

Calcutta Chromotype Ltd.

Vs

Collector of Central Excise, Calcutta

(Sujata V. Manohar, D. P. Wadhwa JJ)

31.03.1998

JUDGMENT

D.P.WADHWA J

1. M/s. Calcutta Chromotype Ltd. was filed this appeal against the order dated October 30, 1989 of the Custom, Excise and Gold (Control) Appellate Tribunal, New Delhi, (for short 'Appellate Tribunal'). By this judgment the Appellate Tribunal while upholding the order of the Collector of Appeals observed that though there was an identity of interest between the appellant, manufacturer and M/s. Ganga Saran & Sons Pvt. Ltd., its sole distributor, the Assistant Collector had not considered the break up of the shares of each member of the family of the manufacturer and distributor. The Appellate Tribunal held that the fact that there was identity of interest was the determining factor in holding whether a person is a related person within the meaning of Section 4 (4) (c) of the Central Excise and Salt Act, 1944 (for short 'the Act'). Since the Assistant Collector had not considered the break up of the shares of each member of the family comprising the two companies being the manufacturer and the distributor, the Tribunal remanded the matter to the Assistant Collector the break up of the shares of each member of the family and if the "test of identity" was satisfied, he should confirm the order.

2. The appellant manufactures playing cards. It sells the entire stock of playing cards manufactured by it to its sole distributor M/s. Ganga Saran & Sons Pvt. Ltd. The Assistant Collector, Central Excise under the Act levied duty at the price at which the playing cards were sold by M/s. Ganga Saran & Sons Pvt. Ltd. as according to the Assistant Collector it was related persons within the meaning of Section 4 (4)(c) of the Act of the appellant. Collector of Appeal confirmed the order of the Assistant Collector also holding that M/s. Ganga Saran & Sons Pvt. Ltd. was the related person of the appellant. Against the order of the Collector the appellant filed a revision application under Section 36 of the Act, prior to its amendment, and thereafter the revision application was transferred to the Appellate Tribunal and heard as appeal.

3. The Assistant Collector, Central Excise found that both the appellant and its sole distributor were limited companies registered under the Companies Act, 1960. He found that the Board of Directors of both these companies were consulted:

"Appellant

1. Shri Narendra Sharma, Managing Director
2. Smt. Brahma Devi, Director
3. Smt. Indu Sharma, Director

M/s. Ganga Saran & Sons Co.

1. Shri Narendra Sharma, Managing Director
2. Smt. Brahma Devi, Director
3. Shri Brajendra Sharma, Director
4. Shri Rajendra Sharma, Director"

4. Assistant Collector also found that shares of the appellant and its sole distributor were held by the members of the Sharma family, i.e., persons who were related to each other and that both the companies were having the common Managing Director and further that the appellant was selling the goods with the brand name of its distributor, namely, M/s. Ganga Saran & Sons Pvt. Ltd. It was contended before the Tribunal that both the companies were registered under the Companies Act and were separate legal entities and therefore, could not be considered as related persons. It was submitted that having the common Director was not the determining factor to hold that M/s. Ganga Saran & Sons Pvt. Ltd. was a related person and further that the fact that the manufacturer was printing the name of the buyer and was selling the entire product to the buyer also did not make the buyer a related person. It was also submitted that the authorities below had failed to establish that M/s. Ganga Saran & Sons Pvt. Ltd. had been accorded a favourable treatment and that, in fact, low price had been charged on that account. The appellant said that in that absence of any such evidence it was not correct to hold that the price at which M/s. Ganga Saran & Sons Pvt. Ltd. sold the product was the price for the purpose of determining the assessable value.

5. The Appellate Tribunal was also of the view with reference to Section 4(4)(c) of the Act that if a person is so associated with the assessee that they have interest in the business of each other then the person was a related person of the other within the meaning of the Section. Appellate Tribunal noted that Collector (Appeal) had held that the appellant as well as M/s. Ganga Saran & Sons Pvt. Ltd. were started and established by G.S. Sharma and his family members and further that Assistant Collector had found that the shares of the appellant and the shares of the buyer company were held by the members of the same Sharma family and, thus, by the persons that who were related to each other. The Appellate Tribunal referred to the decision of this Court in Mohanlal Magan Lal Bhavsar (Deceased) through LRs. and Ors. Vs. Union of India and Ors. [(1986) 23 ELT and also to its own decision in Diamond Clock Manufacturing Co. Ltd. Vs. CCE, Pune [(1988) 34 ELT 662] where it interpreted the definition of related person. Relying on these two decisions as applicable to the facts of this case, the Appellate Tribunal was of the view that there was identity of interest and M/s. Ganga Saran & Sons Pvt. Ltd. was related person within the meaning of Section 4(4)(c) of the Act. The Appellate Tribunal disposed of the appeal with the directions aforesaid.

6. Mr. Dave, learned counsel for the appellant, contended that the Appellate Tribunal erred in holding that the appellant and M/s. Ganga Saran & Sons Pvt. Ltd. were related persons or that there was an identity of interest between the two. He said the two judgments, one of Supreme Court and other of the Appellate Tribunal itself on which the Appellate Tribunal relied were not applicable inasmuch as facts in the said two cases were entirely different and decisions were clearly distinguishable. He said that in order to be a related person within the meaning of Section 4(4)(c) of the Act the person alleged to be related must have interest, direct or indirect, in the business of the assessee and that in the present case both the appellant and its buyer were private limited companies established much before the imposition of the excise duty on playing cards and had been dealing

with each other at arm's length. He said there was no evidence before the Appellate Tribunal as to the shareholding in each of the two companies and to say that shareholdings were held by Sharma family was a misnomer and that such a fragile test could not be applied to test the identity or mutuality of interest. Mr. Dave said that the Appellate Tribunal came to a wrong conclusion on prima facie holding that Sharma family controlled both the companies. Sharma family is a vague term and did not reflect as to what was the exact shareholding of the members in both the companies and how they were related to each other. Lastly, Mr. Dave submitted that there was no allegation and no finding ever recorded that the dealings between the appellant and its distributor were not at arm's length or that prices at which the goods were sold to the distributor were exceptionally low, having been influenced by some extra commercial consideration. Mr. Dave said that the Appellate Tribunal did not examine the whole facts of the case and law applicable thereto in proper perspective and that led it to give directions which are incorrect and these were now being impugned.

7. Mr. Dave have submitted that for subsequent years the Department took the view that the buyer was not a related person. He also cited a few judgment of this Court in support of his submissions. Before we refer to these judgments, we may reproduce the relevant provisions of Section 4 of the Act:

"4. Valuation of excisable goods for purposes of charging of duty of exercise.-

(1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to value, such value shall, subject to the other provisions of this section be deemed to be-

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

Provided that-

(i)

(ii)

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

(b)

(2)

(3)

(4) or the purpose of this section,-

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

(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 or such distributor.

Explanation.- In this clause "holding company" "a subsidiary company" and "relative" have the same meaning as in the Companies Act, 1956;

(d).....

(e)....."

8. Negatively put, it will not, therefore, be the normal price for the purpose of valuation, if the buyer is a related person and the price is not the sole consideration for sale. Both the conditions for sale. Both the conditions must coexists so that the price at which the manufactured goods are sold by the assessee to the buyer is taken as the value for the purpose of assessment of duty of excise. As to who is a "related person" within the meaning of clause (c) of Section 4(4), this Court in Union of India & Ors. Vs. ATIC Industries Ltd. [(1984) 3 SCC 575] said:

"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. There 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."

9. This was followed in subsequent cases in Collector of Central Excise, Madras Vs. T.I. Millers Ltd., Madras and T. I. Diamond chain, Madras [1988 (Supp.) SCC 361]; Show White Industrial Corporation Vs. Collector of Central Excise [1989 (41) ELT 360 (SC)]. It was also pointed out that this Court in a special appeal (Civil Appeal No. 9850/95, decided on April 4, 1996) filed against the order of the Appellate Tribunal had dismissed the same where the Appellate Tribunal had held that mere commonness of Partners and Directors between the buyer and seller was not sufficient to treat the buyer as a 'related person' even if entire production was sold through them. We have examined the file of C.A. 9850/95. What we find is that the appeal was filed by the Revenue which was barred by limitation and delay was condoned subject to payment of cost Rs. 500/- payable within four weeks to the counsel for respondents. Since the cost had not been paid the appeal was dismissed by order dated April 4, 1996. This dismissal of the appeal, therefore, does not help the appellant. The Appellate Tribunal in the order, which was impugned in CA 9850/95, found that the

assessee had sold 95 out of 96 arc lamps to a company of which one of the partners of the assessee firm was a director. On this Department took the view that the company was a related person and sought to assess the goods at a higher price at which the assessee sold the goods to the buyer company. Appellate Tribunal was of the view that merely because there was some common directors between the assessee and the company that itself would not be sufficient ground for holding that both were related persons. Appellate Tribunal found that no evidence regarding mutuality of interest had been brought on record except the sale of goods by the assessee to the buyer company. It said that while this fact of sale may create one way interest of the company in the business of the assessee firm it was not indicative of the interest of the assessee in the business of the buyer company.

10. Reference was also made to two orders of the Appellate Tribunal in Mahalakshmi Glass Works Ltd. Vs. Collector of Central Excise [1991 (53) ELT 120 (Tribunal)] and Weikfield Products Co. (India) Vs. Collector of Central Excise [1993 (63) ELT 672 (Tribunal)]. In the first case, three out of four Directors of the assessee were also the Directors of its whole sale buyer M/s. Western India Glass Works. The Tribunal noticed that it was not the case of the department that sales to customers other than to M/s. Western India Glass Works were at prices different from prices of sales to M/s. Western India Glass Works. The Appellate Tribunal held that in the absence of any other factor like mutuality of interest, commonness of some Directors was not sufficient to constitute relationship between the two companies which were common independent corporate legal entities. In the second case, the assessee sold its goods through two broad channels, viz., directly to Canteen Stores Department and to the Weikfield Central Marketing Organisation. While 20% discount was allowed to Canteen Stores Department, 30% discount was allowed to weikfield Central Marketing Organisation. Assessee justified the reasons for allowing higher discount in one case because the department was of the view that transaction between the assessee and the weikfield Central Marketing Organisation could not be treated as at arms length in view of the fact that most of the partners in the firm were close relatives of the Directors of the assessee which was a company under the Companies Act, 1956. The Appellate Tribunal was of the view that the assessee being a corporate concern and Weikfield Central Marketing Organisation a partnership concern, the latter could not be called a relative of the assessee and to consider weikfield Central Marketing Organisation as a favoured buyer, there must be sufficient proof to show that specially low price was charged.

11. Mr. Sharma, counsel for the Revenue, referred to a decision of this Court in Mohanlal Maganlal Bhavsar (Deceased) through LRs. & Ors. Vs. Union of India & Ors. [1986 (23) ELT 3 (SC)]. In this case one of the pleas raised by the appellant was that the High Court was not correct in holding that the wholesale price of the preparations of the appellant could not be taken for the purpose of valuation under Section 4 of the Act at the price at which these were supplied to M/s. M.B. Bhavsar & Sons, Chief Distributor of the appellant. This Court observed as under:

" The next contention of the Appellants, which was also negated by the High Court, was that in determining the value of the medicine preparations for the purpose of levying excise duty thereon the authorities erred in taking the wholesale price of the said preparations and not the price at which these preparations were supplied by the said firm to their Chief distributor Messrs. M.B. Bhavsar & Sons. In order to test the correctness of this contention it is necessary to set out a few facts which are material to this aspect of the case. The firm of Messrs. M. B. Bhavsar & Sons, though a separate partnership firm, was in fact a firm in which not only the original First Appellant and Appellants Nos.2 and 3 were partners but a son of each of them was

also a partner'. There was thus identity of interest between the firm of Messrs. M.B. Bhavsar & Sons and the firm M/s. Bhavsar Chemical Works. Both these firms had their offices in the same premises and under the partnership agreement the sons of the original First Appellant and the other two Appellants were to share only in the profits of Messrs. M.B. Bhavsar & Sons but not to be liable for any losses. These two firms, therefore, cannot be said to be at arm's length or independent parties and the prices at which the medicinal preparations were supplied by Dhavear Chemicals Works to Messrs. M.B. Bhavsar & Sons cannot be taken to be the real value of the said preparations. The High Court was, therefore, right in rejecting this contention also."

12. The principle that a company under the Companies Act, 1956 is a separate entity and, therefore, where the manufacturer and the buyer are two separate companies, they cannot, than anything more, be 'related persons' within the meaning of clause (c) of sub-section (4) of Section 4 of the Act is not of universal application. Law has traveled quite a bit after decision of the House of Lords in the Case of Salomon Vs. Salomon [1897 AC 22]. This is how this Court notices in Tata Engineering and Locomotive Company Ltd. Vs. State of Bihar & Ors. [(1964) 6 SCR 885]:

"The true legal position in regard to the character of a corporation or a company which owes its incorporation to a statutory authority, is not in doubt or dispute. The corporation in law is equal to a natural person and has a legal entity of its own. The entity of the corporation is entirely separate from that of its shareholders; it bears its own name and has a seal of its own; its assets are separate and distinct from those of its members; it can sue and be sued exclusively for its own purpose; its creditors cannot obtain satisfaction from the assets of its members; the liability of the members as shareholders is limited to the capital invested by them; similarly, the creditors of the member have no right to the assets of the corporation. This position has been well-established ever since the decision in the of Salomon Vs. Salomon & Co. [] (1897) A.C. 22 H.L.] was pronounced in 1897; and indeed, it has always been the well recognised principle of common law. However, in the course of time, the doctrine that the corporation or a company has a legal and separate entity of its own has been subjected to certain exceptions by the application of the fiction that the veil of the corporation can be lifted and its face examined in substance. The doctrine of the lifting of the veil thus marks a change in the attitude that law had originally adopted towards the concepts of the separate entity or personality of the corporation. As a result of the impact of the complexity of economic factors, judicial decisions have sometimes recognised exceptions to the rule about the juristic personality of the corporation. It may be that in course of time these exceptions may grow in number and to meet the requirements of different economic problems, the theory about the personality of the corporation may be confined more and more.

13. In Life Insurance Corporation of India Vs. Escorts Ltd. & Ors. [(1986) 1 SCC 264], this Court again considered this question and said:

"While is firmly established ever since Salomon Vs. A. Salomon & Co. Ltd. [(1897) AC 22 HL] was decided that a company has an independent and legal personality distinct from the individuals who are its members, it was since been held that the corporate veil may be lifted, the corporate personality may be ignored and the individual members recognised for who they are in certain exceptional

circumstances. Pennington in his *Company Law* (4th Ed. states:

"Four inroads have been made by the law on the principle of separate legal personality of companies. By far the most extensive of these has been made by legislation imposing taxation. The government, naturally enough, does not willingly suffer schemes for the avoidance of taxation which depend for their success on the employment of the principle of separate legal personality, and in fact legislation has gone so far that in certain circumstances taxation can be heavier if companies are employed by the taxpayer in an attempt to minimise his tax liability than if he uses other means to give effect to his wishes. Taxation of companies is a complex subject, and is outside the scope of this book. The reader who wishes to pursue the subject is referred to the many standard text books on Corporation Tax, Income Tax, Capital Gains Tax and Capital Transfer Tax. The other inroads on the principle of separate corporate personality have been made by two sections of the Companies Act, 1948, by judicial disregard of the principles where the protections of public interests is of paramount importance, or where the company has been formed to evade obligations imposed by the law, and by the courts implying in certain cases that a company is an agent or trustee for its members. In *Palmer's Company Law* (23rd ED.), the present position in England is stated and the occasions when the corporate veil may be lifted have been enumerated and classified into fourteen categories and classified into fourteen categories. Similarly in *Gower's Company Law* (4th ED.), a chapter is devoted to 'lifting the veil' and the various occasions when that may be done are discussed. In *Tata Engineering and Locomotive Co. Ltd.* [(1964) 6 SCR 885], the company wanted the corporate veil to be lifted so as to sustain the maintainability of the petition, filed by the company under petition, filed by the company under Article 32 of the Constitution, by treating it as one filed by the shareholders of the company. The request of the company was turned down on the ground that it was not possible to treat the company as a citizen for the purposes of Article 19. In *CIT vs. Sri Meenakshi Mills Ltd.* [AIR 1967 SC 819], the corporate veil was lifted and evasion of income tax prevented by paying regard to the economic realities behind the legal facade. In *Workmen Vs. Associated Rubber Industry Ltd.*, [(1985) 4 SCC 114], resort was had to the principle of lifting the veil to prevent devices to avoid welfare legislation. It was emphasized that regard must be had to substance and not the form of a transaction. Generally and broadly speaking, we may say that the corporate veil may be lifted where a statute itself contemplates lifting the veil, or fraud or improper conduct is intended to be prevented, or a taxing statute or a beneficent statute is sought to be evaded or where associated companies are inextricably connected as to be, in reality, part of one concern. It is neither, nor desirable to enumerate the classes of cases where lifting the veil is permissible, since that must necessarily depend on the relevant statutory or other provisions, the object sought to be achieved, the impugned conduct, the involvement of the element of the public interest, the effect on parties who may be affected etc."

14. In *M/s. McDowell and Company Ltd. Vs. Commercial Tax Officer* [(1985) 3 SCC 230=(1985) 154 ITR 148], this Court examined the concept of tax avoidance or rather the legitimacy of the part of dodging tax without breaking the law. This Court stressed upon the need to make a departure from the Westminster principle based upon the observations of Lord Tomlin in the case of *IRC Vs. Duke of Westminster* [(1936) AC 1] that every assessee is entitled to arrange his affairs as to not attract taxes. The Court said that tax planning may be legitimate provided it is within the framework

of law. Colourable devices, however, cannot be part of tax planning. Dubious methods resorting to artifice or subterfuge to avoid payment of taxes on what really is income can today no longer be applauded and legitimised as a splendid work by a wise man but has to be condemned and punished with severest of penalties. If we examine the thrust of all the decisions, there is no bar on the authorities to lift the veil of a company whether a manufacturer or a buyer, to see it was not wearing that mask of not being treated as related person when, in fact, both, the manufacturer and the buyer, are in fact the same persons. Under sub-section (1) of Section 4 of the Act, value of the excisable goods shall not be deemed to be normal price thereof, i.e. the price at which such goods are ordinarily sold by the assessee to a buyer in the course of whole sale trade for delivery at the time and place of removal, if the buyer is a related person and price is not the sole consideration for sale. As to who is a related person, we have to see its definition in Section 4(4)(c) of the Act. It is not only that both, the manufacturer and the buyer, are associated with each other for which corporate veil may be lifted to see who is behind it but also that they should have interest, directly or indirectly, in the business of each other. But once it is found that person the manufacturer and the buyer are same, it is apparent that buyer is associated with the manufacturer, i.e. the assessee and then regard being had to the common course of natural events, human conduct and public and private business it can be presumed that they have interest, directly or indirectly, in the business of each other (refer Section 114 of the Evidence Act). It is, however, difficult to lay down any broad principle to hold as to when corporate veil should be lifted or if on doing that, could it be said that the assessee and buyer are related persons. That will depend upon the facts and circumstances of each case and it will have to be seen who is calling the shots in both the assessee and the buyer. When it is the same person the authorities can certainly fall back on the third proviso to clause (a) of Section 4(1) of the Act, to arrive at the value of the excisable goods. It cannot be that when the same person incorporates two companies of which one so the manufacturer of excisable goods and other is the buyer of those goods, the two companies being separate legal entities the exercise authorities are barred from probing anything further to find out who is the person behind these two companies. It is difficult to accept such a narrow interpretation. True that Share holdings in a company can change but that is the very purpose to lift the veil to find out if the two companies are associated with each other. Law is specific that when duty of exercise is chargeable on the goods with reference to its value than the normal price on which the goods are sold shall be deemed to be the value provided (1) the buyer is not a related person and (2) the price is the sole consideration. It is a deeming provision and the two conditions have to be satisfied for the case is to fall under clause (a) of Section 4(1) keeping in view as to who is the related persons within the meaning of clause (c) of Section 4(4) of the Act. Again if the price is not the sole consideration, then again clause (a) of Section 4(1) will not be applicable to arrive at the value of the excisable goods for the purpose of levy of duty of excise.

15. In the present case, we do find that the authorities of and the Appellate Tribunal did address themselves to the basic question as to the shareholdings of both, the assessee and the buyer, inasmuch as they found that the Managing Director of both the companies was the same and one more director was common. It was also found that the shares of both the companies were held by the members of the 'Sharma family' but that quite a vague expression and, therefore, in our view, the Appellate Tribunal was partly right in giving the direction to ascertain the break-up of the shares of each member of the family in the two companies. To lift the veil the actual shareholding of both the companies and the persons in control of the management of both the companies needed to be ascertained to consider the identity of interest of both the companies in the business of each other. No presumption of such mutuality of interest in the business of each other could have been drawn without the factual data.

16. However, in the present case, we are told that for subsequent years, the authorities have not treated M/s. Ganga Ram & Sons Pvt. Ltd. the sole distributor of the appellant, as a related person which fact has not been controverted by the respondent and have accepted the price at which the goods are sold by the assessee to the sole distributor as the sole consideration for sale. The matter pertains to the years 1976. Order of the Assistant director is of the years 1978. We do not think at this late stage any purpose will be served to inquire into the shareholdings of the assessee, the appellant Tribunal. We are, therefore, inclined to hold that no effect be given to the judgment of the Appellate Tribunal.

17. Accordingly, the appeals are allowed and the impugned judgment of the Appellate Tribunal is set aside. There will be no order as to costs.