

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH**

REGIONAL BENCH - COURT NO. I

Excise Appeal No. 51982 of 2014

[Arising out of Order-in-Original No. 159/SA/CCE/2013 dated 31.12.2013 passed by the Commissioner of Central Excise, Delhi-III, Gurgaon]

Johnson Matthey India Pvt Ltd
Plot No. 12, Sector 23, Imt Manesar,
Gurgaon, Haryana

.....Appellant

VERSUS

Commissioner of Central Excise, Delhi-III
Plot No. 36-37, Sector 32,
Gurgaon, Haryana

.....Respondent

APPEARANCE:

Shri Sanjeev Sachdeva and Shri Nikhil Kapoor, Advocates for the Appellant
Shri Anurag Kumar, Authorized Representative for the Respondent

**CORAM: HON'BLE MR. S. S. GARG, MEMBER (JUDICIAL)
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)**

FINAL ORDER NO. 60127/2025

DATE OF HEARING: 08.10.2024
DATE OF DECISION: 07.02.2025

S. S. GARG :

The present appeal is directed against impugned order dated 31.12.2013 passed by the Commissioner of Central Excise, Delhi-III, whereby the learned Commissioner has confirmed the demand of Rs.72,23,683/- under Section 11A of the Central Excise Act, 1944 along with interest under Section 11AB of the Act and equivalent

penalty under Section 11AC of the Act read with Rule 25 of the Central Excise Rules, 2002.

2. Briefly stated facts of the present case are that on 28.03.2005, the appellant was issued an Entitlement Certificate in Form ST-72B under Rule 28-C of the Haryana General Sales Tax Rules, 1975 (in short "HGST Rules") as a 'New Unit'; in terms thereof, the appellant was entitled to tax concession in accordance with the provisions of Rule 28-C for the period from 28.03.2005 to 27.03.2015. On the same day, a revised Entitlement Certificate was issued in Form VAT-G-15 entitling the appellant to tax deferment in accordance with the provisions of Rule 69 of the Haryana Value Added Tax Rules, 2003 (in short "HVAT Rules"). During the impugned period, i.e. FY 2005-2006 and FY 2006-2007, the appellant retained 50% of the sales tax/VAT collected from its customers amounting to Rs.4,42,62,767/-. The allegation of the department is that the amount of Rs.4,42,62,767/- had been received by the appellant from its customers as sales tax/VAT, but is neither actually paid nor actually payable to the Government of Haryana; accordingly, as per the department, this amount is part of the transaction value of the goods sold by the appellant and is, therefore, leviable to Central Excise duty. On this allegation, a show cause notice was issued on 08.06.2007 invoking the extended period of limitation and by following the due process, the learned Commissioner vide the impugned order has confirmed the demand alongwith interest and penalty.

3. Heard both the parties and perused the material on record.

4.1 The learned Counsel for the appellant submits that the impugned order is not sustainable in law and is liable to be set aside as the same has been passed without properly appreciating the facts and the law.

4.2 The learned Counsel further submits that the retained amount of sales tax continued to be treated as a capital subsidy from the state government and did not lose its character as 'sales tax'. He further submits that sales tax retained was permissible under the Entitlement Certificate issued by the state government. He also submits that the retained amount was a capital subsidy which did not constitute part of the transaction value as defined in Central Excise Act. He also submits that Entitlement Certificate had been issued under Rule 28-C (5)(a) of HGST Rules and under Rule 69 of HVAT Rules which specifically mentioned that the appellant was entitled to tax deferment.

4.3 The learned Counsel further submits that the impugned order has travelled beyond the show cause notice and the learned Commissioner has confirmed the demand on the ground which was not alleged in the show cause notice.

4.4 As regards the extended period of limitation, the learned Counsel submits that extended period cannot be invoked in the present case since the issue involves interpretational questions. He further submits that the extended period of limitation can be invoked under Section 11A(1) only when there is fraud or collusion

or wilful mis-statement or suppression of facts or contravention of any of the provisions of the Chapter or the Rules made there under with intent to evade payment of duty. He also submits that the appellant had submitted all the documents to the department as and when asked for and there was no information which was suppressed. He also submits that the impugned order has not brought on record or disclosed any deliberate and conscious act of omission or commission on the part of the appellant which shows the intention to evade payment of duty. He further submits that the appellant did not include the amount of sale tax concession under a *bona fide* belief that the same is not includable in the transaction value. It has been consistently held in various circulars issued by the Board from time to time that transaction value does not include the sales tax amount actually payable on goods. In this regard, he refers to the following circulars:

- a) Circular No. 378/11-98-CX dated 12.03.1998
- b) Circular No. 354/81/00-TRU dated 30.06.2000
- c) Circular No. 671/62/2002-CX dated 09.10.2002

4.5 The learned Counsel also submits that it is a well settled position in law that guilty intention cannot be presumed on the basis of conjectures and surmises and such intention has to be proved by the department by adducing positive evidence. In this regard, he relies on the following decisions:

- Padmini Products vs. Collector of C. Excise - 1989 (43) ELT 195 (SC)
- Collector of C. Excise vs. Chemphar Drugs and Liniments - 1989 (40) ELT 276 (SC)

4.6 He also submits that the issue involved in the present case essentially relates to the interpretation of the statute and time, and again it has been held by various courts that in such circumstances extended period of limitation is not invokable. For this, he relies on the following decisions:

- Ispat Industries Ltd. vs. Commissioner of Central Excise, Raigad - 2006 (199) E.L.T. 509 (Tri. - Mumbai)
- Shervani Industrial Syndicate vs. CCE, Allahabad - 2009-TIOL-250-CESTAT-DEL
- Singh Brothers vs. CCE, Indore - 2009-TIOL-189-CESTAT-DEL
- Gaytri Construction Co. vs. Commissioner of Central Excise, Jaipur - 2012 (25) S.T.R 259 (Tri. - Del)

4.7 As regards the interest and penalty, the learned Counsel submits that there is no *mens rea* on the part of the appellant to evade the payment of duty and therefore, penalty cannot be imposed.

5. On the other hand, the learned Authorized Representative for the Revenue has filed the written submissions which have been taken on record. He further submits that the learned Commissioner has considered all the submissions of the appellant and vide the impugned order, has confirmed the demand on the retention of sales tax by invoking the extended period of limitation because the appellant has failed to disclose the retention of sales tax and thus, suppressed the material fact with intent to evade duty. He further submits that the identical issue, as involved in the present case, has been considered by two benches of the Tribunal in the cases of

Honda Motorcycles & Scooters India P. Ltd vs. CCE, Delhi-III – 2017 (357) ELT 828 (Tri. – Chan.) and **Denso Haryana Pvt Ltd vs. CCE, Delhi – 2017 (10) TMI 1028 CESTAT CHANDIGARH**, wherein the Tribunal, after relying upon the decision of Hon'ble Apex Court in the case of **Commissioner vs. Maruti Suzuki India Ltd - 2014 (307) ELT 625 (SC)**, has held that retention amount is liable to be included in the transaction value for the computation of excise duty. Further, the learned Authorized Representative fairly concedes that in the aforesaid cases, the Tribunal has confirmed the demand only for the normal period and has set aside the demand for extended period and has also given the benefit of cum-tax-benefits.

6. We have considered the submissions made by both the parties and perused of the material on record. We find that the only issue involved in the present appeal is whether the amount of Rs.4,42,62,767/- which was paid to the appellant as sales tax by its customers but retained by the appellant on the strength of state government's deferment scheme, merits inclusion in the transaction value for computing central excise duty under Section 4 of the Central Excise Act, 1944 or not? We find that this issue is no more *res integra* as the Tribunal in the case of **Honda Motorcycles & Scooters India P Ltd** (supra) has considered the issue of retention of 50% of the amount under tax concession scheme allowed by the Haryana State Government and has held as under:

"5. The main point of dispute is, whether or not the amounts collected by the appellants as Sales Tax from

the customers but not paid to the State Sales Tax authorities should be included in the assessable value for the purpose of levy of Central Excise duty. The admitted facts of the case are that, the appellants have been issued with an Entitlement Certificate on 20-10-2003 by the Haryana VAT authorities. The appellants collected an amount of Rs. 73,12,73,423/- as VAT from their customers during the periods 2003-04 to 2008-09 and this amount has not been paid to the VAT authorities. The said amount has been retained by the appellants in terms of the applicable regulations of the VAT Rules. Section 61(2)(d) of Haryana Value Added Tax Act, 2003 stipulates that, tax concessions to the industrial units in terms of Haryana General Sales Tax Act, 1973 shall remain in force with certain modifications. Sub-clause (i) states that, an industrial unit availing the benefit of exemption from the payment of tax may, in the prescribed manner, change-over to deferment of payment of tax for the remaining period. Sub-clause (iii) stipulates that, an industrial unit availing benefit of deferment of payment of tax may, in lieu of making payment of the deferred tax after five years, pay half of the amount of the deferred tax upfront along with the returns and on making payment in this manner, the tax due, according to the returns, shall be deemed to have been paid in full. As stated earlier, the appellants chose to make half of the amount of deferred tax. While such payment will satisfy the full discharge of VAT in terms of deeming fiction as per Section 61 of the Haryana Value Added Tax Act, 2003, the applicability of such deeming concept to the provisions of Section 4 of the Central Excise Act, 1944 is the point in dispute. In other words, in view of the deeming fiction payment of, say, Rs.50/- as VAT will be considered as full payment of Rs.100/-. The appellants' case is that Rs.100/- should be deducted to arrive at

the value for Central Excise purpose. They are relying on the term 'Sales Tax Actually Payable' indicated in the definition of 'Transaction Value' under Section 4(2)(d). Rs.100/- is actually payable VAT and as such eligible for exclusion. The Department's case is that Rs.50/- is the amount actually paid and eligible for exclusion.

6. First of all, we note that in the present case the concession extended to the appellants by the State Sales Tax authorities is by way of an exemption. The said exemption was converted into the scheme of deferring payment of tax upon introduction of Haryana Value Added Tax Act, 2003. In fact, it is apparent that we are dealing with an exemption scheme where the mode of payment has been modified by the Act of 2003. This is relevant in view of the reliance placed by the appellants on the decision of the Tribunal in *Uttam Galva Steels Ltd (supra)*. There the Tribunal was dealing with a scheme under Maharashtra Value Added Tax Act, 2002. Section 94 of the said Act provides for deferred payment of Sales Tax. No reference has been made to any exemption of Sales Tax in the said provision. One of the points considered by the Tribunal in *Uttam Gaiva Steels Ltd (supra)* is that, as per the incentive scheme of the Maharashtra Government there is no 'exemption' from payment of Sales Tax, whereas in the present case we find that the exemption scheme of 1973 Act is continued in 2003 Act by the Haryana Government.

7. As correctly noted by the original authority, the implication of deeming provision in a VAT enactment for the purpose of Central Excise valuation has to be examined. The Hon'ble Supreme Court in *Meghraj Biscuits industries Ltd vs Commissioner of Central Excise, UP, 2007 (210) ELT 161 (SC)*, and *Commissioner of Central Excise, Bangalore vs Meyer*

Health Care Pvt. Ltd., 2011 (267) E.L.T. 145 (S.C.), held that, deeming fiction of a particular Act cannot be extended to the excise law automatically. Further, the purpose and reason behind the legal fiction, when examining the context, will clearly show that such deeming fiction has limited application to the enactment which contains the same. In the present case, it is the appellants' plea that when they pay 50% of VAT (out of 100% collected from the clients) they have fulfilled their VAT liability in full. Hence, full VAT liability should be available for abatement for Central Excise. In this connection, we find that the Hon'ble Supreme Court examined the issue of retention of collected Sales Tax and its treatment in ascertaining the transaction value for excise purpose. In Commissioner of Central Excise, Delhi-III vs Maruti Suzuki India Ltd., 2014 (307) ELT 625 (S.C.), it has been clearly held that 50% of the Sales Tax collected was retained by the assessee and was not actually paid to the exchequer nor was it actually payable since the HPC permitted the assessee to retain the said amount. The Hon'ble Supreme Court observed, therefore, whichever way the issue is looked at, the fact remains that the assessee retained with it 50% of Sales Tax collected from its customers and it was neither actually paid to the exchequer nor was it actually payable to the exchequer. In such situation, the Hon'ble Supreme Court observed that, the amount retained by the assessee is required to be added in the transaction value.

8. We also note that the Hon'ble Supreme Court in Commissioner of Central Excise, Jaipur vs. Super Synotex (India) Ltd. 2014 (301) E.L.T. 273 (SC), while dealing with a similar issue, held as below

“22. It is evincible from the language employed in the aforesaid circular that set off is to be taken into account for calculating the amount of

sales tax permissible for arriving at the "transaction value" under Section 4 of the Act because the set off does not change the rate of sales tax payable/chargeable, but a lower amount is in fact paid due to set off of the sales tax paid on the input. Thus, if sales tax was not paid on the input, full amount is payable and has to be excluded for arriving at the "transaction value". That is not the factual matrix in the present case. The assessee in the present case has paid only 25% and retained 75% of the amount which was collected as sales tax. 75% of the amount collected was retained and became the profit or the effective cost paid to the assessee by the purchaser. The amount payable as sales tax was only 25% of the normal sales tax. Purpose and objective in defining "transaction value" or value in relation to excisable goods is obvious. The price or cost paid to the manufacturer constitutes the assessable value on which excise duty is payable. It is also obvious that the excise duty payable has to be excluded while calculating transaction value for levy of excise duty. Sales tax or VAT or turnover tax is payable or paid to the State Government on the transaction, which is regarded as sale, i.e., for transfer of title in the manufactured goods. The amount paid or payable to the State Government towards sales tax, VAT, etc is excluded because it is not an amount paid to the manufacturer towards the price, but an amount paid or payable to the State Government for the sale transaction, i.e., transfer of title from the manufacturer to a third party. Accordingly, the amount paid to the State Government is only excludible from the transaction value. What is not payable or to be paid as sales tax/VAT, should not be charged from the third party/customer, but if it charged and is not payable or paid, it is a part and should not be excluded from the transaction value. This is the position after the amendment, for as per the amended provision the words "transaction value" mean payment made on actual basis or actually paid by the assessee. The words that gain signification are "actually paid". The situation after 1-7-2000 does not cover a situation which was covered under the circular dated 17-3-1998. Be that as it may, the clear legislative intent, as it seems to us, is on "actually paid". The question of "actually payable" does not arise in this case.

23. In view of the aforesaid legal position, unless the sales tax is actually paid to the Sales Tax Department of the State Government, no benefit towards excise duty can be given under

the concept of "transaction value" under Section 4(4)(d), for it is not excludible. As is seen from the facts, 25% of the sales tax collected has been paid to the State exchequer by way of deposit. The rest of the amount has been retained by the assessee. That has to be treated as the price of the goods under the basic fundamental conception of "transaction value" as substituted with effect from 1-7-2000. Therefore, the assessee is bound to pay the excise duty on the said sum after the amended provision had brought on the statute book"

9. The learned counsel for the appellants attempted to distinguish the above decisions of the Hon'ble Supreme Court by pleading that they are not applicable to the facts of the present case. He also relied on the decision of the Hon'ble Supreme Court in Purolator India Ltd (supra) to hold that the transaction value should be "for delivery at time and place of the removal". We find in that case the Hon'ble Supreme Court was dealing with the "cash discount" and not with deduction of Sales Tax/VAT from the price to arrive at the transaction value. It was observed in the said order that in Super Synotex (India) Ltd (supra), the Hon'ble Supreme Court was concerned with Sales Tax "not actually paid to the Government and hence held that 75% of Sales Tax retained by the assessee could not be deducted as only amounts payable to the State Government as Sales Tax can be deducted. We find that the Hon'ble Supreme Court again reiterated that the Sales Tax actually paid or payable to the State Government is only eligible for deduction. In the present case, admittedly, the Sales Tax/VAT payable/paid to the Haryana State Government is only 50% which was eligible for deduction. The remaining amount is legally allowed to be retained by the appellants and is not payable to the State exchequer. In such scenario, we find that the impugned order is correct in upholding the inclusion of that portion of Sales Tax/VAT in the assessable value collected by the appellants but not paid or payable to

the State Government. The ratio followed is in conformity with the findings of the Hon'ble Supreme Court, as discussed above. The Hon'ble Supreme Court in CCE vs. National Engg. Industries 2015 (320) ELT 27 (SC.), again held that post 1-7-2000 in arriving 'transaction value' Sales Tax benefit which was retained by the assessee, would be included while fixing the 'transaction value'.

10. We find while the case on merit is against the appellants, their plea of time-bar of that portion of demand beyond normal period has merit. We have examined the impugned order with reference to reasons for upholding the extended period of demand. The original authority had very briefly dealt with the issue. No reasons for confirmation of demand for extended period has been recorded except quoting the Tribunal's order in Emsons Organics Pvt Ltd. 2011 (267) ELT 263 (Tri.-Del.). On perusal of the said order, we find that the same is passed while disposing a stay application and that is only an interim order. We find that there is nothing in the impugned order which examined the party's submissions against longer period demand. We note that in the present case the correct valuation for Central Excise purpose is in dispute. The dispute is directly relatable to Sales Tax amount paid/payable by the appellants to the State authorities. The Sales Tax amounts collected were all reflected in the invoices issued to the clients. Out of this amount, the appellants retained 50% based on a scheme announced by the State Government. In this factual matrix, we find that the allegation of fraudulent intent or suppression of fact against the appellants is not sustainable. It is also a fact that the issue involved has been subject matter of various Circulars before/after the introduction of new provisions for valuation w. e. f. 1-7-2000 and also matter of decision by this Tribunal in

various cases including Maruti Suzuki India Ltd. (supra). This last mentioned case was taken up on appeal by the Revenue and the Hon'ble Supreme Court set aside the order of the Tribunal. The Hon'ble Supreme Court also set aside the penalty on the respondents in the said case. In these circumstances, it is apparent that the issue involved is one of legal interpretation and without a positive evidence for deliberate suppression of fact with intent to evade payment of Central Excise duty invoking the extended period for demand, is not legally sustainable. Accordingly, we hold that the appellants will be liable to different duty of Central Excise during the normal period of demand as confirmed by the lower authority. The demand for extended period as well as penalties are set aside. The appellants pleaded that differential duty, if any, payable should be arrived at taking the additional consideration as inclusive of excise duty as they have not collected any excise duty on such value from the customers. We find that in view of the facts discussed in the order, the appellants are eligible for such calculation of duty liability. The appeal is disposed of in the above terms."

7. Further, we note that the Tribunal in the case of **Denso Haryana Pvt Ltd** (supra) has again considered the same issue and has held as under:

"6. Short issue involved in the matter is whether the appellant is liable to pay duty on the amount retained as Sales Tax collected from the customers as per the Entitlement Certificate issued by the Haryana Vat Department or not.

7. We find that the issue came up before the Hon'ble Apex Court in the case of Maruti Suzuki India Limited (supra) wherein the Hon'ble Apex Court held that the

amount retained on account of sales tax as per the Entitlement Certificate is to be added in the assessable value. Learned Counsel for the appellant has relied upon the decision of this Tribunal in the case of Uttam Galva Steels Ltd (supra) and Man Industries (India) Ltd (supra). We find that those decisions are not applicable to the facts of the present case as those decisions are related to Maharashtra Vat Act and Gujarat Vat Act, whereas in the case of Maruti Suzuki India Limited (supra), the Hon'ble Apex Court has examined the provisions of Haryana Vat Act, therefore, those decisions are not applicable to the facts of the present case as the appellant is located in the State of Haryana following the provisions of Haryana Vat Act.

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11. As we have already held that the show cause notice dated 4.5.2009 has been issued to the appellant by invoking the extended period of limitation, therefore, the demands for the extended period of limitation in the show cause notice dated 4.5.2009 are also set aside. Remaining demands as per show cause notice dated 4.5.2009 which are within the limitation and the demands as per show cause notice dated 7.5.2010 are confirmed. The appellant is liable to pay interest for the intervening period for these demands.

12. We further find that as the appellant has not collected any duty on the amount of sales tax retained by them, the appellant is entitled to cum-duty benefit.

13. As the extended period of limitation is not invocable as the issue was pending before the Apex Court and was settled in the case of Maruti Suzuki India Ltd (supra), therefore, no penalty is imposable on the appellant.

14. In view of above observations, the following order is passed:

- (a) the demands as per show cause notice 3.4.2008 are dropped which have already been dropped by the Id. Commissioner,
- (b) the demands by invoking the extended period of limitation as per show cause notice dated 4.5.2009 are set aside,
- (c) the demands within the normal period as per show cause notices dated 4.5.2009 and 7.5.2010 are confirmed,
- (d) the appellant is entitled for cum-duty benefit,
- (e) no penalty is imposable on the appellant"

8. Further, we find that the learned Commissioner confirmed the demand by invoking the extended period, but the department had not established anything on record to show that the appellant has suppressed the material facts with intent to evade the payment of duty. Further, we find that the issue involved in the present appeal relates to interpretation of the law and the Rules and finally, the Hon'ble Apex Court in the case of **Commissioner vs. Maruti Suzuki India Ltd** (supra) has settled the position of law, therefore, invoking extended period is not justified in the present case.

9. Further, we find that the decisions relied upon by the appellant are not squarely applicable in the facts and circumstances of the present case as those decisions do not pertain to sales tax concession under Haryana VAT Act/Rules.

10. In view of our discussion above and by following the ratios of the decisions of the Tribunal (cited supra), we pass the following order:

- the demand by invoking extended period of limitation is set aside;
- the demand for the normal period is confirmed along with interest;
- the appellant is entitled to benefit of cum-duty;
- no penalty is imposable on the appellant.

11. The appeal is disposed of in the above terms.

(Order pronounced in the open court on 07.02.2025)

(S. S. GARG)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)