production planning was done by SWC. Instructions were given to DIL on the production schedule, quality size and formulation. Suggestions for quality improvement and cost effectiveness of products were given by SWC, (f) supplies were based on SWC's requirements and schedules. 90% of the capacity of DIL was utilized for HLL job-work, and the rest to manufacture their own product. The processing charges were mutually agreed upon between DIL and SWC and periodically revised. Further, all clearances were effected by DIL to SWC only, (g) DIL had a practice of sending monthly newsletter to SWC providing details like despatches, production achievements, problems faced, quality of their product, details of power and diesel

consumption etc. SWC, in turn, would give comments/suggestions on various points, (h) DIL did not incur any expenses towards the advertisement, sales promotion and marketing of the detergents, but were incurred by SWC, (i) DIL filed price lists to the Central Excise Department based on particulars given by SWC. In the said price lists had suppressed their actual relationship with SWC and the incurring of advertisement expenses by SWC, (j) the depots of DIL and SWC co-existed in the same premises. Calcutta Chemical Company (CCCO) (a subsidiary of SWC') were bearing the monthly rent and the telephone bills of the depot, (k) one of the senior officers of SWC also functioned as Company Secretary and Finance Manager of DIL. The Senior Managerial personnel of the three companies were transferred from one company to another, and (l) International audit on finance and administration and other aspects of DIL were carried out by SWC.4. Based on the scrutiny of records and statements obtain from various persons concerned, the department had issued a show cause notice dated 26.3.97 to Detergents India Ltd. asking as to why (a) The excess duty amounting to Rs. 1,12,42,499 should not be paid by them under Rule 9(2) of the CE Rules, 1944 read with proviso to Sub-section (1) of Section 11A of CE Act 1944; (b) penalty should not be imposed upon them under Rules 9(2), 52(A), 173Q of the Rules and Section 11AC of the Act; (c) land, building, plant machinery used in connection with the manufacture, production, storage, removal or disposal of the said excisable goods should not be confiscated under the provision of Rule 173Q (2) *ibid*; (d) pay interest @ 20% per annum on the duty mentioned above till the date of payment of the same should not be paid by them under Section 11AB of CE Act read with Notification No. 34/96-CE(NT) dated 9.10.96; (e) why penalty should not be imposed on M/s Shaw Wallace & Co.

under Rule 209 of CE Rules, 1944 for exercising control over the production and sale of excisable goods, manufactured by Detergents India Ltd., and (f) why penalty should not be imposed on Shri Murali Mohan Raju, ex-factory manager of Detergents India Ltd. under Rule 209A of the Rules.

Based on the above evidences, the department has come to the conclusion that (i) there was also mutuality of interest between DIL & SWC; (ii) as per Section 4(4)(c) of C.E. Act, 1944, DIL & SWC were related persons, and (iii) the price adopted by

SWC for selling the goods produced by DIL should be taken as the assessable value and differential duty was to be demanded from the manufacturing unit namely DIL based on the difference between the price at which the goods were sold by SWC and the cum duty price adopted by DIL.

5. Against the Show cause notice dated 26.3.97, appellant M/s.

Detergents India Ltd. filed their reply dated 4.9.98 as follows: (i) The issue raised in the Show Cause Notice was time barred since they had submitted copies of their printed annual reports and accounts for the years 1986-87 to 1990-91 to the Department as early as 17.1.92 showing the fact of their relationship. The Show Cause Notice was not issued within 6 months of the above date or even 16.5.95 (i.e., the date of visit by the Officers of DGAE).

(ii) The agreement with SWC was only for utilization of the spare production capacity and no other motive should be attributed to their sales to SWC since they were made principal to principal basis.

(iii) Raw material/packing material supplied by HCL/SCL were processed into finished products on job work basis and cleared on payment of duty.

(iv) The advertisement done by SWC were not only for stocks produced by DIL but also third parties.

(v) DIL shares were also held by certain State Government Undertaking like APIDC-15% and Financial Institutions ICICI-3%, IFCI-3%, LIC-3%, IDBI-14% and Public-5% and hence the occasional service rendered by Shri K.Dayakar Reddy vis-a-vis SWC would not ipso-facto lead to any conclusion regarding mutuality of interest.

(vi) The determination of duty was wrong as no admissible deductions such as freight, discounts, sales tax, turnover tax etc. had been given.

(vii) Mutuality of interest was not proved in the Show Cause Notice and the interest of DIL in the organization of SWC was not clearly established.

(viii) The products in question were also purchased by SWC from various other independent manufacturers during the relevant period, in addition to purchase from DIL and SWC's own manufacture. Till date the Department had not made any allegation invoking the related person concept on the said other manufacturing units.

(ix) That during the relevant years, the assessable value of DIL was higher than other parties and that they were yet to be provided with a copy of letter dated 24.9.94 addressed to Simon George which was referred to in Para 8.2(1) of the Show Cause Notice.

Appellant M/s. Shaw Wallace & Company Ltd. in their reply dated 15.10.98 contended that as per settled law, a penalty could be imposed under Rule 209 of the CE Rules, 1944 only on a manufacturer. The judgment of Division Bench of Hon'ble Madhya Pradesh High Court in the case of Ramchand Sharma v. Collector, Customs & Central Excise, 1992 (61) ELT 543 (MP) are very much relevant to their case based on which the proceedings should be dropped.

6. Similarly, Shri M. Murali Mohan Raju, Finance Manager, in his reply to Show cause notice dated 21.10.98 contended that he was only concerned with the day to day activities of the factory and that from 1st July 98, he had no connection with DIL. He had requested for dropping of the proceedings and also for a personal hearing.

7. After giving personal hearing, the Commissioner has given a very detailed finding recorded at page 6 to 17 of his order wherein he has relied on the judgment rendered by the Hon'ble Supreme Court in the case of Calcutta Chromotype Ltd. v. CCE, Calcutta, 1998 (60) ECC 417 (SC) : 1998 (99) ELT 202 (SC) explaining the relationship between the holding company and its subsidiary company, mutuality of interest, etc.

As regards suppression of facts, he has noted that the excisable goods manufactured by the appellants are sold by Shaw Wallace & Co. and Saw Wallace & Co. and Detergents India Ltd. were related to each other as Holding Company and Subsidiary company and that the above facts had not been declared to the

Department by the appellant M/s. Detergents India Ltd. 8. Arguing for the appellants Ld. Counsel Shri N. Venkatraman and Muthu Venkatraman submitted that there was no under-valuation as alleged in the show cause notice and that the allegation of suppression of facts was not sustainable in the face of the fact that as early as 17.1.92 the balance sheets for the years from 1986-87 to 1990-91 had been furnished by the appellant showing the particulars of share-holding by the subsidiaries of Shaw Wallace & Co. and from that date no suppression of facts could be alleged. They pointed out that the show cause notice was issued after a lapse of 5 years on 26.3.1997 and since no allegation of any specific effort on the part of the appellant to suppress facts with intention to evade duty has been made, the extended period cannot be invoked. They also submitted that the Commissioner has come to a wrong conclusion in so far as the related persons in this case. In this connection they relied on the principles laid down by the Hon'ble Supreme Court for related person in its judgment in the case of Union of India v. ATIC Industries Ltd., 1984 (3) ECC 90 (SC) : 1984 (17) ELT 232 (SC) in which the Apex Court clearly ruled that if transactions are at arms length and there is no extra commercial consideration, a person cannot be held to be related merely because he holds 50% shares in the manufacturing company; that mutuality of interest contemplates bilateral interest between the parties and not an unilateral interest of one party over the other. The equality and the degree of interest can vary or be different. It further laid down that it is not enough that the assessee has an interest, direct or indirect in the business of the person alleged to be related nor is it enough that the person alleged to be related person has an interest, direct or indirect in the business of the assessee. It is essential that the assessee and the person alleged to be a related person must have interest direct or indirect in the business of each other. In the instant case, the department has not adduced any evidence to show that Detergents India Ltd. have direct or indirect interest in the business of each other. They have also drawn our attention to the following three tests evolved by the Hon'ble Bombay High Court to construe a transaction as one between related persons as in the case of Ralliwolf Ltd. v. UOI, 1992 (59) ELT 220 (Bom):- (ii) The price charged should not be normal price but the price lower to the normal price and that extra commercial consideration have reduced the normal price; and (iii) The alleged person should be related to the assessee as defined in

Section 4(4)(c) of the said Act.

They further submitted that only if the above three conditions are satisfied, then alone it can be said that the third proviso to Section 4(1)(a) is applicable. They added that the above-mentioned decision has been followed by the Hon'ble Tribunal in the case of CCE Mumbai-III v. Ralliwoolf Ltd., 1998 (100) ELT 528(T) and later by the Tribunal in the case of Rallis India Ltd. v. CCE, Bombay, 2000 (118) ELT 780. The Tribunal in the said judgment has held that department has to establish that the three conditions referred above exist, to reject the price of the assessee. In case all the three conditions are not satisfied, then transaction cannot be stated to be the one coming under Section 4(4)(c). The one ingredient of being a subsidiary cannot be a justifiable ground to invoke related person. Further reliance was placed in the judgment rendered in the case of Chetan B. Thadani v. UOI 1987 (30) ELT 287 (Bom) to show that even the entire production sold to one buyer cannot be a ground for related person. Yet another reliance is placed in the matter of Thungabhadra Industries Ltd. v. CCE, Hyderabad, 1994 ELT 155 (CEGAT-A) to show that mutuality of interest contemplates financial or managerial interest and not mere a business connection. The Tribunal has held in this case that neither the quantum of sale a criteria nor a mere commercial contract between two independent parties for purchase and sale of goods manufactured by one party can ipso facto lead to the conclusion that the two of them are so associated as to have interest in the business of each other. They also pointed out the decision in the case of CCE, Aurangabad v. Electro Services (P) Ltd., 2001 (127) ELT 828 (Tri.-Delhi) which held that common partners or common directors cannot be a ground for related person. There should be evidence to prove mutuality of interest or money flow back in between the two concerns before alleging related person. They submitted that supply of raw material, equipments, machinery and extending transport, trained staff and co-financing also cannot be held as a ground for related person in terms of the CEGAT's order in the case of Art Rubber Industries v. CCE, Aurangabad, 1999 (64) ECC 321 (Tri.) : 1999 (114) ELT 83 (Tri.). They stated that the onus is on the part of Revenue to prove related person and in this connection they relied on the ratio of the Tribunal judgment rendered in the case of Dasani Electra (P) Ltd. v. CCE, Calcutta-I, 2000 (125) ELT 646 (Tri) wherein the Tribunal has held that the adjudicating authority had not discussed

any of the findings relating to the question of related person and that the conclusion arrived at on the ground that the appellants have not been able to put on record adequate evidence in the shape of memorandum and articles of association or authenticated statement related to said two firms who is Challenging the appellants customers to be related person and when value has been increased on that basis, the onus to put evidence to that effect lies on the department. Failure on the part of the appellants to put negative onus cannot be made the basis to arrive at the adverse finding against the appellants. It is contended that incurring advertisement expenses and sales promotion cannot be added to the assessable value and also cannot be a ground for a related person since it is evident on record that appellants M/s. Detergents India Ltd. are making outright sale of goods to M/s. Shaw Wallace & Co. Ltd. and once goods are sold, they become property of the latter and any advertisement expenses incurred by them is towards sale of their products purchased from the appellants Detergents India Ltd. In the circumstances, advertisement expenses incurred by M/s. Shaw Wallace & Co. Ltd for the sale of their products cannot form part of assessable value of M/s. Detergents India Ltd. in terms of the decision of the Hon'ble Supreme Court in the case of Phillips India Ltd. v. CCE, Pune, 1997 (91) ELT 540 (SC), For the same reason they cannot also constitute a basis to invoke related person. In this regard reference is drawn to the decision of the Bombay High Court in the case of UOI v. Mahindra and Mahindra Ltd., 1989 (43) ELT 611 (Bom) wherein the Hon'ble High Court had held that even providing advertisement expenses should not affect the real nature of the transaction when the same are on a principal to principal basis and cannot be a ground to assess the goods on the resale price of the buyer. Further reliance is placed on the Tribunal decision in the case of Indian Oxygen Ltd. v. CCE, Calcutta-II, 1997 (95) ELT 223 (Tri).

Wherein the Tribunal has held that sales promotion being for the mutual benefit of both buyers and sellers not sufficient to hold that dealers are related persons to the appellants manufacturers. Allegation of mutual interest merely on the ground of sales promotion is not sufficient and not sustainable. Finally, with regard to lifting of corporate veil and related person, the Ld. Advocates cited the judgment rendered by the Hon'ble Supreme Court in the case of Calcutta Chromotype Ltd. v. CCE, Calcutta, 1998 (60) ECC 417 (SC) : 1998 (99) ELT 202 (SC) wherein the

Hon'ble Supreme Court had prescribed the guidelines on the concept of lifting the corporate veil to find out whether the manufacturer and the buyer are one and the same entity. The Apex Court had laid down that Revenue should be in a position to prove that the manufacturer and the buyer are one and same and the buyer is a facade. There is no such allegation in the show cause notice nor any such finding in the order except for the fact that one is a holding company and another is a subsidiary company and there is no other legal nexus or connection. Further, no evidence has been adduced to prove that there is mutuality of interest and under-valuation of the goods.

There is also no evidence to show that there is extra commercial consideration in the transactions. Each of the factors sought to be relied upon by the Revenue has already been dealt either by Courts or by the Tribunal concluding that they would not constitute the basis to allege related person. There is nothing in the Ld. Commissioner's order which suggest that appellant M/s. Detergent India Ltd. has any interest financially or managerially in M/s. Shaw Wallace & Co. Ltd. nor the Revenue has proved that appellants M/s. Detergent India Ltd. has ultimately realized extra considerations or flow back of the sale proceeds so as to interfere or disturb the Section 4(1) (a) price adopted at arms length in the course of wholesale trade between appellants M/s. Detergent India Ltd. and Shaw Wallace & Co. Ltd. Therefore, they sought for allowing their appeals by setting aside the Ld. Commissioner's order both on merits as well as on time bar.

9. Ld. SDR reiterated the order and submitted that Detergents India Ltd. had been clearly evading duty by way of under-valuation as they sold the goods to Shaw Wallace & Co. at a lower price than the wholesale price at which such goods were in turn sold by the latter. He further submitted that Shaw Wallace & Co. and Detergents India Ltd. are indeed related persons as it is an admitted fact that the former is a holding company to which apart from Calcutta Chemical Company, Detergents India Ltd. is a subsidiary company; that employees of the said subsidiaries are managing the affairs of marketing/sales of Shaw Wallace & Co.; that the depots of all the subsidiaries are located in the same premises; depot expenses like rent, electricity, etc. are paid from Shaw Wallace & Co/s imprest account, senior and managerial personnel of all these three companies are

transferred from one company to the other and that officers of the holding company conducted the internal audit of the subsidiary companies, therefore there existed clear mutuality of interest between the Shaw Wallace & Co. and the Detergents India Ltd, and as a consequence of which there has been under-valuation of goods manufactured and sold by Detergents India Ltd. resulting in short payment of CE Duty. The wordings in the text of Section 4 of Central Excise Act, 1944 says 'normal price thereof, 'ordinarily sold', in the course of wholesale', for delivery at the time and place of removal', 'buyer is not a related person', price is the sole consideration for the sale', which clearly convey the message that the transaction should be absolutely independent and should contain all the ingredients mentioned above. Even if any one of the ingredients is not present in the transactions between the seller and the buyer, explicitly or by inference, then the price adopted or such a sale cannot be taken to be the assessable value. In the instant case, the facts clearly revealed that the sale has not been made to a buyer in the course of wholesale trade. It has actually been sold to a related person and price did not appear to be the sole consideration of sale. Hence, the definition of related person is clearly implied in terms of Section 4(4)(c) of the CE Act, 1944. According to the above Act, 'Related person' means "a person who is so associated with the Assessee that they have interest, directly or indirectly, in the business of each other and includes a holding company, a subsidiary company, a relative and a distributor of the Assessee and any sub-distributor of such distributor".

Ld. SDR submitted that the investigating officers had adduced a lot of evidences to show that Shaw Wallace & Co. had controlling interest over Detergents India Ltd. and that the former and the latter were mutually interested in each other's business like (a) no independent company like Detergents India Ltd. would allow its staff to be rotated to and from other company (Shaw Wallace & Co.) unless the other company was in a position to command and control; (b) Without mutuality of interest, the holding company would not be bearing the product launching expenses for the products of the subsidiary company or financing the entire cost of many schemes of the subsidiary company; (c) the holding company would not have borne the major expenses towards the advertisement and sales promotion of Detergents India Ltd.'s products if they were only mere wholesale dealers/distributor of Detergents India Ltd.; (d) Shaw Wallace

& Co. would not have taken pains to standardize the packing wrappers of the subsidiary company's products and pay such expenses unless they are interested in the business of the latter. Ld. SDK further submitted that Detergents India Ltd. might have been an independent company at the time of signing the job work agreement with Shaw Wallace & Co. But, when it became a subsidiary of Shaw Wallace & Co., it no longer would be considered to be retaining its independence. Whatever was owned by Detergent India Ltd. including the brand names would become the property of the holding company and the holding company would be very much in a position to use the subsidiary company's brands even without any contract or agreement and the royalty payments, etc. and that it need even pay the job charges to the subsidiary company. Ld. SDR and Shri S. Jayachandran, Ld. DR further contended that the normal price in such cases shall be determined only in the manner specified under Section 4(1)(a)(iii) of the Central Excise Act, 1944, which states that "where the assessee so arranges that the goods are generally not sold by him in the course of wholesale trade except to or through a related person, the normal price of the goods sold by the assessee to or through such related person shall be deemed to be the price at which they are ordinarily sold by the related person in the course of whole sale trade at the time of removal to dealers (not being related persons). In this regard they contended that as it has been established beyond doubt that Shaw Wallace & Co. and Detergent India Ltd. are 'Related Persons', the department had adopted the price only in accordance with Section (4)(i)(a)(iii) as stated above, i.e.

the price at which Shaw Wallace & Co. had actually sold such goods to outsiders as the price for the purpose of assessment and not to take the contract price adopted by Detergents India Ltd. to the Shaw Wallace & Co. As the 'related persons' and 'mutuality of interest' have been clearly established by the department, as has been narrated above and through the findings recorded by the Ld.

Commissioner, Ld. SDR sought for confirmation of the impugned order by rejecting the Appeals No. E/1852/99 and E/160/2000.

10. We have considered the submissions made by both the sides and perused the records and the citations referred to and observe that the investigations carried out by the officers attached to the Director-General of Anti-Evasion Wing, Chennai alongwith officials of Central Excise, Hyderabad revealed, among other things, in the balance sheets, Shaw Wallace & Co. was shown as the holding company and Detergents India Ltd. and Calcutta Chemical Company as its subsidiaries. Majority of the shares of Detergents India Ltd. were held by subsidiaries of Shaw Wallace & Co. Unsecured loans were given by Shaw Wallace & Co. to Detergents India Ltd., the brands of detergent soaps owned by DIL, were taken over by the SWC, on lease by paying certain royalty; the major raw materials were purchased by DIL itself.

The finished stock (various varieties of soaps) were transferred to the depots of DIL, on payment of duty and then sold to SWC, (d) DIL charged lesser processing charges from SWC, compared to that received from Hindustan Lever Ltd. (HLL); DIL's production planning was done by SWC. Instructions were given to DIL on the production schedule, quality size and formulation. Suggestions for quality improvement and cost effectiveness of products were given by SWC; supplies were based on SWC's requirements and schedules. 90% of the capacity of DIL was utilized for HLL job-work, and the rest to manufacture their own product. The processing charges were mutually agreed upon between DIL and SWC and periodically revised. Further, all clearances were effected by DIL to SWC only; DIL had a practice of sending monthly newsletter to SWC providing details like despatches, production achievements, problems faced, quality of their product, details of power and diesel consumption etc. SWC, in turn, would give comments/suggestions on various points; DIL did not incur any expenses towards the advertisement, sales promotion and marketing of the detergents, but were incurred by SWC, DIL filed price lists to the Central Excise Department based on particulars given by SWC; the said price lists had suppressed their actual relationship with SWC and the incurring of advertisement expenses by SWC; The depots of DIL and SWC co-existed in the same premises. Calcutta Chemical Company (CCCO) (a subsidiary of SWC) were bearing the monthly rent and the telephone bills of the depot; one of the senior officers of SWC also functioned as Company Secretary and Finance Manager of DIL. The Senior Managerial

personnel of the three companies were transferred from one company to another and internal audit on finance and administration and other aspects of DIL were carried out by SWC. From the various records and from investigation, it is evidently clear that in the balance sheets, Shaw Wallace & Co. Ltd. (hereinafter referred to as SWC) has been shown as the holding company and Detergents India Ltd. and Calcutta Chemical Co.

(hereinafter referred to as DIL and CCCO respectively) are its subsidiaries. Majority of the shares of DIL were held by the subsidiaries of SWC. However, SWC had also given unsecured loan to DIL thus there is a mutuality of interest between SWC and DIL. M/s. DIL charged lesser processing charges for SWC as compared to that received from M/s. Hindustan Lever Ltd. (HLL), thus a favoured treatment was shown to SWC by M/s. DIL compared to the goods received from M/s. HLL.

DIL's production planning was done by SWC and instructions were given to DIL on the production schedule, quality, size and formulation.

Suggestions for quality improvement and cost effectiveness of products were also given by SWC. It is very clear that until and unless there is mutuality of interest and both are having interest in the business of each other, SWC would not have interfered in the production planning of the DIL and would not have given instructions to DIL on the production schedule, quality, size and formulation. They would not have given any suggestions for quality improvement and cost effectiveness of products.

It would therefore be seen that SWC had controlled the whole production, quality and formulation. Moreover, all clearances were effected by the DIL to SWC only. Further, DIL had the practice of sending monthly news letter to SWC providing details like despatches, production achievements, problems faced, quality of their products, details of power, diesel consumption, etc. and based on these monthly reports, SWC used to give comments/ suggestions on various points. Had there been no mutual interest between these two companies in the business of each other, there was no need for DIL to send monthly news letter to SWC providing details like despatches, production achievements, problems faced, quality of their

products, details of power and diesel consumption etc. and there would not have been any necessity for SWC to give comments/ suggestions on various points.

Further, DIL did not incur any expenses towards advertisement, sales promotion and marketing of the detergents. All these expenses were incurred by SWC. Here, it is pertinent to mention that no independent wholesale dealer would incur any expenses through advertisement, sales promotion and marketing of the detergents as was done by SWC which was a holding company and DIL was a subsidiary of SWC. DIL had filed price list to the Central Excise Department based on particulars given by SWC and since these price lists were between related persons having mutual interest in the business of each other, their relationship with SWC was not disclosed at the time of filing the price-list. The depots of DIL and SWC co-existed in the same premises. Not only their premises co-existed, the Calcutta Chemical Company (CCCO), a subsidiary of SWC was bearing the monthly rent and the telephone bills of the depot. If SWC was an independent company and had no mutual interest with DIL, then it's another subsidiary company CCCO would not have borne the monthly rent and the telephone bills of the depot where the goods belonging to DIL and SWC were stored and DIL never paid any monthly rent and telephone bills. It is also on record that one of the senior officers of SWC also functioned as Company Secretary and finance manager of DIL. Further, the senior managerial personnel of the three companies were transferred from one company to another. In other words, no independent company would allow its senior officers to be posted out of its charge and would not accept any other senior manager from another independent company to look after the affairs of his company.

Even the internal audit, finance, administration and other aspects of DIL were carried out by SWC. Had DIL, and SWC not been having any mutual interest, they would not have allowed SWC to do internal audit, finance and administration by SWC.¹¹ It is, therefore, very clear that there was mutuality of interest between SWC, DIL and CCCO as could be seen from the balance sheets and from other evidences adduced by the Revenue. DIL sold the goods to SWC (related person) at a lower price than the wholesale price at which such goods were in turn sold by SWC to other wholesale dealers. After allowing permissible discounts/abatements,

there remained disproportionate gap/difference between the price at which SWC purchased from DIL and its sale price which was not commensurate with the declared price of DIL. They were, therefore required to pay duty at the price at which SWC sold the goods to other wholesale dealers. Both CCCO and DIL are subsidiary companies of SWC as can be seen from the consolidated report of SWC. Depots of CCCO, SWC and DIL were located in the same premises, depot expenses like rent, electricity charge, etc.

were paid from SWC's imprest account as well as paid by CCCO, another subsidiary company of SWC. SWC had given them unsecured loans which no person would give without any collateral security until and unless they have mutual interest in the business of each other. Therefore, there is mutuality of interest between SWC and DIL as a consequence of which there has been undervaluation of the goods manufactured and sold by DIL resulting in short payment of Central Excise duty.

12. It is an admitted fact that SWC is the holding company to which apart from CCCO, DIL is a subsidiary company. Further, the brands manufactured by DIL though owned by DIL, were actually used by SWC on payment of small amount of token royalty. DIL did large volume of job work producing detergents for Hindustan Lever Ltd. (HLL). Even though the job involved was more or less the same, the job charges charged from the group companies was much less compared to that charged from M/s. HLL, a wholesale dealer. This extra commercial consideration between SWC and DIL was relatable to the fact that SWC was the holding company of the DIL. Thus the relationship between DIL and SWC was not a relationship that of principal to principal and was not at an arm's length and the person behind the manufacturer (DIL) and the buyer (SWC) were one and the same, and SWC was calling the shots being the holding company and DIL was obeying their commands being the subsidiary company.

13. The Commissioner in his findings from para 8 to para 33 has given detailed findings based on enormous evidence adduced by the Revenue.

The findings as contained in para 8 to 33 are reproduced herein below:- 8. I have gone through the records of the case carefully including the reply to the Show

Cause Notice, the submissions made during personal hearing, the case laws cited and the further submissions made and taken on record.

9. It is alleged in the Show Cause Notice that DIL had been evading Central Excise duty through under-valuation on the following counts: (i) There appeared a mutuality of interest between SWC, DIL and CCCO as seen from the Balance Sheet and from other evidences.

(ii) DIL sold goods to SWC (related person) at a lower price than the wholesale price at which such goods are in turn sold by SWC. (iii) After allowing permissible discounts/abatements there remained disproportionate gap/difference between the price at SWC purchased from DIL and its sale price, which was not commensurate with the declared price of DIL.

10. In support of the above allegations, the department has pointed out certain instances in the statement of grounds enclosed with the Show Cause Notice, which are as follows: (i) Both CCCO and DIL are subsidiary companies of SWC as appearing from the consolidated report of SWC. (ii) Depots of CCCO, SWC and DIL are located in the same premises.

Depot expenses like rent, electricity etc. are paid from SWC's imprest account.

(iii) The senior and managerial personnel of SWC, CCCO & DIL are transferable from one company to the other.

(v) SWC carried out advertisements, local promotions, incurred product-launching expenses, and announced schemes.

(vi) Suggestions and directions for quality improvement and effectiveness are given by SWC to DIL.

(i) Whether there is mutuality of interest between SWC and DIL as a consequence of which there has been under-valuation of goods manufactured and sold by DIL, resulting in short payment of Central Excise duty.

(ii) Whether suppression of facts can be invoked in this case or whether the demand is time barred.

(iii) In the event both the issues being confirmed against DIL, whether the differential duty as demanded in the Show Cause Notice has been correctly arrived at, with due consideration of the allowable abatements. (1) Whether SWC and DIL are related persons: 12. It is an admitted fact that SWC is the holding company to which apart from CCCO, DIL is a subsidiary company. Employees of the said subsidiaries are managing the affairs of marketing/sales of SWC as well. The employees of one company are transferred to other companies on oral orders. Some senior officers even held positions in two different companies, at the same time. SWC incurred the imprest expenditure of common godown-cum-sales outlets where the godown of SWC, CCCO and DIL are situated. SWC financed entire cost for many schemes of DIL. SWC has also borne the salary of personnel on deputation to DIL. The entire advertisement charges for the products manufactured by DIL were borne by SWC. DIL was sending a monthly report to SWC wherein it gave details of power consumption, production achieved, efficiency etc.

13. Further, the brands manufactured by DIL, though owned by DIL, were actually used by SWC on payment of royalty. DIL did large volume of job-work producing detergents for HLL. Even though the job involved was more or less the same, the job charges charged for the group companies is much less compared to that charged to HLL. This extra commercial consideration between SWC and DIL was relatable to the fact that SWC was the holding company of DIL. Thus the relationship between DIL and SWC does not appear to be at arm's length and that person behind the manufacturer (DIL) and the buyer (SWC) were one and the same. It was SWC calling the shots.

14. In their replies and further submissions, DIL stated that there was no mutuality of interest between SWC and DIL. However, I find from the facts of the case that the allegations in the Show Cause Notice were not made just on the premise that DIL was doing job-work manufacture to SWC and sold its entire production (of such job work) to SWC. As a matter of fact, there is nothing unusual for a job worker sending back the finished goods manufactured to the person who gave orders for such job-work.

15. In a job-work situation; the adoption of assessable value is determined on principles set-out by the Ujagar Prints judgment of the Hon'ble Supreme Court. As such, doing job work would not automatically enable the department to adopt the buyer's price. To do so, the Department has to establish some thing more in the relationship between the buyer and the seller and prove that the price adopted by the seller did conform to the 'normal price' within the meaning of Section 4 of the Central Excise Act, 1944.

16. Section 4 ibid requires and demands absolute independence to the transaction between the buyer and the seller before a price is taken as the assessable value. The wordings in the text of Section 4, namely, 'normal price thereof', 'ordinarily sold', 'in the course of wholesale', 'for delivery at the time and place of removal', 'buyer is not a related person', 'price is the sole consideration for the sale', all clearly convey the message that the transaction should be absolutely independent and should contain all the ingredients mentioned above. Even if any one of the ingredients is not present in the transactions between the seller and buyer, explicitly or by inference, then the price adopted for such a sale cannot be taken to be the assessable value.

(i) the goods should be ordinarily sold for delivery at the time and place of removal
(ii) to a whole sale buyer who should not, in any way, be related to the Assessee, and (iii) there should not be any extra consideration (in cash or in kind) other than price for such transaction".

17. In the instant, case, the facts clearly reveal that the sale has not been made to a buyer in the course of whole sale trade. It has actually been sold to a related person and price does not appear to be the sole consideration of sale. So, the definition of related person assumes significance. In terms of Section 4(4)(c) of the Central Excise Act, 1944, 'Related person' means a person who is so associated with the Assessee that they have interest, directly or indirectly, in the business of each other and includes a holding company, a subsidiary company, a relative and a distributor of the Assessee and any sub-distributor of such distributor.

Explanation -- In this clause "holding company" "a subsidiary company" and relative have the same meaning as in the Companies Act, 1956.

18. It may be seen that the above definition has two parts. The first part specifies the essential requirements to identify who is a 'related person' and the second, giving the examples of a related person.

19. As such, related persons would be persons having mutuality of interest among themselves like that of a Holding Company and a Subsidiary Company or relative and distributor of the other. So, in order to determine the actual relationship between SWC and DIL, we have to keep the above principles in mind and see Whether SWC is so associated with DIL that both show interest directly or indirectly in the business of each other (c) In any other manner showing mutuality of interest in the business of each other.

20. If any one of the above is present, then the buyer would be a related person. It is an admitted fact that SWC is the holding company and DIL (as well as CCCO) are subsidiaries of SWC thus satisfying the requirement of a related person. Further, the Investigating Officers have also brought out certain other evidences to show that SWC and DIL were dependent on each other and functioned for the benefit and betterment of each other. As such, any transaction between DIL and SWC would have to be construed only as between two related persons. Under such circumstances, the absolute independence enunciated in the Section 4 is violated, and the price adopted by DIL cannot represent the 'normal price'.

21. The expression "interest in the business of each other" does not merely refer to the interest, which is created by the sale of goods.

The interest may also be pecuniary and/or of such nature as would have the effect of promoting the business of each other. The use of the words directly or indirectly is to cover all those inter-relationships, which may arise as a result of any financial or other involvement directly or through third parties. The Hon'ble Supreme Court has also reiterated above views in the case of Union of India and Ors. v. ATIC Industries, 1984 (3) ECC 90 (SC): 1984 (17) ELT 323 (SC) that "The Assessee and the person alleged to be a related person must have interest, director indirect, in the business of each other.

Each of them must have a direct or indirect interest 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. That would not make any difference, so long as each has got some interest, direct or indirect, in the business of the other." 22. In this regard, the Investigating Officers have adduced lot of evidences to show that SWC had controlling interest over DIL and that SWC and DIL were mutually interested in each other's business, as given below: (i) No independent company (like DIL) would allow its staff to be rotated 'to and fro' from other company (SWC) unless the other company was in a position to command and control.

(ii) Without mutuality of interest, SWC would not be bearing the product launching expenses for the products of DIL or financing the entire cost of many schemes of DIL.

(iii) SWC would not have borne major expenses towards the advertisement and sales promotion of DIL's products if they were only mere wholesale dealer/distributor of DIL.

(iv) SWC would not have taken pains to standardize the packing wrappers of DIL's products and pay such expenses unless they are interested in the business of DIL.

(v) SWC would not be seeking the monthly reports from DIL with details of power and fuel consumption, efficiency achieved, problems faced, summary of expenses etc., if it is not really interested in the well being of DIL or would be offering suggestions and directions for quality improvement and cost effectiveness of DIL's products.

(vi) DIL was also mutually benefited from the above relationship by way of financial assistance, technical help, availability of qualified and experienced staff etc., from SWC. They didn't take any trouble to sell their products since such jobs i.e., advertisement, sales promotion and marketing was undertaken by SWC. (vii) SWC would not have incurred such expenses or involved itself actively in the manner as above stated just as an act of benevolence. SWC had done them with the sole aim

of capturing the market enjoyed by DIL's products and get more profit by getting DIL's products at a lower price and spiling them at a higher price.

(viii) DIL might have been an independent company at the time of signing the job work agreement with SWC. But, once it became a subsidiary of SWC, it no longer would be considered to be retaining its independence. Whatever was owned by DIL including the brand names would become the property of SWC and SWC would be very much in a position to use DIL's brands even without any contract or agreement and the royalty payments etc. It need not even pay the job charges to DIL.

However, DIL, instead of explicitly admitting its actual nature of relationship with SWC had chosen to hide the same and create an impression of an independent company dealing with SWC on principal to principal basis. So, to establish mutuality of interest in such cases, the Department has no alternative than to lift the veil or the camouflage and probe deep into the matter. Similar views have also been expressed by the Hon'ble Supreme Court in the case of Calcutta Chromotype Ltd. v. Collector, Central Excise, Calcutta, 1998 (60) ECC 417 (SC): 1998 (99) ELT 202 (SC). Under Para 14 of the said order, it has been held that In Mcdowell and Company Ltd. v. Commercial Tax Officer, (1985) 3 SCC 230 : (1985) 154 ITR 148 this Court examined the concept of tax avoidance or rather the legitimacy of the art of dodging tax without breaking the law. This Court atressed upon the need to make a departure from the Westminster principle based upon the observations of Lord Tomlin in the case of IRC v. Duke of Westminster, (1936) AC 1 that every Assessee is entitled to arrange his affairs as to not attract taxes. The Court said that tax planning may be legitimate provided it is within the framework of resorting to artifice or subterfuge to avoid payment of taxes on what really is income can today no longer be applauded and legitimised as a splendid work by a wise man but has to be condemned and punished with the severest of penalties. If we examine the thrust of all decisions, there is no bar on the authorities to lift the veil of a company, whether a manufacturer or a buyer, to see it was not wearing that mask of not being treated as a related person when, in fact, both the manufacturer and the buyer, are in fact the same persons. Under Sub-section (1) of Section 4 of the Act, value of the excisable goods shall not be deemed to be

normal price thereof i.e., the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal, if the buyer is a related person, we have to see its definition of Section 4(4)(c) of the Act.

It is not only that both the manufacturer and the buyer, are associated with each other for which corporate veil may be lifted to see who is behind it but also that they should have interest directly or indirectly in the business of each other. But once it is found that persons behind the manufacturer, i.e., the assessee and then regard being had to the common course of natural events, human conduct and public and private business it can be presumed that they have interest, directly or indirectly, in the business of each other (refer Section 114 of the Evidence Act). It is, however, difficult to lay down any broad principle to hold as when corporate veil should be lifted or if on doing that, could it be said that the assessee and the buyer are related persons. That will depend upon the facts and circumstances of each case and it will have to be seen who is calling the shots in both the assessee and the buyer. When it is the same person the authorities can certainly fall back on the third proviso to Clause (a) of Section 4(1) of the Act, to arrive at the value of the excisable goods. It cannot be that when the same person incorporates two companies of which one is the manufacturer of excisable goods and other is buyer of those goods, the two companies being separate legal entities, the Excise authorities are barred from probing anything further to find out who is the person behind these two companies. It is difficult to accept such a narrow interpretation. True that shareholdings in a company can change but that is the very purpose to lift the veil to find out if the two companies are associated with each other. Law is specific that when duty of excise is chargeable on the goods with reference to its value than the normal price on which the goods sold shall be deemed to be the value provided (1) the buyer is not a related person, and (2) the price is the sole consideration. It is a deeming provision and the two conditions have to be satisfied for the case is to fall under Clause (a) of Section 4(1) keeping in view as to who is the related person within the meaning of Clause (c) of Section 4(4) of the Act. Again if the price is not the sole consideration, then again Clause (a) of Section 4(1) will not be applicable to arrive at the value of the excisable goods for the purpose of levy of duty of excise." 23. The above judgment clearly shows that the

Department is not barred from looking beyond the projected relationship to see what was the actual relationship. We have already seen that what was projected by SWC and DIL was wrong and legally incorrect. The transaction between DIL and SWC was, in reality, a case, where the buyer and the seller are one and the same. The "so called job work agreement" etc., could not be accepted since a holding company and a subsidiary company cannot, by any fiction or imagination, be deemed to have "independent negotiable agreements" between themselves with the sole aim of making business profits. Contract for use of brands, payment of Royalty, payment of job-charges etc. were all made by SWC just to create a false impression that the transactions between them was on 'principal to principal basis'. In other words, to camouflage the real nature of the relationship between SWC and DIL.

24. Whatever was paid by SWC to DIL as royalty and job charges would, in effect, go back to SWC itself by being the holding company of DIL. In view of the above said relationship, the price 'adopted' by DIL and 'paid' by SWC, would not form the sole consideration for sale, since they are biased by considerations other than sale, as above said. By lifting the veil of the 'Buyer and Seller' and looking beyond, I find that SWC was having commercial, financial, and administrative control over DIL and the relationship between them were more than that of a normal interest between a manufacturer and a wholesale dealer. Further, the actual sales had taken place only in the hands of SWC and hence, the price at which such goods were actually sold by DIL did not represent the assessable value within the meaning of Section 4 of the Central Excise Act, 1944.

25. Normal Price in such cases shall be determined only in the manner specified under Section 4(1)(a)(iii) of the Central Excise Act, 1944, which states that "Where the Assessee so arranges that the goods are generally not sold by him in the course of wholesale trade except to or through a related person, the normal price of the goods sold by the Assessee to or through such related person shall be deemed to be the price at which they are ordinarily sold by the related person in the course of wholesale trade at the time of removal to dealers (not being related persons).

26. As it has been established beyond doubt that SWC and DIL are 'Related Persons', we have to adopt the price only in accordance with Section 4(1)(a)(iii) as above said, i.e., the price at which SWC had actually sold such goods to outsiders as the price for the purposes of assessment and not to take the contract price adopted by DIL to SWC. Even though DIL claimed that they had sold similar goods (to HLL) at a lesser price and hence the Department can take only such prices under the concept of "comparable price", we need not do so since the law does not permit such arbitrary adoption. For cases covered by related person concept we can only adopt the price as stipulated in Section 4(1) (a) (iii) and in no other manner. By adopting such a price, the investigating officers have found that there was some differential value (between SWC price and DIL price) on which DIL ought to have paid certain differential duty now proposed in the Show Cause Notice.

27. In view of the same, I hold that SWC and DIL are related persons within the meaning of Section 4(4)(c) of the Central Excise Act, 1944 and, therefore, the price adopted by DIL for the transfer of goods, manufactured on job work basis, to SWC in respect of its transaction with SWC did not conform to the norms specified in Section 4 of the Central Excise Act, 1944, since they were not based on Section 4(1)(a)(iii) of the Central Excise Act, 1944 (11) Whether there is suppression of facts warranting the invoking of proviso to Section 11A of the Central Excise Act, 1944: 28. As regards suppression of facts, I note DIL had not declared to the Department, the following facts: (ii) That SWC and DIL were related to each other as Holding Company and Subsidiary Company.

29. In the questionnaire filed alongwith the price list, they had actually mis-declared that their buyers do not include persons having control over them. Actually DIL ought to have made the declaration about its relationship with SWC in an explicit manner rather than forcing the Department to infer such a meaning in an indirect and circuitous manner. No doubt, they were filing the various returns to the department and the same was assessed. But, all that they filed were statutory returns showing the quality of goods cleared, rate of duty, duty paid particulars, details of consignees and date of removal.

30. It is only after officials of the Directorate General of Anti Evasion took up investigations in various parts of the country, the real fact about the administrative/ financial control of SWC over DIL came to light. DIL could not produce a single instance to prove that they had voluntarily declared their status to the Department.

Not only they ought to have made such voluntary declaration, they also ought to have voluntarily adopted the SWC price while filing their price lists and also while raising the invoices under Rule 173(c) of the Central Excise Rules, 1944. This fact, seen in consonance with the evidences regarding the difference in price clearly show that DIL had suppressed such information with a view to evade payment of duty. The allegation with regard to wilful mis-declaration/misstatement with intent to evade duty has been substantiated and brought out very clearly in this case warranting the invoking of the extended time limit under proviso to Section 11 A (i) of the Central Excise Act, 1944. Accordingly, I uphold the proposals made in the Show Cause Notice for the demand of duty under Rule 9(2) of the Central Excise Rules, 1944 read with proviso to Section 11A (I) of the Central Excise Act, 1944. (III) Whether the demand is inflated: 31. Lastly, I find from the replies and further submissions the argument of DIL, that the demand contained in the Show Cause Notice was inflated because the price has been considered as cum-duty price without considering uniformly the allowable deductions. But, I find from para 10.4 of the statement of grounds annexed to the Show Cause Notice that the differential duty has been worked out depot- wise after allowing all eligible abatements like discounts in cash, in kind through credit notes, and also the freight incurred upto the point of sale, by SWC. As such, no further abatement needs to be given now.

32. In view of the suppression of facts, resulting in evasion of duty amounting to Rs. 1,12,42,499, the land, plant and machinery used in the manufacture of the said dutiable goods are also liable for confiscation under Rule 173Q *ibid*.

33. I find that since SWC was actively involved in the under-valuation of the goods manufactured by DIL resulting in the evasion of central excise duty as above mentioned. SWC, in the capacity of the Holding company maintained control over its subsidiary i.e., DIL, in production, selling and marketing of DIL's goods and also

intentionally reduced the transfer price of such goods from DIL with a view to enjoy a higher profit margin and closely associated with and abetted in the above said evasion of Central Excise duty. Accordingly, I find the proposal to impose penalty under Rule 209 of Central Excise Rules, 1944 on SWC as sustainable." 14. From the findings, it has been proved beyond any doubt that DIL had indulged in wilful suppression of facts with an intention to evade payment of duty and evaded payment of duty to the tune of Rs. 1,12,42,499 thereby violating various provisions of Rule 9 (1), 52A, 173C, 173F and 173G of the Central Excise Rules, 1944 and they are also liable to pay penalty under Rule 173Q of C.E. Rules. M/s. SWC, Calcutta are also liable for penalty under Rule 209 of the Central Excise Rules, 1944. It is proved beyond doubt that there existed mutuality of interest between both the parties, i.e. DIL and SWC, and both are having interest direct as well as indirect in the business of each other. Since Revenue has proved mutuality of interest besides the relationship of subsidiary and holding company and the price charged is not the normal price, i.e. much below the normal price, and extra commercial consideration which have been discussed and mentioned above have influenced the normal price, since they are related persons within the meaning of Section 4(4)(c) of the said Act. All the three tests as laid down by the Hon'ble High Court of Judicature at Bombay in the case of Ralliwolf Ltd. v. UOI 1992(59) ELT 220 (Bom) have been satisfied to prove the mutual interest between the DIL and SWC. The said decision has been followed by the Tribunal in the case of CCE, Mumbai-III v. Ralliwolf Ltd. 1998 (100) ELT 528 (Tri) and later by the Tribunal in the case of Rallis India Ltd. v. CCE, Mumbai, 2000 (118) ELT 718 (T).

It has also been proved that they have got financial and managerial interest and the senior managers are transferred mutually to look after the affairs of each other. The Hon'ble CEGAT-A bench in the case of Tungabhadra Industries v. CCE Hyderabad, 1994(2) RLT 155 (CEGAT) has held that if there is financial or managerial interest between the seller and the buyer, mutuality of interest exists. The Revenue has, therefore, proved that the manufacturer and the buyer are one and the same being related persons and having mutual interest in the business of each other. SWC being the holding company has complete control over the production, schedule and receives monthly reports from DIL being the subsidiary company, give instructions from time to time as to how they should conduct their

business, has got power to transfer the senior managerial staff from DIL to SWC and vice versa. They have, therefore, bilateral interest, both financially and managerially.

Therefore, we are of the considered opinion that in terms of Section 4(1)(a)(iii), the price at which the goods are sold by M/s. SWC (the related person) in the course of wholesale trade at the time of removal, to dealers (not being related persons) shall be the assessable value because the department has successfully established the said mutuality of interest between these two parties. Further, the price at which SWC have sold their goods to independent dealers should be taken as the assessable value and this cannot be considered as cum duty price because the duty has not been paid on the value at which the goods have been sold to independent wholesale dealers by M/s. SWC but at the value charged by DIL to SWC and therefore, the price charged by SWC shall be the assessable value and no abatement is involved and it cannot be considered as a cum-duty price as duty has not been paid at this price by SWC. What the department has demanded is the differential duty on the price charged by SWC from independent dealers because the price charged by the related person within the meaning of Section 4(1)(a)(iii), that is, the price at which the goods have been sold by SWC, shall be the assessable value and the department has successfully established from the corporate sales and other mutual interest of the whole group that they are related persons within the meaning of Section 4(1)(a)(iii) of the Central Excise Act, 1944.

15. The time bar pleaded by the Ld. Advocate is not applicable in the present case. The reason being that during investigation carried out on the units and depots of SWC and its subsidiaries/associates by the officials of Director-General of Anti-Evasion Wing, Hyderabad, on 16.5.95, it was found out that M/s. SWC and its subsidiaries were evading Central Excise duty on detergents and soaps by grossly under-valuing the goods. During investigation, several records were seized and it was on scrutiny of them, the Revenue has clearly found out that SWC, among other things, marketed various brands of detergent powders, soaps namely "CHEK, SUPER CHEK, CHEK POWDER, REGAL, SP. REGAL, SIXER" etc. As the above mentioned goods were consumer goods, aggressive marketing and sales promotion were carried out by M/s. SWC through independent and large

advertisements and huge expenditure was incurred on this count by SWC. It was also found out during investigation that the said goods were marketed by SWC which were manufactured either by SWC or by its associates/subsidiaries namely M/s. DIL and M/s. CCCO. It was also found during investigation only, after the visit of the officers to the factories of the assessee and their Corporate office on 16.5.95 that the detergents and soaps manufactured by the above units were cleared from factory premises to depots of SWC at a much lower price as compared to the price at which these goods were sold in the market to the wholesale buyers like M/s.

Hindustan Lever Ltd. and others. M/s. CCCO and DIL were found to be subsidiary companies of SWC and the mutuality of interest between these companies was clearly established from the various records found during the search operation on 16.5.95. Since there was suppression of these facts by not disclosing the same to the jurisdictional Central Excise officers, the proviso to Section 11 A (1) of the Central Excise Act, 1944 would be applicable for invoking extended period of limitation of 5 years.

The department had to scan through enormous records and after verifying the voluminous records, the show cause notice was issued by the authorities vide Show cause notice Order No. 56/97-Adjn. Dated 26.3.97 which was received by the appellants on 2.4.97. Further, it is a settled law on this issue that the department is at liberty to issue the show cause notice, in a case like this, within a period of 5 years from the date of detection of facts which had been suppressed to the department. In the case of Nizam Sugar Ltd. the Larger Bench of the Tribunal consisting of 5-Members as reported in 2000 (123) ELT 64 has clearly held that in case of suppression or fresh facts leading to the allegations to extend larger period comes to light, then show cause notice can be issued within a period of 5 years from the date of occurrence of the incident under proviso to Section 11A of the Act. The above law has also been applied by this bench in the case of Flowline Engineering Pvt. Ltd. v. CCE, Madras by Final order Nos. 621 & 622/01 dated 4.5.2001. The appeals filed by Flowline Engineering (P) Ltd. were rejected and demands for extended period within 5 years were held to be legally valid and sustainable. In the present case, the show cause notice has been issued within a

period of less than 2 years whereas the department in a case of suppression of facts had 5 year period available to them for issue of the show cause notice. The contention of the appellants that they had submitted balance sheets for the years 1986-87 to 1990-91 to the department is not relevant because the balance sheets did not disclose the whole modus operandi adopted by the assessees in order to evade payment of duty. Further, these balance sheets might have been given to the jurisdictional Superintendent of Central Excise in a routine manner whereas the search operation has taken place which was based on the specific intelligence about the modus operandi adopted by SWC and their subsidiaries on which action was taken, only on 16.5.95. From the balance sheets, only fact which could have been known was that they were subsidiary and holding company, but the other facts which have been suppressed by the appellants from the department at the time of filing of the price list etc. would not have come to light but for the search operation conducted on 16.5.95 at the corporate offices of SWC and their subsidiary companies as well as at their factory premises. Hence the time bar pleaded by the appellants in this case is not applicable.

16. In the light of discussion above, we do not find any infirmity in the order passed by the Ld. Commissioner vide his Order-in-Original No.19/99 dated 31.8.99 and hence the appeals filed by M/s. DIL and M/s.

SWC are, therefore, rejected.

17. Appeal No. E/685/2000 has been filed by the Revenue against Order-in-Appeal No. 1/2000(H-II)(D) CE dated 5.1.2000 by which the Commissioner (Appeals), Hyderabad has rejected the department's appeal against the Order-in-original No. C.Ex.36/97 dated 11.3.97 passed by the Deputy Commissioner. The Dy. Commissioner, Hyderabad in his Order-in-original dated 11.3.97 had held that the assessee (M/s.

Detergents India Ltd.) is an independent unit of Shaw Wallace & Co.

Ltd. and their assessable value may not be accepted as there was no mutuality of interest. While coming to this conclusion, the Ld.

Commissioner has relied on the judgment of Hon'ble Supreme Court rendered in the case of UOI v. Atic Industries Ltd., 1984 (3) ECC 90 (SC) : 1984 (17) ELT 323 (SC) and also that of the Tribunal judgment rendered in the case of CCE v. Ralliwolf Ltd., 1998 (100) ELT 528 (Tri).

18. Both the Advocates appeared on behalf of the respondents in Appeal No. E/685/2000 and advanced the same arguments as in the above two cases. They pointed out that both the original authority as well as the lower appellate authority have held that in order to invoke the related persons concept, the onus to prove mutuality of interest is on the department, which has not been done. Further they submitted that the aspect of mutuality of interest with material evidence was not brought out in the show cause notice dated 8.12.95. They submitted that the very admission in the Revenue appeal that the aspect of mutuality was not brought out in the show cause notice and it was only during the subsequent investigations that evidence of such mutuality of interest was revealed clinches the issue for rejection of the Revenue appeal.

They stated that both the original authority as well as the Commissioner (Appeals) have followed the ratio of the Hon'ble Supreme Court rendered in the case of Atic Industries Ltd., 1984 (3) ECC 90 (SC) : 1984 (17) ELT 323 (SC) and the Tribunal judgment in the case of CCE Mumbai-III v. Ralliwolf Ltd., 1998 (100) ELT 528 (Tri) to hold that the two companies are not related persons since there was no flow back of money before rejecting the Revenue appeal. They sought for rejection of the Revenue appeal in this case in view of the clear applicability of the citations referred to above.

19. Ld. DR in this case submitted that the orders passed by both the original authority as well as the lower appellate authority did not take into account the evidence adduced by the investigating officers with regard to the 'related person' and 'mutuality of interest'. He further submitted that in the explanation appended to Section 4(4)(c) of CE Act, 1944, it is clarified that "holding company" and "subsidiary company" have the same meaning as in the Companies Act, 1956 (1 of 1956). The meaning of holding and subsidiary company as per Section 4(1)(b)(ii) of Companies Act 1956 is "for the purposes of this Act, a company shall,

subject to the provisions of Sub-section (3), be deemed to be a subsidiary of another if, but only if, where the first mentioned company in any other company, holds more than half in nominal value of its equity share capital". In this connection, he explained that as consolidated Annual balance sheets of M/s. Shaw Wallace & Co.

for the year 1993-94 showed that M/s. Dakshinwar Investments Ltd. and M/s, Paraganas Investments Ltd., which are subsidiaries of Shaw Wallace Co. are holding 56% of the share of M/s. Detergents India Ltd., which makes M/s. Detergents India Ltd. a subsidiary of M/s. Shaw Wallace Co.

[as observed by Commissioner (Appeals) vide para 7 of his Order-in-Appeal No. 1/2000]. Therefore, the respondents in this case is a subsidiary of Shaw Wallace Co. and both fall under inclusive part of definition of 'related person' as per Section 4(4)(c) of Central Excise Act 1944. Ld. DR cited the observations made by the Hon'ble Apex Court in the case of UOI v. Bombay Tyre International Ltd., 1984 (2) ECC 102 (SC) : 1983 (14) ELT 2896 (SC) that "since under new Section 4(1) (a) the price should be the sole consideration for the sale, it will be open for the Revenue to determine on the basis of evidence whether a particular transaction is one where extra commercial consideration has weight. Nevertheless, it was open to Parliament to incorporate provisions in the Act declaring that certain specified categories of transactions fall within the tainted class in which case an irrebuttable presumption will arise that transactions belonging to those categories of transactions which cannot be dealt with under the usual meaning of expression 'normal; price' set forth in new Section 4(1)(a).In such cases, the Revenue can proceed straightaway to determine the value in accordance with the terms of the third proviso to Section 4(1)(a) of Central Excise Act, 1944". Ld. DR submitted that the Ld. Commissioner (Appeals) has failed to appreciate that the grounds for establishing mutuality of interest is not relevant factor in such cases. Thus, discussion about mutuality of interest and lack of evidence to establish the same are not relevant to the issue under consideration. Once M/s. Detergents India Ltd. is the subsidiary company of M/s. Shaw Wallace Company Ltd., the holding company they are automatically related persons in terms of definition of Section 4(4)(c) of the CE Act, 1944 and since M/s. Detergents India Ltd. did not disclose

this fact in the price list, such an act amounted to suppression of facts. As the holding and subsidiary companies fall under the inclusive part of the definition of 'related person' as explained above, therefore the aspect of mutuality of interest need not be proved in such cases. The very fact that one company is holding and the other subsidiary, is sufficient enough to prove that companies are related and the flowback of money is not the yardstick in such cases.

Hence, in terms of Section 4(4)(c) of CE Act, 1944, the price at which such goods are ordinarily sold by M /s. Shaw Wallace & Co. in the course of wholesale trade at the time of removal of their products to independent buyers should be treated as the normal price and not the price at which the Detergents India Ltd. charged to its holding company who are related persons. As the Revenue has proved the 'related person' and mutuality of interest in each other's business, Ld. DR sought for allowing the Revenue appeal by setting aside both the Order-in-Original as well as the Order-in-Appeal.

20. We have considered the submissions carefully and perused the records in this Revenue appeal. We are of the considered opinion that the appeal filed by the department in this case is required to be allowed in view of the evidence discussed in the above two cases and also in view of the fact that it is not only the relationship of a holding company and subsidiary company, but the respondents have got much more mutual interest among them which came to light after lifting the corporate veil. As the Order passed by the Ld. Commissioner (Appeals), Hyderabad is based on wrong facts and on wrong understanding of the law, therefore the impugned order passed by the Commissioner (Appeals), Hyderabad is set aside and the appeal filed by the Revenue is allowed by way of remand in view of the evidence discussed in the above two cases and also in view of the fact that the respondents have much more mutual interest among them. The enormous evidences came to light only after visit of the officers of the Directorate-General of Anti-Evasion Wing and the local Central Excise officers to the factories of the assessee and their corporate office on 16.5.95. It was also found during search operations that the goods from the subsidiary companies were cleared from their respective factory premises to the depot of SWC at much lower price as compared to the price at which these goods were sold by SWC in the market to the

wholesale dealers like Hindustan Lever Ltd. and others. Further, M/s. CCCO and DIL were found to be subsidiary companies of SWC and the mutual interest between these companies was clearly established on scrutiny of the records found during the search operations conducted on 16.5.95. Since these facts were not before the Commissioner (Appeals), the Commissioner (Appeals) is directed to take into consideration all the evidences and various judgments quoted by the Revenue and the assessee and decide the case de novo after giving an opportunity to both the Revenue and the assessee. Thus, the appeal filed by the Revenue is allowed by way of remand. Ordered accordingly.

1. With due respect, I beg to differ with my Learned Brother's order.

Hence, I am recording a separate order.

2. The facts of the case, grounds of appeal, arguments of the Councils and the findings recorded by the individual Commissioners have already been brought out in great detail by my learned brother. The grounds for holding that there is 'mutuality of interest' in the matter for adopting the wholesale price of M/s. Shaw Wallace Co. Ltd. has been briefly brought out by my learned Brother in para-3 of his order. The same, on perusal, is required to be considered for answering the question as to whether the wholesale price of Shaw Wallace Co. Ltd. can be adopted for demanding duty on the clearance of the goods manufactured by the appellants on job work basis. I have also noticed from the Ld. Brother's order the factors which have been delineated by the department in the show cause notice in assessee's appeal. In my humble opinion, the law laid down is very quite clear and there is no ambiguity with the same. In terms of law laid down in the citations which would be referred to infra, the department is required to establish that there is "mutuality of interest" between two independent companies. Mutuality of Interest means that both the industries mutually get benefited with each other by sharing the profits and losses. The business undertaking of both the units is not only a joint venture but there is further connection in flow of funds, financial arrangements to such the extent that there cannot be even a thin line to be drawn between them to differentiate their independent existence in terms of profit and loss account or in terms of transactions. In this particular case, as the facts reveal, appellants

Detergent India unit was set up by the Government of Andhra Pradesh with several share holdings held by independent organizations including the financial institutions. No doubt, Shaw Wallace Co. Ltd., has purchased certain percentage of shares but retaining shares in their name or investing their money as a direct share holder is quite different from having mutuality of interest. Even this aspect of matter has been gone into in large number of judgments and it has been well laid down that a person holding shares is independent of the existence of a registered company under the Company's Act. An independent entity under the Company's Act is a juristic person which can sue and be sued.

In this particular, we have two juristic independent entities. While, promoting a company, shares are sold to the public for purchase. The shareholder has got only limited rights in as much as he gets the dividend when profits are earned by the company. A shareholder has no other right in the management of the company or in the policy that is adopted except as delineated in the Memorandum of Articles of the incorporated company. A juristic person is an independent entity in totality like an individual person with independent will and acts on its own. Therefore, it has to be shown in the present case that the individual entity has been corroded by taking over of the financial interest by the Shaw Wallace Co. Ltd. The factors delineated are merely business arrangements for the purposes of carrying out the job work entrusted to the appellant M/s. Detergent India Ltd. The said appellant is a job worker and was required to have manufactured the various goods in terms of agreement to maintain quality and standards laid down by the principal-purchaser. For the purpose of such manufacture, the appellant, Detergent India Ltd. had entered into an agreement to share the machineries, employees, telephone charges and such other expenses; which are all accounted. The said appellant does not have a cross mutual interest in the affairs of M/s. Shaw Wallace Co. Ltd. and in its management or in M/s. Shaw Wallace's various business ventures and activities as can be seen from the facts brought out in the reply to the show cause notice. It is the Shaw Wallace, who is getting the work done from the said appellant.

Therefore, the ingredients alleged does not show appellant having any independent financial interest of Shaw Wallace Co. Ltd. Even as per the

department's case the business undertakings of Shaw Wallace is an independent multinational company. In that circumstance, the alleged factors brought out in para-3 of my brother's order cannot be considered as a 'mutuality of interest'. As there is no mutual sharing of profits and losses or mutual joint business venture in the matter.

The relationship in terms of the agreement is that of principal to principal basis. So long as the relationship is on the principal to principal basis and an entity is not a hired labour, then in such circumstances, it cannot be held that the appellant Detergent India is the unit of Shaw Wallace Co. Ltd. and that each is having mutual interest in the others financial dealings and business affairs. Mere holding shares by an independent entity or person do not give them absolute proprietary interest in the company, as the company is an independent juristic person with independent rights and liabilities as delineated under the Companies Act.

3. As can be seen from the facts of the case, the appellant Detergent India had in fact, informed the department about the existence of the agreement with Shaw Wallace Co. Ltd. and also had filed the annual balance sheet. This clearly indicates the shares held by the two subsidiaries of SWCL. In fact, it is not Shaw Wallace, who is holding the interest but it is their subsidiary who hold the shares. Be that as it may, there has to be a direct relationship between Shaw Wallace in the business interest in terms of the profit sharing and losses in the affairs of Detergent India. So also the said appellant should have similar interest in the Shaw Wallace's affairs including the affairs of their subsidiaries. Only such factors as delineated in para-3 is being alleged; which in terms of various judgments to be discussed infra cannot be considered as having "mutuality of interest" to adopt the wholesale price of Shaw Wallace for the purpose of arriving at the assessable value in terms of Section 4 of C.E. Act. Furthermore, the appellants' contention that department was aware of the existence of these facts and the annual balance sheets had been filed with the department is not denied. In such circumstances, it is difficult to hold that there is any intention to evade duty or to suppress material facts which are required to consider "mutuality of interest" for invoking larger period. There is no mutuality of interest and the factors alleged do not go to constitute 'mutuality of interest'.

Therefore, in such circumstances, the non-furnishing of those details has no material consequence at all. Only those facts and details which go to constitute 'mutuality of interest', if suppressed and such facts on enquiries get revealed, then in such circumstance, the department can invoke larger period. The factors which are alleged do not go to constitute 'mutuality of interest'. Non-furnishing of same does not have any legal consequences for invoking larger period and it does not give any ground for alleged suppression, fraud, misstatement etc. as required in terms of proviso to Section 11A of the Act. In that view of the matter, appellants also succeed on the ground of time bar in this case as the SCN has been issued in the year 1997 with regard to demand period of 1992-95.

4. The issue in the present appeals is also covered in appellants' favour as contended by the Counsel, as has been laid down by the Apex Court in the case of UOI v. ATIC Industries Ltd., 1984 (3) ECC 90 (SC) : 1984 (17) ELT 323 (SC). In para-4 to 5 of the said judgment, identical facts have been brought out, inasmuch as, it has to be seen that transactions between the manufacturer and his customer were on principal to principal basis and the wholesale price charged by the assessee to the customer was sole consideration of same and no extra commercial considerations was entered for determination of such price of customer. Therefore, it was held by the Apex Court that the appellant cannot be considered as a related person merely because, he holds 50% shares in the manufacturing company. In the present case, also no such extra consideration has flown to the appellant or to the Shaw Wallace Co. Ltd. and there is no allegation of suppression of facts of such flow of consideration or under-valuation of the product.

Shaw Wallace have got other subsidiaries and they have also independently got manufactured the goods through them and were selling them. In such circumstances, the ratio laid down on the aspect of mutuality of interest and related person in the case of UOI v. ATIC Industries Ltd. would clearly apply.

The same is required to be adopted in the present case as well. It is seen that a similar ratio was laid down by the Apex Court in the case of UOI v. Cibatul Ltd., 1986 (8) ECC 45 (SC) : 1985 (22) ELT 302. In this case, it was held that merely

because buyer had interest to supervise the manufacture and to reject the substandard goods and the buyer company having holding shares of selling company, that by itself was held to be not sufficient factors to treat as manufacturer to have produced the goods on behalf of the buyer. The aspect of related person has also been gone into by the Apex Court and it has been held that merely because a trade name is affixed on behalf of buyer that by itself will not be a ground to consider them as related person. Similar view has been expressed in the case of Union and Ors. v. Godfrey Philips India Ltd and Ors., 1986 (8) ECC 26 (SC) : 1985(22) ELT 306 (SC) which is again reiterated in the case of Joint Secretary to GOI v. Food Specialities Ltd., 1985 (22) ELT 324 (SC). The aspect was reconsidered by the Apex Court again in R.O. Industries v. UOI, 2000 (120) ELT 31 (SC) wherein it was held that goods sold to the wholesale dealer under the brand name pertaining to the wholesale dealer by itself will not be a ground to adopt the whole price of the dealer in terms of Section 4 of the Act. The Apex Court in the case of Sidhosons & Anr. etc. etc., v. UOI and Ors. etc., 1986 (26) ELT 881 (SC) decided the case with regard to the aspect of valuation of goods under Section 4 of the Act in case of customer's brand name being used by the manufacturer and it was held to be not a factor for adopting the price of buyers. The case of Rattiwolf Ltd v. UOI., 1992 (59) ELT 220 (Bom.) is on identical facts. It was held that merely because the holding company had certain business interest that by itself it is not sufficient to hold mutuality of interest, in the absence of any extra commercial consideration having passed on. The Hon'ble Bombay High Court held that holding company's price cannot be adopted for arriving at the assessable value. This judgment clearly knocks out the department's case. The Tribunal also held the same ratio in CCE, Mumbai v. Ralliwolf Ltd., 1998 (100) ELT 528, This aspect of the matter was also discussed by the Hon'ble Delhi High Court in the case of Straw Products Ltd and Anr. v. UOI, 1987 (30) ELT 275 (Del). Reference can also be made to the cases of Burman Laboratories Ltd., CCE., 2000 (122) ELT 52; Xerographers Ltd. v. CCE., 1999 (108) ELT 372; Transweld Products Pvt. Ltd., 1996 (88) ELT 257; CCE Electro Services (P) Ltd., 2001 (127) ELT 828. The ratio laid down in these judgments would apply to the case including the judgment of Apex Court rendered in the case of Calcutta Chromotype Ltd. v. CCE., 1998 (60) ECC 417 (SC) : 1998 (99) ELT 202 (SC).

5. In view of these judgments the appellants appeals are allowed by setting aside the impugned order of the Commissioner by granting consequential relief, if any.

6. In respect of departmental appeal, it is seen that both the authorities had allowed assessee's claim and the show cause notice was dropped on the ground that SCN does not allege facts or rely on any evidence of mutuality of interest. It was held that without same having been brought out in the SCN, the revenue's case cannot be considered. I have gone through the order of Commissioner (Appeals) who has clearly discussed the issue and has noted that department has not produced any evidence of mutuality of interest and in the absence of any evidence, revenue's case cannot be considered. There is no infirmity in this order, and hence revenue's appeal is rejected by following the ratio of large number of judgments cited in this case.

In view of difference of opinion between the Members, the matter is required to be placed before the Hon'ble President for reference of the matter to the Third Member for deciding the following points arisen in this case: (1) Whether party's Appeals No. E/1852/99 and E/160/2000 are required to be dismissed in terms of findings recorded by Member (Technical); Assessee's appeals are required to be allowed in terms of findings recorded by Member (Judicial) by following the ratio of the judgments noted and cited in the order.

(2) Whether Revenue's Appeal No. E/685/2000 is required to be remanded for de novo consideration as held by Member (Technical); Whether the above Revenue appeal is required to be rejected as held by Member (Judicial).

1. The conflicting decisions of the Ld. Member (Technical) and the Ld.

Member (J) of the regular bench have landed the matter before me as Third Member.

2. The facts of the case have already been detailed by the Ld. Member (T) in his order and hence need not be repeated herein.

(i) Whether, insofar as M/s. Detergent India Limited were concerned in the facts of the case, M/s. Shaw Wallace and Co. Limited could be considered to be a "related

person" within the meaning of this expression as used in Section 4 (1) (a) of the Central Excise Act, (ii) Whether, in the facts and circumstances of the case, the extended period of limitation under the proviso to Section 11 A (1) of the Central Excise Act could be invoked against M/s. Detergent India Ltd. 4. Both sides have referred to relevant facts and relied on judicial authorities to buttress their respective positions on the aforesaid issues. Ld. Counsel for M/s. Detergents India Limited ("DIL" for short) and M/s. Shaw Wallace & Co. Ltd. ("SWCL" for short) have relied on the following case law on the meaning of "related persons" under Section 4 of the Central Excise Act: (i) UOI v. ATIC Industries Ltd., 1984 (3) ECC 90 (SC) : 1984 (17) ELT 323 (SC) Art Rubber Industries Ltd. v. CCE, 1999 (64) ECC 321 (Tri.): 1999 (114) ELT 83 (T) Calcutta Chromotype Ltd. v. CCE, 1998 (60) ECC 417 (SC) : 1998 (99) ELT 202 (SC) N.P. Textile Mills v. CCE, (vii) Narendra Machines Work (P) Ltd. v. CCE, 2001 (74) ECC 246 (T) : 2001 (128) ELT 118 (T) Sunaren Industries v. CCE, (ix) Alembic Glass Industries Ltd. v. UOI, 1993 (41) ECC 257 (Guj.): 1992 (59) ELT 207 (Gup 5. In the case of ATIC Industries (supra), one of the issues considered by the Supreme Court was as to what could be the assessable value of the dyes manufactured and cleared by the assessee -- the wholesale price charged by them to M/s. Atul Products Ltd. and M/s. Crescent Dyes and Chemicals Ltd. or the price at which the latter sold the goods to their dealers/consumers? The court examined the facts of the case as well as the relevant provisions of Section 4 of the Central Excises and Salt Act and held that Atul Products Ltd. and Crescent Dyes & Chemicals Ltd. were not "related" to the assessee within the meaning of Section 4(4)(c) and hence the assessable value must be determined on the basis of the wholesale cash price charged by the assessee to the said companies. The court's decision on the issue is contained in paragraph 5 of its judgment, extracted below; "5. The second ground on which the assessee assailed the validity of the demand made by the Assistant Collector for differential duty related to the applicability of the definition of "related person" in Clause (c) of Sub-section (4) of Section 4 of the amended Act.

The Assistant Collector took the view that the assessee on the one hand and Atul Products Limited and Crescent Dyes and Chemical Ltd. on the other were related persons within the meaning of the first part of the definition of the term "related person" and the assessable value of the dyes manufactured by the assessee for

the purpose of Excise duty was, therefore, liable to be determined with reference to the price at which the dyes were ordinarily sold by Atul Products Limited and Crescent Dyes & Chemicals Limited. This view taken by the Assistant Collector was set aside by the High Court on the ground that the assessee on the one hand and Atul Products Ltd. and Crescent Dyes & Chemicals Ltd. on the other were not "related persons" and the wholesale cash price charged by the assessee to Atul Products Ltd. & Crescent Dyes & Chemicals Limited and not the price at which the latter sold the dyes to the dealers or the consumers, represented the true measure of the value of the dyes for the purpose of chargeability to Excise Duty. This conclusion readied by the High Court was assailed before us by the learned Attorney General appearing on behalf of the Revenue. He fairly conceded that the only part of the definition of "related person" in Clause (c) of Sub-section (4) of Section 4 on which he could reply was the first part which defines "related person" to mean "a person who is so associated with the assessee that they have interest directly or indirectly in the business of each other". The second part of the definition which adds an inclusive clause was admittedly not applicable, because neither Atul Products Limited nor Crescent Dyes and Chemicals Limited was a holding company or a subsidiary company nor was either of them a relative of the assessee, so as to fall within the second part of the definition.

But we do not think that even the limited contention urged by the learned Attorney General on behalf of the Revenue based on the first part of the definition can succeed. What the first part of the definition requires is that the person who is sought to be branded as a "related person" must be a person who is so associated with the assessee that they have interest, directly or indirectly, in the business of each other. It is not enough that the assessee has an interest, direct or indirect, in the business of the person alleged to be a related person nor is it enough that the person alleged to be a related person has an interest, direct or indirect, in the business of the assessee. It is essential to attract the applicability of the first part of the definition that the assessee and the person alleged to be a related person must have interest, direct or indirect, in the business of each other. Each of them must have a direct or indirect interest in the business of the other. The equality and degree of interest which each has in the business of the other may be different; the interest of one in the business of the other may be direct, while the

interest of the latter in the business of the former may be indirect.

That would not make any difference, so long as each has got some interest, direct or indirect, in the business of the other. Now, in the present case, Atul Products Limited has undoubtedly interest in the business of the assessee, since Atul Products Limited holds 50% of the share capital of the assessee and has interest as shareholder in the business carried on by the assessee. But it is not possible to say that the assessee has any interest in the business of Atul Products Limited. There are two points of view from which the relationship between the assessee and Atul Products Limited may be considered. First, it may be noted that Atul Products Limited is a shareholder of the assessee to the extent of 50% of the share capital. But we fail to see how it can be said that a limited company has any interest, direct or indirect, in the business carried on by one of its shareholders, even though the shareholding of such shareholder may be 50%. Secondly, Atul Products Limited is a wholesale buyer of the dyes manufactured by the assessee but even then, since the transactions between them are as principal to principal, it is difficult to appreciate how the assessee could be said by virtue of that circumstance to have any interest, direct or indirect, in the business of Atul Product Limited. Atul Product Limited buys dyes from the assessee in wholesale on principal to principal basis and then sells such dyes in the market. The assessee is not concerned whether Atul Products Limited sells or does not sell the dyes purchased by it from the assessee nor is it concerned whether Atul Products Limited sells such dyes at a profit or at a loss. It is impossible to contend that the assessee has any direct or indirect interest in the business of a wholesale dealer who purchases dyes from it on principal to principal basis. The same position obtains in regard to Crescent Dyes & Chemical Limited.

Perhaps the position in regard to Crescent Dyes and Chemicals Limited is much stronger than that in regard to Atul Product Limited. Crescent Dyes and Chemicals Limited is not even a shareholder of the assessee and it has, therefore, no interest direct or indirect in the business of the assessee.

It is Imperial Chemical Industries Limited, London which holds 50% of the share capital of the assessee and this foreign company also holds 40% of the share

capital of Crescent Chemicals and Dyes Limited. Imperial Chemicals Industries Limited, London would admittedly have an interest in the business of the assessee in its capacity as a shareholder, but how can Crescent Dyes and Chemicals Limited of which 40 Per cent of the shares are held by Imperial Chemicals Limited, London which in its turn is a shareholder of the assessee, can be said to have any interest, direct or indirect, in the business of the assessee. Equally the assessee has no interest direct or indirect in the business of Crescent Dyes & Chemicals Limited, which is just a wholesale dealer purchasing dyes from the assessee in wholesale on principal to principal basis. It is obvious that for the same reasons which have prevailed with us while discussing the case of Atul Product Limited, the assessee has no direct or indirect interest in the business of Crescent Dyes and Chemicals Limited. The first part of the definition of related person in Clause (c) of Sub-section (4) of Section 4 the amended Act is, therefore, clearly not satisfied both in relation to Atul Products Limited as also in relation to Crescent Dyes and Chemicals Limited and neither of them can be said to be a "related person" vis-a-vis the assessee within the meaning of the definition of that term in Clause (c) of Sub-section (4) of Section 4 of the amended Act. We, therefore, affirm the view taken by the High Court and hold that the assessable value of the dyes manufactured by the assessee cannot be determined with reference to the selling price charged by Atul Products Limited and Crescent Dyes and Chemicals Limited to their purchasers but must be determined on the basis of the wholesale cash price charged by the assessee to Atul Products Limited and Crescent Dyes and Chemicals Limited. The demand made by the Assistant Collector for differential duty must, therefore, be held to be rightly quashed by the High Court." 6. Having thoroughly compared the facts of the present case with that of the above case, I am of the view that the ratio of the Apex Court's decision can squarely be followed in the instant case. Accordingly, it has to be held that the price at which the goods were sold by DIL to SWCL should be the basis for determination of the assessable value of the goods, and not the price charged by the latter to their dealers.

SWCL cannot be said to be "related" to DIL within the meaning of this expression as used in Section 4 (1)(a) as no "mutuality of interest" between the two companies has been established in this case. None of the "commonalities" suggested by the Ld. SDR in his bid to set up a "relation" between the two

companies would, individually or collectively, amount to "mutuality of interest" expounded by the Apex Court. The decisions cited by him are easily distinguishable. On the other hand, the decisions cited by the counsel are largely supportive of the assessee's stand in this case. I do not think it necessary to elaborate this aspect as a detailed discussion has already been made in this behalf by Ld. Member (J). I am in full agreement with him on the issue.

7. As DIL and SWCL have already been found not to be "related persons", it cannot be said that the former suppressed (in their price lists filed with the department) any "relationship" before the department with an intent to evade payment of duty. The fact is that there was no mutuality of interest between DIL and SWCL and hence they were not "related persons" within the meaning of Section 4(1) (a) of the Act.

The fact alleged by the department in the show-cause notice did not exist at all to be suppressed by the notice. Therefore, the extended period of limitation was not invocable in this case. I agree with Ld.

Member (J) on this score also.

8. In the result, the appeals filed by DIL and SWCL have to be allowed and the Revenue's appeal to be rejected.

In terms of the majority order the appeals filed by Detergents India Ltd. and Shaw Wallace Company are allowed. The appeal filed by the revenue against Detergents India Ltd. is rejected.

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