
(1980) 12 DEL CK 0009

In the Delhi High Court

Case No : Civil Appeal No. 1518 of 1979

Jay Engineering Works Ltd. and Another

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 24-12-1980

Acts Referred:

Citation : (1981) 8 ELT 284 : (1981) ILR Delhi 795

Hon'ble Judges : S. Ranganathan, J;Prakash Narain, J

Bench : Division Bench

Advocate : Ravnder Narain, T.A. Ansari, A.N. Haksar and S.N. Sapra, for the Appellant;

Judgement

S. Ranganathan, J.

(1) Jay Engineering Works Limited (petitioner No. 1) is a limited company having its registered office at Delhi. It owns a unit in Agra known as Agra Engineering Industries where it manufactures electric fans and regulators. According to the petitioner it is also manufacturing regulators for the fans at its Agra unit but it is stated by the respondents in the counter affidavit that the regulators are not manufactured by the petitioner but that the petitioner gets them manufactured from a unit named and styled as Bharat Kumar Bhargava by supplying them requisite raw-material. The electric fans and regulators are sold by the petitioner company to dealers appointed by it and also directly to customers from its own shops in the State of West Bengal and Andaman & Nicobar Islands. In respect of the rest of the country, however, about 90 per cent of its sales are effected to Usha Sales Limited (hereinafter referred to as "Usha") and to some extent directly to bulk institutional buyers.

(2) We are concerned in this writ petition with the determination of the assessable value of the electric fans manufactured and sold by the petitioner for purposes of the Central Excise and Salt Act, 1944 (hereinafter referred to as the - Act"). The dispute relates to the period subsequent to 1st October, 1975 with

effect from which date Section 4 of the Act was amended by Parliament. The respondents have taken the view that the assessable value is the price at which Usha, after purchasing the goods from the assessed, sold the same to other dealers and further that the value of the regulators should also be included in the said assessable value. The petitioner's contention, however, is that the assessable value of the goods should be the price at which the petitioner sold the goods to Usha and not the resale price of Usha to other dealers. It is also contended on behalf of the petitioner that the value of the regulators should not be included in the assessable value of the electric fans till 18th June, 1977 and that such inclusion is permissible only after the said date when there was an amendment to the Tariff prescribed in respect of the above item. A further contention of the petitioner is that in determining the assessable value the petitioner is entitled to deduct from the price charged by it to Usha an element of post-manufacturing expenses included therein. It is submitted that the petitioner company transfers the goods manufactured by it from its factory to its regional godowns situated in various parts of the country. It, thus, incurs expenses by way of freight for the transport of the goods and also godown charges. goods sold, repair charges, interest and the like and also ensures goods sold, repair charges, interest and the like and also ensures that the goods are sold in various parts of India at the same price. The contention of the petitioner is that all the expenses thus incurred by it in the post-manufacturing stage are all included in the price at which the goods are sold to Usha and than this element of post-manufacturing expenses and profits should be deducted from the price paid by Usha before the assessable Value of the goods for the purpose of excise can be properly determined. These are the three points of controversy which are in issue in the present writ petition.

(3) It will be convenient first to deal with the question whether the respondents were entitled to ignore the bulk sales affected by the assessed petitioner to Usha for determining the assessable value and in proceeding to the next point, namely, to the price at which Usha in turn sold the goods, for arriving at the assessable value. In justification of its action in this regard the respondents rely on the amendments made in Section 4 of the Act with effect from 1st October, 1975. The relevant provisions of this section after the amendment can be briefly summarised as follows :

(4) Section 4(1) lays down the general principle, that the value with reference to which the duty of excise is chargeable shall be deemed to be the normal price of the goods, that is to say, the price at which such goods are ordinarily sold by the assessed to a buyer in the course of the wholesale trade or delivery at the "time and place of removal." But this is made subject to two conditions : (i) the buyer should not be a related person and (ii) the price at which he buys the goods should be the sole consideration for the sale. If the buyer is a related person then clause (iii) of the proviso will come into operation which runs as follows :

"(III)where the assessed 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 assessed 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."

In other words if the manufacturer sells the goods generally to or through a related person the price at which they are sold to the related person will be ignored. Instead of that the price at which the related person sells those goods to other dealers in the course of wholesale trade will be taken into account provided such wholesale dealers are also not related persons. If, however, even the wholesale dealers to whom the goods are sold by the related persons are related persons then all such sales will be ignored and the price at which the goods are sold to dealers who sell the goods in retail will be taken as the assessable value of the goods. To put it shortly all intermediate sales through related persons are ignored for the purpose of determining the assessable value of the goods.

(5) In view of the above far-reaching consequence where sales are effected to or through related persons this concept of a related persons" assumes very great importance. This expression is defined in clause (c) of Section 4(4) and reads as follows :-

"(C)"related person" means a person who is so associated with the assessed 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 assessed, and any sub-distributor of such distributor.

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

(6) The short question for consideration, Therefore, is whether in the present case Usha can be said to be a related person within the meaning of the above definition. It is common ground that the assessed company and Usha are not connected with each other as holding company, subsidiary company or relative (the last expression being available only in the case of individuals) and Therefore these expressions can be left out of count. The controversy, Therefore, is limited to the questions whether (1) Usha is so associated with the assessed petitioner that they have interest directly or indirectly in the business of each other: and (2) Usha is a distributor of the assessed ?

(7) So far as the first question is concerned, it appears to us that the answer is obviously and patently in the negative. There is no material on record to indicate that Usha and the Petitioner are so associated with each other that they can be said to have an interest directly or indirectly in the business of each other. We shall refer later on to the terms of the arrangement between the petitioner and Usha while discussing the second aspect referred to above. It will be seen there

from that primarily the arrangement between the parties is that Usha should purchase a substantial part of the petitioner's production and sell the goods at a price not higher than the maximum price stipulated by the petitioner. Assuming that the term of the agreement create an interest in Usha vis-a-vis the business of the petitioner there is nothing to indicate and no material to justify the conclusion that the petitioner has any interest in the business of Usha. As will be seen later, the petitioner sells its goods to Usha and receives the price Therefore within; 90 days. It has no doubt certain responsibilities for servicing the goods sold by Usha but there is no manner of interest direct or indirect in the business of Usha so far as the petitioner is concerned. The terms of the above definition contemplate two persons who are so associated that they are mutually interested in the business of each other. Examples of the kind may be two companies associated with each other as holding and subsidiary companies or two companies or persons associated as the company and its managing agent or the company and its Secretaries and Treasurers, firms having related partners, companies having common shareholders in the majority and the like. It is very difficult to say that a mere purchaser or even a sole selling agent (if Usha could be said to be one) would be a related person within the meaning of the first part of the definition. We are, Therefore, unable to accept the contention of learned counsel for the respondents that Usha will be a related person under the above portion of the definition clause. Certain judicial decisions to which we shall be referring later also touch upon this aspect of the matter and reinforce our conclusion.

(8) The next question turn consideration is whether Usha can be said to be a distributor Of the assessed. The precise mean- ing of the expression "distributor" is not clear and has not been defined in the Statute. This is a very wide expression which gains colour from the context in; which it is employed. Its meaning is very vague, extensive and indefinite. It ranges from a person who, under an enforceable contract, acts as an agent of the manufacturer for the distribution of his goods to a person who at some stage or point of time distributes, i.e., physically transports and sells the goods manufactured by a particular manufacturer. We have already referred to the fact that the effect of a person falling within the definition of related persons is very extensive and far-reaching. It will have the effect of enabling the authorities to ignore the price at which the sales are effected to or through such persons and even to proceed right up to the stage of retail distribution for the purpose of determining the assessable value. Having regard to the very radical impact of this definition on the assessable value of the excisable goods it appears to us that this expression should be given a very restricted meaning. It will be seen that to give a very wide meaning would practically alter the entire scheme of the Excise Act. If any person who distributes a fairly good part of the goods of a manufacturer were to be treated as a distributor (and it should not be forgotten that the definition also takes in; the sub-distributors of such distributor) the effect will practically be that the assessable value in many cases will be taken as the retail price of the goods.

Any manufacturer in order to dispose of his goods will have to employ various types of agents or other persons who will transport the goods and sell them in bulk to retailers in various parts of this vast country. Bhagwati J. in the *Atic Industries Ltd. Vs. H.H. Dewa, Asstt. Collector of Central Excise and Others*, has very graphically described the effect of Ignoring the intermediate stages of distribution. The learned judge said

" THE value of the goods for the purpose of excise must take into account only the manufacturing cost and the manufacturing profit and it must not be loaded with post-manufacturing post or profit arising from post-manufacturing operation. The price charged by the manufacturer for sale of the goods in wholesale would, Therefore, represent the real value of the goods for the purpose of assessment: of excise duty. If the price charged by the wholesale dealer who purchases the goods from the manufacturer and sells them in wholesale to another dealer were taken as the value of the goods, it would include not only the manufacturing cost and the manufacturing profit of the manufacturer but also the wholesale dealer's selling cost and selling profit and that would be wholly incompatible with the nature of. excise. It may be noted that wholesale market in a particular type of goods may be in several tiers and the goods may reach the consumer after a series of wholesale transactions. In fact the more common and less expensive the goods, there would be greater possibility of more than one tier of wholesale transactions. For instance, in a textile trade, a manufacturer may sell his entire production to a single wholesale dealer and the latter may in his turn sell the goods purchased by him from the manufacturer to different wholesale dealers at State level, and they may in their turn sell the goods to wholesale dealers at the district level and from the wholesale dealers at the district level the goods may pass by sale to wholesale dealers at the city level and then, ultimately from the wholesale dealers at the city level, the goods may reach the consumers. The only relevant price for assessment of value of the goods for the purpose of excise in such a case would be the wholesale cash price which the manufacturer receives from sale to the first wholesale dealer, that is. when the goods first enter the stream of trade. Once the goods have entered the stream of trade and are on their onward journey to the consumer, whether along a short or a long course depending on the nature of the goods and the conditions of the trade, excise is not concerned with what happens subsequently to the goods. It is the first immediate contact between the manufacturer and the trade that is made decisive for determining the wholesale cash price which is to be the measure of the value of the goods for the purpose of excise. The second or subsequent price, even though on wholesale basis, is not material. If excise were levied on the basis of second or subsequent wholesale price, it would load the price with post-manufacturing element, namely, selling cost and selling profit of the wholesale dealer. That would be plainly contrary to the true nature of excise as explained in the *A.K. Roy and Another Vs. Voltas Limited*, Secondly, this would also violate the concept of the factory gate sale which is the basis of determination of value of the

goods .for the purpose of excise."

(9) These observations have not lost their relevance even after the amendment of Section 4. This amendment was the consequence of the decision of the Supreme Court in the Voltas case (supra). In that case the assessed company had effected direct sales to consumers in respect of 90 to 95 per cent of its production. It also sold its articles to the extent of remaining 5 to 10 per cent to wholesale dealers in different parts of the country in pursuance of agreements entered into with them. Such agreements restricted the prices at which the dealers could sell the commodity and they were also required to provide service in respect of the articles sold in their territory. The attempt of the excise department to ignore the price at which the goods were sold to these dealers was negated by the Supreme Court which held that the sales to the wholesale dealers did not cease to be wholesale sales merely because the wholesale dealers had entered into agreements with the respondent under which certain commercial benefits were conferred upon them in consideration of their undertaking to do service to the articles sold, or because of the fact that no other person could purchase the articles wholesale from the manufacturer. It was pointed out that the wholesale cash price had to be ascertained on the basis of transactions at arms length. If there was a special or favored buyer to whom a specially low price was charged because of extra commercial considerations such as for example his relationship with the manufacturer, the price charged could not be the wholesale cash price. The court, however, emphasised and pointed out :

" A sole distributor might or might not be a favored buyer according as terms of the agreement with "aim are fair and reasonable and were arrived at on purely commercial basis. Once wholesale dealings at arms length are established, the determination of the "wholesale cash price" for the purpose of Section 4(a) of the Act may not depend upon the number of such wholesale dealings."

(10) The objects and reasons of the amendment proposed by the Bill which was introduced in 1973 but which was enacted only with effect from 1st October, 1975 after referring to the Voltas decision stated :

" IN order to overcome the various difficulties experienced in the working of the section it is proposed to suitably revise the valuation provision contained in Section 4 of the Act, providing, as far as practicable, for assessment of excisable goods at the transaction value, except in areas where there may be scope for manipulation (such as sales to or through related persons) and making specific stipulation with respect to situations frequently encountered in the sphere of valuation."

THE Bill was merely intended to achieve the above object. The amendment was effected, it should be remembered, before the decision in the Atics case was rendered by the Supreme Court. Bearing in mind the objects and reasons with which the amendment was affected and that the primary purpose of the

amendment was to forestall any manipulation in respect of the wholesale cash price, it appears to us that the concept of related persons, though apparently very widely worded, should be given a restricted meaning when we come to the last few words of the definition. It will be observed that where the wholesale dealer and the manufacturer are related as holding and subsidiary companies or as an individual and his relative, some scope for manipulation is perceivable. Similarly where the two persons are closely associated and mutually interested in the business of each other there may be a scope for manipulation. But when we come to the category of distributors it is not every distributor or agent that will have such a close connection or proximity or relationship with the manufacturer that any manipulation could be presumed because of the mere distributorship. It is obvious, Therefore, that when the definition talks of a distributor, it talks of a person who has entered into a contract with the manufacturer as a sole or primary agent for the sale of the whole or a substantial portion of the manufactured goods. It cannot, it seems to us, be intended to cover cases where a person is remotely connected with the process of distribution or where, even though he may be entering into a contract with the manufacturer, what he has bargained for is an outright purchase of the goods manufactured by the manufacturer. In such a case where the distributor so called purchases the goods of the manufacturer outright there is no reason to presume, in the absence of any particular facts, that there is no deal at arms' length or that there is likely to be a manipulation which needs to be safeguarded against. Sri Ravinder Narain in fact raised a contention that if the definition of related person is to be read in a very wide and extensive manner leading to the very negation of the concept of excise duty as a result of such an interpretation (as envisaged by the Supreme Court in the Atics case) then the very concept of related person would be ultravires. He relied in support of this contention on a decision of the Gujarat High Court in the case of Cibatul Limited 1919 Elt 3 407 (2) where the definition of related person in such a wide manner has been declared to be unconstitutional. We do not think it is necessary to dilate on this aspect of the matter. For the reasons already stated. we are of opinion that it was not the intention of the legislature to rope in every distant buyer within the range of the definition but on the other hand reading the expression in the context in which it is used the word "distributor" was intended to have a Very limited and restricted field of operation and to apply to cases where the distributor functions as an agent of the manufacturer.

(11) In *M/s. Hind Lamps Ltd. v. Union of India* 1977 Elt 1 a Division Bench of the Allahabad High Court considered a similar question. In that case the petitioner company Hind Lamps had five shareholders, namely, Bajaj Electricals Limited, Crompton Parkinson Ltd., N. V. Philips, General Electric Co. Ltd. and Mazda Lamp Co. Ltd., Bajaj Electricals Ltd. which was an Indian company held 1,80,000 shares. The other foreign companies together held 1,80,000 shares. The petitioner company was engaged in the manufacture of electric lamps, fluorescent lamps and miniature lamps.. It sold the entire output of its product

exclusively to five customer companies which were : (i) Bajaj Electricals Ltd.; (ii) Philips India Ltd. ; (iii) Crompton Greaves Ltd., (iv) General Electric Co, of India Ltd. and (v) Mazda Lamps Co. Ltd. On the lamps manufactured by it the petitioner company put brand names or trade marks like Philips, Osram, Mazda, Crompton and Bajaj of the respective customer companies according to their directions. The customer companies in turn sold these lamps under their names at prices higher than the prices charged by the petitioner company. The excise authorities took the view that the customer companies were related persons within the meaning of the Act and Therefore the assessable value should be taken as the price at which the customer companies sold the goods in the market. This contention was, however, repelled. The court held that the actual relationship between the four foreign companies and the corresponding customer companies bearing similar names had not been placed before them and Therefore it was not possible to accept the department's contention that these customer companies must be regarded as having an indirect interest in the business of the petitioner company. The court further observed that even assuming that all these four companies had interest in the business of the petitioner company it was not shown that the petitioner company had any interest directly or indirectly in the business of the four customer companies. The concept of relatives was held to have no application to the case because the five customer companies were not natural persons but impersonal bodies. Turning to the expression "distributor" the court observed :

"The word "distributor" is understood in commerce as an agent or one who distributes goods to consumers. It is not the case of the Central Excise Authorities that the five customer companies are the agents of the petitioner company. The customer companies are not distributing the products of the petitioner company to customers, but generally sell to wholesale dealers. It is also not the case of Central Excise Authorities that the customer companies are the distributors of the petitioner company."

(12) In Nagpal Petro-Chem. Ltd. v. Assistant Collector of Central Excise 1979 ELT 117 the petitioner was engaged in the manufacture of petro-Chemical products. The petitioner's products were in great demand in Bombay where about 80 per cent of the total production of the products were sold. M/s. Sikri and Grover were the main buyers for sale of the products of the petitioner at Bombay. They had selling branches at Bombay, Calcutta, New Delhi and Madras and sold the petitioner's products to dealers, manufacturers and public sector undertakings. There was no discrimination on the price at which the petitioner's products were sold to M/s. Sikri and Grover when compared with the price at which they were sold to the wholesale buyers. It was held by the Madras High Court that the sale price to Sikri and Grover included post-manufacturing expenses such as cost of transport, insurance, packing, octroi, sales-tax and branch overheads and that Therefore these items had to be excluded in computing the assessable value of the goods. That apart, in reply to the argument of the department that since the bulk of its goods were sold to Sikri and Grover they should be taken to be related

persons, the petitioner's stand was that though the bulk of its products were purchased by M/s. Sikri and Grover and marketed to wholesalers the petitioner itself also sold its goods at wholesale price at factory gate and that merely because the instance of such sales were not many the respondents could not ignore the factum and legal consequence of those sales. It was also argued that except the usual trade discount no concessions were given to M/s. Sikri and Grover by the petitioner. After referring to the decisions of the Supreme Court in *Voltas arid Atics* and the contention of the department that the position charged with the amendment in Section 4, the Court observed :

"IT is true the amended section gives the definition of "related person" and the proviso to Section 4(1)(a) gives power to the assessing authorities to go into the question whether the wholesale rate given by the assessed for the purpose of excise assessment is with reference to sales held at arms' length or sales effected to related persons. Even so, there is no escape from the position that in order to classify a person within the terminology of "related person", the department must prove that the person and the assessed have direct or indirect interest in the business of each other. This is made clear by the definition of the term "related person" contained in Section 4(4)(c). The respondents, however, have not put forward any material to show that Sikri and Grover on the one hand and the petitioner on the other have direct or indirect interests in the business of each other. "The resultant position is that the respondents have not shown a nexus of interest between the petitioner and the alleged related person in the business of each other, nor have they shown that the bulk of the petitioner's products have been sold to Sikri and Grover as such concessional rates as to lead to the inescapable conclusion that extra-commercial consideration have weighed with the assessed to charge such a concessional rates to Sikri and Grover. On this one ground alone, the petitioner's challenge of the impugned order has to be sustained."

(13) The Andhra Pradesh High Court had occasion to consider a similar question in *Indo-National Limited Nellore-4 v. Union of India and Others* 1979 Dlt J 334. The judgment has dealt with several points and it is sufficient for our purpose to refer to paragraph 57 on page 371 :

WRIT Petition No. 5948 of 1975, eleven out of the twelve authorised wholesale dealers of the petitioner company are treated as related persons within the meaning of the third provision to section 4(1)(a) of the Act and that the excise duty is levied on the goods manufactured by the petitioner-company on the basis of the price charged by those authorised wholesale dealers from their buyers. It is true that some of the partners of eleven out of the twelve authorised wholesale dealers are related to two of the nine directors of the petitioner-company. But the mere sale to a wholesale dealer who is a relative will not authorise the levy of duty on the price charged by the wholesaler, who purchases goods from the manufacturer and sells them in wholesale to another dealer. As laid down by the Supreme Court, that course would be open to the authorities

only when the agreement with the wholesale dealers sought to be treated as "related persons" confers some extra commercial advantages to them making them favored buyers. It is admitted by the excise authorities that, out of the twelve authorised dealers of the petitioner-company, there is an independent buyer in Orissa State though the percentage of sales to the independent buyer is less than five, for the year ending with 30-9-1975, the percentage of sale to the said independent buyer was 2.89. It is not denied that a fully commercial price charged to the admittedly independent buyer of the petitioner-company is also charged from the other authorised wholesale dealers of the petitioner-company. So long as there is an independent buyer of the good of the petitioner company from whom a fully commercial price is charged by the company, that price should be taken into consideration for the purpose of arriving at the "normal price" even in respect of sales to the authorised wholesale dealers of the petitioner-company, treated as "related persons". Our conclusion derives support from the decisions in the *Voltas* case and the *Atic Industries* case. We are also strengthened in our view by the decisions in *Nagpal Petro-Chem. Limited, Madras-58 vs. Assistant Controller of Central Excise, Madras 1978 E.L.T. 595* and the *Tata Engineering and Locomotive Company Limited vs. S. N. Guha Thakurta, Superintendent of Central Excise, Jamshedpur and others 1977 E.L.T. 14*, decided by a Division Bench of the Patna High Court. In the view we have taken on the admitted facts, it is wholly unnecessary to consider the virus of the third proviso to Section 4(a) (i) of the Act."

(14) The case of *Atics* after the amendment of Section 4 came up for consideration before the Gujarat High Court in 1979 *Elt 513*. It will be remembered that in this case the assessee company which was engaged in the business of manufacturing dyes sold practically its entire output to two companies, *Atul Products Limited* and *Imperial Chemical Industries Limited* which were in turn subsidiaries of two companies which were the shareholders of the assessee company. One of the contentions raised on behalf of the assessee was that the sale price charged by the assessed company to *Atul Products Limited* and *Imperial Chemical Industries Limited* could not be ignored by the excise authorities in determining the assessable value. In support of this contention, it was urged that Section 4 as amended was ultra vires the Constitution and Section 3 of the Act. This contention was accepted and, following the earlier decision of the court in the case of *Cibatul* (earlier referred to) the expression "the buyer is not a related person and" in the main part of Section (1) and proviso (iii) to clause (a) of sub-section (1) of Section 4 were struck down. It had also been contended on behalf of the assessee company that the petitioner-company and its buyers were not related persons. Upholding this contention also, it was held that the petitioner-company and the two buyers could not be said to have any mutuality of interest direct or indirect. It could be that the two buyers had an interest in the business of the petitioner-company but it could not be said that the petitioner-company had any interest in the business of its two buyers because if these two buyers didn't purchase the products of the petitioner

company, the petitioner company could as well sell them to other persons.

(15) The above decisions are only helpful in a general way. They are all cases where a few persons purchased outright, but without any concession or non-commercial motivation, the whole or a substantial part of the production of the manufacturer concerned (and so can be said to be "distributors" if the word is to be understood in a very wide sense) but it has been held that they cannot be treated as "related persons" within the meaning of Section 4(4)(c). As earlier mentioned, they are also helpful in understanding that part of the definition which talks of the two parties having "interest, directly or indirectly, in the business of each other". However, in the Allahabad and Gujarat cases, the department does not appear to have even contended that such persons could be said to be "distributors". The Madras and Andhra Pradesh decisions also do not contain any discussion as to the scope of this expression and it appears to us that some of the observations made in these cases are rather too wide and may need careful consideration in some other case. One more decision which is directly in point can also be usefully referred to here. This is the decision of the Bombay High Court in the case of *S. M. Chemicals and Electronics and Another v. R. Parthasarathy and Others* 1980 ELT 197. The petitioner was manufacturing, inter alia, radios and television sets at Bombay. The goods manufactured by the petitioner company were being sold to five buyers at Bombay, Delhi, Calcutta, Madras and Bangalore. The question was whether these five buyers could be said to be "related persons" within the meaning of the Act. According to the excise department the buyers rendered after sales service of the goods sold during the period of warranty; the agreement also had certain restrictive provisions, the details of which, it is unnecessary to set out here. It was, therefore, contended by the department that the buyers had an indirect interest in the manufacturer and so became "related persons" within the meaning of Section 4. The court rejected this contention and pointed out that in order to satisfy the definition of related person it was not sufficient for either of the two persons, i.e., the manufacturer and the buyer to have an interest in the other. The interest must be mutual. In order to establish mutuality of business interest direct or indirect the manufacturer must in his own interest promote the business of the buyer and likewise the buyer in his own interest promote the business of the manufacturer. Referring to the earlier decision in *Cibatuil* of Gujarat High Court it was pointed out that between a manufacturer and a buyer there is only a one way business and that this was not sufficient to bring the case within the meaning of the definition. The mere fact that the buyers effected after sales service during the warranty period would not also indicate that the buyers had any interest in the business of the manufacturer. The petitioner company itself had at some stage referred to its having a network of wholesale dealers, distributors and stockists. On the strength of this admission as well as on the facts it was contended that the five buyers should be treated as distributors and hence as related persons. On this point the Court after referring to the decision of the Allahabad High Court in the case of *Hind Lamp Ltd.* observed :

" MERELY because goods were sold wholesale to these five buyers would not make these five buyers the distributors of the 1st petitioner-Company. There is no provision that a manufacturer can sell only to a certain number of persons before a sale can be characterised as wholesale. Merely by virtue of limited numbers if wholesalers were to be categorised as distributors, all wholesalers would automatically be garbed as distributors despite the fact that the transactions had all the ingredients of wholesale trade. In a distributorship must enter the concept of agency between the manufacturer and the distributor."

REFERRING to the reliance placed on the different dictionary meanings of the word "distributor" the court observed : "It is unnecessary to be relegated to the dictionary definition of "distributor" as urged on behalf of the petitioners and the respondents respectively. The fact and circumstances of this case put beyond the pale of controversy that the five buyers can be said to be distributors within the meaning of section 4 of the Excise Act. It is futile for Mr. Dalal to urge that there appears to be some secret understanding or arrangement of distributorship between the 1st petitioner-Company and the five buyers. No such secret understanding or arrangement has even been alluded to even by the Assistant Collector himself in his impugned order and is now put across the Bar in the form of an ipso dixit. There is also no merit in Mr. Dalal's contention that no one would buy regularly in wholesale unless there was" some agreement of distributorship". This is by far too sweeping a pronouncement which need not detain me any longer than it has."

IN the view taken by it the court did not go into the question whether the concept of "related person" in Section 4 was ultravires the legislative competence of Parliament under Article 246 read with entry 84 in the Union List and entry 54 in the State List as had been held in *Cibatul* (supra).

(16) In the light of the discussion contained above we are clearly of opinion that Usha cannot be said to be a distributor of the petitioner company. Sri Sapra, for the respondents, attempted to distinguish the above cases by saying that there were no agreements governing the relationship between the manufacturers and dealers in those cases whereas here the parties were governed by an agreement which made it clear that Usha was a distributor of the assessed. The argument is not quite correct for, at least in the Gujarat case there was a written agreement. But that apart, the question whether a person is a "distributor" or not cannot, it seems to us, depend merely on the existence or otherwise of written agreement; it must depend upon the dealings between the parties and these, in the present case, appear to be no different from those in the cases cited. Further, we are unable to agree with Sri Sapra that the agreement in this case spells a distributorship on the part of Usha. The terms of the agreement between the petitioner company and Usha have been set out in the order of the Assistant Collector dated 31-7-1979. The learned counsel for the respondents points out that under the agreement between the two parties a territory comprising of the whole of India except West Bengal and Andaman and Nicobar Islands has been

assigned to Usha; under clause (3) Usha is to organise sales and the distribution of the product, canvass and procure orders, maintain adequate stocks, arrange for sales promotion measures and provide after sales service; under clause (4) Usha is obliged to sell the goods at the price determined from time to time by the assessed company; under clause (6) Usha has to procure orders for the petitioner from Government and bulk institutional buyers on a commission basis as an agent under clause (7) the cost of sales promotion measures including publicity, discount etc. have to be borne by the manufacturer and under clause (8) Usha is to buy at least 90 per cent of the company's production of the product for sale in their territory. The Assistant Collector has also referred to clause (10) of the agreement which makes it subject to force majeure factors. But this is clearly irrelevant and can be excluded from consideration. It is no doubt true that under the agreement Usha has a large number of obligations in regard to the products of the petitioner company. But the crucial question, in the light of the above discussion, is to find out whether the contract between the petitioner and the Usha is on a principal to principal basis or whether Usha is only an agent of the petitioner company. The agreement leaves no doubt in regard to this. Clause (5) makes it clear that all the goods are to be purchased by Usha and it has to pay for the purchases within ninety days of the date of the bill. Clause (8) also refers to Usha buying at least 90 per cent of the company's products. The reference in clause (6) to Usha being an agent remunerated by commission in respect of the orders booked by it with Government and other public institutions also highlights the fact that in respect of all other purchases effected by it the dealing between the parties is on a principal to principal basis. In short, this is merely a contract by which the assessee is able to sell the bulk of its goods to Usha. Usha in turn sells the goods to various persons. But there is neither mutual interest between the parties nor is there any agency" involved. If the goods are lost at any stage after the sale to Usha, the responsibility of the loss will have to be borne by Usha. If Usha makes certain sales and does not realise the proceeds, the loss will be borne by itself. Once the goods are sold by the assessee to Usha, so far as the assessee is concerned, there is an end of the matter. The dealings between the two parties though subject to certain restrictions such as limitation of retail price and the like which are common in modern commerce reflect purely a relationship between two principals. Apart from a vague mention that one of the directors of Usha is also the Chairman of the petitioner company there is nothing else to show how the two concerns are interested in each other. In our opinion, it is clear from the facts on record which are undisputed that Usha is an independent buyer of the major part of the assessee's goods and it cannot be said to be a related person within the meaning of Section 4.

(17) We, Therefore, accept the contention of the assessee that the sales made by the assessee to Usha cannot be ignored while determining the assessable value of the goods manufactured by it.

(18) So far as the contention regarding the deductibility of post-manufacturing expenses are concerned, there can be no doubt that the assessee is entitled to

petitioner but got done through somebody else. Though, generally, a regulator may also be purchased along with a fan, it cannot be said that a fan without a speed regulator is no fan at all. The position is somewhat analogous to the voltage stabiliser which has become an almost indispensable accessory in regard to electrical goods in places where the electric supply widely fluctuates in its voltage. A voltage stabiliser is almost indispensable particularly when such costly equipment such as Refrigerators, Television sets and the like are used. But it cannot be said that voltage stabiliser is a part of the Refrigerator or Television set. In a like manner though one does appreciate that a fan and the regulator go side by side and very often compliment each other in their functioning, it is too much to say that a regulator is a part of the fan itself. The fact that the legislature considered it necessary to amend the Item in our opinion also supports the above conclusion. It cannot be said that the amendment merely clarifies the position. It rather appears that by the amendment the position has been changed so as to include the cost of the regulator also while determining the assessable value of a fan. We are, Therefore, of opinion that till 18-6-1977 the department would not be justified in including the cost of a regulator in determining the assessable value of the fan.

(20) For the above reasons we have come to the conclusion. that the contentions raised on behalf of the petitioners have to be accepted. We direct the issue of a writ directing the respondents to charge excise duty in respect of the products manufactured by the petitioner by determining the assessable value at the price at which the goods were sold to Usha after excluding there from: the element of post-manufacturing expenses which might be proved by the assessed. The respondents should also exclude the value of the regulator in determining the assessable value for the period prior to 19-6-1977. In the view we have taken on the construction of Section 4 as amended it is not necessary to consider the contention raised by Sri Ravinder Narain that if the section was given a wider meaning, it would be unconstitutional.

(21) We may also refer to a preliminary objection raised by Mr. Sapra that we should not interfere by way of a writ petition because the writ petitioner has also filed an appeal from the order of the Assistant Collector. This is no doubt true but it is settled law that the mere existence of an alternative remedy does not bar the entertainment of a writ petition. But that apart, in the present case the petitioner in this writ petition has also challenged basing itself on a decision of the Gujarat High Court, the constitutionality of Section 4 of the Act as interpreted by the Assistant Collector. It is only as a result of the consideration of this point and our conclusion that the expressions "related person" and "distributor" should be given a narrow and restricted interpretation that it has become unnecessary to pronounce on the question of constitutionality. We, Therefore, think that writ is not liable to be dismissed on the preliminary objection raised by Mr. Sapra.

(22) In the result, the writ petition is allowed and we direct the issue of a writ on

the terms already mentioned. The respondents will determine the liability of the petitioner to excise duty in accordance with the principles enunciated above. The assessed-petitioner will be entitled to its costs in the writ petition : counsel's fee Rs. 500.