

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 2635 OF 1995

1. M/s. Biostar Pharmaceuticals	}	
Limited, being a public limited	}	
company, incorporated under	}	
the provisions of the Companies	}	
Act, 1956, having its office	}	
at T-82, M. I. D. C. Bhosari,	}	
Pune - 411 026.	}	
	}	
2. Mr. Ashok Bora	}	
of Pune Indian inhabitant,	}	
residing at 38 Mukund Nagar,	}	
Pune - 411 037	}	Petitioners

versus

1. The State of Maharashtra	}	
	}	
2. The Superintendent,	}	
State Excise, having his office	}	
at 14-A, Sadhu Vaswani Marg,	}	
Pune - 411 001.	}	
	}	
3. The Commissioner of State	}	
Excise, Maharashtra, Bombay,	}	
having his office at Old Customs	}	
House, Fort, Bombay - 400 023.	}	Respondents

WITH
WRIT PETITION NO. 5421 OF 2005

1. M/s. Biostar Pharmaceuticals	}
Pvt. Ltd., being a public limited	}
company, incorporated under	}
the provisions of the Companies	}
Act, 1956, having its office	}
at T-82, M. I. D. C. Bhosari,	}
Pune - 411 026.	}

2. Mr. Ashok Bora }
of Pune Indian inhabitant, }
residing at 38 Mukund Nagar, }
Pune - 411 037 } **Petitioners**

versus

1. The State of Maharashtra }
} }
2. The Collector of Pune }
having his office at 791/93, }
New Guruwar Peth, Pune }
} }
3. The Commissioner of State }
Excise, Maharashtra, Bombay, }
having his office at Old Customs }
House, Fort, Bombay - 400 023. } **Respondents**

Mr. V. Sridharan - Senior Advocate with
Mr. Jeshan Sinha and Mr. Arpit Singhvi
i/b. M/s. Wadia Ghandy and Co. for the
petitioners.

Mr. C. P. Yadav - AGP for respondent nos.
1 to 3.

**CORAM :- S. C. DHARMADHIKARI &
B. P. COLABAWALLA, JJ.**

**Reserved on 24th January, 2017
Pronounced on 27th February, 2017**

Judgment :- (Per S. C. Dharmadhikari, J.)

1. The writ petition (W. P. No. 2635 of 1995) was placed for directions by us as it is pending from 1995. We have, as a policy to give priority to old matters, listed such petitions under the caption "for directions", but with a clear understanding to the

parties and their counsel that if they are ready, we would take them up forthwith for hearing and final disposal. It is in terms of such understanding that both parties requested us to dispose of these petitions by a final order. That is how we have proceeded in the matter.

2. The writ petitions, as originally filed and subsequently amended, claim a writ of certiorari or any other appropriate writ, order or direction, calling for the records in relation to the communications, more particularly set out in prayer clause (a) of the Writ Petition No. 2635 of 1995 and to quash and set aside an order passed by respondent no. 3 dated 20th July, 1995 Annexure 'GG' to the said writ petition.

3. The facts lie in a very narrow compass. The petitioners before us manufacture a product known as Betonin. The first petitioner is in the business, *inter alia*, of manufacturing and sale of various drugs and pharmaceutical products. One of the products is Betonin 200 ml. and 450 ml., which is referred to as “the said goods” hereafter, which is a sugar free B-complex Elixir (syrup) administered to patients suffering from vitamin 'B' deficiency and especially to diabetic patients.

4. The respondents to these petitions are the State of Maharashtra and the officials empowered by the Medicinal and Toilet Preparations (Excise Duties) Act, 1995 to recover duties of excise on the said goods, as the same contain alcohol.

5. The petitioners state that they filed a price list in respect of the said goods dated 1st July, 1994. It was duly approved by the second respondent, by his letter dated 28th September, 1994. Copies of these documents are annexed as Annexures 'A' to 'D' to the petition.

6. Then, the petitioners received a letter dated 3rd January, 1995, in which, the second respondent stated that the prices of the said goods, declared by the petitioners in their approved price list of 1st November, 1994, were less than those previously declared by M/s. Boots on 15th July, 1993. Hence, the petitioners were called upon to explain why this reduction in price. The petitioners were informed to pay excess duty on differential price of the said goods, namely, a difference in the prices as per the price list of M/s. Boots dated 15th July, 1993 and that of the petitioners dated 1st November, 1994. Then, by further letter dated 21st January, 1995, the second respondent purported to state that the approved price lists of the petitioners dated 1st July, 1994 and 1st November, 1994 were being cancelled. The approved price list of

M/s. Boots dated 15th July, 1993 stood provisionally approved in the case of the first petitioner and that is how they were called upon to pay the differential excise duty. Then, on 25th January, 1995, the second respondent purported to state that the amount of excise duty paid by the first petitioner on the basis of the approved list of 1st June, 1993 was in excess of the amount paid on the basis of the first petitioner's approved list of 1994 and therefore, a differential sum of Rs.7,96,043.08 be paid.

7. The petitioners gave a detailed reply to these letters by pointing out that the value of the goods declared in their price list was the correct value as arrived at under the provisions of the said Act read with section 4(1)(a) of the Central Excise and Salt Act, 1944. The petitioners gave a detailed explanation and replied by their letter dated 3rd February, 1995, copy of which is at Annexure 'H' to the petition. However, respondent no. 2 persisted in the demand and reiterated it by his letter dated 13th February, 1995, copy of which is at Annexure 'I'. The second respondent also issued a notice to the petitioner to remain present in his office with the requisite documents on 6th March, 1995. The petitioners gave a detailed reply by their advocate's letter dated 23rd February, 1995 and refuted the allegations and disputed the demand. A copy of this letter is at Annexure 'K' to the petition.

8. Then, there was another demand raised in the sum of Rs.42,90,996/- for the period from 1st July, 1994 onwards. The petitioners state that every information having been furnished, explanation provided, the demand ought to have been withdrawn. However, the second respondent insisted on compliance with his requisitions. The petitioners being aggrieved and dissatisfied with the demand and the communications from respondent no. 2, preferred an appeal before the Commissioner of State Excise and applied for a stay. That was because the petitioners' licence was in jeopardy. It was threatened to be cancelled. That is why an interim stay was sought and a direction to renew the licence. It is stated that on 19th April, 1995, the licence was directed to be renewed by the said Commissioner. Thereafter, the Superintendent-licencing authority was called upon to renew the licence. The second respondent, despite such position, could not direct the officials reporting to him to renew the licence. It is in these circumstances that the petitioners had to approach this court. The petitioner had, in the absence of a licence, been forced to discontinue the sales and when the prices were not approved and the matter was kept pending, there was a threat of virtual closure of the business. It is in these circumstances that the petitioners contended that the revised price list, as approved by the second respondent on 3rd January, 1995 being not acceptable

that the petitioners decided to press their appeal or to approach this court in writ jurisdiction. Finding that even the appeal was not being heard, they moved this court. This court protected the petitioners by directing that the second respondent should decide the appeals and in the event his decision is adverse to the petitioners' interest, the same should not be enforced and executed for a period of one week. Thus, the appeal was to be heard and disposed of by 1st July, 1995 and the order, if adverse, was to be kept in abeyance for one week. This was on the condition that the petitioners furnish a bank guarantee in the sum of Rs.10 lakhs to the Collector, Pune, which bank guarantee would be kept alive for three months. Thereafter, the time was extended to pass the order. It is in pursuance of such extensions granted that the Commissioner passed the order dated 20th July, 1995. After that order was passed, the writ petition came to be amended. The amendment was granted. The petition was admitted after the amendment and interim relief in terms of prayer clause (c) (i) was granted on certain terms and conditions.

9. Based on the amendments to the petition, the petitioners have incorporated grounds and which are to be found in the rider at pages 48-A to 48-Q of the petition.

10. An affidavit in reply has been filed to this writ petition by the Superintendent of State Excise, Pune, in which, the order of the second respondent is supported fully. It is stated that the product under reference, namely, Betonin was originally manufactured by Boots Pharmaceuticals Ltd. on loan licensee arrangement with Borachem Industries, a sister concern of the petitioners. The manufacturing by M/s. Boots continued till 31st March, 1994, on which date, as the licence expired, M/s. Boots surrendered the same on 14th June, 1994. In that case, the excise duty liability was calculated on the basis of the price list of M/s. Boots. In order to reduce their liability in respect of the excise duty, M/s. Boots have entered into various documents and agreements with the petitioners and the petitioners have also in turn entered into agreements in such a crafty manner that the burden of excise duty could be avoided. The petitioner applied, in March, 1994, for a licence to manufacture a syrup known as Bonitone with same ingredients as Betonin. However, they never manufactured such a product though a licence was granted. Then, the petitioners made an application for change of the name of the product from Bonitone to Betonin and that application was granted on the basis of the arrangement with M/s. Boots. M/s. Boots transferred the brand name and property rights thereof to one Zest Pharmaceutical Ltd. along with brand name of

other products for a paltry sum of Rs.800/-. The said Zest Pharma, on the same day, transferred the user licence of the said brand name of Betonin in favour of the petitioners. Hence, the petitioner started manufacturing the earlier product of the Boots, namely, Betonin as its own as per the arrangements in their own factory. This factory was earlier used by Borachem Industries. The price list was approved in respect of the product Betonin, when it was manufactured by M/s. Boots. The details of the price list and the price pack size are set out at pages 252-253 of the paper book in the affidavit in reply of the respondents. The said respondent, on verification, found that the same products manufactured by the petitioners were charged less in their price list, which was approved, much below that of M/s. Boots. It is for that reason that the petitioners were called upon to furnish an explanation and to the demand of the differential sum. The second respondent could not obtain any particulars from the petitioners and therefore, based on the information available with him and from the market, he raised the demand and re-calculated the arrears of duty liability at Rs.42,90,996.00. That is how the petitioners were called upon to pay the sum. The petitioners approached the Commissioner, who has passed an exhaustive order. The stand of the petitioners in the writ petition is denied. It is stated that the petitioners and M/s. Boots are "related

persons". The criteria in that behalf, as laid down by law is fulfilled. That is how the conclusion in the impugned order is fully supported. It is submitted that this is a plank to avoid duty liability.

11. The petitioners have filed a rejoinder affidavit and denied all the allegations in the affidavit in reply. They reiterated their stand in the writ petition and also contended that the affidavit in reply purports to supply or add to the reasons already assigned in the impugned order.

12. When this petition was placed before us, we were informed that a supplementary affidavit would be filed on behalf of the petitioners. The supplementary affidavit is indeed to elaborate as to how the petitioners and M/s.Boots cannot be termed as related persons. In that regard, what is alleged is as under:-

"3. I say that around the time of filing the captioned Writ Petition, Petitioner No. 1 was also manufacturing various medicinal preparations/products, which did not contain alcohol as part of its ingredients. By virtue thereof, the excise duty on the said products was being levied and collected by the Central Excise Department. The said medicinal products were also being sold by Petitioner No. 1 to Abbott *inter alia*, as is the case in the captioned writ petition where the Respondents have sought to hold Petitioner No. 1 and Abbott as "related persons" under the Act for the sale of Betonin.

4. It is pertinent to note that till 2003, the Central Excise Department collected the excise duty on the aforesaid alcohol-free products at the price at which Petitioner No. 1 was selling to Abbott, and not at the price

at which Abbott was selling the said products to its buyers, as has been wrongfully sought to be done by the State Excise Department in the case at hand before this Hon'ble Court.

5. I say that for the relevant period, the Central Excise Department collected excise duty on products which formed the substantial share of the sales of Petitioner No.1, whereas the State Excise Department collected excise duty on products which formed a relatively much smaller share of sales of Petitioner No. 1. Annexed hereto and marked as **Exhibit A** is a schedule of the sales turnover of Petitioner No. 1 from the FY 1996-97 to 2001-02, setting out the turnover for state excise products and central excise products in the respective years.

6. I say that the Central Excise Department, which has dealt with a larger share of products of Petitioner No. 1 which are/were being sold through Abbott, has never once raised disputes about the price declared by Petitioner No.1, or alleged that Petitioner No. 1 and Abbott are "related persons" under the Act. I say and submit that the only reason for the difference in the agency for collection of excise duty on the different products is the presence/absence of alcohol as an ingredient in the products, and therefore the Central Excise Department which is dealing with and scrutinising the payment of excise duty on a larger volume of products of Petitioner No.1, is better equipped to determine the assessable value of excise duty. I say and submit that the Central Excise Department has accepted that the assessable value is the price at which Petitioner No. 1 is selling to its buyers, including Abbott, and not the price at which Abbott is selling to its stockists/wholesalers. The Central Excise Department has also accepted that Petitioner No. 1 and Abbott are not "related persons" under the Act."

13. It is on this material that we have heard Mr. Sridharan learned senior counsel appearing for the petitioners and Mr.Yadav learned AGP appearing for the respondents.

14. Mr. Sridharan would submit that the impugned order is contrary to law. It is *ex-facie* erroneous and illegal. It is based on

certain assumptions, which have no basis in law. The second respondent/Commissioner for State Excise has completely misread and misinterpreted the relevant statutory provisions. He has also not been able to appreciate the arrangement between Pharma companies. He submits that the petitioners and M/s.Boots are not covered by the term “related persons” as defined in law.

15. Mr. Sridharan submits that during the relevant period, the expression “related persons” was defined in section 4(4)(c) of the Central Excise and Salt Act, 1944. The ingredients thereof have been relied upon to urge that the respondents have not referred to any particular portion of this definition to suggest that the petitioners and M/s. Boots are related persons. He would submit that the expression “interested in the business of each other” denotes reciprocity of interest in the business of each other. Mere interest as buyer and seller is not enough to attract this part of the definition. Mr. Sridharan would submit that the petitioners do not have any share holding in M/s. Boots, the buyer and vice versa. The petitioners are not concerned whether M/s. Boots makes profit or loss when M/s. Boots further sells the goods to its customers. Similarly, M/s. Boots is not worried or concerned whether the petitioners make profit or loss when the petitioners

sell the goods to M/s. Boots for the price charged by the Petitioners from Boots. Hence, there is no interest in the business of each other. Admittedly, the petitioners and M/s. Boots are not related to each other in the sense as holding or subsidiary company. Hence, the second part of the definition is also not applicable. It is submitted that the concept of “relative” as defined in section 4(4)(c) can be applied to natural person only. It cannot be applied to the body corporates. Both, the petitioners and M/s.Boots are corporate legal entities. Hence, they cannot be termed as related to each other. In addition, M/s. Boots is not a distributor. M/s. Boots makes outright purchases. In these circumstances, when the statutorily defined concept is inapplicable, the respondents cannot invoke any vague and ill-defined concept to hold that the petitioners and M/s. Boots are related persons.

16. Mr. Sridharan would submit that the transaction between the petitioners and M/s. Boots is on principal to principal basis. Hence, the sales price charged by the petitioners should be the assessable value in terms of section 4(1)(a). He submits that the goods are manufactured by the petitioners in their own factory. The plant and machinery is owned and operated by the petitioners, they employ their own work force and invest the

money for manufacturing and selling the goods. These goods are sold on outright basis for the price agreed between the parties. Hence, that is the normal price. That should be taken to be the applicable one in terms of section 4(1)(a) of the Central Excise and Salt Act, 1944. Mr. Sridharan also submits that in law a sole buyer cannot be termed as related person to the seller.

17. Finally, he would submit that the fact that there is a common director between Zest Pharma and M/s. Boots is entirely irrelevant to decide the issue at hand. The issue at hand is whether the petitioners, the seller and M/s. Boots, the purchaser/buyer are related persons. For all these reasons, he would submit that the finding and conclusion reached in the impugned order is perverse. It is also contrary to the well settled principles and statutory provisions. It is thus vitiated by an error of law apparent on the face of the record. Hence, the impugned order be set aside.

18. On the other hand, Mr. Yadav, learned AGP appearing for the respondents relies upon the affidavit in reply and the factual conclusion. He submits that the medicine belongs to M/s. Boots. The petitioners' premises originally belonged to M/s. Boots. Relying upon page 73 of the paper book, which is a copy of the letter dated 21st January, 1995 and particularly the information

sought by the same, Mr. Yadav would submit that the rates of M/s. Boots are reduced. This reduction has never been explained. The price lists were not approved by the respondents for this reason. That is why they validly called upon the petitioners to explain as to why the rates charged by M/s. Boots should not be applicable. Mr. Yadav would submit that it is the petitioners who invited the respondents to decide the larger issue. In that regard, he would submit that the response from the petitioners dated 3rd February, 1995, copy of which is at pages 82 to 84, denotes this position. Mr. Yadav also relied upon the calculations at page 89 of the paper book, which is a part and parcel of the communication addressed by the respondents to the petitioners (commencing from page 85 of the paper book). It is in these circumstances that he would submit that the respondents have passed the order in accordance with law. That order cannot be termed as perverse or vitiated by any error of law apparent on the face of the record. The writ petition, therefore, has no merit and be dismissed.

19. The impugned order proceeds on the footing that the office of the Commissioner for State Excise is empowered to decide the appeals. The appeals were directed against the order of the Superintendent of State Excise, Pune, dated 31st March, 1995

refusing to renew the appellant's L-1 and R. S. II licences on the ground that they had not paid the differential duty to the tune of Rs.42,90,996/-. A second appeal had been filed on 27th April, 1995 against the Superintendent's order dated 25th April, 1995 holding that the excise duty is payable at the prices at which goods are sold by M/s. Boots to other wholesalers. Therefore, he directed that the petitioner should furnish necessary information for getting the new rates approved. He directed that no clearances would be permitted till such list is approved and the approval obtained for the same.

20. It is common ground that the petitioners manufacture Betonin 200 ml. and Betonin 450 ml. The petitioners started actual production only after change in product's name to Betonin and accordingly submitted the price list. The approval to the price list has been termed as provisional for the respondents were of the view that the petitioners are bound by the price, which is charged by M/s. Boots to its wholesalers. They have not been able to explain the reduction in price charged by M/s. Boots to its wholesalers. That is how the price list, which was approved earlier, came to be cancelled. As an interim measure, some price list was approved.

21. The petitioners' response was that the Medicinal and Toilet Preparations (Excise Duties) Act, 1955 provides for levy and collection of duties of excise on medicinal and toilet preparations containing alcohol, narcotic drug or narcotic.

22. That is an Act, which was enacted so as to bring uniformity in the rates and procedures for collection of the duty on medicinal and toilet preparations containing alcohol. The definitions are contained in section 2. Clause (a) thereof defines "alcohol". Then, the definition of the term "collecting Government" is relevant. That appears in clause (b) of section 2 and to mean the Central Government or, as the case may be, the State Government which is entitled to collect the duties levied under this Act. The term "excise officer" is defined in clause (d) of section 2 to mean an officer of the Excise Department of any State and includes any person empowered by the collecting Government to exercise all or any of the powers of an excise officer under this Act. The term "medicinal preparation" is defined in clause (g) of section 2 to include all drugs which are a remedy or prescription prepared for internal or external use of human beings or animals and all substances intended to be used for or in the treatment, mitigation or prevention of disease in human beings or animals.

23. Levy and collection of duties is provided in section 3. By section 4, rebate of duty on alcohol etc., supplied for manufacture of dutiable goods is dealt with. By section 5, the recovery of sums due to Government is possible. Then section 6 states that certain operations would be subject to licences. Section 7, which has been invoked, deals with offences and penalties and evasion of the payment of duty of excise payable under the Act is an offence. There is a power of court to order forfeiture and that is to be found in section 8 and there is a power to arrest. By section 10, the power to summon persons to give evidence and produce documents in inquiries under this Act has been conferred. There are other powers and there are supplementary provisions as well. Thus, what is apparent from a reading of this Act is that the duties of excise to be levied and collected on certain goods are at the rates specified in the Schedule. These are levied on all dutiable goods excluding goods produced or manufactured in a Special Economic Zone manufactured in India [see section 3(1)]. The duties are leviable where the dutiable goods are manufactured in bond, in the State in which such goods are released from a bonded warehouse for home consumption, whether such State is the State of manufacture or not and where the dutiable goods are not manufactured in bond, in the State in which such goods are manufactured. The collection of duties is in

such manner as may be prescribed. Prescribed means prescribed by rules. Therefore, the petitioners rightly do not dispute the power of the authorities. They are aware that since their medicinal preparation contains alcohol, it would be permissible for the State Excise Department to recover and collect the duty difference, provided the requirement and pre-requisites thereof are satisfied. They only raise a contention that the basis of the demand is not sound in law.

24. The arguments have been noted in the order of the Commissioner and the stand of the respondents is that M/s. Boots was manufacturing their product Betonin under the licence granted to it at the premises of Borachem Industries at Bhosari, Pune, up to 31st March, 1994. These are the same premises where the petitioner M/s. Biostar is now producing these goods and supplying solely to M/s. Boots. Even when M/s. Boots was the manufacturer, the production was done by Borachem on job work basis. It is significant that in 1994, when M/s. Boots surrendered their licence and Biostar obtained the licence for manufacture of Betonin, four directors were common in Biostar and Borachem Industries. Petitioner Biostar increased the rates of the maximum retail price of the product with effect from 1st July, 1994. While, on the other hand, the assessable value, instead of

increasing proportionately was reduced from Rs.8.50/- as on 15th July, 1993, when M/s. Boots was the manufacturer, to Rs.7.18/- in the case of Betonin 200 ml. pack and Rs.15.96 to Rs.14.26 in the case of 450 ml. pack. There is no wholesaler discount shown in respect of the petitioners' sales to M/s. Boots. That, according to the respondents, is unimaginable in absence of a peculiar arrangement. When Biostar charged such a low price to M/s. Boots, M/s. Boots sold the product to the wholesalers at a much higher price, namely, Rs.13.89/- for 200 ml. pack at 7% discount and Rs.24.08/- at 7% discount in respect of 450 ml. pack. Therefore, it is obvious that this kind of arrangement has been made to eventually make payment of excise duty on lower assessable value. Thus, M/s. Boots, which was earlier manufacturer of Betonin has now become a so called wholesaler and Borachem, who was earlier paid job work charges has now entered into manufacturing by floating a new company, namely, Biostar. Borachem themselves have assumed the role of clearing and forwarding agent for M/s. Boots. The price of the product to the consumer is increased substantially while the manufacturing price is suppressed to the mutual benefit of Biostar and Boots, but to the detriment of the excise revenue. Thus, the transactions between the petitioners and M/s. Boots were not at arms length and they were related persons in terms of section 4(4)(c) of the

Central Excise and Salt Act, 1944. The rate charged by M/s.Boots to wholesalers would be the correct assessable value for the purpose of levying excise duty. The appellate authority, namely, the commissioner notes all these facts and arrives at a conclusion that the arrangement between the parties would enable him to hold that the justification by the petitioners, that the difference in the maximum retail price of the product and their issue price is on account of marketable expenses, is baseless. The issue price to M/s. Boots is understated with a view to evade excise duty to the mutual benefit of both, Biostar and M/s. Boots. This is supported by some other attendant circumstances. M/s.Boots, who is the owner of the trade mark Betonin, sold the same to Zest Pharmaceuticals Ltd. on 1st October, 1993. Zest Pharma, in turn allowed the use of this trade mark to Biostar by an agreement of the same date and that too without charging any royalty or any other remuneration from Biostar. This clearly shows that M/s. Boots and Biostar have commercial interest in common and are interrelated. On the one hand an arrangement is made for allowing use of brand name without any royalty or free through a circuitous route and on the other hand, ex-factory issue prices are understated, thereby transferring the manufacturer's expenses as marketing expenses. Assuming that the manufacturing prices have come

down in case of Biostar, it does not stand to reason that with the manufacturer's prices having come down, the manufacturers should feel compelled to increase the maximum retail price very substantially. There is no share to the petitioners in such increases. That is why the appellate authority concludes that the transactions between petitioner no.1 Biostar and M/s. Boots cannot be construed to be at arms length and in the ordinary course of business. The terms of agreement between the parties are not fair and reasonable. M/s. Boots, who is a sole distributor, is selling the entire production with an unusually big margin between so called manufacturers' price and the price the goods can fetch in the market. It is very unusual that the Boots has made its trade mark available to the Biostar without any royalty or consideration. Thus, M/s. Boots, the sole distributor, is a favoured buyer and a related person. The transactions between Boots and Biostar are neither at arms length nor in the ordinary course of business. Therefore, ingredients of section 4(4)(c) of the Central Excise and Salt Act, 1944 are satisfied.

25. Each of the above conclusions have to be tested on the touchstone of the settled legal principles. We must now refer to section 4. Section 4 of the Central Excise and Salt Act, 1944, to the extent relevant, reads as under:-

“.....

4(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)

.....”

26. The Hon'ble Supreme Court of India had an occasion to consider the challenge to the constitutional validity of this provision and it examined it in the case of *Union of India vs. Bombay Tyre International*¹. On the second occasion as well and in the case of *Union of India and Ors. vs. Atic Industries Ltd.*², the Hon'ble Supreme Court of India had an occasion to consider the applicability of this definition as it stood after its amendment by the Central Act 22 of 1973, which came into effect from 1st October, 1975. The Hon'ble Supreme Court of India, in para 5 of this decision, held as under:-

“5. The second ground on which the assessee assailed the validity of the demand made by the Assistant Collector for differential duty related to applicability of the definition of “related person” in clause (c) of sub-section (4) of section 4 of the amended Act. The Assistant Collector took the view that the assessee on the one hand and Atul Products Limited and Crescent Dyes and Chemicals Limited on the other were related persons within the meaning of the first part of the definition of the term “related person” and the

¹ (1984) 1 SCC 467

² 1984(17) ELT 323 (SC)

assessable value of the dyes manufactured by the assessee for the purpose of excise duty was, therefore, liable to be determined with reference to the price at which the dyes were ordinarily sold by Atul Products Limited and Crescent Dyes and Chemicals Limited. This view taken by the Assistant Collector was set aside by the High Court on the ground that the assessee on the one hand and Atul Products Limited and Crescent Dyes and Chemicals Limited on the other were not "related persons" and the wholesale cash price charged by the assessee to Atul Products Limited and Crescent Dyes and Chemicals Limited and not the price at which the latter sold the dyes to the dealers or the consumers, represented the true measure of the value of the dyes for the purpose of chargeability to excise duty. This conclusion reached by the High Court was assailed before us by the learned Attorney General appearing on behalf of the Revenue. He fairly conceded that the only part of the definition of "related person" in clause (c) of sub-section (4) section 4 on which he could rely was the first part which defines "related person" to mean "a person who is so associated with the assessee that they have interest directly or indirectly in the business of each other." The second part of the definition which adds an inclusive clause was admittedly not applicable, because neither Atul Products Limited nor Crescent Dyes and Chemicals Limited was a holding company or a subsidiary company nor was either of them a relative of the assessee, so as to fall within the second part of the definition. But we do not think that even the limited contention urged by the learned Attorney General on behalf of the Revenue based on the first part of the definition can succeed. What the first part of the definition requires is that the person who is sought to be branded as a "related person" must be a person who is so associated with the assessee that they have interest, directly or indirectly, in the business of each other. It is not enough that the assessee has an interest, direct, or indirect in the business of the person alleged to be a related person nor is it enough that the person alleged to be a related person has an interest, direct or indirect, in the business of the assessee. It is essential to attract the applicability of the first part of the definition that the assessee and the person alleged to be a related person must have interest, direct or indirect, in the business of each other. Each of them must have a direct or indirect interest in the business of the other. The equality and degree of interest which each has in the business of the other may be different; the interest of one in the business of the other may be direct, while the interest of the latter in the

business of the former may be indirect. That would not make any difference, so long as each has got some interest, direct or indirect, in the business of the other. Now, in the present case, Atul Products Limited has undoubtedly interest in the business of the assessee, since Atul Products Limited holds 50 per cent of the share capital of the assessee and has interest as 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 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 than 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. It is Imperial Chemical Industries Limited, London which holds 50 per cent of the share capital of the assessee and this foreign company also holds 40 per cent of the share capital of Crescent Chemicals and Dyes Limited. Imperial Chemical Industries Limited, London would admittedly have an interest in the business of the assessee in its capacity as a shareholder, but how can Crescent Dyes and Chemicals Limited of which 40 per cent of the shares are held by Imperial Chemical Industries Limited, London which in its

turn is a share holder of the assessee, can not be said to have any interest, direct or indirect, in, the business of the assessee. Equally the assessee has no interest direct or indirect in the business of Crescent Dyes and Chemicals Limited, which is just a wholesale dealer purchasing dyes from the assessee in whole sale on principal to principal basis. It is obvious that for the same reasons which have prevailed with us while discussing the case of Atul Products Limited, the assessee has no direct or indirect interest in the business of Crescent Dyes and Chemicals Limited. The first part of the definition of related person in clause (c) of sub-section (4) of section 4 of the amended Act is, therefore, clearly not satisfied both in relation to Atul Products Limited as also in relation to Crescent Dyes and Chemicals Limited and neither of them can be said to be a "related person" vis-a-vis the assessee within the meaning of the definition of that term in clause (c) of sub-section (4) of section 4 of the amended Act. We, therefore, affirm the view taken by the High Court and hold that the assessable value of the dyes manufactured by the assessee cannot be determined with reference to the selling price charged by Atul Products Limited and Crescent Dyes and Chemicals Limited to their purchasers but must be determined on the basis of the wholesale cash price charged by the assessee to Atul Products Limited and Crescent Dyes and Chemicals Limited. The demand made by the Assistant Collector for differential duty must, therefore, be held to be rightly quashed by the High Court."

27. Then, in the two cases, which were decided post this judgment, the Hon'ble Supreme Court of India once again considered the ambit and scope of this definition and held as under:-

In the case of *Collector of Central Excise, Ahmedabad vs.*

*I.T.C.E.*³:-

"5. From a plain reading of the definition, it is evident that if a person is so associated with the assessee that both of them have interest directly or indirectly in the business of each other, they would be treated as related person. The definition also includes a holding company, a subsidiary

³ AIR 2002 SC 3322

company, a relative and a distributor of the assessee and any sub-distributor of such distributor, but we are not concerned with the later part of the definition. The ingredients of the first part of definition are: first, a person to be treated as related person must be associated with the assessee; secondly, the person so associated and the assessee must have interest in the business of each other; and thirdly, such interest may be direct or indirect. Mutuality of interest between the other person and the assessee in the business of each other, whether direct or indirect, is necessary to label such a person as a related person.”

28. It may be that in that case such mutuality and interest between the other persons and the assessee was established, but the test is as above.

29. In the later decision rendered in the case of *Flash Laboratories Limited vs. Collector of Central Excise*⁴, a three Judge Bench judgment, the Hon'ble Supreme Court of India considered the *Bombay Tyres International* (supra) and *Atic Industries Ltd.* (supra) and came to the conclusion that there is mutuality of interest.

30. Mr. Sridharan has invited our attention to a decision of the Hon'ble Supreme Court of India in the case of *Alembic Glass Industries Ltd. vs. Collector of Central Excise*⁵, where, again the facts were that the assessee held shares in a chemical company and the chemical company held shares in the assessee. The

⁴ AIR 2003 SC 1894

⁵ 2002 (143) ELT 244 (SC)

chairman and three directors were common. Therefore, it was contended by the revenue that they were related persons and the price at which the assessee sold glassware to the chemical company should be marked up for the purposes of valuation for excise duty. The Hon'ble Supreme Court reproduced the definition, referred to *Atic Industries Ltd.* (supra) and concluded as under:-

“7. In our view, this is the heart of the matter. The shareholders of a public limited company do not, by reason only of their shareholding, have an interest in the business of the company. Equally, the fact that two public limited companies have common Directors does not mean that the one company has an interest in the business of the other. It is, therefore, not possible to uphold the conclusion of the Tribunal that the assessee and the chemical company were related persons. This being so, it is unnecessary to go into the alternate arguments advanced on behalf of the assessee.”

31. Mr. Sridharan then relied upon the judgment in the case of *Commissioner of Central Excise, Aurangabad vs. Goodyear South Asia Tyres Pvt. Ltd.*⁶. The Hon'ble Supreme Court, in the backdrop of the principles in *Atic Industries Ltd.* (supra) and applying them to the facts of that case, held as under:-

“11. No doubt, the two buyers had given Rs.85.66 crores interest free loan to the assessee. However, that by itself may not be a reason to hold them as related persons within the meaning of Section 4(4)(c) of the Act. In the absence of any mutuality of interest existing between them, giving of this interest free loan could have been a basis to include the notional interest while arriving at the cost of product sold by the assessee to the two buyers. However, instead of doing that, the appellant wanted to make use of this factor

⁶ 2015 (322) ELT 389 (SC)

to hold that the assessee and the two buyers are “related persons” which position is difficult to comprehend having regard to the principle laid down in *Atic Industries Ltd.'s case*.”

32. In this judgment, the Hon'ble Supreme Court of India analysed the amended provision of section 4(4)(3)(b) and concluded that the assessee became the fully owned company of Goodyear, the relationship between the two would be that of related persons as they became interconnected undertakings and are covered by the provisions of amended section 4(4)(3)(b).

33. We need not multiply the precedents, save and except making reference to another judgment, which was cited by Mr. Sridharan in the case of *Kirloskar Oil Engines Ltd. vs. Union of India*⁷. This judgment holds that the distributors could not be treated as holding company, subsidiary company or relative. Mr. Sridharan relied upon another prior judgment in the case of *Amar Dye-Chem Ltd. vs. Union of India*⁸, where, once again it was held that merely by the use of the word “distributor” in the price list or in the forwarding letter, it cannot be said that the distributor was a related person. Whether the distributor falls within the definition of “related person” depends upon the real substance of the transaction between the manufacturer and the distributor (see para 14).

⁷ 1986(26) ELT 504

⁸ 1981(8) ELT 348 (Bom.)

34. We referred to the definition of the term “related person”, the binding judgments interpreting it only to emphasise that the foundation or basis of the Commissioner's conclusion is *ex-facie* contrary thereto. It is wholly unsustainable in law. Before us, the Commissioner applies a test which defies even commonsense. He comes to a conclusion that M/s. Boots were manufacturing their product Betonin under the licence granted to them at the premises of Borachem Industries. These are the same premises where Biostar is now producing these goods and supplying to M/s.Boots. Even when M/s. Boots was the manufacturer, the production was done by Borachem Industries Ltd. on job work basis. It is significant that when M/s. Boots surrendered its licence and Biostar obtained it for manufacture of Betonin, four directors were common in Biostar and Borachem Industries Ltd. The further criteria or test that he applies and which appears to be a little strange is that M/s. Boots are the owners of the trade mark Betonin. It sold the same to Zest Pharma on 1st October, 1993 and the Zest Pharma, in turn allowed the use of this trade mark to Biostar by an agreement of the same date and that too without charging any royalty or any other remuneration from Biostar. This clearly shows that M/s. Boots and Biostar had commercial interest in common and are interrelated. We cannot uphold this conclusion on the touchstone of the legal principles

enunciated in detail above. Merely because M/s. Boots is the sole distributor, is selling the entire production of the petitioner with unusually big margin between so called manufacturers' price and the price the goods can fetch in the market is termed as unusual, coupled with making available the trade mark of the goods by M/s. Boots, does not mean that petitioner no. 1 and M/s. Boots are related persons. The test applied in para 7.0(a) cannot, therefore, be enough for holding that section 4(4)(c) of the Act is attracted. For that to be attracted, it is evident that the Commissioner would have to conclude that M/s. Boots is so associated with petitioner no. 1 that they have interest, directly or indirectly, in the business of each other. We find that the Commissioner seems to be indicating that the transaction to be termed at arms length would require the parties to be so unrelated and independent, but M/s. Boots, who is the sole distributor and selling the entire production of petitioner no. 1 with an unusually big margin would necessarily mean that there is an interest in the business of each other and which interest could be direct or indirect. The law, as laid, is that being a sole distributor is not enough to hold that the manufacturer and such distributor are related persons. There is no presumption that the manufacturer supplying its entire production to a sole distributor would mean they have an interest in the business of each other.

Pertinently, the petitioners and Borachem are supposed to be having something common, inasmuch as there were four directors, who were on the board of both. However, the licence was possessed by M/s. Boots and when it surrendered the same to Biostar, beyond the relationship of manufacturer and distributor, nothing has been placed on record, which would fulfill the ingredients of clause (c) of sub-section (4) of section 4 of the Central Excise and Salt Act, 1944. It may be that when M/s.Boots was holding the licence, it was manufacturing its product Betonin at the premises of Borachem and these are the very premises, from which, petitioner no. 1 is now producing the goods and supplying them to M/s. Boots. By this, it is not established and proved and as rightly contended by Mr.Sridharan that there is an interest, direct or indirect, in the business of each other. The goods have been sold on outright basis (principal to principal) to M/s. Boots. The reciprocity of interest is not established and proved. The interest in this case is that of a buyer and seller. The petitioners do not have any share holding in M/s.Boots and vice versa. M/s. Boots is not concerned as to whether the Petitioners make a loss or profit in the business and similarly, the petitioners are not concerned whether M/s. Boots makes a loss or profit in the onward sale of Betonin. They are not holding and subsidiary company. They are independent corporate legal entities. It is in

these circumstances and when the entire business of manufacturing of the goods is carried out by the petitioners on their own supports our conclusion that petitioner no. 1 and M/s.Boots are not related persons. That there is a common director in Zest Pharma and M/s. Boots is entirely irrelevant for our conclusion, for we are considering and probing the legality and validity of the respondents' reasoning that petitioner no. 1 and M/s. Boots are related persons.

35. As a result of the above discussion, we are not in agreement with Mr. Yadav that the Commissioner was justified in reaching the conclusion that the transactions between the petitioners and M/s. Boots are not carried out at arms length. The price, therefore, cannot be determined on that basis, but must be, therefore, treated as having been decided upon by two related persons. Once this conclusion is unsustainable, given the admitted facts and the established legal principles, then, it is not possible to agree with Mr. Yadav that the price list as desired by the respondents needs to be approved. Rather the price as finalised by the petitioners and the list in that regard previously approved was rightly treated as final. There was no question of then calling upon the petitioners to alter their price structure and pay any differential duty. The entire demand is only based on the

above understanding of the respondents and as reflected from their communications. It is these very communications and the above basis, which was reiterated by Mr. Yadav also by inviting our attention to the affidavit in reply. The foundation being totally weak and unsustainable in law, we cannot uphold the impugned order.

36. In these circumstances, the writ petition succeeds. Rule is made absolute in terms of prayer clause (a).

37. As a consequence of this declaration, the bank guarantee furnished by the petitioners shall be returned to them duly discharged. In the facts and circumstances of the case, there would be no order as to costs.

38. At this stage, Mr. Sridharan, learned Senior Counsel appearing for the petitioners, prays that relief in terms of prayer clause (b)(ii) be also granted.

39. In our view, it is not possible to grant this relief and after the time that has been consumed in the litigation. We grant liberty to the petitioners to move the authorities insofar as this prayer is concerned and if any such request is made by the petitioners, that be dealt with in accordance with law.

(B.P.COLABAWALLA, J.) (S.C.DHARMADHIKARI, J.)