

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH-COURT NO.1

Excise Appeal No. 50803 of 2019

[Arising out of Order-in-Appeal No. IND-EXCUS-000-APP-348-18-19 dated 24.12.2018 passed by the Commissioner (Appeals), CGST, Customs & Central Excise, Manik Bagh Palace, Post Box No. 10, Indore (M.P.)]

**Assistant Commissioner of CGST, Central
Excise, Ujjain**

29, Administrative Area, Bharatpuri
Ujjain-456001 (M.P.)

....Appellant

Versus

M/s Grasim Industries Ltd.
(Chemical Division) Birla Gram Nagda,
Distt-Ujjain (M.P.)

....Respondent

APPEARANCE:

Shri Rakesh Agarwal, Authorized Representative of the Department
Ms. Sukriti Das, Advocate for the Respondent

CORAM:

**HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. RAJEEV TANDON, MEMBER (TECHNICAL)**

FINAL ORDER NO. 50765/2023

Date of Hearing: May 29, 2023

JUSTICE DILIP GUPTA

The department has filed this appeal for setting aside the order dated 24.12.2018 passed by the Commissioner (Appeals) by which the order dated 29.01.2018 passed by the Joint Commissioner for recovery of Central Excise duty from M/s Grasim Industries Ltd., respondent in this appeal, has been set aside and allowed.

2. The issue that arises for consideration in this appeal is as to whether the amount of subsidy received by the respondent from the State Government under the Madhya Pradesh Industrial Investment Promotion Assistance Scheme, 2004 is includible in the assessable value of the goods cleared during the period in dispute i.e. from

2012-2013 to 2015-2016, in terms of section 4(3)(d) of the Central Excise Act, 1944.

3. The Commissioner (Appeals), while allowing the appeal, made the following observations:-

" **2.** The facts of the case are that during course of Audit of records of the Appellant it was observed that the Appellant during the period 2013-14 to 2015-16 received VAT/CST incentive! subsidy of Rs.13,56,37,000/- from MP Trade & Investment Facilitation Corporation Ltd., Bhopal under various sanction Orders. The Adjudicating Authority relying upon the Hon'ble Apex Court's Judgment rendered in the case of M/s. Super Synotex (India) Ltd. (2014(301) ELT-273(SC)] vide the impugned Adjudication Order held that the said amount of Rs.13,56,37,000/- received by the Appellant will be includable in the transaction value of the goods in-terms of the provisions of Section 4(3)(d)(2) of the Central Excise Act, 1944 (here-in-after referred to as the said Act) and therefore Central Excise duty of Rs. 1,40,03,901/- (including both Ed Cesses) was payable, hence confirmed the demand along with Interest. The Adjudicating Authority also imposed equivalent penalty of Rs.1,40,03,901/- under Section 11AC of the said Act.

7. I find that the issue to be decided in the present appeal is as to whether the Subsidy given by the Commercial Tax department to the Appellant, a manufacturer, shall be includable in the Assessable Value of goods for the purpose of discharging Central Excise duty or not?

8. In the present case, I find that the Adjudicating Authority relying upon the Hon'ble Apex Court's Judgment rendered in the case of M/s Super Synotex (India) Ltd., cited supra held that the amount of Rs. 13,56,37,000/- received by the Appellant will be includable in the transaction value of the goods in-terms of the provisions of Section 4(3)(d)(2) of the said Act. I also find that in M/s Super Synotex (India) Ltd the Assessee paid only 25% and retained 75% of the amount which was collected as sales tax. 75% of the amount collected was retained by the Assessee. The amount payable as sales tax was only 25% of the normal sales tax. Here, the Hon'ble Apex Court held that 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, and 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 Hon'ble Apex Court held that the amount paid to the State Government is only excludible from the transaction value, and 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 of value of goods and should not be excluded from the transaction value.

08.1 While in the instant case the Appellant have contended that the Adjudicating Authority grossly erred in holding that VAT tax was not actually paid to the State Government, and thus claimed that the Hon'ble Apex Court decision cited supra is distinguishable as also held by the Hon'ble Tribunal in the case

of CCE Vs. Welspun Corporation Ltd., (TIOL-1287-CESTAT-MUM) and in Man Industries (I) Ltd. CCE (2017-TIOL-2002-CESTAT-MUM. I find that the Adjudicating Authority has held that the appellant had received an amount of Rs. 13,56,37,000/- for the period 2013-14 to 2015-16 as refund of Commercial Tax and Sales Tax as subsidy. To this I also find that the Appellant has relied up on the Hon'ble Tribunal Mumbai's Order passed in the case of M/s Welspun Corporation Ltd. referred supra, wherein it is held that the Sales Tax assessment orders indicated that the finished goods cleared by the appellants were assessed to full rate of tax and allowed as remission under Section 41 of Gujarat Value Added Tax Act, 2003. This shows that the Sales Tax was actually payable to the Government. Thus distinguished the judgment of Hon'ble Apex Court in case of M/s Super Synotex (India) Ltd. as the Sales Tax was actually payable and there was as such no blanket exemption from sales tax. The term "remission" from sales tax itself means that the sales tax was actually payable at the time of clearance of goods but was remitted at a later date by passing of assessment orders by the Sales Tax authorities. While in the instant case I find force in the Appellant's contention that the Adjudicating Authority miserably failed to address the issue in as much as the impugned Adjudication Order is completely silent on the Appellant's submission that since they have actually paid the entire Sales Tax Hon'ble Apex Court's judgment of M/s Super Synotex (India) Ltd. is not applicable to their case. I also find that the Adjudicating Authority has ignored the judicial discipline in as much as he has not given any reasoning for distinguishing Hon'ble Tribunal Mumbai's Order passed in the case of M/s Welspun Corporation Ltd. and of Man Industries (I) Ltd., Vs CCE [2017-TIOL-2002-CESTAT-MUM] relied up on by the Appellant.

10. In view of above, I find that in the present case the Appellant have initially paid the entire Sales Tax to the State Government while the amount of Rs. 13,56,37,000/- for the period 2013-14 to 2015-16 has been subsequently refunded to them as subsidy. Therefore, I find force in the Appellant's contention that the Hon'ble Apex Court judgment in M/s Super Synotex (India) Ltd. is not applicable to their case in the light of Hon'ble Tribunal Mumbai's Order passed in the case of M/s Welspun Corporation Ltd. and above cited recent decisions of Hon'ble CESTAT, Delhi. Therefore, in the facts and circumstances, of the present case, I am bound to follow above cited decisions of Hon'ble CESTAT as judicial discipline."

4. Ms. Sukriti Das, learned counsel for the respondent submitted that the issue now stands settled by an order dated 21.03.2023 on the reference that had arisen on account of difference of opinion between the two Members constituting the Division Bench in **M/s Harit Polytech Pvt. Ltd. Vs. Commissioner, Central Excise,**

CGST, Jaipur-I¹, and, therefore, the appeal filed by the Department should be dismissed.

5. Shri Rakesh Agarwal, learned authorized representative appearing for the Department has, however, submitted that in view of the decision of Supreme Court in **Commissioner of Central Excise Jaipur-II Vs. Super Synotex (India) Ltd.²**, the appeal deserves to be allowed.

6. The submissions advanced by the learned authorized representative appearing for the Department and the learned counsel appearing for the respondent have been considered.

7. The reference that was made by the Division Bench in **Harit Polytech** is as follows:-

“ **(A)** whether in the facts and circumstances, the capital/wage subsidy in question reduces the selling price of goods, as held by the Member (Technical)

OR

As held by the Member (Judicial) that the subsidy in question does not reduce the selling price of the goods. Nor does it amount to indirect flow from the buyer to the seller.

(B) The amount of subsidy under dispute is an independent amount of subsidy received from the Government on the basis of the capital investment and employment generation/wages paid and thus, is not an additional sales consideration, as held by the Member (Judicial).

OR

The amount of subsidy under dispute is not an independent amount received by the appellant. Rather it is computed with reference to the sales tax paid and thus, is an additional consideration for sales, as held by the Member (Technical).

(C) The facts in this appeal are similar to the facts in the case of **Super Synotex India Ltd. (supra)** as held by the Member (Technical)

OR

The facts in the present case are difference (should be different) and hence, ruling of the Apex Court in the case of Super Synotex India Ltd. (supra) is not applicable.

(D) Under the facts and circumstances, the appellant have received VAT subsidy (directly affecting the selling price of the goods), as held by the Member (Technical)

OR

1. 2023 (3) TMI 1120-CESTAT NEW DELHI
2. 2014 (301) ELT 273 (SC)

It is not a case of VAT subsidy, affecting or depressing the selling price of the goods, as held by the Member (Judicial)."

(E) The provisions of Section 9 of Rajasthan VAT Act has not been considered in the case of **Shree Cement Ltd. (supra)** leading to erroneous judgment in the said case, as held by the Member (Technical)

OR

The provisions of section 9 of Rajasthan VAT Act 2003 has got no application in the facts of the present case, as held by the Member (Judicial).

(F) It is an appropriate case for reference to the Id. Third Member on the questions framed by the Id. Member (Technical)

OR

There is no case for reference to the Id. Third Member and the appeal is fit to be allowed, as held by the Member (Judicial)."

8. After referring to the provisions of law and the various decisions referred to by the assessee and the Department, the reference was answered in the following manner:-

"31. To revert, what has to be examined is whether in a case where the assessee collects Rs.2500/- towards sales tax and adjusts the sales tax liability of Rs.1000/- from VAT 37B challan issued by the State Government as subsidy under the promotion policy and deposits the remaining amount of Rs. 1500/- towards sales tax in cash through VAT 37A Challan, then whether this 1000/- can be said to be an additional consideration. **The decision of the Supreme Court in Super Synotex India would not be applicable to the facts of the present case as that was a case where 25% of the amount collected as sales tax from the customers was paid by the assessee and the remaining 75% of the amount was retained by the assessee, which amount was treated to be the price of the goods. In the promotion policy involved in the present case, the subsidy does not reduce the sales tax that is required to be paid by the assessee as the entire amount of sales tax collected by the assessee from the customer is paid.** The subsidy amount, therefore, cannot be included in the transaction value for the purpose of levy of central excise duty under section 4 of the Excise Act.

32. In view of the aforesaid discussion, the reference is answered in the following manner:

- a- Subsidy under the promotion policy does not reduce the selling price;
- b- The amount of subsidy under the promotion policy is not an additional consideration;
- c- The decision of the Supreme Court in Super Synotex India would not be applicable to the present case;
- d- The subsidy amount under the promotion policy does not affect the selling price of the goods;
- e- Section 9 of the Rajasthan VAT Act, 2003 would have no application to the facts of the present case; and
- f- As neither party raised any objection on this issue, the reference has been answered.

33. The matter shall now placed before the regular bench hearing the excise appeals.”

9. The decision of the Supreme Court in **Super Synotex India** was considered in the aforesaid order and it was held that it would not be applicable in the facts of the present case.

10. In view of the aforesaid answer to the reference made by the Division Bench, the order of the Commissioner (Appeals) does not suffer from any illegality so as to call for interference.

11. The appeal is, accordingly, dismissed.

(Order dictated and pronounced in the open Court)

(JUSTICE DILIP GUPTA)
PRESIDENT

(RAJEEV TANDON)
MEMBER (TECHNICAL)