

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 1947-1950 OF 2003

COMMISSIONER OF CENTRAL EXCISE, AURANGABAD ... Appellant

VERSUS

M/S.GOODYEAR SOUTH ASIA TYRES P. L.& ORS. ... Respondents

WITH

CIVIL APPEAL NO. 4370 OF 2003

COMMISSIONER OF CENTRAL EXCISE, AURANGABAD ... Appellant

VERSUS

M/S.GOODYEAR SOUTH ASIA TYRES PVT. LTD. ... Respondent

J U D G M E N T

A. K. SIKRI, J.

These two appeals are filed by the Commissioner Central Excise, Aurangabad, wherein the respondent arrayed is same. The issue involved also is common which pertains to the valuation of goods, sold by the assessee, for the purposes of charging excise duty. For this reason, both the appeals were taken up together and are being disposed of by this common judgment. However, keeping in view some distinct feature in the second appeal, viz., Civil Appeal No. 4370 of 2003, the same shall be taken up for discussion separately to address the distinct features.

The respondent (hereinafter referred to as the

'assessee') holds Central Excise Registration for the manufacture of Tyres, Tubes, Flaps, Bladders, etc., falling under Chapter 40 of the Central Excise Tariff Act, 1985. In the first appeal, the period involved for the purposes of excise duty is 01.03.1997 to 16.04.1998. The assessee was originally M/s. RPG CEAT Group Company. Later on 'RPG SATL' and 'Goodyear' entered into a Joint Venture Agreement dated 10.09.1993 to form a third company in the name of M/s. SATL (the assessee), which came into existence on 30.09.94. The primary objective of the assessee was to manufacture OTR Tyres and Radial tyres exclusively for CEAT and Goodyear under their brand names. The promoters namely Goodyear USA and Goodyear India on one side and RPG CEAT on the other were holding 50:50 equity each in the assessee, and were exclusive buyers of goods manufactured by the assessee. In the said Joint Venture Agreement, various other stipulations were mentioned showing interest of both Goodyear as well as CEAT in the assessee. As per the said agreement, the assessee also received unsecured interest free loan of Rs.85.66 crores from CEAT and Goodyear. Some moulds and other equipments worth Rs. 10 crores free of cost, on loan basis, were also given by these two companies to the assessee.

This kind of arrangement led to the issuance of show cause notice by the Commissioner of Central Excise and

Customs on 25.01.1999, alleging that CEAT and Goodyear are related persons of the assessee within the meaning of Section 4(4)(c) of the Act of 1944 and as such the selling price of CEAT and Goodyear shall be the assessable value of goods produced by the assessee under section 4 of the Act. Alternatively, it was also alleged as to why the additional consideration flowing back to the assessee should not be added in their present selling price in terms of Rule 5 of the Central Excise (Valuation) Rules, 1975 r/w Section 4 of the Act. In this way a Demand cum Show Cause Notice was issued to the assessee demanding differential duty of Rs.8,76,85,385/- for the period from 01.03.1997 to 16.04.1998 for under valuation of the goods. Contravention of Section 4 of the Act read with Rules 9, 9(2), 52, 173C, 173F, 173G of the Rules was also alleged and penal action was proposed under Section 11AC of the Act read with Rules 173 of the Rules, alongwith penal interest under section 11AB of the Act.

JUDGMENT

The notice also invoked extended period under proviso to Section 11A(1) of the Act for suppression of facts and willful mis-declaration of Assessable value by assessee with intent to evade payment of Central Excise duty. The notice was also issued to four individuals, working for the assessee.

The assessee rebutted the aforesaid allegations in the show cause notice by putting up the defence to the effect that the assessee on the one hand and the CEAT and Goodyear on the other hand, were not related persons as there was no mutuality of interest and that no extra commercial considerations were pointed out regarding price fixation. It was contended that the sale of goods by assessee to these two companies was on principal to principal basis and at arm's length. The Commissioner heard the matter and thereafter, passed Orders-in-Original dated 11.05.2000 confirming the demand in the show cause notice. Some penalties were also imposed. The matter was taken in appeal before the Customs, Excise and Gold (Control) Appellate Tribunal (hereinafter referred to as 'CEGAT'). A Bench of the CEGAT heard the appeal on 18.05.2001. By an order dated 28.05.2002, the two members of the Bench differed with each other; one member allowing the appeal and the other remanding it. Accordingly, the matter was referred to a third member, who heard the appeals. By her order dated 26.07.2002, she concurred with the view that the appeals were to be allowed. Accordingly, the order of CEGAT was recorded on 31.07.2002 allowing the appeals.

This order of CEGAT is the subject matter of Civil Appeal Nos. 1947-1950 of 2003.

Mr. K. Radhakrishnan, learned senior counsel appearing for the Department, has extensively read the contents of the show cause notice as well as the Order of the Commissioner and from there he has pointed out that there is evidence to show deep interest of the Goodyear and CEAT in the assessee company. He thus, submitted that the Commissioner was right in holding that these were 'related persons'. It is not necessary to narrate those features which are pointed out by Mr. Radhakrishnan inasmuch as those features only indicate interest of the two companies, viz., CEAT and Goodyear in the assessee to bring the case within the definition of 'related persons'. What is necessary is to prove mutuality of interest, viz., interest both ways, i.e., of the two companies in the assessee as well as of the assessee in the said two companies. This legal requirement is necessary in view of the definition of related persons contained in clause (c) of Sub-Section (4) of Section 4 of the Central Excise Act (hereinafter referred to as 'Act') which reads as under: -

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

Explanation. - In this clause "holding company", "subsidiary company" and "relative" have the same meanings as in the Companies Act, 1956 (1 of 1956)."

The expression 'in the business of each other' clearly

denotes that interest of the two persons have to be mutual, i.e., in each other, in order to treat them as related persons. We find from the order of the Member Judicial that only on the ground that the two companies had given a loan of Rs. 85.66 crores to the assessee company, was treated as sufficient to establish the relationship between the assessee and the buyers. That only shows one way traffic whereas requirement is that of two way traffic. The other Member, in our opinion, aptly held that this cannot be the factor which would show the mutuality of interest. For this purpose, he referred to the judgment of this Court in '*Union of India v. Atic Industries Ltd.* [1984 (17) ELT 323]. The third Member has, therefore, rightly, concurred with the aforesaid view of Member (Technical).

The assessee did not have any interest in the business of the buyers (Goodyear Indian Limited and CEAT Limited). Given this, the requirement of 'mutuality of interest' which is a pre-requisite under section 4(4)(c) of the Act does not get satisfied. The matter is squarely covered by the decisions of this Court in the case of *Atic Industries Ltd.*

We have gone through the judgment in the case of *Atic Industries Ltd.* wherein this court categorically held that there should be mutuality of interest in the business of each other. After referring to the definition of 'related

persons', the aforesaid essential feature occurring therein which needs to be satisfied is elaborated in the following manner:-

"What the first part of the definition requires is that the person who is sought to be branded as a "related person" must be a person who is so associated with the assessee that they have interest, directly or indirectly, in the business of each other. It is not enough that the assessee has an interest, direct or indirect, in the business of the person alleged to be a related person nor is it enough that the person alleged to be a related person has an interest, direct or indirect, in the business of the assessee. It is essential to attract the applicability of the first part of the definition that the assessee and the person alleged to be a related person must have interest, direct or indirect, in the business of each other. Each of them must have a direct or indirect interest in the business of the other. The equality and degree of interest which each has in the business of the other may be different; the interest of one in the business of the other may be direct, while the interest of the latter in the business of the former may be indirect. That would not make any difference, so long as each has got some interest, direct or indirect, in the business of the other. Now, in the present case, Atul Products Limited has undoubtedly interest in the business of the assessee, since Atul Products Limited holds 50 per cent of the share capital of the assessee and has interest as share holder in the business carried on by the assessee. But it is not possible to say that the assessee has any interest in the business of Atul Products Limited. There are two points of view from which the relationship between the assessee and Atul Products Limited may be considered. First, it may be noted that Atul Products Limited is a shareholder of the assessee to the extent of 50 per cent of the share capital. But we fail to see how it can be said that a limited company has any interest, direct or indirect, in the business carried on by one of its shareholders, even though the shareholding of such shareholder may be 50 per cent. Secondly, Atul Products Limited is a wholesale buyer of the dyes manufactured by the assessee but even then, since the transactions between them are as principal to principal, it is difficult to appreciate how the assessee could be said by virtue of that circumstance to have any interest, direct or indirect, in the business of Atul

Products Limited. Atul Products Limited buys dyes from the assessee in wholesale on principal to principal basis and then sells such dyes in the market. The assessee is not concerned whether Atul Products Limited sells or does not sell the dyes purchased by it from the assessee nor is it concerned whether 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.

No doubt, the two buyers had given Rs. 85.66 crores interest free loan to the assessee. However, that by itself may not be a reason to hold them as related persons within the meaning of Section 4(4)(c) of the Act. In the absence of any mutuality of interest existing between them, giving of this interest free loan could have been a basis to include the notional interest while arriving at the cost of product sold by the assessee to the two buyers. However, instead of doing that, the appellant wanted to make use of this factor to hold that the assessee and the two buyers are "related persons" which position is difficult to comprehend having regard to the principle laid down in *Atic Industries Ltd's* case.

We thus, do not find any fault or error in the impugned judgment. These appeals are, accordingly, dismissed.

Civil Appeal No. 4370 of 2003

The period involved in Civil Appeal No. 4370 of 2003

is from 01.07.2000 to 26.09.2000. It so happened that the joint venture agreement between the parties was terminated and the CEAT transferred its entire shareholding in the Goodyear group of which 97 percent is held by Goodyear USA and 3 per cent is held by Goodyear India Private Limited. Thus, the assessee became the subsidiary of Goodyear USA. On this basis, show cause notice was issued for the aforesaid period treating the assessee and Goodyear as related persons having mutuality of interest.

No doubt that the assessee became the fully owned company of Goodyear, the relationship between the two would be that of related persons as they became "inter connected undertaking" and are covered by the provisions of amended Section 4(4)(3)(b) of the Act which provides that the person would be deemed to be "related" if:

- "i. they are inter-connected undertakings,
- ii. they are relatives,
- iii. Amongst them the buyer is a relative and a distributor of the assessee, or a sub-distributor of such distributor, or
- iv. they are so associated they have interest, directly or indirectly, in the business of each other."

This position was not denied even by the assessee. However, their submission was that provisions of Rule 9 of the Valuation Rules are not attracted as this Rule applies only when assessee so arranges its affairs that the excisable goods are not sold by it except to or through a person who is related in the manner specified in either of

the sub clauses (ii), (iii) or (iv) of Section 4(3)(b) of the Act. [Rule 9 does not cover clause (i)]

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

Apart from the above, it would be significant to mention that after taking over of the assessee company by Goodyear, more than 70 per cent of the sales by the assessee company are to the third parties. That apart, there was another contention of the assessee, viz., that the goods sold to the outsiders are at a lesser rates than sold to Goodyear. These two contentions have not been refuted by the Revenue. The case, therefore, would be clearly covered by a recent judgment of this Court in '*Commissioner of Central Excise, Hyderabad v. M/s. Detergents India Limited and Another*' [2015 (4) SCALE 631] wherein it was held:-

"We are of the view that the "arrangement" spoken of

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

On these grounds, even this appeal fails and is dismissed.

....., J.
[A.K. SIKRI]

....., J.
[ROHINTON FALI NARIMAN]

New Delhi;
July 22, 2015.

JUDGMENT