M/S Saci Allied Products Ltd.,U.P vs Commissioner Of Central Excise, Meerut on 26 April, 2005

Equivalent citations: AIR 2005 SUPREME COURT 4031, 2005 (7) SCC 159, 2005 AIR SCW 2581, 2005 (4) SLT 692, 2005 (4) SCALE 405, (2005) 4 JT 577 (SC), (2005) 4 SCJ 387, (2005) 4 SUPREME 202, (2005) 4 SCALE 405, (2005) 183 ELT 225

Author: Ar. Lakshmanan

Bench: S.N. Variava, Ar. Lakshmanan, S.H. Kapadia

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           CASE NO.:
Appeal (civil)  5854 of 1999

PETITIONER:
M/s SACI Allied Products Ltd.,U.P.

RESPONDENT:
Commissioner of Central Excise, Meerut

DATE OF JUDGMENT: 26/04/2005

BENCH:
S.N. Variava, Dr. AR. Lakshmanan & S.H. Kapadia

JUDGMENT:
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J U D G M E N T Dr. AR. Lakshmanan, J.

This appeal is preferred against the Final Order of the Customs Excise & Gold (Control) Appellate Tribunal, New Delhi dated 22.6.1999 in Final Order No. 879/99-A in Appeal No. E/1225/95-A holding that the appellants are liable to pay excise duty on the basis of the sale price of the buyer to its dealers in Uttar Pradesh and not based on the appellants' sale price to independent dealers.

The appellant is a company manufacturing detergent powder and allied products in its factory near Ghaziabad in the State of Uttar Pradesh. The appellant sells its goods from the factory to dealers spread throughout the country other than Uttar Pradesh at a particular price. It has paid excise duty for these sales on this price. No dispute has been raised by the Excise Department in respect of these sales. The appellants also sold the goods in the State of Uttar Pradesh to a company called Syndet & Chemical Industries Ltd. (for short 'Syndet') at a price which was lower. Syndet, in turn, sold the goods to its dealers in Uttar Pradesh at a price which was higher than the price at which the appellants sold the product outside Uttar Pradesh. Roughly 35% of the goods are sold to independent dealers and 65% of the goods are sold to Syndet by the appellants. Syndet is also the owner of trademark "Fena" for detergent powder and allied products. According to the appellants,

they have paid excise duty for sales made to Syndet also at the price charged by the appellants from the independent dealers situated all over the country, other than in Uttar Pradesh, since according to the Department, the appellants (SACI Allied products Pvt. Ltd.) and buyer Syndet are related persons as per Section 4(4)(c) of the Central Excise and Salt Act, 1944 (hereinafter referred to as "the Act").

The respondent-Collector passed an order dated 30.3.1995 to the effect that Syndet is a related person and, therefore, in view of third proviso to Section 4(1)(a) of the Act, excise duty is to be paid by the appellants based on the price at which the goods are resold by Syndet to its dealers in the State of Uttar Pradesh. The appellate Tribunal has upheld the above order of the Collector on a totally new and different basis by holding that the dealers of Syndet in the State of Uttar Pradesh constitute a different class of buyers than the dealers in other regions and, therefore, Syndet's price to its dealers should be the value under first proviso to Section 4(1)(a) in respect of sales made by the appellants to Syndet.

The appellants had earlier filed two sets of price lists, one in respect of the sales effected to dealers in all the States other than the State of Uttar Pradesh and the other in respect of sales effected to Syndet in Uttar Pradesh. In this price list for sales in Uttar Pradesh, the resale price of Syndet was declared as the assessable value for payment of excise duty, since the Department was treating Syndet as related to the appellants. These price lists were provisionally approved by the Department. Based on the circular issued by the CBEC, show cause notices were issued by the Department all relating to price lists filed before 4.10.1991 proposing to take the highest price at which the goods are sold by the appellants which incidently happened to be the price at which the goods are sold in Uttar Pradesh where appellants' related person effects sales to dealers. The appellants filed a single price list in Part-I under Section 4(1)(a) of the Act in respect of their sales made to independent dealers based on the sale price charged to these dealers. Price list also covered sales in Uttar Pradesh made to Syndet. Excise duty was paid on the appellants' price to independent dealers including for sales made to Syndet. This price list was finally approved by the Assistant Collector on 26.12.1991 accepting the price declared by the appellants.

The appellants filed another single price list in Part-I in respect of all their sales including the sales made to independent dealers and sales in Uttar Pradesh made to Syndet. Excise duty was being paid accordingly on the appellants' price to independent dealers. This price list was finally approved by the Assistant Collector on 26.12.1991 accepting the price declared by the appellants. A show cause notice was issued by the Collector of Central Excise, Meerut proposing to take Syndet's resale price as the basis for determining the assessable value in respect of sales made by the appellants to Syndet in Uttar Pradesh. On this basis, differential duty was demanded for the period from 13.12.1990 to November, 1994. The Collector of Central Excise, Meerut passed an order on 30.3.1995 confirming the proposals made in the show cause notice and demanding differential duty accordingly. The appellants filed appeal before the appellate Tribunal and submitted that since sale price to independent dealers are available, the same should be taken as the basis for determining the assessable value in respect of sales to related persons also. The Tribunal passed the impugned order on 22.6.1999 upholding the order of the Commissioner entirely on a new and different basis. On the issue of quantification of duty demand, the appellate Tribunal remanded the matter to the Collector

for de novo consideration. Aggrieved by the impugned final order passed by the Tribunal, the appellants preferred the above appeal before this Court.

We heard Mr. V. Lakshmikumaran, learned counsel, appearing for the appellants and Mr. A. Subba Rao, learned counsel, appearing for the respondent. Mr. V. Lakshmikumaran made the following submissions:

> 1) The impugned order of the appellate Tribunal has gone beyond the show cause notice and the order of the Collector and is, therefore, unsustainable.
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> 2) When wholesale price to independent dealers satisfying the requirements of Section 4(1)(a) of the Act is available, even sales to related persons should be assessed based on the wholesale price to independent dealers.
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> 3) First proviso to Section 4(1)(a) of the Act is also not invokable in the present case and hence order of the appellate Tribunal on this score is unsustainable.

While elaborating the above submissions, learned counsel appearing for the appellants, invited our attention to the relevant portions of the Tribunal's order, the order of the Commissioner and other related documents, Circulars and Annexures. To appreciate the arguments of the learned counsel, it is beneficial to reproduce Section 4 of the Act:

> "Section 4. Valuation of excisable goods for purposes of charging of duty of excise
> (1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to value, such value, shall, subject to the other provisions of this section, be deemed to be
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> (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:
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> Provided that
>
> (i) where, in accordance with the normal practice of the wholesale trade in such goods, such goods are sold by the assessee at different prices to different classes of buyers (not being related persons) each such price shall, subject to the existence of the other circumstances specified in clause (a), be deemed to be the normal price of such goods in relation to each such class of buyers;
>
> (ii) where such goods are sold by the assessee in the course of wholesale trade for delivery at the time and place of removal at a price fixed under any law for the time being in force or at a price, being the maximum, fixed under any such law, then, notwithstanding anything contained in clause (iii) of this proviso, the price or the

maximum price, as the case may be, so fixed, shall, in relation to the goods so sold, be deemed to be the normal price thereof;

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

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

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

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

(4) For the purposes of this section, -

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

(b) "place of removal" means-

(i) a factory or any other place or premises of production or manufacture of the excisable goods; or

(ii) a warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty, from where such goods are removed;

(c) "related person" means a person who is so associated with the assessee that they have interest, directly or indirectly, in the business of each other and includes a holding company, a subsidiary company, a relative and a distributor of the assessee, and any sub-distributor of such distributor.

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

(d) "value" , in relation to any excisable goods, -

(i) where the goods are delivered at the time of removal in a packed condition, includes the cost of such packing except the cost of the packing which is of a durable nature and is returnable by the buyer to the assessee.

Explanation - In this sub-clause, "packing" means the wrapper, container, bobbin, prin, spool, reel or wrap beam or any other thing in which or on which the excisable goods are wrapped, contained or wound;

(ii) does not include the amount of the duty of excise, sales tax and other taxes, if any, payable on such goods and, subject to such rules as may be made, the trade discount (such discount not being refundable on any account whatsoever) allowed in accordance with the normal practice of the wholesale trade at the time of removal in respect of such goods sold or contracted for sale.

Explanation For the purposes of this sub-clause, the amount of the duty of excise payable on any excisable goods shall be the sum total of -

(a) the effective duty of excise payable on such goods under this Act; and

(b) the aggregate of the effective duties of excise payable under other Central Acts, if any, providing for the levy of duties of excise on such goods, and the effective duty of excise on such goods under each Act referred to in clause (a) or clause (b) shall be, -

(i) in a case where a notification or order providing for any exemption (not being an exemption for giving credit with respect to, or reduction of duty of excise under such Act on such goods equal to, any duty of excise under such Act, or the additional duty under section 3 of the Customs Tariff Act, 1975 (51 of 1975), already paid on the raw material or component parts used in the production or manufacture of such goods from the duty of excise under such Act is for the time being in force, the duty of excise computed with reference to the rate specified in such Act, in respect of such goods as reduced so as to give full and complete effect to such exemption; and

(ii) in any other case, the duty of excise computed with reference to the rate specified in such Act in respect of such goods.

(e) "wholesale trade" means sales to dealers, industrial consumers, Government, local authorities and other buyers, who or which purchase their requirements otherwise than in retail."

Mr. A. Subba Rao, learned counsel appearing for the respondent submitted that dealers in different parts of the country are to be considered constituting different class of buyers and in this case also, the dealers located in other parts of the country other than the State of Uttar Pradesh would

constitute different class of buyers. However, the dealers of Uttar Pradesh being in different region would from a different class of buyers since in Uttar Pradesh, there was no independent buyer to whom the goods were directly sold by the appellants, the question of comparing price does not arise. According to Mr. A. Subba Rao, Section 4(1)(a) of the Act is not applicable as there is no comparable sale price available for independent buyers as in Uttar Pradesh no sale has been effected directly to dealers and the entire sale has been effected through SCIL who has been held as related to the appellant. He would further submit that if the goods have not been genuinely offered to all other dealers at the same price then it would be reasonable to conclude that the price under Section 4(1)(a) of the Act main clause cannot be determined. Therefore, when no goods have been offered for sale to any person nor supplied in Uttar Pradesh except to Syndet then the wholesale price charged at the depot when the goods enter the wholesale market for the first time, would be the normal price under Section 4(1)(b) of the Act read with Rules 7 & 5 of the Central Excise Valuation Rules, 1975.

Mr. Subba Rao further submitted that though the circulars are binding on the Department once that part of the Circular which is relevant for the purpose of this case is declared as invalid by the Delhi High Court in the case of Indian Rayon & Industries Ltd. vs. Union of India, 1994(73) E.L.T.25 (Delhi), the appeal against which was dismissed by this Court in 2002(143) E.L.T. A269, it is permissible to the Department to take note of the fact of the judgment of the Delhi High Court which is confirmed by this Court and ignore the Circular for the purpose of arriving at assessable value in regard to the Uttar Pradesh. It was further submitted that it is open to the Department to contend before this Court not to take note of the two circulars and that the circulars are binding on the Department but not on quasi-judicial authority and this Court. It was also submitted that no appeal lies against a finding, as it was contended that the Department has not filed any appeal against the finding of the Collector that the assessable value has to be only under Section 4(1)(b) of the Act and once the Tribunal comes to the conclusion that Section 4(1)(b) of the Act is not applicable, the appeal of the assessee has to be allowed and it is not open to the Tribunal or for the Department to contend that Section 4(1)(a) of the Act is applicable. It is open to the party-respondent to sustain the judgment of the Tribunal though it has not filed any appeal or cross objection. Concluding his arguments, Mr. A. Subba Rao submitted that the decision arrived at by the Tribunal is correct in law and, therefore, is not liable to be interfered with.

We have carefully considered the rival submissions with reference to the pleadings, orders, annexures and other relevant records. Regarding Submission No.1 In the instant case, the proceedings were initiated against the appellants by the respondent-Collector on the ground that Syndet, to whom the appellants sold the goods in Uttar Pradesh, should be treated as a related person of the appellants in terms of Section 4(4)(c) of the Act and, therefore, in respect of sales made by the appellants to Syndet, excise duty should be paid on the basis of Syndet's resale price to its dealers in terms of third proviso to Section 4(1)(a) of the Act. In other words, according to show cause notice and the order of the respondent-Collector, since Syndet is related to the appellants, excise duty should be paid for sales to Syndet in terms of third proviso to Section 4(1)(a) of the Act, i.e. based on Syndet's resale price to its dealers. The following extract from the impugned order of the appellate Tribunal reveals this position:

> "The adjudicating authority ordered the assessment of the goods sold in the State of Uttar Pradesh through SCIL on the basis of the prices charged by SCIL from the wholesale buyers in U.P. The prices charged by the SCIL from the stockists/distributors in U.P. were taken to be the normal prices for determining the assessable value and for levying the central excise duty after giving the benefit of admissible deductions."

The appellate Tribunal, by the impugned order, has upheld the order of the respondent-Collector, however, on a totally new and different basis which was never the case of the Department either in the show cause notice or in the impugned order. The appellate Tribunal, in the impugned order, has held as under:

> "All the wholesale dealers and all the wholesale buyers in the whole of the country would not be taken to form a single class of buyers. M/s SACI and SCIL were related persons. M/s SACI sold their goods in the State of U.P. through SCIL and no direct sales were effected by SACI in the State of U.P. Seen in the light of the Tribunal's decision in the case of Goramal Hari Ram Ltd., the prices at which SCIL were disposing of the goods of SACI in the State of U.P. had been correctly taken as the normal price for determining the duty liability of SACI under Section 4 of the Act."

Thus according to the appellate Tribunal, since the dealers in Uttar Pradesh who purchased the goods from Syndet, and independent dealers in other parts of the country to whom the appellants directly sold the goods are different class of buyers, appellants' price to the independent dealers cannot be taken as the basis for assessing appellants' sales to Syndet in Uttar Pradesh. This finding of the appellate Tribunal is based on first proviso to Section 4(1(a) of the Act. While the show cause notice and the order of the Collector proceeded on the basis of the invocation of third proviso to Section 4(1)(a) of the Act, the appellate Tribunal for the first time in the impugned order has sustained the proceedings on the basis of first proviso to Section 4(1)(a) of the Act. It was argued that the first proviso to Section 4(1)(a) of the Act was never invoked by the Department either in the show cause notice or in the impugned order and it was for the first time that the appellate Tribunal in the impugned order has sought to sustain the impugned order by invoking the first proviso to Section 4(1)(a) of the Act. It is thus seen that the Tribunal has gone totally beyond the show cause notice and the order of the Collector, which is impermissible. The appellate Tribunal cannot sustain the case of the Revenue against the appellants on a ground not raised by the Revenue either in the show cause notice or in the order.

In this context, we may usefully refer to the judgment of this Court in the case of Reckitt & Colman of India Ltd. vs. CCE, 1996(88)ELT 641(SC). This Court held that it is beyond the competence of the Tribunal to make out in favour of the Revenue a case which the Revenue had never convassed and which the appellants had never been required to meet.

The impugned order of the Tribunal which had gone beyond the show cause notice and the order of the respondent-Collector is, therefore, liable to be set aside. Regarding Submission No.2 We shall now consider the second submission made by Mr. V. Lakshmikumaran. We have already extracted

Section 4(1)(a) of the Act and the third proviso to Section 4(1)(a) of the Act in paragraph supra. In the present case, normal price satisfying the requirements of Section 4(1)(a) of the Act is available and there is no dispute on this factual position. About 35% of the production of the goods is sold by the appellants to independent and unrelated dealers spread through the country other than in Uttar Pradesh. There is no dispute raised by the Central Excise Department with regard to these sales. Appellants' sale price to these independent dealers duly satisfy the requirements of Section 4(1)(a) of the Act in every respect and there is no dispute on this factual position. In respect of these sales to independent dealers located other than in U.P., appellants have paid excise duty based on their sale price to these dealers. This factual position is not disputed by the respondent. It was argued that once such a wholesale price to an unrelated buyer satisfying the requirements of Section 4(1)(a) of the Act is available, then that price alone should be treated as the normal price in respect of all the sales made by the appellants including the sales made to related persons. In other words, where sales are made by the assessee to wholesale buyers who are unrelated and also to buyers who are related, then the price to unrelated buyers should be adopted as the basis for payment of excise duty even in respect of sales to unrelated buyers. In such a situation, third proviso to Section 4(1)(a) of the Act will not come into play at all. Since in the present case, normal price to independent dealers is available, same should be treated as the basis for arriving at the assessable value in respect of sales to Syndet also. This submission of Mr. V. Lakshmikumaran is duly supported by the judgment of this Court in Union of India vs. Kanti Lal Chunilal & Ors., 1986(Suppl) SCC 345 = 1986(26)ELT 289(SC). This judgment dealt with a situation when 34% to 40% of sales were effected by the assessee to a related buyer namely, Alok Textiles and balance sales were to unrelated buyers. Excise Department sought to levy excise duty, in respect of sales made to Alok Textiles, based on Alok Textiles' resale price to its buyers. This Court negatived such an approach and held that the value for the purpose of excise duty even in respect of sales effected to the related buyer Alok Textiles should be the price at which the goods were sold to unrelated buyers. The relevant portion of the judgment is reproduced hereinbelow:

> "The respondents sold only 34 to 40% of the total production to the firm of M/s Alok Textiles and the remaining production was sold to other wholesale dealers. The assessing authorities were, therefore, clearly wrong in taking the wholesale cash price at which the excisable goods were sold by the wholesale traders as the value of excisable goods for the purpose of levy of excise duty. The wholesale cash price at which the excisable goods were sold by the respondents to M/s Alok Textiles and other wholesale dealers was the only price liable to be taken for determination of the value for the purpose of levy of excise duty."

The appellate Tribunal itself has consistently taken the view that if the price to independent wholesale dealers, satisfying the requirements of Section 4(1)(a) of the Act is available, then that price should be treated as the assessable value even in respect of sales to related persons also.

In paragraph 5 of the judgment in the case of Collector of Central Excise, Madras vs. The Enfield India Ltd., 1988(34)ELT 654 (Tribunal), the Tribunal held as under:

> "We have given the matter our earnest consideration. Sale of one-one Motor- Cycle to direct users in the public cannot be called a wholesale sale. It was a retail sale, as already held by this Tribunal in the case of M/s Escorts Ltd. aforesaid. Before a resort is made to the retail price, we have to see whether some other basis of assessment, which in law has precedence over retail price assessment under the Valuation Rules, is available or not. We find that there were two sets of wholesale sales available in this case.
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> The first was to M/s Enfield Sales Ltd. They were admittedly a 'related person' of the respondents, and, therefore, the respondent's sale price to them was not acceptable. The other set of wholesale sales was to about 150-200 dealers all over India outside Tamil Nadu. The Department has now shown us anything wrong with these sales except saying that they constituted the minority sales. But 20.1% is not an insignificant quantity. Even though it was the minority sale, it becomes important because the rest of the sales were either retail sales or they were sales made to a 'related person'. There is nothing to show that if the dealers outside Tamil Nadu wanted to buy more Motor-Cycles, larger quantities would not have been available to them. We hold that these 20.1% sales were bona fide sales and they were made in the normal course of wholesale trade. They satisfied all the conditions of 'normal price' under Section 4(1)(a). Accordingly, the price charged by the respondents from these dealers should constitute the basis of valuation for all the Motor Cycles removed from the respondents' factory during the material period. There is no need to resort to the Valuation Rules for working out the assessable value."

In paragraph 6 of the judgment in the case of Escorts Tractors Ltd. vs. Collector of Central Excise, Delhi, 1998(103) E.L.T. 533 (Tribunal), it was held as under:

> "The Department has no case that the appellant, during the period in question, has so arranged that the tractors were not generally sold in the course of wholesale trade except to or through M/s Escorts Ltd. and hence consequently proviso (iii) to Section 4(1(a) has not been invoked. According to Section 4(1)(a), the assessable value should 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 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. Since M/s Escorts Ltd. is a "related person", the price charged to M/s Escorts Ltd. cannot be regarded as the normal price under Section 4(1)(a) of the Act. There were sales to independent wholesalers at lesser discount. Those wholesalers were not "related persons", therefore, the lower authorities were justified in holding that the assessable value of the goods sold to M/s Escorts Ltd. should be based on the wholesale price charged by appellant to independent wholesalers."

Mr. V. Lakshmikumaran submitted that though the above judgments were duly relied upon before the Tribunal during the course of the arguments as also before the Collector, the Tribunal in the

impugned order has failed to deal with any of the aforesaid judgments. Therefore, he submitted that the impugned order of the appellate Tribunal taking a view totally contrary to the well settled legal position, as laid down by this Court is, therefore, liable to be set aside. We see merit and substance in this contention. Mr. V. Lakshmikumaran invited our attention to the Circulars issued by the Central Board of Excise and Customs and submitted that the Revenue is bound by the circulars issued by it and cannot contend to the contrary. Therefore, in view of the circular, third proviso to Section 4(1)(a) of the Act is not invokable in the present case. In this view of the matter, the argument advanced by Mr. A Subba Rao, learned counsel appearing for the respondent, has no merits.

As a matter of fact, the Tribunal, by its order, has not questioned the genuineness of the sale between the appellants and Syndet. The appellants submitted before the Tribunal and also before the Collector that the depot of Syndet was existing right from 1976 and it was not created only after the appellants started selling the products to Syndet in 1990. The appellants, in support of this submissions, also filed affidavits of dealers, transporters, employees of Syndet. The Tribunal having accepted the sale as a genuine sale and having accepted that price to independent dealers is available under Section 4(1)(a) of the Act, the appellate Tribunal ought not to have rejected the submission of the appellants regarding the acceptance of price to independent dealers for sales to Syndet also. As could be seen from the records produced before the authorities below, Syndet also manufactures the goods in its Okhla factory in Delhi and sells the goods on its own and the Central Excise Department at Delhi has accepted the price at which Syndet has been selling to its dealers and paying excise duty accordingly without any dispute. It was submitted that the assessable value on which the duty has been paid by the appellants, in the present case, even in respect of transactions with Syndet in Uttar Pradesh is higher than the approved assessable value for Okhla factory of Syndet and this itself proves the bona fide of the appellant and the genuineness of the price particularly when the goods are only 'Fena' brand sold practically to the same dealers.

Regarding Submission No.3 The only reason given by the appellate Tribunal in the impugned order for adopting Syndet's resale price to its dealers as the basis for payment of excise duty in respect of sales made by the appellants to Syndet is that dealers in different regions constitute different classe of buyers and in view of the first proviso to Section 4(1)(a) of the Act, each such price shall be taken as the normal price and duty should be paid accordingly. We have already extracted the findings of the Tribunal in paragraph supra. It was submitted that the first proviso to Section 4(1)(a) of the Act is totally inapplicable to the present case and, therefore, the question of taking different prices to dealers in different regions as the assessable value cannot arise. We have already reproduced the first proviso to Section 4(1)(a) of the Act. Thus the first proviso to Section 4(1)(a) of the Act merely says that where the goods are sold by the assessee to different classes of buyers at different prices, each such price, subject to the same satisfying the requirements of Section 4(1)(a) of the Act be deemed to be the normal price of such goods. Thus, the most important criteria for invoking the proviso is that each such price should satisfy the requirement of Section 4(1)(a) of the Act and if the price do not satisfy the requirements of Section 4(1)(a) of the Act, then the proviso cannot apply. One of the circumstances specified in Section 4(1)(a) of the Act is that the sale should be to unrelated buyers. If the sale is effected to a related buyer, then this requirement of the proviso is not satisfied. The proviso would apply only when the assessee sells the goods at different prices to

different class of buyers. In the present case, sales to dealers in Uttar Pradesh which is being considered as different class by the Tribunal, is not made by assessee appellant, SACI, but by Syndet after purchasing the goods from the appellant. Hence, first proviso to Section 4(1)(a) of the Act is wholly inapplicable. The impugned order of the appellate Tribunal which is solely based on the first proviso to Section 4(1)(a) of the Act is, therefore, in our view, cannot be sustained.

Our attention was invited to the circular No.3/90-CX.1 dated 25.1.1990 issued by the Central Board of Excise and Customs (at page 18 of Vol.II of the paper book) taking the view that the wholesale dealers in India cannot be considered as belonging to different classes simply because they are located in different places. This position was again reiterated by the CBEC vide its further Circular No. 24/14/93 dated 31.12.1993. Thus, during the disputed period in question in the present case, the CBEC itself has held that dealers in different regions cannot be treated as different classes of buyers and, therefore, the first proviso to Section 4(1)(a) of the Act cannot be invoked in such circumstances. Having issued such a circular which is binding on the Department, the Revenue cannot now contend to the contrary and say that dealers in different regions constitute different classes of buyers and, therefore, price to independent dealers cannot be adopted for sales to Syndet in Uttar Pradesh. Further, during the disputed period, when the appellants were filing price lists regionwise declaring different prices for different dealers located in different regions, based on the above circular dated 25.1.1990, show cause notices were issued by the Department contending that it is not permissible to have different prices for dealers in different regions. The show cause notices sought to take the highest price as the assessable value which incidently was the price at which the goods were sold by Syndet to its dealers. Having taken such a stand based on the circular of CBEC, which held the field then , it is not open to the Revenue or to the appellate Tribunal to hold that dealers in different regions constitute different classes of buyers and, therefore, the price to independent dealers in other regions cannot be adopted as the basis for sales to Syndet in Uttar Pradesh. It was contended that Syndet is not related to the appellants within the meaning of Section 4(4)(c) of the Act. The appellants and the Syndet are distinct private limited companies and have been separately assessed to Income-Tax and sales tax and by all other Government Departments. There is no inter se shareholding by either company in each other. Syndet has its own factory at Okhla. Thus, in these circumstances, it cannot be said that the appellants and the Syndet are related persons within the meaning of Section 4(4)(c) of the Act. Therefore, excise duty is payable by the appellants based on its sale price to Syndet. Therefore, the finding of the appellate Tribunal to the contrary is liable to be set aside.

It has been argued that sales were effected at the factory gate to a number of independent dealers throughout India at the uniform price of Rs.100/- and the Department has not questioned the correctness of the sale. In fact, there is no demand of duty for sales made to independent dealers throughout India. The Collector also has given a specific finding in this regard and that the Department is distributing the assessing value only in respect of sales price to Syndet. Arguing further, Mr. V. Lakshmikumaran, submitted that Section 4(1)(b) of the Act will apply only when Section 4(1)(a) is not applicable. Section 4(1)(b) has already been extracted above. The said section will apply only when goods are sold only to all through related persons and at the normal price such goods are resold to unrelated dealers is not applicable. Since, the Collector has given a finding that there exists factory gate as well as to independent dealers throughout India at a uniform price and

which is not distributing normal price for such goods is ascertainable at the factory gate. In such an event, section 4(1)(b) of the Act is not permissible. These submissions merits acceptance. We have already referred to the judgment of this Court in Union of India vs. Kanti Lal Chunni Lal & Ors. (supra) which has been followed by the Bombay High Court in the case of Cosmos (India) Rubber Works Pvt. Ltd. & Ors. vs. Union of India, 1988(36) E.L.T. 102 (Bom). The Tribunal has also passed the judgment to the similar effect in the case of Racold Appliances vs. CCE, 1994(69)E.L.T. 312 which has been affirmed by this Court in 1998(100) E.L.T. A64. This issue, therefore, is no longer res integra and, therefore, the Collector could not have confirmed the demand under Section 4(1)(b) of the Act when there are significant sales at the factory gate to the independent buyers throughout India.

We have already referred to the certain findings of the Tribunal applying the first proviso to Section 4(1)(a) of the Act, confirmed the same demand. In our view, it is not permissible on the part of the CEGAT to change the basis of the demand since the assessee was asked to show only in relation to applicability of Section 4(1)(b) of the Act.

In the case of Commissioner of Central Excise, Calcutta-II vs. TISCO Ltd., 2004(174) E.L.T. 307(SC) (S.N. Variava & Dr. AR. Lakshmanan,JJ.), it was held that in order to attract the first proviso to Section 4(1)(a)(i) of the Act, there has to be an averment and the proof of the existence of a trade practice in that trade that the goods are being sold at different prices to different class of buyers. This Court, further, held that to claim benefit of proviso to Section 4(1)(a)(i) of the Act, a trade practice must be averred and shown to exist and it must be shown that there is a different class of buyers and only on basis of facts averred and proved, a conclusion can be reached that the sale is to a different class of buyers. This is a condition precedent for invoking the first proviso to Section 4(1)(a) of the Act. As already noticed, neither the show cause notice nor the Collector's order nor the CEGAT order makes any such averment let alone proving the same with evidence. On this ground alone the invocation of First Proviso to Section 4(1)(a) of the Act must fail. Further, the first proviso to Section 4(1)(a) specifically states that the sale to different class of buyers should not be to related persons. In view of the specific provision contained in the first proviso to Section 4(1)(a) of the Act, it is difficult to understand as to how the CEGAT applied this provision.

In the case of C.C.E. vs. Ashok Ark, 2005(179) E.L.T. 513(SC), a Bench of S.N. Variava, Dr.AR. Lakshmanan and S.H. Kapadia, JJ. observed as under:

> "6. We are unable to agree with the view expressed by the Tribunal. The Tribunal has ignored the proviso to Rule 173C(11). It is true that in cases where, having regard to the nature of the goods and frequent fluctuations of the price of the goods, an assessee or class of assessee may be allowed to declare price of goods on the basis of the challan and advice note. But those are cases where it is not possible to determine the value in accordance with Section 4. Under Section 4, as it then read, the value of the goods is the normal price, i.e. the price at which the goods are ordinarily sold by an 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. Thus, if it is found that there is a normal price at which

goods are sold at the factory gate then even though earlier the assessee was permitted to clear under rule 173C(11) the re-assessment would be on the basis of the normal price as determined under Section 4.

7. We are unable to accept the submission that such an interpretation would negate rule 173C(11). A Rule cannot override or be contrary to a Section. Under Section 4 the normal price has to be the value at which the goods are ordinarily sold. Thus clearly Rule 173C(11) only provides for cases where the normal price cannot be ascertained. In those cases, goods are allowed to be removed on basis of price shown on the challan or advise note. But the framers of the rule were careful enough to provide, in the proviso, that if the price on the challan or advise note does not represent the value as determined under Section 4 then there can be reassessment.

8. In this case, it could not be shown that the price at the factory gate could not be determined or that the price at the factory gate was varying. Thus the assessing authority was right in holding that the value would have to be determined as per that price. The Tribunal was clearly in error in ignoring the proviso."

In the case of Hindustan Polymers Co. Ltd. vs. Collector of C.Ex. Guntur, 1999 (106) E.L.T. 12(S.C.), this Court in paragraph 6 held as under:

"While we appreciate the Tribunal's desire to do complete justice and mould the relief in that direction, we think that, in the circumstances, the Tribunal should not, in this case, have passed an order which proceeded upon a basis that is altogether different from that of the demand made upon the appellants. That is not "moulding"

relief. The demand that was made upon the appellants was under

Tariff Item 68 and it proceeded upon the basis that there was a process of manufacture of coloured polystyrene from uncoloured polytyrene. Having come to a conclusion against the Revenue on these counts, the appropriate order for the Tribunal to have passed was to have set aside the demand and left it open to the Revenue to proceed against the appellants, as permissible under the law. The appellants would then have had the opportunity of meeting the precise case made out by the Revenue."

By the impugned order, the appellate Tribunal remanded the matter for quantification of duty demand. We see merit in this appeal and the appeal is allowed and we set aside the impugned order of the Tribunal dated 22.6.1999 in Final Order No. 879/99-A in Appeal No. 1225/95-A. However, there shall be no order as to costs.