REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 6891 OF 2018

Commissioner of Central Excise & Service Tax, Rohtak ..... Appellant

VERSUS

Merino Panel Product Ltd. ..... Respondent

JUDGEMENT

Surya Kant, J:

1. The present Civil Appeal originates from the impugned order dated 30.11.2017 passed by the Customs, Excise and Service Tax Appellate Tribunal, Chandigarh ("CESTAT"). The CESTAT set aside the show cause notice issued by the Appellant-Revenue to the Assessee-Respondent, on the ground that it had invoked an incorrect method of valuing related party transactions.

A. FACTUAL BACKGROUND

2. The Assessee is involved in the manufacture of decorative laminates and other like materials, which fall under Chapter 48 of

the Central Excise Tariff Act, 1985. As excisable goods, the value at which the Respondent was selling these goods would be the determinant for the amount of tax recoverable by the Appellant. Following an audit conducted on the Assessee's operations for FY 2009-10 and 2010-11, discrepancies were unearthed in terms of the prices at which these goods were being sold. The goods were being offered not only to independent parties unconnected with the Respondent, but also to two 'related parties' called "Merino Industries Ltd." ("MIL") and "Merino Services Ltd." ("MSL"), as defined under Section 4(3)(b)(i) of the Central Excise Act, 1944[1] ("CEA") read with Section 2(g) of the Monopolies and Restrictive Trade Practices Act, 1969.[2] It was ascertained that Respondent was a subsidiary of MIL with 74.65% of its shareholding vested in the latter. With regard to MSL, the Assessee was found to have significant influence over its operations and the two companies shared Directors/Key Managerial Personnel.

3. The sales to these related entities were discovered to be undervalued in comparison to those made by the Assessee to non-

1 **Section 4. Valuation of excisable goods for purposes of charging of duty of excise -**

(3) For the purpose of this section,-

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

(b) persons shall be deemed to be "related" if -

(i) they are inter-connected undertakings;

...

Explanation - ....

2 **2. Definitions.** – In this Act, unless the context otherwise requires, -

(g) "inter-connected undertakings" means two or more undertakings which are inter-connected with each other in any of the following manner, namely:-

...

related independent entities. This artificial devaluation resulted in a shortfall in collection of excise duty due to the deliberate deflation of the price by the Assessee when selling goods to its related party concerns. Hence, the assessable value of the excisable materials had to be established in order to then calculate the correct amount of excise duty to be levied.

4. The assessable value of excisable goods is worked out via Section 4(1) of the CEA. As we will repeatedly be referring to this provision at a later stage, a reproduction of its relevant portion is necessary at this point:-

> ***Section 4. Valuation of excisable goods for purposes of charging of duty of excise. –***
>
> ***(1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to their value, then, on each removal of the goods, such value shall –***
>
> ***(a) in a case where the goods are sold by the assessee, for delivery at the time and place of the removal, the assessee and the buyer of the goods are not related and the price is the sole consideration for the sale, be the transaction value;***
>
> ***(b) in any other case, including the case where the goods are not sold, be the value determined in such manner as may be prescribed.***
>
> ***Explanation. - For the removal of doubts, it is hereby declared that the price-cum-duty of the excisable goods sold by the assessee shall be the price actually paid to him for the goods sold and the money value of the additional consideration, if any, flowing directly or indirectly from the buyer to the assessee in connection with the sale of such goods, and such price-cum-duty, excluding sales tax and other taxes, if any, actually paid, shall be deemed to include the duty payable on such goods.***

5. The wording of the sub-sections indicates that Section 4(1)(a) of the CEA is relevant for sales to independent parties, while Section 4(1)(b) addresses all other cases including sales made to related parties. Due to the fact that sales in the present case were made by Respondent to both independent and related parties, the latter part of Section 4(1) was deemed applicable, read with the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 ("CEVR").

6. The show cause notice issued by the Revenue noted that the CEVR did not contain any guidelines on the methodology to be adopted for discovering the assessable value of goods, when sales are made partially to both independent parties and related parties. For our purposes it is not necessary to go over every provision within the CEVR. The show cause notice narrowed the scope of inquiry down to Rules 4 & 9-11, which are provided below:-

> ***Rule 4.***
>
> ***The value of the excisable goods shall be based on the value of such goods sold by the assessee for delivery at any other time nearest to the time of the removal of goods under assessment, subject, if necessary, to such adjustment on account of the difference in the dates of delivery of such goods and of the excisable goods under assessment, as may appear reasonable.***
>
> ***Rule 9.***
>
> ***When the assessee so arranges that the excisable goods are not sold by an assessee except to or through a person who is related in the manner specified in either of sub-clauses (ii), (iii) or (iv) of clause (b) of sub-section (3) of section 4 of the Act, the value of the goods shall be the normal transaction***

> ***value at which these are sold by the related person at the time of removal, to buyers (not being related person); or where such goods are not sold to such buyers, to buyers (being related person), who sells such goods in retail :***
>
> ***Provided that in a case where the related person does not sell the goods but uses or consumes such goods in the production or manufacture of articles, the value shall be determined in the manner specified in rule 8.***
>
> ***Rule 10.***
>
> ***When the assessee so arranges that the excisable goods are not sold by him except to or through an inter-connected undertaking, the value of the goods shall be determined in the following manner, namely:-***
>
> ***(a) If the undertakings are so connected that they are also related in terms of sub-clause (i) or (iii) or (iv) of clause (b) of sub-section (3) of section 4 of the Act or the buyer is a holding company or subsidiary***
>
> ***Explanation. – In this clause "holding company" and "subsidiary company" shall have the same meanings as in the Company Act, 1956 (1 of 1956).***
>
> ***(b) In any other case, the value shall be determined as if they are not related persons for the purpose of sub-section (1) of section 4.***
>
> ***Rule 11.***
>
> ***If the value of any excisable goods cannot be determined under the foregoing rules, the value shall be determined using reasonable means consistent with the principles and general provisions of these rules and sub-section (1) of section 4 of the Act.***

7. A bare reading of the extracted provisions indicates that Rules 9 & 10 are applicable only in situations where the entire batch of goods is sold to a related party. This would have ordinarily excluded the applicability of those Rules in the present case, given that the Assessee was selling its products partially to both independent and related buyers. The only remaining option would have been taking recourse to Rule 11, the residuary provision which addresses scenarios that are not otherwise covered by the CEVR. The Rule

refers back to Section 4(1)(a) of the CEA and outlines a broad requirement to determine the assessable value of the goods while keeping in mind the "***principles and general provisions***" of the CEVR.

8. The Revenue in the show cause notice duly invoked Rule 11 read with Section 4(1)(a), and also placed reliance on an earlier decision of the CESTAT, Bangalore, in ***Aquamall Water Solutions v. CCE***.[3] It was noted that the holding of the Tribunal had been affirmed by the Supreme Court in appeal.[4] On the strength of this, the show cause notice stated that the transaction value of the goods sold to the independent buyers would be transposed onto the sales made by the Assessee to its sister concerns in order to determine the appropriate excise duty chargeable. After undertaking the comparison between the two prices, the Revenue determined that the undervaluation of the sales to the related parties amounted to Rs. 24,14,05,257, and resulted in a shortfall in payment of Rs. 3,15,13,343 in excise duty. Further, due to the purported suppression of the differential in the prices at which the goods were being sold, the extended period of limitation of 5 years was invoked under the Proviso to Section 11A(1) & (4) of the CEA.[5]

3 2003 SCC OnLine CEGAT 119.
4 2006 (193) ELT A197 (SC).
5 **Section 11A. Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded.-**
(1) Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, for any reason, other than the reason of fraud or collusion or any wilful misstatement or suppression of facts or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of

9. The Assessee disputed the contents of the notice before the Commissioner. One of the contentions raised was that the Revenue had incorrectly invoked Rule 11 of the CEVR, read with Section 4(1) of the CEA, to value the goods that were sold to the Respondent's alleged sister concerns. The Department itself had issued a Circular on 01.07.2002[6] which clarified the manner in which valuation was to be done when sales are made to both independent and related buyers. The Circular stated:

No.	Question	Response
...	...	...
12.	How will valuation be done when goods are sold partly to related persons and	There is no specific rule covering such a contingency. Transaction value in respect of sales to unrelated buyers cannot be adopted for sales to

duty,-

(*a*) the Central Excise Officer shall, within one year from the relevant date, serve notice on the person chargeable with the duty which has not been so levied or paid or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice;

(*b*) the person chargeable with duty may, before service of notice under clause (*a*), pay on the basis of,-

(*i*) his own ascertainment of such duty; or

(*ii*)the duty ascertained by the Central Excise Officer, the amount of duty along with interest payable thereon under section 11AA.

...

(4) Where any duty of excise has not been levied or paid or has been shortlevied or short-paid or erroneously refunded, by the reason of-

(*a*) fraud; or

(*b*) collusion; or

(*c*) any wilful mis-statement; or

(*d*) suppression of facts; or

(*e*) contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty,

by any person chargeable with the duty, the Central Excise Officer shall, within five years from the relevant date, serve notice on such person requiring him to show cause why he should not pay the amount specified in the notice along with interest payable thereon under section 11AA and a penalty equivalent to the duty specified in the notice.

6 No. 643/34/2002-CX

	partly to independent buyers?	related buyers since as per Section 4(1) transaction value is to be determined for each removal. For sales to unrelated buyers valuation will be done as per Section 4(1)(a) and for sale of the same goods to related buyers recourse will have to be taken to the residuary Rule 11 read with Rule 9 (or 10). Rule 9 cannot be applied in such cases directly since it covers only those cases where all the sales are to related buyers only.

10. The Assessee took the stand that the valuation method adopted in the show cause notice for determining the transaction value for goods sold to related parties was contrary to the Circular. The Circular had been followed by the CESTAT, Ahmedabad, in ***Reliance Industries v. CCE, Surat***[7] where the Tribunal had noted that the formula outlined in Point No. 12, as reproduced above, for undertaking the valuation had not been contravened by any judicial forum. Thus, it was not open for the Department to go against its own administrative directions and the show cause notice was

7 2009 SCC OnLine CESTAT 3384.

defective and void ab initio on account of being contrary to the Revenue's interpretation of the CEVR.

11. The Commissioner rejected this argument after noting that the show cause notice had adhered to the spirit of Rule 11 by extrapolating the transaction value of the sales to the related parties from the price charged to independent buyers. This fulfilled the requirement of using "reasonable means" under Rule 11 while arriving at the assessable value, and was also in conformity with Section 4(1) of the CEA. Further backing for the correctness of this approach was drawn from different holdings by CESTAT Tribunals, including the aforementioned decision in ***Aquamall Water Solutions (Supra)***. The Commissioner asserted that there was nothing inconsistent between the Circular of 01.07.2002 and the conclusions arrived at in respect of the correctness of the valuation method invoked by the Revenue.

12. Eventually, the demand in the show cause notice was confirmed, along with a penalty of Rs. 2,34,42,050 and interest, prompting the Assessee proceeded to lodge an appeal before the CESTAT, Chandigarh. The CESTAT set aside confirmation order passed by the Commissioner and allowed the Respondent's appeal while holding:

i) Section 4(1)(a) of the CEA was not applicable as it referred to sales made exclusively to independent buyers. As part of the sales by the Assessee in the present case were to related buyers, reliance had to be placed on Section 4(1)(b) instead;

ii) The CBEC Circular of 01.07.2002 clarified the methodology to be adopted for determining the value of goods when sales are made to both independent and related buyers i.e. resort to Rule 11 read with either Rule 9 or 10 of the CEVR;

iii) The CESTAT in ***Reliance Industries (Supra)*** had affirmed the usage of the formula as provided in the Circular. The decision in ***Aquamall Water Solutions (Supra)*** relied upon by the Commissioner was distinguishable on facts, as the dispute in that instance exclusively involved transfer of goods solely to related parties;

iv) The show cause notice by the Revenue sought to assess the value of the goods by relying on Rule 11 of the CEVR, read with Rule 4 and Section 4(1)(a) of the CEA. This was contrary to the CBEC Circular and rendered the notice defective and unenforceable;

v) Consequently, the order of the Commissioner affirming a defective show cause notice would, necessarily, have to be set aside as well.

The Appellant-Revenue is now in appeal before us.

B. SUBMISSIONS

13. Mr. Balbir Singh, learned Additional Solicitor General, has assailed the impugned order of the CESTAT on the following grounds:-

i) There is no dispute regarding the fact that there was an undervaluation of sales made by the Assessee to the related parties;

ii) There is no requirement in law for there to be a specific manner in which the relevant Sections and/or Rules are quoted in a show cause notice. Rule 9, which the CESTAT concludes is the appropriate provision in this case, was mentioned in the show cause;

iii) Even if it is considered that the show cause notice did not sufficiently specify the relevant Rules, this has no consequence on its validity. It has long been established by this Court through successive judgments in ***J.K. Steel Ltd. v. Union of India***[8] and ***Collector of Central Excise, Calcutta v. Pradyumna Steel Ltd.***[9] that mere invocation of an incorrect provision as the source of a power is irrelevant, provided the power itself actually exists;

8 (1969) 2 SCR 481.
9 (2003) 9 SCC 234.

iv) The show cause notice merely cited the most apt method of ascertaining the independent selling price and the proper assessable value for the goods, in line with the spirit of Section 4(1) of the CEA;

v) In any case, Rule 9 of the CEVR cannot cover the specific factual scenario of the present dispute which involves sales made to both independent and related parties, as the scope of the provision is confined only to sales made to the latter.

14. On the contrary, Mr. S. Sunil, learned Counsel for the Respondent, has supported the holding of the CESTAT by drawing our attention to the following:-

i) The CBEC Circular of 01.07.2002 mandates the usage of Rule 11 read with either Rule 9 or 10 of the CEVR for ascertaining the value of excisable goods when sales are effected to both independent and related purchasers;

ii) The Circular is binding on the Revenue and it is not open for them to take a contrary stand. Various decisions of the Supreme Court support the proposition that the Department cannot act in contravention of its own administrative instructions as contained in its Circulars;

iii) Any departure from the Circular would have required either its modification or withdrawal. As the Revenue has done neither, it is not open for them to take an alternative stance;

iv) Apart from this, the show cause notice has invoked Rule 4 of the CEVR which is applicable only when the sale of goods does not take place at the time of removal from the factory. There is no dispute over the fact that sales were effectuated at the time of removal itself by the Assessee;

v) Regardless of whether the show cause notice is defective, the invocation of the extended period of limitation and the imposition of penalties under the CEA are unwarranted.

Having benefitted from the assistance of both parties, we may now examine their rival contentions.

C. ANALYSIS

C.1. BINDING NATURE OF CIRCULARS ISSUED BY THE DEPARTMENT

15. On first blush, it appears that the arguments from the Appellant-Revenue and Respondent-Assessee are on two separate footings. While the former assails the specific reasoning given by the CESTAT for setting aside the show cause notice in terms of invocation of an incorrect part of the CEVR, the latter is more concerned with the binding nature of the CBEC Circular issued by the Revenue itself.

16. It is clear that the latter question goes to the heart of the matter, rather than the issue of whether the show cause notice becomes legally untenable for failure to expressly mention that the valuation of the goods is to be done under Rule 11 read with Rule 9 of the CEVR. On the legal proposition advanced by learned ASG, we readily affirm that citation of an incorrect source of power does not vitiate the exercise of the power itself provided the power vests in the authority to begin with.

17. However, what needs to be additionally ascertained is whether the Appellant acted in contravention of its own Circular. The reason for this is that while citation of an incorrect provision may not, by itself, lead to an invalidation of the show cause notice, but contravention of a binding circular that mandates a particular methodology to be followed might. The power under the CEA for issuance of such administrative/executive directions is contained in Section 37B.[10] The binding nature of such Circulars has long been acknowledged by this Court. In ***The Paper Products Ltd. v.***

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10 **Section 37B. Instructions to Central Excise Officers. -**

The Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963), may, if it considers it necessary or expedient so to do for the purpose of uniformity in the classification of excisable goods or with respect to levy of duties of excise on such goods or for the implementation of any other provision of this Act, issue such orders, instructions and directions to the Central Excise Officers as it may deem fit, and such officers and all other persons employed in the execution of this Act shall observe and follow such orders, instructions and directions of the said Board :

Provided that no such orders, instructions or directions shall be issued-

a) so as to require any Central Excise Officer to make a particular assessment or to dispose of a particular case in a particular manner; or

b) so as to interfere with the discretion of the Commissioner of Central Excise (Appeals) in the exercise of his appellate functions.

Commissioner of Central Excise[11] the settled position on this point of law was noted in the following passage:

> "***4. The question for our consideration in these appeals is: what is the true nature and effect of the Circulars issued by the Board in exercise of its power under Section 37-B of the Central Excise Act, 1944? This question is no more res integra in view of the various judgments of this Court. This Court in a catena of decisions has held that the Circulars issued under Section 37-B of the said Act are binding on the Department and the Department cannot be permitted to take a stand contrary to the instructions issued by the Board. These judgments have also held that the position may be different with regard to an assessee who can contest the validity or legality of such instructions but so far as the Department is concerned, such right is not available***."

18. The rationale behind the requirement for the Revenue to abide by its own administrative directions and interpretation of different parts of the CEA and CEVR, was commented upon in ***Ranadey Micronutrients & Ors. v. Collector of Central Excise***[12]:

> "***15. There can be no doubt whatsoever, in the circumstances, that the earlier and later circulars were issued by the Board under the provisions of Section 37B, and the fact that they do not so recite does not mean that they do not bind Central Excise officers or become advisory in character. There can be no doubt whatsoever that after 21st November, 1994, Excise duty could be levied upon micronutrients only under the provisions of heading 31.05 as "other fertilisers". If the later circular is contrary to the terms of the statute, it must be withdrawn. While the later circular remains in operation the Revenue is bound by it and cannot be allowed to plead that it is not valid.***
>
> ***16. We reject the submission to the contrary made by learned counsel for the Revenue and in the affidavit by M.K. Gupta, working as Director in the Department of Revenue, Ministry of Finance. One should have thought that an officer of the Ministry of Finance would have greater respect for circulars such as these issued by the Board, which also operates under the***

11 (1999) 7 SCC 84.
12 (1996) 10 SCC 387.

> ***aegis of the Ministry of Finance, for it is the Board which is, by statute, entrusted with the task of classifying excisable goods uniformly. The whole objective of such circulars is to adopt a uniform practice and to inform the trade as to how a particular product will be treated for the purposes of Excise duty. It does not lie in the mouth of the Revenue to repudiate a circular issued by the Board on the basis that it is inconsistent with a statutory provision. Consistency and discipline are of far greater importance than the winning or losing of court proceedings.***"

19. Thus, the starting point of our analysis on this question is that the CBEC Circular of 01.07.2002 is binding on the Revenue. If the show cause notice issued by the Revenue is found to be contrary to the Circular, it would prima facie result in abrogation of the uniformity and consistency which is strongly emphasized upon in ***Ranadey Micronutrients (Supra)***. It goes without saying that the Revenue's stance against its own circular can potentially lead to a chaotic situation where, with one hand, the Revenue would lay down instructions on how to interpret the relevant statutes and rules, and with the other hand, it would promptly disobey those very directions. Maintaining predictability in taxation law is of utmost importance and, for this reason, the Court should not accept an argument by the Revenue that waters down its own Circular as this would fall squarely within the contours of the prohibition outlined in ***Paper Products (Supra)***.

C.2. CONFLICT BETWEEN A CIRCULAR, AND A JUDGMENT AND/OR THE STATUTE

20. While the Department's hands are tied with regard to its Circulars, no such prohibition operates on Courts and Tribunals. It is incumbent upon the adjudicatory bodies to ascertain the correct position of law unencumbered by the Revenue's interpretation as crystallized in its administrative directions. A Constitution Bench of this Court in ***Collector of Central Excise, Vadodara v. Dhiren Chemicals Industries***[13] while interpreting an exemption notification issued under the CEA, had noted in Para 11 of its judgment that "...***regardless of the interpretation that we have placed on the said phrase ["appropriate"], if there are circulars which have been issued by the Central Board of Excise and Customs which place a different interpretation upon the said phrase, that interpretation will be binding upon the Revenue.***"

21. ***Dhiren Chemicals (Supra)*** subsequently led to some uncertainty, as the paragraph reproduced above was interpreted to mean that Circulars issued by the Revenue would remain binding even if they went against the ratio of decisions by this Court. However, the true intention behind the passage, as recounted above, was clarified in ***Kalyani Packaging Industry v. Union of India***[14] by observing that:

> "***6. We have noticed that Para 9 (para 11 in SCC) of Dhiren Chemical's case is being misunderstood. It***

13 (2002) 2 SCC 127.
14 (2004) 6 SCC 719.

> ***therefore becomes necessary to clarify Para 9 of Dhiren Chemical's case. One of us (Variava, J.) was a party to the Judgment of the Dhiren Chemical's case and knows what was the intention in incorporating Para 9. It must be remembered that law laid down by this Court is law of the land. The law so laid down is binding on all Courts/Tribunals and Bodies. It is clear that circulars of the Board cannot prevail over the law laid down by this Court. However, it was pointed out that during hearing of Dhiren Chemical's case because of circulars of the Board in many cases the Department had granted benefits of exemption Notifications. It was submitted that on the interpretation now given by this Court in Dhiren Chemical's case, the Revenue was likely to reopen cases. Thus Para 9 was incorporated to ensure that cases where benefits of exemption Notification had already been granted, the Revenue would remain bound. The purpose was to see that such cases were not reopened. However, this did not mean that even in cases where Revenue/Department had already contended that the benefit of an exemption Notification was not available, and the matter was sub-judice before a Court or a Tribunal, the Court or Tribunal would also give effect to circulars of the Board in preference to a decision of the Constitution Bench of this Court. Where as a result of dispute the matter is sub-judice a Court/Tribunal is, after Dhiren Chemical's case, bound to interpret as set out in that judgment. To hold otherwise and to interpret in the manner suggested would mean that Courts/Tribunals have to ignore a judgment of this Court and follow circulars of the Board. That was not what was meant by Para 9 of Dhiren Chemical's case.***"

22. Following this, the position of law which materialized was that the Revenue was at liberty to issue Circulars on the interpretation or application of different provisions, but Courts and Tribunals would give effect to the decisions of the Supreme Court as the law of the land. Another Constitution Bench of this Court in ***Commissioner of Central Excise, Bolpur v. Ratan Melting and Wire Industries***[15] drew a line in the sand with regard to any future confusion on this point, in definitive terms and held as follows:

15 (2008) 13 SCC 1.

> "***7. Circulars and instructions issued by the Board are no doubt binding in law on the authorities under the respective statutes, but when the Supreme Court or the High Court declares the law on the question arising for consideration, it would not be appropriate for the Court to direct that the circular should be given effect to and not the view expressed in a decision of this Court or the High Court. So far as the clarifications/circulars issued by the Central Government and of the State Government are concerned they represent merely their understanding of the statutory provisions. They are not binding upon the court. It is for the Court to declare what the particular provision of statute says and it is not for the Executive. Looked at from another angle, a circular which is contrary to the statutory provisions has really no existence in law.***"

23. The other aspect of the dispute deals with whether the plain wording of Rule 9 of the CEVR abrogates the Circular in any way. On this point, a very recent decision of this Court by a 3-Judge Bench in ***Assistant Commissioner of Income Tax (Exemptions) v. Ahmedabad Urban Development***[16] has provided an interpretation of various past decisions, including the Constitution Bench in ***Ratan Melting (Supra),*** and laid down that:

> "***131. In the opinion of this court, the views expressed in Keshavji Ravji, Indian Oil Corporation and Ratan Melting and Wire Industries (though the last decision does not cite Navnit Lal Jhaveri), reflect the correct position, i.e., that circulars are binding upon departmental authorities, if they advance a proposition within the framework of the statutory provision. However, if they are contrary to the plain words of a statute, they are not binding. Furthermore, they cannot bind the courts, which have to independently interpret the statute, in their own terms. At best, in such a task, they may be considered as departmental understanding on the subject and have limited persuasive value. At the highest, they are binding on tax administrators and authorities, if they accord with and are not at odds with the statute; at the worst, if they cut down the***

16 2022 SCC OnLine SC 1461

plain meaning of a statute, or fly on the face of their express terms, they are to be ignored."

24. However, as we will elaborate upon below, we do not agree that there exists any conflict between the Circular dated 01.07.2002, and provisions of the CEVR at all. In any case, in the legal background set out above, even if we were to conclude that the provisions relied upon in the show cause notice was incorrect such a defect is curable and cannot be enough for the notice itself to be set aside.

25. As correctly submitted by learned ASG, invocation of the incorrect methodology for arriving at the assessable value is immaterial to the validity of the notice provided that the power itself existed. In this case, the residuary Rule 11 of the CEVR provides the basis for determining the assessable value of the goods in line with the principles contained in Section 4(1) of the CEA. Thus, the existence of the power is not in question and neither has the Respondent denied this.

26. We must not, however, lose sight of the distinction between the basis of the liability to pay additional excise duty, and the determination of the actual amount. The former is the bedrock on which the show cause notice lies and will form the foundation for further proceedings against the assessee. If the notice alleges shortfall in payment of excise duty on completely non-existent and

inapplicable grounds, the proceedings would be vitiated by the simple reason that assessees have a right to know in clear and unambiguous terms the exact nature of their liability. Assessees can only frame a response defending themselves based on the infractions that have been pointed out in the show cause. If, subsequently, the Revenue argues that an incorrect provision was cited and the liability in fact arises from a different source altogether, the assessee would be left in an untenable position as it would have only responded to what was stated in the show cause notice itself.

C.3. METHOD OF VALUATION FOR DETERMINING ASSESSABLE VALUE

27. Based on our reliance on ***Ratan Melting (Supra)*** and ***Ahmedabad Urban Development (Supra)*** we have no reason to doubt that if a circular has been issued contrary to statutory provisions or in defiance of the interpretation of such provisions by a judicial forum, the circular in question would be stripped of any binding force. The larger question that we must answer is whether the CBEC Circular of 01.07.2002 is, at all, contrary to either the CEA or the CEVR. A close reading of Section 4 of the CEA and Rules 4, 9 and 11 of the CEVR are necessary for this exercise. Rule 4, as we have noted already, is inapplicable in this case as it addresses situations where goods are not sold at the time of removal from the factory of the manufacturer. In this case, the Respondent-Assessee

admittedly sold the goods upon removal itself, hence Rule 4 is of no relevance.

28. Rule 9 addresses the valuation of excisable goods when sales are to related parties. Thus, we will focus on Section 4(1)(b) of the CEA, and Rules 9 & 11 of the CEVR. This final limb of our examination will be to determine the method adopted for valuation in cases of partial sales to both independent and related purchasers. Since Rule 11 merely refers back to the principles under the CEVR as a whole read with Section 4(1) of the CEA, it is arguable that there is still a gap in terms of how to proceed with the assessment. In normal circumstances, we may have left this responsibility to the Department but given the history of the case, we find it appropriate to fill in the blanks ourselves.

29. In fact, a solution to this problem already exists and it is drawn from the notion of "value" that exists under Section 4(1) of the CEA. This Court in ***Commissioner of Central Excise, Mumbai v. FIAT India (P) Ltd. & Ors.***[17] has commented on the deeming fiction created by Section 4(1) in the following manner:

> "***41. Section 4 of the Act, as we have already noticed, speaks of valuation of excisable goods, with reference to their value. The 'value' subject to other stipulation in Section 4 is deemed to be the 'normal price' at which the goods are 'ordinarily' sold to the buyer in the course of 'wholesale trade' where the buyer is not 'related person' and the 'price' is the 'sole consideration' for the sale. Against this background, for the purpose of this case, we have now to consider the meaning of the words 'value', 'normal price',***

17 (2012) 9 SCC 332.

> ***'ordinarily sold' and 'sole consideration', as used in Section 4(1)(a) of the Act.***
>
> ***42. The 'value' in relation to excisable commodity means normal price or the price at which the goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade at the time and place of removal where the buyer is not a related person and price is the sole consideration for sale. Stated another way, the Central Excise duty is payable on the basis of the value. The assessable value is arrived on the basis of Section 4 of the Act and the Central Excise Valuation Rules.***
>
> ***43. Section 4(1)(a) deems the 'normal price' of the assessee for selling the excisable goods to buyers to be the value of the goods for purpose of levy of excise duty. The expression 'normal price' is not defined under the Act.***"

30. In ***Commissioner of Central Excise, Ahmedabad v. Xerographic Ltd.***[18] which was in the context of transactions between related persons, the contrast between "normal price" and the price charged from 'related parties' was highlighted:

> "***6. Section 4(4)(c) defines the expression "related persons" and the said section has to be read in the context of third proviso to Section 4(1)(a). On the reading of the entire section it is clear that three conditions are required to be satisfied before invoking the third proviso. Firstly, there should be mutuality of interest; secondly, that the alleged related person should be related to the assessee as per definition of Section 4(4)(c) given in the Act and thirdly, and importantly, that the price charged from the "related persons" was not the normal price by the price lower than the normal price and because of extra-commercial considerations the price charged was less than the normal value.***"

31. In the present case, the factors mentioned in ***Xerographic Ltd. (Supra)*** have been clearly fulfilled as MIL and MSL were charged below the price that was imposed on independent buyers due to extra-commercial considerations. Hence, we can determine

18 (2006) 9 SCC 556.

the price of goods sold to related parties by perusing the price at which the sales were made to independent parties. In ***SACI Allied Products Ltd., U.P. v. Commissioner of Central Excise, Meerut***[19] the facts were very similar to the case before us. The sales by the Assessee were made to both 'independent' and 'related' parties and the question that arose was regarding fixing the assessable value of the goods that were conveyed to the latter entities. The 3-Judge Bench held that:

> ***19. …We have already extracted Section 4(1)(a) of the Act and the third proviso to Section 4(1)(a) of the Act in paragraph supra. In the present case, normal price satisfying the requirements of Section 4(1)(a) of the Act is available and there is no dispute on this factual position. About 35% of the production of the goods is sold by the appellants to independent and unrelated dealers spread through the country other than in Uttar Pradesh. There is no dispute raised by the Central Excise Department with regard to these sales. Appellants' sale price to these independent dealers duly satisfy the requirements of Section 4(1)(a) of the Act in every respect and there is no dispute on this factual position. In respect of these sales to independent dealers located other than in U.P., appellants have paid excise duty based on their sale price to these dealers. This factual position is not disputed by the respondent. It was argued that once such a wholesale price to an unrelated buyer satisfying the requirements of Section 4(1)(a) of the Act is available, then that price alone should be treated as the normal price in respect of all the sales made by the appellants including the sales made to related persons. In other words, where sales are made by the assesses to wholesale buyers who are unrelated and also to buyers who are related, then the price to unrelated buyers should be adopted as the basis for payment of excise duty even in respect of sales to related buyers. In such a situation, third proviso to Section 4(1)(a) of the Act will not come into play at all. Since in the present case, normal price to independent dealers is available, same should be***

19 (2005) 7 SCC 159.

> ***treated as the basis for arriving at the assessable value in respect of sales to Syndet also.***
>
> ***....***
>
> ***24-25. In this view of the matter, the argument advanced by Mr. A Subba Rao, learned counsel appearing for the respondent, has no merits. As a matter of fact, the Tribunal, by its order, has not questioned the genuineness of the sale between the appellants and Syndet. The appellants submitted before the Tribunal and also before the Collector that the depot of Syndet was existing right from 1976 and it was not created only after the appellants started selling the products to Syndet in 1990. The appellants, in support of this submissions, also filed affidavits of dealers, transporters, employees of Syndet. The Tribunal having accepted the sale as a genuine sale and having accepted that price to independent dealers is available under Section 4(1)(a) of the Act, the appellate Tribunal ought not to have rejected the submission of the appellants regarding the acceptance of price to independent dealers for sales to Syndet also.***"

32. This Court, thus, ruled that the amount charged from independent buyers can form the benchmark to calculate the appropriate assessable value of the goods sold to the related parties. This approach is of great assistance keeping in view the similarity between the facts and issues that arose in ***SACI Allied Products (Supra)*** and in the dispute before us.

33. The conclusion we reach from this is that the principles under Section 4(1) of the CEA are geared toward determination of the 'value' of goods. Under Section 4(1)(a), the value of goods for the purposes of excise duty, is deemed to be the 'normal price' of the goods that are 'ordinarily sold' in the course of business, and where the price is the 'sole consideration' for the transaction. It is only

when this cannot be gleaned from the set of transactions available on record that we resort to Section 4(1)(b).

34. The presumption under Section 4(1)(a) is that the sale from an Assessee to an independent party is the proper valuation to be used for determining excise duty. Conversely, a rebuttable presumption can be drawn regarding related party transactions and the value at which goods are sold in such situations. Rule 9 would be sufficient to resolve this issue when sales are made only to related entities, but where both independent and related parties are involved, we must refer to other means. In this context, Rule 11 obliges the Revenue to use "reasonable means" consistent with the principles under Section 4(1) of the CEA to arrive at the appropriate value. We observe that the show cause notice and the order of the Commissioner proceed along the basis that Section 4(1)(b) is applicable as the Assessee and MIL and MSL are related parties. Section 4(1)(a) was deemed to be inapplicable as it addresses situations where the parties are not related.

35. The unequivocal position which emerges before us is that the price charged from independent parties for the sale of excisable goods can be used as a benchmark for determination of excise duty on related transactions when such a price is readily available. However, we add the caveat that when making such calculations via transposition, the Revenue cannot act in a mechanical way. The

assessment of the appropriate value of the related party transaction must be made after considering relevant material and due application of mind. The entire quasi-judicial process of issuing a show cause notice and considering the distinguishing factors placed by the Assessee must be completed before the price of sales to independent buyers is utilized as a benchmark for sales to related parties. The general principles of Section 4(1) of the CEA, read with Rule 11 of the CEVR, are meant to provide a pathway for determination of the "normal price" and "value" of goods in cases where no alternative methodology is applicable. This fulfils the dual objectives of being in consonance with the Circular dated 01.07.2002 and harmonizing different provisions of the CEA and CEVR.

36. The sum and substance of our analysis is that the assessable value for the related party sales can be established by referring to the normal price under Section 4(1)(a) of the CEA, which is readily available in the present case. This is, in our opinion, the true meaning and intention underlying the Circular of 01.07.2002. The reference to Rule 11 in Point No. 12 of the Circular simply mandates the usage of "reasonable means" keeping in mind Section 4(1)(a) of the CEA and Rule 9 of the CEVR. This is merely a method by which the Revenue is required to apply its mind to a case of partial sales to both independent and related parties. The conclusion reached

through this process may very well be in consonance with our analysis.

37. Regardless of the value the Revenue finally settles upon, we do not find the Circular itself to be contrary to any statutory provisions. To do so would essentially render Point No. 12 ineffective and such an outcome should, ideally, be avoided as far as possible. In fact, the Commissioner's order proceeds to determine the value of the sales made by the Respondent-Assessee to its sister concerns on the basis of the value of its sales to independent parties. In our considered view, this is entirely consistent with the actual intent of the Circular dated 01.07.2002, which we have already held is not in contravention with either the CEA or the CEVR.

38. The only remaining facet of the case is the extended period of limitation invoked against the Respondent-Assessee under the CEA. The justification of extending the period of limitation depends upon whether the Respondent-Assessee has suppressed facts and failed to provide accurate information regarding its sales to the Revenue. To this extent, there is a finding of fact against the Assessee. At the same time, we are of the considered view that since the Revenue itself appeared to be unclear on the correct method of valuation of the goods, it is not appropriate to saddle the Respondent with additional liability, namely, other than the excise duty. Hence, though we confirm the demand made by the Appellant, we do not

approve the levy of interest and penalties upon the Respondent, and direct that these amounts be reduced from the total recoverable amount from the Assessee.

D. CONCLUSION

39. Having held so, we can now bring this matter to a close. For the purposes of current dispute, it suffices for us to clarify that Point No. 12 in the Circular of 01.07.2002 is not contrary to the intent of the CEA and CEVR and the object behind it is to merely use "reasonable means" as outlined under Rule 11 of the CEVR, in conformity with Section 4(1)(a) of the CEA and Rule 9 of the CEVR, so as to reach the assessable value of goods for determination of excise duty.

40. When the normal price that is ordinarily charged in dealings where the price itself is the sole consideration of the transaction is available, as it is here, that price can be transposed onto the related party purchases as well, to arrive at the assessable value. Hence, the order of the Commissioner regarding the value of the goods sold to the Respondent's sister concerns is in consonance with this Court's earlier judgments and the Circular dated 01.07.2002.

41. We allow the Civil Appeal in the abovementioned terms.

42. Pending applications, if any, are disposed of accordingly.

..... J.
(SURYA KANT)

..... J.
(J.B. PARDIWALA)

New Delhi:
December 05, 2022