

(1992) 01 GUJ CK 0001

In the Gujarat High Court

Case No : Special Civil Application No. 1423 of 1987

Alembic Glass Industries Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 22-01-1992

Acts Referred:

Central Excise Rules, 1944 — Rule 173B, 9(2)

Central Excises and Salt Act, 1944 — Section 11A, 11A(1), 14, 35E, 4

Citation : (1993) 41 ECC 251 : (1993) ECR 147 : (1992) 59 ELT 207 : (1992) 2 GLR 1301

Hon'ble Judges : J.M. Panchal, J;A.P. Ravani, J

Bench : Division Bench

Advocate : Kamal B. Trivedi, for Trivedi, Gupta and Dave, for the Appellant; B.B. Naik, for the Respondent

Judgement

Ravani, J.—Petitioner No. 1 is a company registered under the provisions of Companies Act, 1956 and petitioner No. 2 is a shareholder thereof. The petitioners challenge the legality and validity of order passed by the Collector, Central Excise and Customs. Baroda dated February 26, 1987 by which the Collector held that there was short payment of duty of excise as alleged in the show cause notices dated March 29, 1982 and August 6, 1983 which were issued under Rule 9(2) of the Central Excise Rules read with first proviso to sub-section (1) of Section 11A of the Central Excises and Salt Act, 1944. The Collector confirmed the demand made in the show cause notices referred to hereinabove and ordered the petitioner company to pay the duty of excise as per the details mentioned hereinbelow :

Rs. 29,11,209.83 ps. (28,06,564.24 ps. as basic duty + 1,04,645.58 ps. spl. ex. duty) Rs. 6,83,928.73 ps. (Rs. 6,51,360.69 ps. as basic duty + Rs. 32,568.84 special ex. duty) ----- Rs. 35,95,138.56 ps. -----

The Collector also imposed penalty of Rs. 8 lakhs (rupees eight lakhs only) in respect of the show cause notice dated March 29, 1981 and Rs. 2 lakhs (repees two lakhs) in respect of the show cause notice dated August 6, 1983 under the

provisions of sub-rule (1) of Rule 173-Q of the Central Excise Rules, 1944.

2. The petitioner company is inter alia engaged in the business of manufacturing and selling glassware including hollow wares and press wares falling under Tariff Item No. 23-A of the First Schedule to the Central Excises & Salt Act, 1944 as it was in force upto February 22, 1986. Thereafter the said article falls under Chapter 70 of the Schedule to the Central Excise Tariff Act, 1985.

3. A show cause notice dated March 29, 1982 covering the period commencing from September 6, 1979 to August 15, 1981 or thereabout was issued to the petitioner company calling upon it to show the reasons as to why the amount of duty of Rs. 29,11,209.83 ps. which was not paid by the company be not recovered from it. The company was also required to show cause as to why penalty as provided under Rule 173Q(1) of the Rules be not imposed upon it. Similarly a show cause notice dated August 6, 1983 was also issued covering the period from August 16, 1981 to January 15, 1982, by which the petitioner company was called upon to show cause as to why an amount of Rs. 6,83,928.73 ps. of duty of excise which was not paid by the company be not recovered from it. The company was also called upon to show cause as to why penalty as provided under Rule 173Q(1) of the Central Exise Rules, 1944 be not imposed. The company appeared before the Collector who after hearing the parties passed order dated February 26, 1987 as indicated hereinabove. The petitioner has challenged the legality and validity of this order by filing this petition. It may be noted that by order dated December 29, 1984, the Collector passed an order confirming the demand. It was challenged by the petitioners by filing Spl. C.A. No. 700 of 1985. This court (Coram : B. K. Mehta & G. T. Nanavati, JJ.) by order dated February 15, 1985 gave certain directions to the department and ordered to hear the petitioner company afresh. After this order dated February 15, 1985, the petitioner company has been afforded an opportunity of being heard and thereafter the Collector has passed fresh order dated February 26, 1987, and it is under challenge in this petition.

4. Facts leading to the controversy. From the 35th and 36th Annual report for the years 1979 and 1980 respectively of the petitioner company, it transpired that there were ten directors of the company. Out of these ten directors; Shri Ramanbhai B. Amin, Smt. Dhiraben R. Amin and Shri Chirayu R. Amin were the directors and Shri Ramanbhai B. Amin was the Chairman of the Board of Directors of the Company. As on December 31, 1979 and on December 31, 1980, the petitioner company held 34,152 equity shares of Rs. 100/- each in M/s. Alembic Chemicals Works Company Ltd. Baroda which was engaged in the manufacture of patent or proprietary medicines falling under Item 14-E of the First Schedule to the Act as it was then in force. From 73rd and 74th Annual Reports of the years 1979 and 1980 of Alembic Chemical Works Company Ltd., it transpired that three directors namely, Shri Ramanbhai B. Amin, Smt. Dhiraben R. Amin and Shri Chirayu R. Amin were also directors of Alembic Chemical Works Company Ltd. and Shri Ramanbhai B. Amin was the Chairman of Board of

Directors of Alembic Chemical Works Company Ltd. also. To this company, i.e. Alembic Chemical Works Company Ltd. the petitioner company sold substantial portion of its product-hollow wares during the period in question. This buyer company, i.e. Alembic Chemical Works Company Ltd. also held 37,428 equity shares in the petitioner company, i.e. Alembic Glass Works. Thus there were common directors and common Chairman for both the companies and both the companies reciprocally held equity shares of each other and thus both had interest in the business of each other.

5. The petitioner company was supplying hollow wares manufactured by it to different industrial consumers who did not resell the goods purchased by them and used the same for the purpose of their own packing requirements. The largest buyer was Alembic Chemical Works Company Ltd., which purchased about 66 different items during the period commencing from March 1978 and March 1981 or thereabouts. There were other small scale buyers who included M/s. Sarabhai Chemicals, M/s. Parke Davis (India) Ltd., M/s. Swastik Household and Industrial Products, M/s. Parlour Exports Ltd. etc.

6. The petitioner company filed price list from time to time in Part I prescribed for excisable goods intended for sale to buyers in the course of wholesale trade as provided u/s 4(1)(a) of the Act. [Proforma for price list to be submitted in different forms is prescribed. Price list Part I is required to be filed "for excisable goods for sale by the assessee to buyers (not being related persons) in the course of wholesale trade - Section 4(1)(i) main definition clause], while price list Part II is prescribed for excisable goods for sale to classes of buyers (not being related persons) [Section 4(1)(a) proviso (i)]. Price list Part III is prescribed for excisable goods for sale on the basis of the price or the maximum price fixed under any law for the time being in force [Section 4(1)(a) proviso (ii)]. Proforma Part IV of the price list is prescribed for excisable goods for sale to or through related persons [Section 4(1)(a), proviso (iii)]. The petitioner company did not file price list in Part II which relates to sales at different prices to different classes of buyers not being related persons nor did it file price list in Part IV which related to sales of goods to or through related persons. It was alleged in the show cause notice that barring one or two stray occasions, the petitioner company did not make upward revision in prices of its product of hollow wares numbering about 66 items supplied to Alembic Chemical Works Company Ltd. after September 6, 1979. On the other hand, in respect of the prices of hollow wares supplied to other small scale buyers referred to hereinabove, there was upward revision of prices. It appeared that upward revision was made on account of general spurt in prices of all commodities and particularly in the prices of essential raw materials, such as quartz, sand and soda ash used by the petitioner in the manufacture of hollow wares.

7. The summons dated August 21, 1981 as provided u/s 14 of the Act was issued by the Superintendent of Central Excise (Preventive Branch) and the petitioner was called upon to produce documents specified therein which included :

- (1) the correspondence relating to fixing of prices of their products supplied to Alembic Chemical Works Co. Ltd.;
- (2) the cost data for each of the products supplied by the company to Alembic Chemical Works Co. Ltd.; and
- (3) the cost data of other products supplied to other buyers for the years 1978 to 1981.

The petitioner company initially sought adjournment for replying to the summons but ultimately submitted reply dated August 26, 1981. Therein it was contended that once price list was filed and approved by the appropriate officer under the provisions of Rule 173-C no such enquiry was permissible. It was also contended that the price list had become final and conclusive and it was binding upon both the sides and it could not be reopened except by filing appeal or revision. The petitioner company did not produce the documents and did not furnish the details as called for by the summons. Thus the summons remained uncomplied.

8. During the course of investigation, Shri C. N. Jani, Assistant Manager, (Sales Execution) Marketing Division, submitted a typed prepared statement before the officer of the department on September 28, 1981. Therein it was stated that for most of their buyers the petitioner company filed price list in Part I and it also filed price list in Part II in respect of supplies made to Government and others. It was stated therein that supplies made to Alembic Chemical Works Co. Ltd. were on principal to principal basis and that the petitioner company had revised the prices in respect of the products supplied to Alembic Chemical Works Co. Ltd. during the period on 1-4-1979, 1-7-1979 and 6-9-1979 and that thereafter the prices of bottles and vials supplied to Alembic Chemical Works Company Ltd. were revised on August 16, 1981. It was also stated in the statement that the prices once declared and approved by the department could not be reopened at a later stage.

9. After the commencement of the enquiry, the petitioner company filed price list in Part I bearing No. 41 on August 16, 1981. This was the first upward revision of prices after September 6, 1979 in respect of the products mentioned therein and supplied to Alembic Chemical Works Company Ltd. As indicated in the notice, this upward revision was without assigning any reason as to why the enhancement of the prices was necessary after a long period of time since September 6, 1979. It was also not disclosed as to why the enhancement in prices was not made earlier in the same manner as it was done in respect of supplies made to other small scale buyers though there was rise in the cost of raw materials and inputs as indicated in Directors' report dated April 12, 1980.

10. Since the summons was not complied with, the investigating officer proceeded further with the enquiry as he deemed proper and feasible in the situation. It appears that he looked into the relevant purchase bills in respect of the essential raw materials i.e. quartz sand and soda ash purchased and used by the petitioner company in the manufacture of products. On the basis of purchase

invoice of quartz sand and soda ash, it appears that there was progressive and steep rise in the prices following the period September 1979. After September 6, 1979 the first upward revision of prices was made in respect of supplies to Alembic Chemical Works Company Ltd. on August 16, 1981 by filing price list No. 41. On the basis of the materials available it was alleged that the correct assessable value for the goods cleared worked out to Rs. 3,69,08,324.40 ps. (Rupees three crores sixty-nine lakhs eight thousand three hundred twenty-four and paise forty only) as against the lower assessable value of Rs. 2,99,34,420.62 ps. (Rupees two crores ninety-nine lakhs thirty-four thousand four hundred twenty and paise sixty-two only) declared by the petitioner for determining its liability to pay the duty.

11. In view of the aforesaid position, it was alleged that the petitioner company had suppressed facts and it had wilfully misstated the facts when it filed the prices list on 19-6-1980 and 1-3-1981 in respect of other small buyers that is after 6-9-1979 and in respect of the hollow wares manufactured and supplied by it to Alembic Chemical Works Company Ltd., the largest purchaser of its product. It was also alleged that the petitioner company had interest in the business of Alembic Chemical Works Company Ltd. and Alembic Chemical Works Company Ltd. had reciprocal interest in the business of Alembic Glass. It was alleged that the petitioner company did not make upward revision in the prices of the products in question though such upward revision was made in respect of other small scale buyers. It was also alleged that the petitioner company was required to make upward revision of prices in the context of the increase in the cost of the basic material purchased and used by it in the manufacture of hollow wares. As indicated in the Directors' Report dated April 12, 1980, there had been steep rise in the cost of inputs and on different heads. That after commencement of the enquiry, the company enhanced the price of the hollow wares vide its price list No. 41 dated August 16, 1981. Thus it was alleged that there was wilful suppression and misstatement of facts and the company had refused to comply the summons issued to it on August 21, 1981.

12. After considering the reply submitted by the petitioner to the show cause notice and after hearing the petitioner company, the Collector, inter alia, held that the petitioner company had been filing price list without making any upward revision in the prices of its hollow glasswares supplied to M/s. Alembic Chemicals Works Company Ltd., that the Chairman and three of the directors were common to the petitioner company and to M/s. Alembic Chemical Works Company Ltd., and that both the companies were holding equity shares in each other and therefore they had interest in the business of each other and that M/s. Alembic Chemical Works Company Ltd. was related person. The Collector did not believe the contention that the price lists were pre-determined on the basis of the contracts entered into which were purely out of commercial transaction. The Collector held that the petitioner company had filed price list in Part I and not in Part II which would require the particulars to be recorded if the price was on a contract basis for different buyer. The Collector held that since the price lists

were not filed in Part II and though different price was charged in respect of the supplies made to Alembic Chemical Works Company Ltd., the petitioner company had contravened the provisions of Rule 173C and had suppressed the facts. The Collector also held that the petitioner company had not produced any contract of sale at the material time. As regards the wilful suppression of facts and misstatement, the Collector observed that this was noticed during the visit of the Additional Collector, Simply because other officers did not point out the same, it did not cease to be suppression. The Collector held that the petitioner company had not disclosed the fact of charging different prices and therefore there was suppression of facts. As indicated hereinabove, the Collector confirmed the demand as per the details mentioned hereinabove. The petitioners have challenged the legality and validity of this order in this petition.

13. It is contended that the conclusion arrived at by the Collector is based on obvious misinterpretation, and disregard to the provisions of law particularly Section 4(4)(c) which defines "Related person". At this stage, it would be appropriate to reproduce the relevant part of the provisions of Section 4 of the Act which reads as follows :

"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 value, such value, shall, subject to the other provisions of this section, be deemed to be -

(a) the normal price thereof, that is to say, the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal, where the buyer is not a related person and the price is the sole consideration for the sale :

Provided that -

(i) where, in accordance with the normal practice of the wholesale trade in such goods, such goods are sold by the assessee at different prices to different classes of buyers (not being related persons) each such price shall, subject to the existence of the other circumstances specified in clause (a), be deemed to be the normal price of such goods in relation to each such class of buyers;

(ii) where such goods are sold by the assessee in the course of wholesale trade for delivery at the time and place of removal at a price fixed under any law for the time being in force or at a price, being the maximum, fixed under any such law, then, notwithstanding anything contained in clause (iii) of this proviso, the price or the maximum price, as the case may be, so fixed, shall, in relation to the goods so sold, be deemed to be the normal price thereof.

(iii) where the assessee so arranges that the goods are generally not sold by him in the course of wholesale trade except to or through a related person, the normal price of the goods sold by the assessee to or through such related person shall be deemed to be the price at which they are ordinarily sold by the related

person in the course of wholesale trade at the time of removal, to dealers (not being related persons) or where such goods are not sold to such dealers, to dealers (being related persons), who sell such goods in retail;

(b) where the normal price of such goods is not ascertainable for the reason that such goods are not sold or for any other reason, the nearest ascertainable equivalent thereof determined in such manner as may be prescribed.

(2) X X X X X X

(3) X X X X X X

(4) For the purposes of this section, -

(a) X X X X X X

(b) X X X X X X

(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);

(d) X X X X X X

(e) X X X X X X"

14. The contention may be examined. In the instant case, the petitioner company has shareholding to the extent of 34,152 equity shares of Rs. 100/- each in Alembic Chemical Works Company Ltd., while the Alembic Chemical Works Company Ltd., holds 37,428 equity shares in Alembic Glass, i.e. the petitioner company. Thus both have reciprocal interest in the business of each other. Moreover three of the directors are common. Chairman of both the companies is also common. In view of this position, it cannot be said that the assessee company and Alembic Chemical Works Company Ltd. have no interest in the business of each other. The shareholding of each in other company cannot be said to be negligible. The Collector has committed no error whatsoever in coming to the conclusion that Alembic Chemical Works Co. Ltd. was related person and also a favoured buyer.

15. There was enough material on record before the Collector to come to the conclusion that the upward revision of prices was necessary in respect of hollow wares produced by the petitioner company and supplied to Alembic Chemical Works Company Ltd. This is evident from the following circumstances :

1. that the Directors' report dated April 12, 1980 which found its place in the 35th Annual Report of the Company for the year 1979 referred to the steep price rise of raw materials namely quartz sand and soda ash.

2. that there was in fact upward revision in prices of other small scale buyers.

3. that the petitioner company did not comply with the summons issued to it and did not produce the correspondence relating to fixation of prices of its products supplied to Alembic Chemical Works Co. Ltd. and it did not produce cost data of each of the products supplied by it to Alembic Chemical Works Co. Ltd. and also supplied to other buyers for the period in question. The company did not produce any contract of sale with Alembic Chemicals when the appropriate officer of the Excise Department called for the same.

In view of the aforesaid position, it cannot be said that the Collector has committed any error in taking into consideration the upward revision of prices and the rise in cost of raw material while arriving at the assessable value of the goods in question.

16. It was contended that when the Collector held that Alembic Chemical Works Co. Ltd. was "related person" then the only course left open to the Collector was to determine the assessable value of the goods as provided in 3rd proviso to Section 4(1)(a) of the Act. In this provision, it is laid down that when an assessee sells its goods through a related person, the price charged by the related person in the course of wholesale trade would be the price for determining the assessable value of the goods. However, this contention cannot be accepted. It is an admitted position that Alembic Chemical Works Company Ltd. to whom the largest supplies have been made by the petitioner company is engaged in the business of patent and proprietary medicines. It purchased the products of the petitioner company, i.e. hollow wares for packing purposes and for not selling the same in the market. Therefore, there could not be any price at which the goods can be said to have been sold in the course of wholesale trade by Alembic Chemical Works Company Limited.

17. The Collector has referred to the decision of the Supreme Court in the case of Union of India (UOI) and Others Vs. Bombay Tyre International Ltd. and Others, . After referring to the aforesaid decision of the Supreme Court, the Collector has held that proviso to Section 4(1) of the Act empowers the appropriate excise officer to determine the true value of the excisable articles after taking into account any concession shown to a special or favoured buyer because of extra-commercial consideration in order that the price be ascertained only on the basis that it is a transaction at arm's length. In the case of Bombay Tyre International (supra) in Para 44 of the reported decision in AIR, the Supreme Court has inter alia observed that the new Section 4(1) contains inherently within it the power to determine the true value of the excisable article, after taking into account any concession shown to a special or favoured buyer because of extra-commercial considerations in order that the price be ascertained only on the basis that it is a transaction at arm's length. As observed by the Supreme Court the aforesaid requirement is emphasised by the provisions in the new Section 4(1)(a) that the price should be the sole consideration for the sale. The Supreme Court has observed as follows :

"That requirement is emphasised by the provision in the new Section 4(1)(a) that the price should be the sole consideration for the sale. In every such case, it will be for the Revenue to determine on the evidence before it whether the transaction is one where extra-commercial considerations have entered and, if so, what should be the price to be taken as the value of the excisable article for the purpose of excise duty."

Thereafter the Supreme Court has further observed that there are certain specific categories of transactions which fall within the tainted class, in which case an irrebuttable presumption will arise that transactions belonging to those categories are transactions which cannot be dealt with under the usual meaning of the expression "normal price" set forth in the new Section 4(1)(a). In such cases, it will not be necessary for the Revenue to examine the entire gamut of evidence in order to determine whether the transaction is one prompted by extra-commercial considerations. The Supreme Court has further observed that in such cases it will be open to the Revenue on being satisfied that the 3rd proviso to the new Section 4(1)(a) read with the definition of "related person" in Section 4(4) (c) is attracted to proceed to determine the value in accordance with the terms of third proviso.

18. The aforesaid observations make it clear that where there is transaction of goods of the categories falling within the tainted class, it would be open to the Revenue to have resort to the provisions of Section 4(4)(c) and determine the excisable value accordingly. But this does not mean that where it is not possible to find the sale price by the "related person", the Revenue cannot determine the price as provided u/s 4(1) of the Act. In this connection, observations made by the Supreme Court in para 29 and 30 of the reported decision *Union of India (UOI) and Others Vs. Bombay Tyre International Ltd. and Others*, in the case of *Bombay Tyre* are relevant. As observed therein the fundamental criterion for computing the value of an excisable article is the price at which the excisable article or an article of the like kind and quality is sold or is capable of being sold by the manufacturer. This position of law is made clear by the Supreme Court when it has made further observations in para 44 of the decision to the effect that new Section 4(1) contains inherently within it the power to determine the true value of the excisable article after taking into account any concession shown to a special or favoured buyer because of extra-commercial considerations. This power is conferred in order that the prices be ascertained only on the basis that it is a transaction at arm's length.

19. In this case the Collector has taken into consideration the following facts and circumstances :

- (1) upward revision in prices in case of other small scale buyers;
- (2) the suppression of facts as regards the fact that the largest buyer namely, Alembic Chemical Works Co. Ltd. was a related person;
- (3) that the assessee company did not produce the documents called for in the

summons;

(4) that the assessee company did not file the correct price list i.e. it did not file price list in part II or in part IV as required under the provisions of Section 4(1) of the Act.

If the contention advanced by the petitioner is accepted, it would mean that in cases where the goods have been sold to a related person who in turn does not sell the goods in market, but utilises the same for packing purposes or for manufacturing of other goods, it would not be possible for the department to arrive at a correct assessable value of the goods in question and the power conferred upon the appropriate officer of the excise department to determine the correct assessable value would be meaningless. This interpretation would make the provisions of Section 4(1) of the Act unworkable. This interpretation which leads to unworkable results and therefore brings about absurdity cannot be accepted.

20. It was contended that had the Collector come to the conclusion that Alembic Chemical Works Company Ltd. was something more than related person then only he could have come to the conclusion that Alembic Chemical Works Company Ltd. was a favoured buyer. The learned counsel for the petitioner has submitted that the price list was filed in Part I and price was the sole consideration for the transactions and that there was no extra-commercial consideration. Therefore in his submission, the Collector committed an error in determining the assessable value on the basis that the supplies were made to a favoured buyer i.e. Alembic Chemical Works Company Ltd. The aforesaid submission was made by relying upon the decision of the Supreme Court in the case of Union of India (UOI) and Others Vs. Bombay Tyre International Ltd. and Others, , in the case of Juggi Lal Kamalpat Vs. Commissioner of Income Tax, U.P., and in the case of Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam Vs. K. Kelukutty, .

21. Having regard to the facts of the case, the aforesaid submission cannot be accepted. In the instant case, though the petitioner company sold the goods to different class of buyers at different prices, the petitioner company did not file price list in Part II as envisaged in first proviso to Section 4(1)(a) of the Act. This itself was misstatement. Moreover, there was upward revision of prices in cases of other small scale buyers. While in case of supplies to Alembic Chemical Works Company Ltd., such upward revision has not been made except on stray occasions. This is a finding of fact and it is based on evidence. Directors' report which formed part of the 35th Annual Report of the company itself indicated that there was steep rise in the prices of raw materials of the product (hollow wares). Despite this position no upward revision of price has been made in respect of the supplies of 66 items to Alembic Chemical Works Company Limited. This is sufficient to show that there is extra-commercial consideration in making large scale supply of about 66 items of hollow wares to Alembic Chemical Works Company Limited at a lower price. Moreover the petitioner company did not

comply with the summons and did not produce the correspondence called for and the cost data. In view of this position, it cannot be said that the Collector has committed any error in concluding that there was short payment of duty.

22. The contention that for bringing the assessee company and the Alembic Chemical Works Company Limited within the definition of related person, the shareholding of each other should be much more has no merits. In the case of Union of India (UOI) and Others Vs. Atic Industries Ltd., , the Supreme Court inter alia observed that it is essential to attract the applicability of the first part of the definition of related person 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 quality and degree of interest which each has in the business of the other may be different and 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. Thus as observed by the Supreme Court even some interest in the business of each other would be sufficient to hold that a person is a related person. In the instant case, the assessee company is holding 34,152 equity shares of Rs. 100/- each in Alembic Chemical Works Company Limited and it is little over 9% of the total shareholding. On the other hand, Alembic Chemical Works Company Limited is holding 37,428 equity shares which is about 14% of the total shareholding. This shareholding cannot be said to be nominal or negligible by any reckoning. Coupled with the aforesaid facts, the Chairman of both the companies is common and three of the directors are also common. Thus the Collector has rightly come to the conclusion that Alembic Chemical Works Company Limited was a related person and the supplies made to it have been on the basis of extra-commercial consideration.

23. The contention that the petitioner while filing the price list has declared all that was required to be declared cannot be accepted. The petitioner company was required to make declaration below price list part I which reads as follows :

"I/We declare that -

(i) the price shown in Column 3 is the sole consideration and no other consideration flows or will flow directly or indirectly from my/our buyers to me/us; or the price shown in Column 3 is not the sole consideration and the amount of the money value of the other consideration is Rs.

(ii) the discounts shown above are normal trade discounts unconditionally and uniformly allowed by me/us to my/our buyers and they are not refundable on any accounts whatsoever by the buyer to me/us;

(iii) in respect of the goods not so sold, I/we have shown the required particulars in other parts of this proforma;

(iv) the particulars herein furnished are true and complete to the best of my/our knowledge and belief.

Place Date Assessee Note - Where the value as approved is different from the value as claimed, reasons may briefly be indicated by the proper officer in the "Remarks column".

The petitioner company did not make true and complete disclosure of all the relevant information which it was required to make as per its own declaration in clause (iv) referred to hereinabove. The petitioner did not file correct price list. The petitioner ought to have filed price list in part II if there were different classes of buyers and different prices were charged. The petitioner did not file the correct price list and thus made misstatement. The petitioner very well knew that it had shareholding in Alembic Chemical Works Company Limited. Similarly Alembic Chemical Works Company Limited had also shareholding in the petitioner company. The Chairman and three of the directors are common. In view of this position, the petitioner knew about the business of each other. The petitioner company had the knowledge about the upward rise in the prices of raw materials. The petitioner company, in fact, charged higher prices in respect of small scale buyers. The petitioner withheld the information with regard to the different prices charged to different classes of buyers. It also withheld the information regarding interests in the business of Alembic Chemical Works. The petitioner also withheld the information as regards the alleged contract of sale with Alembic Chemical Works Company Limited. Though called for by issuing summons, the petitioner did not disclose the correspondence as regards the contract and did not furnish the cost data. Therefore, it cannot be said that the petitioner is not guilty of wilful suppression and wilful misstatement.

24. It was contended that once the price list is approved under the appropriate provisions of Rule 173C, it becomes final and it cannot be reopened unless the same is set aside in appeal as provided u/s 35E of the Act. Section 11A of the Act provides for recovery of duties not levied and not paid or short levied or short paid or erroneously refunded. The only condition for invoking the provisions of Section 11A of the Act is that there may be non-levy of duty, non-payment of duty, short levy of duty, short payment of duty or erroneous refund of duty. If any of the aforesaid eventuality occurs, the Central Excise Officer would be empowered to issue show cause notice and call upon the assessee to show cause as to why the amount specified in the notice be not recovered from him. In the instant case, short payment of excise duty has been proved. In fact it is not even urged that there was no short payment of duty. Once this condition is satisfied, the provisions of Section 11A of the Act can be invoked. If there is no fraud, collusion or any wilful misstatement or suppression of facts or contravention of any of the provisions of the Act, the notice may be issued within a period of six months from the relevant date. In case of fraud, collusion or wilful misstatement or suppression, it could be issued within a period of five years from the relevant date. The approval of the price list may be a quasi-judicial function. But that fact

does not debar the department from invoking the provisions of Section 11A of the Act. Section 11A of the Act empowers the Excise Officer to reopen the assessment in cases where duty may be short levied, short paid, not levied, not paid or erroneously refunded. If the contention of the learned counsel for the petitioner is accepted that the provisions of Section 11A can be resorted to only after the price list has been set aside in appeal or revision, it would amount to re-writing the section. No such fetter on the power of the excise officer is envisaged by the legislature. Therefore the contention cannot be accepted.

25. If the contention that the provision of Section 11A of the Act can be resorted to only after filing appeal u/s 35E of the Act, it would make the provisions of Section 11A and particularly that of the proviso thereto unworkable. The proviso can be invoked within the period of five years from the relevant date. While appeal can be filed by the Revenue within the period of one year. If the fraud is detected, say after a period of two years or three years, and if the condition that the appeal is required to be filed u/s 35E before invoking the provisions of Section 11A is sought to be read into the provisions of Section 11A, Section 11A and particularly the proviso thereto could never be implemented. Virtually the proviso to Section 11A would become redundant if the contention advanced by the learned counsel for the petitioner is accepted. There is no reason to adopt such unreasonable construction.

26. It may be noted that in relation to the classification once filed and approved by the department, the provisions of Section 11A can be resorted to by the department. This is the view expressed by the Supreme Court in the case of Tata Iron and Steel Co. Ltd. Vs. Union of India (UOI) and Others, . While considering the question of limitation, the Supreme Court observed that in that case there was no suppression or misstatement of facts or fraud by the assessee and therefore the proviso to Section 11A of the Act would not be attracted. In that view of the matter, the demand was limited to the period of six months prior to the service of the show cause notice. This decision clearly points out that the classification list approved by the department under the provisions of Rule 173B can be reopened by having recourse to the provisions of Section 11A of the Act. The same logic and reasoning will apply to the reopening of assessment even in relation to short levy, short payment, non-levy, non-payment or erroneous refund of excise duty resulting from the approval of price list. In practice there is no difference between the provisions of Rule 173B which pertain to approval of classifications and Rule 173C which pertain to approval of price list. The only distinction sought to be made out is that in the provisions of Rule 173C the assessee is required to be heard by the department if the price list is to be modified or changed. This is no distinction at all because in all actions or decisions that may be taken by the department and which are likely to adversely affect the assessee the department would be required to afford an opportunity of being heard to the assessee unless there is an express provision dispensing with the applicability of the principles of natural justice. Thus the decision of the Supreme Court in the case of Tata Iron and Steel Co. Ltd. Vs. Union of India

(UOI) and Others, which pertains to classification would also apply to the cases of reopening of assessment as provided u/s 11A which has its roots in price list.

27. It was contended that the Collector could not have invoked the proviso to Section 11A of the Act inasmuch as there was no fraud or suppression. The contention cannot be accepted. In the instant case, there is, to say the least, well designed misstatement of facts and suppression of facts. The petitioner did not file price list in Part II though prices charged were different to different buyers. This itself was misstatement. That there was upward revision of prices in respect of other small scale buyers except Alembic Chemical Works Company Limited. In the instant case, Alembic Chemical Works Company Limited was the largest buyer. The goods manufactured by the assessee company was being utilised to the largest extent by Alembic Chemical Works Company Limited. The assessee company and Alembic Chemical Works Company Limited have interest in the business of each other. That though there was upward revision of prices on account of escalation of prices in raw material, the prices were not revised in case of supplies made to Alembic Chemical Works Company Ltd. Had there not been misstatement as regards filing of price list, the department would not have been misled. It also appears that only one Additional Collector during his visit noticed the suppression of facts. As observed in para 27 of the order passed by the Collector other officers did not take care to verify the price aspect. This observation indicates that there was probably collusion also. In view of this position, the contention that the larger period of five years could not have been invoked has no merits.

28. No other contention is raised.

29. There is no substance in the petition. Hence the petition is rejected. Rule discharged. Interim relief granted earlier stands vacated.

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30. After the judgment is pronounced, learned counsel for the petitioner requests for keeping the order vacating interim relief in abeyance for six weeks so as to enable the petitioners to approach the Supreme Court and obtain appropriate orders. Learned counsel for the respondents objects to the request being granted. It is pointed out that if the interest benefit accrued to the petitioner during the pendency of the petition is taken into consideration the amount earned by the petitioners by way of interest would be almost two to three times the principal amount involved in the petition. Moreover in view of the decision of the Supreme Court in the case of Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others, and in the case of State of Gujarat Vs. Consumer and Education Research center and Others, , even at the stage of interim relief in cases of indirect taxes, stay/injunction against recovery of taxes should not be granted. Now, in the instant case when the matter is finally decided, there is no case for grant of interim relief.

31. After considering the overall situation, learned counsel for the petitioners

concedes that the petitioners are agreeable to pay interest at the rate of 18% per annum for the period during which the protection of the order of the court be extended and it remains in force. It is also conceded that the amount of interest will be paid in advance as it may be directed by the court and that the amount of interest will not be refundable whatsoever be the final result in the litigation.

32. In view of the aforesaid concession made by the learned counsel for the petitioners and having regard to the overall facts and circumstances of the case it is directed that the recovery of the amount in question which in all comes to Rs. 45,95,138.56 ps. shall not be enforced till March 8, 1992. The petitioners shall pay interest on the amount of Rs. 45,95,138.56 ps. at the rate of 18% per annum from January 22, 1992 till March 8, 1992. The amount of interest shall be paid to respondent No. 2 herein, i.e. Collector of Central Excise and Customs, Vadodara, latest by February 5, 1992 and it shall not be refundable. The petitioners shall file an undertaking in this Court on or before January 28, 1992 to the effect that the amount of interest as stated above will be paid to respondent No. 2 latest by February 5, 1992. If the undertaking as stated above is not filed on or before January 28, 1992 and/or the amount of interest as indicated hereinabove is not paid to respondent No. 2 on or before February 5, 1992, the protection extended to the petitioners by this order shall automatically stand vacated.

33. Subject to the aforesaid conditions, recovery of the amount in question is stayed and no further action shall be taken pursuant to the impugned order passed by the Collector till March 8, 1992.