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FLASH LABORATORIES LTD.

v.

COLLECTOR OF CENTRAL EXCISE, NEW DELHI.

DECEMBER 20, 2002

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[M.B. SHAH, K.G. BALAKRISHNAN AND D.M.
DHARMADHIKARI, JJ.]

Central Excise Act, 1944; Sections 4(1)(a) & 4(4)(c):

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Valuation of excisable goods—Exception to general concept of sale—Applicability of—Held, since appellant-company is selling goods at lower price to its holding company and another subsidiary company, there exists a business interest—Holding company incurring expenditure on promotion of sale of product—They are related persons—Section 4(4)(c) attracted—Tribunal rightly confirmed demand of differential amount of duty—Central Excise Tariff Act, 1985—Chapter heading 3306.

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Appellant company-assessee was selling certain goods to its holding company and another subsidiary company of holding company. Appellant was paying excise duty on the goods at the selling price. Revenue authorities noticed that there existed a business relationship amongst assessee, holding company and another subsidiary company and goods were being sold by assessee at lower price to evade payment of proper excise duty. A show cause notice was served and after affording an opportunity of hearing, differential amount of duty was confirmed against the assessee. In other pending matter of the appellant-company, after following the decision, demand of differential amount of duty was confirmed. Hence these appeals.

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It was contended for the assessee that appellant-company was not the related person to its holding and another subsidiary company.

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Dismissing the appeals, the Court

HELD: 1.1. Section 4 of the Central Excise Act, 1944 deals with valuation of excisable goods for purposes of charging of duty of excise and as per Section 4(1)(a), the value shall be deemed to be the normal price thereof, the price at which such goods are ordinarily sold by the assessee

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to a buyer in the course of wholesale trade for delivery at the time and place of removal where the buyer is not a related person and the price is the sole consideration for the sale. Section 4(4)(c) is an exception to the general concept of sale. [701-F, G] A

1.2. The definition of “related person” shows that when an assessee is so closely associated with another person, directly or indirectly, in the business, then they are “related persons”. The definition further shows that the holding company and subsidiary company have got special significance. It is clear from the definition that there must be mutuality of interest between the two persons. [702-B, C] B

1.3. In the instant case, the appellant-company is a subsidiary company of a company which also have another subsidiary company. Sixty per cent of the products manufactured by the appellant are sold to holding company and forty per cent of the products are sold to its another subsidiary company. According to the respondent, the appellant and other subsidiary company could be treated as “related person” within the meaning of Section 4(4)(c) of the Act. [701-D, F] C D

1.4. Having regard to the ruling and plain meaning of the definition of “related person”, it is to be noticed that the appellant is a subsidiary company of a company which have another subsidiary company. Therefore, the relationship between the appellant and another subsidiary company though indirect they have mutual interest in the business of each other. The facts and circumstances of the case show that there is mutuality of interest between the three companies as sixty per cent of the products of the appellant are sold to holding company and the remaining forty per cent of the total product is being sold to another subsidiary company. Moreover, holding company is incurring the expenses for sales promotion and advertisement for the sale of the appellant’s product. In the connected appeal, no other materials are placed to show that the finding of the Tribunal is not correct. Besides, the appellant had paid the excise duty pursuant to these notices and the same must have been passed on to the consumers. Hence the appellant is not entitled to seek any relief. E F G

[703-D-F; 704-B-C]

Union of India and Ors. v. Atiç Industries Limited, [1984] 3 SCC 575, relied on.

Union of India v. Bombay Tyre International, [1984] 1 SCC 467, H

A referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No.. 5619 of 1994.

B From the Judgment and Order dated 19.5.1994 of the Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi in Appeal No.E/1958 of 1991-A

WITH

C C.A. No. 7216 of 2000.

.Manjula Gupta, Rupesh Kumar, Tara Chandra Sharma and Ms. Neelam Sharma, for the Appellants.

M.L. Verma, Ashok K. Srivastava and B.K. Prasad for the Respondent.

D The Judgment of the Court was delivered by

E **K.G. BALAKRISHNAN, J.** Both these appeals are filed by Messrs. Flash Laboratories Limited, a company engaged in the manufacture of tooth paste ("Prudent"), falling under chapter Heading 3306.00 of the Schedule to the Central Excise Tariff Act, 1985. The appellant has been selling its products to their holding company, Messrs. Parle Products Limited, which is a subsidiary company of Messrs. Parle Biscuits Limited. The appellant was found paying duty at the price at which the goods were being sold to the holding company, namely, Parle Products Limited. A show cause notice was issued to the appellant company alleging that Messrs. Parle Products Limited and Messrs. Parle Biscuits Limited were "related persons" and were purchasing goods at lower prices and selling the same at higher prices and that the appellant had not filed the price list in Part IV for the sale to a related person, rather they filed the price list in Part I. The Revenue took objection that this amounted to mis-statement. The appellant was also asked to show cause as to why Rs. 11,30,570:35p should not be demanded from him as differential duty for the period September, 1986 to May, 1989. The appellant was given a personal hearing and the Collector of Central Excise confirmed the demand for differential duty. Aggrieved by the same, the appellant filed an appeal before the Custom Excise & Gold (Control) Appellate Tribunal. The Tribunal confirmed the demand, but reduced the penalty to Rs. 50,000. Civil Appeal No. 5619 of 1994 is directed against that decision of the Tribunal.

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Based on the original order dated 26.4.1991, further show cause notices were issued to the appellant. The appellant filed an appeal to set aside the order in original, dated 26.4.1991. The Asstt. Collector, Central Excise, dropped the proceedings against the appellant on the ground that the issue regarding "related person" had already been decided in favour of the appellant by the Collector (Appeals), Central Excise, New Delhi, vide order dated 23.8.1991. The Revenue filed an appeal before the Collector (Appeals), Central Excise, New Delhi, and the appellant also filed cross-objections. The Commissioner, Central Excise, New Delhi, remanded the case back to the Adjudicating Authority to re-examine the same in the light of the final order passed on 19.5.1994. In the *de novo* proceedings before the Asstt. Commissioner, the appellant contended that the order of the Tribunal dated 19.5.1994 could not be made applicable as the order of the appellate authority must hold good. The Asstt. Commissioner confirmed the demand by holding that all the three parties were 'related persons' in terms of Section 4(4)(c) of the Act. The appellant then preferred an appeal before the Commissioner of Central Excise (Appeals), Delhi. The appeal was dismissed by the Commissioner of Central Excise (Appeals) and aggrieved by the same, the appellant preferred an appeal before the Customs, Excise & Gold (Control) Appellate Tribunal. By final order No. 828/2000-A, the appeal was dismissed and it was held that the four show cause notices issued to the appellant were sustainable in law. Aggrieved by the same, Civil Appeal No. 7216 of 2000 is filed.

We heard learned counsel for the appellant as also learned counsel for the Revenue. The counsel for the appellant contended that the appellant-company, Messrs. Flash Laboratories Limited is not a "related person" as against Parle Products Limited and Messrs. Parle Biscuits Limited. Admittedly, the appellant-company is a subsidiary company of Parle Products Limited. Messrs. Parle Products Limited has also another subsidiary company, that is, Messrs. Parle Biscuits Limited. Sixty per cent of the products manufactured by the appellant are sold to Messrs. Parle Products Limited and forty per cent of the products are sold to Parle Biscuits Limited. According to the respondent, the appellant and Messrs. Parle Biscuits could be treated as "related person" within the meaning of Section 4(4)(c) of the Central Excise Act, 1944.

Section 4 of the Central Excise Act, 1944 deals with valuation of excisable goods for purposes of charging of duty of excise and as per Section 4(1)(a), the value shall be deemed to be the normal price thereof, that is to say, the price at which such goods are ordinarily sold by the assessee to a

A buyer in the course of wholesale trade for delivery at the time and place of removal where the buyer is not a related person and the price is the sole consideration for the sale. Section 4(4)(c) is an exception to this general concept of sale. Section 4(4)(c) of the Central Excise Act reads as follows :

B “4(4)(c). ‘related person’ means a person who is so associated with the assessee that they have interest, directly or indirectly, in the business of each other and includes a holding company, a subsidiary company, a relative and a distributor of the assessee, and any sub-distributor of such distributor.”

C The definition of “related person” shows that when an assessee is so closely associated with another person, directly or indirectly, in the business, then it could be said that they are “related persons”. The definition further shows that the holding company and subsidiary company have got special significance. It is clear from the definition that there must be mutuality of interest between the two persons. In *Union of India v. Bombay Tyre*
 D *International*, [1984] 1 SCC 467, the constitutional validity of this provision was challenged and it was contended that the definition of the expression “related person” was arbitrary as it would include within its ambit a distributor of the assessee. But, this Court held that “related person” being a relative, a distributor would not come within its fold. It was held that a related person
 E is a person who is so associated with the assessee that they have interest, direct or direct, in the business of each other and includes a holding company or a subsidiary company and is being used in sufficiently restricted sense for employing a legal fiction.

F In *Union of India and Ors. v. Atic Industries Limited*, [1984] 3 SCC 575, the assessee was a limited company manufacturing dyes. Fifty per cent share capital of the assessee was held by a limited company, AP Limited and the remaining fifty per cent thereof was held by a foreign company, ICI Limited, London. The ICI Limited, London, was having fifty per cent share capital of an Indian company, CDC Limited. The assessee sold the dyes manufactured by it in wholesale to AP Limited and CDC Limited at a uniform
 G price and the wholesale buyers in turn sold the dyes to dealers and consumers at a higher price. The Central Excise authorities held that the wholesale buyers were ‘related persons’ within the meaning of Section 4(4)(c) of the Central Excise Act. The High Court set aside this view and held that the buyer companies were not related persons. In appeal before this Court, the Revenue sought to rely on the applicability of the first part of Section 4(4)(c),
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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.” While dismissing the appeal, this Court explained the circumstances under which two concerns could be treated as “related persons”. A

“What the first part of the definition requires is that 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.” B C D

Having regard to the above decision and the plain meaning of the definition of “related person”, it is to be noticed that the appellant is a subsidiary company of Messrs. Parle Products Limited and Messrs. Parle Biscuits Limited is also a subsidiary company of Messrs. Parle Products Limited. Therefore, the relationship between the appellant and Messrs. Parle Biscuits Limited, though indirect, they have mutual interest in the business of each other. The facts and circumstances of the case show that there is mutuality of interest between the three companies as sixty per cent of the products of the appellant are sold to Messrs. Parle Products Limited and the remaining forty per cent of the total product of tooth paste is being sold to Messrs. Parle Biscuits Limited. Moreover, Messrs. Parle Products Limited are incurring the expenses for sales promotion and advertisement for the sale of the appellant’s product, namely, “Prudent tooth paste”. E F

Having regard to the facts and circumstances of the case, we do not find any reason to disagree with the views expressed by the Tribunal. G

In Civil Appeal No. 7216 of 2000, the appellant further contended that it received four show cause notices dated 10.6.1991, 20.8.1991, 16.12.1991 and 13.4.1992. The appellant contended that the Asstt. Collector held that the H

- A** appellant and Messrs. Parle Products Limited and Messrs. Parle Biscuits Limited are “related persons” but this order was reversed by the Collector vide order dated 23.8.1991 and according to the appellant, the department did not challenge the subsequent order and therefore the subsequent order attained finality. The Tribunal has dealt with this aspect in Paragraph 7 of the impugned order. It was held by the Tribunal that the period relied upon by the appellant is July’ 89 to Jan’ 91 whereas the SCNs dealt with in the Order-in-Original pertained to the period 14.2.1991 to 31.3.1992 and that these SCNs arose out of the Order-in-original No. 87/CE/01 and this order was not challenged by the appellants and accordingly the tribunal was of the view that the four SCNs and the Order-in-Original No. 87/CE/91 are sustainable in law.

- D** No other materials are placed before us to show that the finding of the Tribunal is not correct. We are also told that the appellant had paid the excise duty pursuant to these notices and the same must have been passed on to the consumers. In that view of the matter, the appellant is not entitled to seek any relief. Both the appeals are dismissed. There will be no order as to costs.

S.K.S.

Appeals dismissed.