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REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO(S). 9195-9196 OF 2010

M/S BILAG INDUSTRIES P. LTD. & ANR. ...APPELLANT(S)

VERSUS

COMMR. OF CEN. EXC. DAMAN & ANR. ...RESPONDENT(S)

J U D G M E N T

S. RAVINDRA BHAT, J.

1. The question which arises for consideration in these appeals, directed against an order of the Customs, Excise and Service Tax Appellate Tribunal[1] (hereafter 'CESTAT' or 'tribunal') is whether the price at which the appellant M/s Bilag Industries Ltd., Vapi (hereafter 'BIL') sold its products to the buyer, should be treated as a transaction with a "related person" under Section 4(4)(c) of the Central Excise Act, 1944 (hereafter "the Act").

2. BIL was incorporated as Mitsu Industries Ltd. (hereafter 'MIL') in 1992; it was formed by members of the Bilkhias family who were its major shareholders/promoters. MIL used to manufacture pesticides, insecticides and their intermediaries classifiable under Chapter 38, Central Tariff Act, 1985 (hereafter

[1] Dated 23.04.2010 in Order No. 330-337/WZD/AHB/20210

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‘CETA’). These fell under the broad category of pyrethroid products. Besides other products like Cypermethrin and alpha Cyermethrin, MIL manufactured Allethrins, Deltamethrin, and intermediates for the entire range of products. Before July 1999, MIL did not manufacture Esbiothrin and Esbiol (falling under the product group of Allethrins).

3. On 16.02.1998, AgrEvo GmbH and MIL signed a Letter of Intent, and on 22.11.1998 they signed a letter of Memorandum of Understanding (‘MOU’) expressing their intention to form a joint venture for research, manufacture, and sale of mainly synthetic pyrethroids products and their intermediates. Thereafter, MIL, AgrEvo GmbH, and AgrEvo SA entered into a Joint Venture Agreement (JVA) on 03.07.1999. This was for the purpose of researching, developing and manufacturing agrochemicals and environmental health products. MIL agreed to first transfer its entire non-pyrothroid business to another company, namely, Mitsu Pesticides Ltd.

4. On the date of closing of the JVA, MIL’s name was changed to M/s Bilag Industries Ltd. (‘BIL’). At the time of formation of the joint venture, AgrEvo SA held 51% of the share capital in BIL and the balance share capital in BIL was held by the Bilakhias family. Further to the JVA, a Technology and Know-How Licence Agreement (dated 13.07.1999) was entered into by AgrEvo SA and MIL. In terms of this licence agreement, the necessary process and know-how to manufacture Esbiothrin and Esbiol as per the specifications provided by AgrEvo SA was transferred to BIL. In terms of this agreement, AgrEvo SA had agreed to licence

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BIL to manufacture the allethrin molecules (i.e., Esbiothrin and Esbiol products) conforming to AgrEvo SA's specifications. Thus, as a JV partner, AgrEvo SA invested a certain amount as capital in BIL and also brought the technical know-how for the Joint Venture Company (BIL) to manufacture Esbiothrin and Esbiol products. In terms of the JVA, it was agreed that three members of the Bilakhias family (who were directors of MIL), were to be paid non-compete fee of ₹25.51 crores as conforming parties to the JVA. This non-compete fee bound the Bilakhias to not compete with the JVA after it came into force, i.e., from 03.07.1999.

5. BIL had been selling its manufactured products to various bulk formulators including Rhone Poulenc Agro Chemicals India Ltd./ Aventis CropScience (India) Ltd. The Esbiothrin purchased from BIL had been sold by Aventis CropScience (India) Ltd., to various end-consumers. Other products purchased from BIL were used by Aventis CropScience (India) Ltd., for formulation. The price at which the goods manufactured by BIL and sold to AgrEvo SA on export was based on supply agreement dated 03.07.1999. According to the supply agreement, BIL agreed to sell deltamethrin product at a particular price for different periods from April 1999 to March 2003. The price was to be arrived at on the basis of actual cost of production plus profit margin as mentioned in the table in Annexure 3.1(a) of the supply agreement dated 03.07.1999. Similarly, the allethrin products (Esbiothrin) were also agreed to be sold by BIL to AgrEvo SA at the actual cost plus mark up of 35% in 1999-2000, 30% in 2000-2001 and 25% in 2002-2003. Esbiothrin products were sold by AgrEvo SA outside India. BIL arrived at the price in the

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same manner for its sale to AgrEvo (India) Ltd. / Aventis CropScience (India) Ltd. within India. Certain changes in share holding patterns of foreign companies occurred later; however, they are not relevant for the purposes of deciding this case.

6. What is relevant for this case is that in BIL, AgrEvo SA held 51% of the share capital initially (which was increased to 74% subsequently) and it continued to hold more than 51%. BIL thus became a subsidiary of AgrEvo SA. AgrEvo SA held 100% shares in Aventis Crop Science (India) Ltd. Therefore, both BIL and Aventis Crop Science (India) Ltd. became subsidiaries of AgrEvo SA (the name of which was changed to Aventis CropScience SA around March 2000; both names are used interchangeably hereafter) during the relevant period. The dispute in this case arose as regards value of Esbiothrin. During the period between 19.04.2000 - 23.05.2001, BIL sold the goods to Aventis CropScience (India) Ltd., who sold the same to end customers. For this period, the revenue proposed to treat the price at which Aventis Crop Science (India) Ltd. sold the product to the end customers as the assessable value ignoring the transaction cost. The duty demand was ₹1,68,81,685/- for that period. An amount of ₹2,39,54,913/- was demanded on the ground that AgrEvo SA/ Aventis CropScience SA had recovered a sum of ₹14,97,18,205/- through its 100% owned subsidiary Aventis CropScience (India) Ltd. towards expenses incurred for advertising, publicity, marketing and selling expenses, storage, outward handling, servicing, warranty, etc., in terms of the agreement entered into with Sumitomo on the ground that since AgrEvo SA/ Aventis CropScience SA was the holding company of BIL, the amount paid by

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Sumitomo to AgrEvo SA/ Aventis CropScience SA should be treated as additional consideration and added to the value of the goods manufactured and cleared to BIL. An amount of ₹5,95,97,434/- was demanded as differential duty on Esbiuothrin during the period 09.06.2001 to 25.03.2004, on the ground that the price at which the goods were sold to end customers by Sumitomo should be the basis for determination of assessable value and that the sale by BIL to Aventis CropScience (India) Ltd. was to a "related" person. The order in original was appealed by BIL, to the CESTAT.

7. By the impugned order, the CESTAT noted that BIL had developed a process of manufacture of Esbiothrin which did not reach the final stage. Before that, AgrEvo SA, the foreign company became aware that a competitor was emerging, and it entered into a JVA. The result was that BIL stopped development of the process. It obtained know-how of the complete manufacturing process as well as the right to manufacture the product and then, sold the whole product to a subsidiary of AgrEvo SA. In return, BIL received technical know-how free of cost as well as an existing marketing set up developed by a subsidiary company of AgrEvo SA, at no cost. BIL was also assured of sale of the product and a level of profit for the manufacturing activities undertaken by it. It was free to develop other products. The shareholders of the private company, Bilakhias family members also got a lumpsum non-compete fee. In return, AgrEvo SA and the Indian subsidiary ensured that there were no competitors. The market established by them was intact. Furthermore, the product price at which they sold, needed no revision. The

marketing set up and the consumers identified by them would remain intact in the absence of any competitor. According to the CESTAT, these transactions between the foreign company (AgrEvo SA, later known as Aventis CropScience SA) and two Indian subsidiaries was a combined operation by which both benefited. Therefore, the price at which BIL sold the goods to Aventis Crop Science (India) Ltd., was to be treated as sales to a "related person".

8. Mr. V. Shridharan, learned senior advocate appearing on behalf of BIL, submitted that the impugned order is erroneous. He submitted that the test applied consistently by this court to decide if an entity was "related" to another has been whether the seller has an interest in the business and affairs of the buyer; and likewise, whether the buyer has an interest in the business of the seller. Even if one were present, in the absence of the other, there would be no relationship, for the purpose of Section 4(4)(c) and the transaction should be treated as one at arm's length. Learned counsel relied on the decisions of this court, reported as *Union of India & Others v. Atic Industries Ltd.*[2], *Union Of India & Ors v. Hind Lamp Ltd.*[3], *Commissioner of Central Excise, Hyderabad v. Detergents India Ltd.*[4], and *Commissioner of Central Excise, Chandigarh v. M/s Kwality Ice Cream Co.*[5]. It was argued that the synergies in production, achieved by the creation of the JVA, optimised the development and resources of the JV partners; the sale by BIL (the

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[2] [1984] 3 SCR 930
[3] [1989] 2 SCR 1023
[4] [2015] 6 SCR 886
[5] [2010] 14 SCR 409

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assessee), to Aventis CropScience (India) Ltd. (the buyer), another subsidiary of AgrEvo SA/Aventis CropScience SA did not result in BIL being deemed to have an interest in its business or affairs; likewise, Aventis Crop Science (India) Ltd. did not have any interest in BIL's business.

9. Mr. Arijit Prasad, learned senior counsel appearing for the revenue, pointed out that business relationships, and interest of one entity in the affairs or business of another cannot be placed in a straitjacket. The formation of the JVA and BIL, in which the foreign company AgrEvo SA/Aventis CropScience SA is a major shareholder, was for the purpose of ensuring that the products manufactured reached its overseas markets, through the medium of its subsidiary, Aventis CropScience (India) Ltd., which was owned to the extent of 100% by AgrEvo SA/Aventi CropScience SA. These clearly showed a real and live interest in the businesses of the buyer in each other. He therefore, submitted that the CESTAT's order should not be interfered with.

Analysis and Reasoning

10. The relevant part of Section 4 of the Act reads as follows:

> ***"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 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*

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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.
(2) Where, in relation to any excisable goods the price thereof for delivery at the place of removal is not known and the value thereof is determined with reference to the price for delivery at a place other than the place of removal, the cost of transportation from the place of removal to the place of delivery shall be excluded from such price.

(3) The provisions of this section shall not apply in respect of any excisable goods for which a tariff value has been fixed under sub-section (2) of section 3.

(4) For the purposes of this section-

(a) "assessee" means the person who is liable to pay the duty of excise under this Act and includes his agent;
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(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 the assessee, and any sub-distributor of such distributor."

11. In *Atic Industries* (supra), this court examined the expression "related person":

"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 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 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 per cent of the share capital. But we fail to see how it can be said that a limited company

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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 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 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 and Chemicals Limited. Perhaps the position in regard to Crescent Dyes and Chemicals Limited is much stronger then that in regard to Atul Products 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."

12. In the subsequent decision *Hind Lamp Ltd.* (supra), the same principle was echoed:

"It is not enough that the assessee has an interest, or indirect in the business of 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. To attract the applicability of the first part of the definition, 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 quality and degree of interest which each must have 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. After analysing the facts, this Court came to the conclusion that there was no relationship."

13. In *Detergents India Ltd.* (supra), this court examined both parts of the definition in Section 4(4)(c) and observed as follows:

"Section 4(4)(c) is in two parts. The first part requires the department to apply a de facto test, whereas the second part requires the application of a de jure test. "Relative" in the Companies Act, 1956 is defined as follows:

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A reading of the definition of "relative" would show that the relative need not be a person who is so associated with the Assessee that they have mutual interest in each other's businesses. If that were the case, the expression "relative" in the second part would be otiose inasmuch as a relative would be subsumed within "person" in the first part. Thus, "relatives" would also be "persons" who are so associated with the Assessee that they have a mutual interest in each other's businesses. The legislature by application of a de jure test has extended the meaning of "related persons" to include the entire list of relatives per se without

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more as related persons. Similarly, holding companies and subsidiary companies by virtue of the exercise of control by a holding company over a subsidiary company are similarly included by application of a de jure test.

We have indicated that the Assessee argued that the price paid by Shaw Wallace and Company for the same/similar products as was sold by unrelated entities to it was even lower than the price paid by Shaw Wallace to Detergents India Ltd. This being the case, it is clear that on facts here there is no "arrangement" between Shaw Wallace and Detergents India Limited to depress a price which is otherwise at arm's length. Though this fact is pleaded expressly before the Commissioner as pointed out above, the Commissioner's order does not contain any finding based on this fact."

14. The decision in *Commissioner of Central Excise, Aurangabad v. Goodyear South Asia Tyres Pvt. Ltd. & Ors.*[6] is instructive. The assessee, a JV entity of Goodyear and CEAT (both of whom had equal share in it), had borrowed substantial sums of money from both Goodyear and CEAT. Later, CEAT transferred its entire shareholding to Goodyear. The revenue alleged that the assessee and Goodyear were related persons, which was negatived by this court:

"7. 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.
8. 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…"

15. In *Kwality Ice Cream* (supra) again, the court underlined the interdependence and mutuality of business interests of the two entities, viz. the assessee and the buyer:

"On analysis of the decisions referred to herein above, it appears what is important is that each of the parties involved should have an interest, whether direct or indirect in the business of each other. The following are the relevant clauses of the agreement between M/s. Kwality Ice Cream and BBLIL/HLL

[6] (2015) 11 SCC 646

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based on which and applying the principles referred to herein above, a view is required to be taken as to whether they are 'related persons'.
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What is of importance is certain interdependence and reciprocity beyond the relationship of either a distributor or manufacturer so as to consider as to whether the parties are 'related persons'. On the facts it is noticed, essentially the relationship between M/s. Kwality Ice Cream and BBLIL/HLL is one sided and the facts do not suggest that each one of them have interest direct or indirect, in the business of each other."

16. On the other hand, if one were to consider what constitutes inter-relationship, the decision in *Supreme Washers Pvt. Ltd. v. Commissioner of Central Excise, Pune*[7], is instructive. The assessee and the buyer were involved in common procurement of raw material; they had common stock accounting and planning and interdependence in manufacturing operations. This court held that holding common stock of raw material and semi-finished goods, with common use of machinery between the three units, with common marketing arrangements and free flow of finance between the three units, cumulatively established the assessees' inter relationships and interdependence of all three units with each other.

17. In the present case, undoubtedly AgrEvo SA/ Aventis CropScience SA holds the entire shareholding in Aventis CropScience (India) Ltd. (the buyer). It also is a shareholder in BIL. All of the latter's products are sold to Aventis CropScience (India) Ltd. However, this does not show that BIL has any business interest or interest in the affairs of Aventis CropScience (India) Ltd., nor, conversely, that Aventis CropScience (India) Ltd has any such interest, direct or indirectly in BIL. The revenue's concern in examining whether the parties were related might be

[7] (2003) 1 SCC 142

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justified; however, it could not have concluded that such relationship, as is contemplated by Section 4(4)(c) could have been inferred, without applying the proper test. Additionally, the revenue had the materials before it, in the form of documents which indicated the mark up towards profit margin, and other objective evidence to compare, if indeed, the cost of the goods sold, were depressed, or were comparable to the market price of the same or similar goods. There is no finding that the price of the goods was lower than what was the price of those goods, in the market.

18. In view of the foregoing discussion, it has to be concluded that the revenue's decision in rejecting the value at which the goods were sold, by treating the assessee as a related person, was erroneous. For the same reasons, it is held that the impugned order cannot be sustained; it is set aside. The appeals are allowed, but in the circumstances, without any order on costs.

...J.
[S. RAVINDRA BHAT]

...J.
[DIPANKAR DATTA]

New Delhi,
March 22, 2023.