CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

EXCISE APPEAL No. 50394 OF 2019

(Arising out of Order-in-Appeal No. 507-516(SM)CE/JP2018 dated 30.11.2018 passed by the Commissioner (Appeals), Central Excise & GST, Jaipur)

M/s H-One India Private Limited **........Appellant**
A-46 A2 and A-46 A1
RIICO Industrial Area
Khushkhera, Bhiwadi
District - Alwar
RAJASTHAN

Versus

Commissioner of Central Excise **.......Respondent**
RIICO Industrial Area
Behror, Alwar
RAJASTHAN

WITH

(i) Excise Appeal No. 50421 of 2019 (M/s Yukata Autoparts India Pvt. Ltd.); (ii) Excise Appeal No. 50476 of 2019 (M/s Maruti Products Pvt. Ltd.); (iii) Excise Appeal No. 50569 of 2019 (M/s Mittal Forgings & Components Pvt. Ltd.); (iv) Excise Appeal No. 50608 of 2019 (M/s Badve Engineering Ltd.); and (v) Excise Appeal No. 50778 of 2019 (M/s Seva Steel (P) Ltd.)

(Arising out of Order-in-Appeal No. 507-516(SM)CE/JPR/2018 dated 30.11.2018 passed by the Commissioner (Appeals), Central Excise & GST, Jaipur)

APPEARANCE:

Ms. Anshika Aggarwal, Advocate, for the Appellant in Excise Appeal No. 50394 of 2019

Ms. Sukriti Dass, Advocate, for the Appellant in Excise Appeal No. 50421 of 2019

Shri Anirudh Samantray, Advocate, for the Appellant in Excise Appeal No. 50476 of 2019

Shri Sube Singh Jangir, Authorised Signatory, for the Appellant in Excise Appeal No. 50569 of 2019

Shri A.P. Kolte, Advocate, for the Appellant in Excise Appeal No. 50608 of 2019

None for the Appellant in Excise Appeal No. 50778 of 2019

Shri R.K. Mishra, Authorised Representative for the Respondent

Date of hearing/decision: 30.04.2019

CORAM : HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. V. PADMANABHAN, MEMBER (TECHNICAL)

FINAL ORDER NO. 50675-50680/2019

JUSTICE DILIP GUPTA :

All these six Appeals seek the quashing of a common order dated 30 November, 2018 passed by the Commissioner (Appeals) and, therefore, are being decided together.

2. Show cause notices were issued to the Appellants alleging that they had received subsidy under various challans sanctioned against Entitlement Certificates under the Rajasthan Investment Promotion Scheme – 2010 (hereinafter referred to as the '**Scheme**') which were adjusted towards payment of VAT and CST in their returns, but the Central Excise Duty was not paid on the amount received as additional consideration of sales tax collected from the buyers and retained by them to the extent of sales tax liability not actually paid to the state exchequer. The Adjudicating Authorities confirmed the demand of Central Excise duty and ordered for recovery of the same with interest under section 11A and section 11AA/11AB of the Central Excise Act,

1944 (hereinafter referred to as the '**Act**') and imposed penalties. Feeling aggrieved, the Appellants preferred Appeals before the Commissioner (Appeals) under Section 35 of the Act. It was sought to be contended that the disbursement of the sales tax amount as 'Subsidy' under the Scheme would not be included in the 'Transaction Value'. The Appellants also contended that the Scheme is entirely different from the Scheme under consideration before the Supreme Court in **Commissioner of Central Excise vs Super Synotex (India) Limited,** reported in **2014 (301) ELT 273 (SC),** and, therefore, the said decision of the Supreme Court would be of no help to the Revenue. This contention was not accepted by the Commissioner (Appeals) and it was observed as follows :

> **"11.** The appellant also argued that the scheme of the RAJASTHAN INVESTMENT PROMOTION POLICY-2003 and RAJASHTAN INVESTMENT PROMOTION POLICY-2010/13 are different from the scheme covered under the order of the Apex Court in the case of M/s Super Synotex (India) Ltd. [2014 (301) ELT 273 (SC)] mainly on the ground that in the case of M/s Super Synotex (India) Ltd. the assessee charging/collecting full VAT from the buyers but only part payment was made to the Govt. And retained the balance amount with them whereas in the present appeals the appellants paid the part amount of sales tax by way of cash and part amount by way of subsidy amount. I observe that in the present appeals the appellants charged and collected full amount of sales tax/vat from the buyers and thereafter filed their claim for said subsidy to the commercial taxation department and obtained entitlement certificates and various 37 B challans. For subsequent period that appellants also charged and collected full amount of sales tax but in that cases the appellants paid some part in cash and remaining by way of 37 B challans, thus in these cases the appellants retained some amount of sales tax as equal to the amount of said subsidy which was actually collected by them from the buyers. On this retained amount the appellant have not paid Central Excise Duty whereas in view of definition of "transaction value" as made effective w.e.f. 01.07.2000 the

> amount of sales tax actually paid is only deductable for the purpose of levy of Central Excise Duty."
>
> **"14.** In view of the above, it is clear that in whichever way the aforesaid mechanism or the adjustment is looked into, whether the appellants collects the sales tax and retains part of it directly or retains it by way of getting the amount in form of others (mode of deposit) and utilizing it for discharge of subsequent tax liability, the fact remains that the appellants have not actually paid the tax which was collected from the customers as sales tax to the extent of the amount adjusted towards their subsequent sales tax liability through 37B challans (mode of deposit)."

3. Learned Counsel for the Appellant had placed before us the relevant provisions of the Scheme as also the decision of a Division Bench of this Tribunal in **M/s Maihar Cement vs. CCE & ST, Jabalpur** (Appeal No. E/51979 of 2017 decided on 5 April 2018). It is the submission that the Division Bench of the Tribunal in **Maihar Cement** examined an identical issue after placing reliance upon an earlier Division Bench decision of the Tribunal in **Shree Cement Ltd. vs. CCE, Alwar** (decided on 18 October 2018).

4. The learned Authorised Representative of the Department has, however, supported the impugned order and contended that it does not call for any interference.

5. It is in the year 2010 that the Government of India notified a Scheme called "Rajasthan Investment Promotion Scheme – 2010". The Scheme seeks to promote investment in the State of Rajasthan and to further generate employment

opportunities through such investment. It came into effect from 25 August, 2010 and remained in force upto 31 March, 2018. The Scheme was made applicable to (i) new enterprise; (ii) existing enterprise making investment for modernization/ expansion/diversification; (iii) sick industrial enterprise for its revival; and (iv) enterprise which has set up Project for Common Social Good.

6. Clause 4 of the Scheme relates to 'Subsidy' and is as follows :

> **"4. SUBSIDY**
>
> A. Subsidy shall consist of Investment Subsidy and Employment Generation Subsidy and shall be allowed, for a period of seven years, to all enterprises to which an Entitlement Certificate as prescribed under the Scheme has been issued. However for MSME located in the notified area the benefit of subsidy shall be for ten years
>
> B. The maximum amount of subsidy shall be 50% of the total amount of tax (es) that is VAT and CST or SGST (whenever introduced), which have become due and have been deposited into the government exchequer, however, an Additional subsidy to the extent of 10% of the amount of said tax (es) which have become due and have been deposited into the government exchequer shall be allowed to Women/ SC/ ST/ Person with disability (PwD) entrepreneur, by way of additional investment subsidy. However, in case of Modernization/ Expansion/ Diversification, the subsidy shall be allowed only on the amount of additional tax liabilities which accrue due to utilization of increased capacity/ increased volume of sales in quantity, created/ achieved after Modernization/ Expansion/ Diversification.
>
> C. The break-up of subsidy amount shall be as mentioned in Table-2 given below:

TABLE 2

	Type of Subsidy	Amount of Subsidy
1.	Investment Subsidy	30% of tax (es) which have become due and have been deposited by the enterprise
2.	Employment Generation Subsidy	20% of tax (es) which have become due and have been deposited by the enterprise, subject to sub-clause E below.

D. Investment Subsidy shall be allowed to all eligible enterprise on the basis of tax deposited by the enterprise subject to condition that the total amount of subsidy (Investment Subsidy + Employment Generation Subsidy) shall not exceed 50% of the amount of tax (es) which have become due and have been deposited by the enterprise. However for Women/ SC/ ST/ Person with disability (PwD) entrepreneur, total amount of subsidy including Additional Investment subsidy shall not exceed 60% of the amount of tax (es) which have become due and have been deposited by the enterprise.

E. The maximum limit of Employment Generation Subsidy shall be as mentioned in column number 5 of Table 3, and shall be allowed to the eligible enterprise at the rate as mentioned in column number 4, according to the category of enterprise and employee as mentioned in column number 2 and 3 respectively of Table-3 given below."

7. Clause 5 deals with 'Exemptions' and provides as follows :

"A. The Enterprise to which an Entitlement Certificate as prescribed under the Scheme has been issued shall be eligible to claim the exemption(s) from the taxes/duties/charges, to the extent and for the period as mentioned in Table-4 given below

xxxxxxxxx xxxxxxxxx xxxxxxxx

B. In case of Enterprises going for Modernization/ Expansion/ Diversification, the exemption from payment of tax (es) shall be allowed only to the extent to which additional tax liabilities accrue due to utilization of additional capacity created after Modernization/Expansion/Diversification."

8. The procedure for claim has been set out in Clause 6 of the Scheme, while 'Procedure for Disbursement of Subsidy' has been provided in Clause 7. Clause 7 of the Scheme is reproduced below :

> **"PROCEDURE FOR DISBURSEMENT OF SUBSIDY:**
>
> A. For disbursement of subsidy the enterprise to which an Entitlement Certificate as prescribed under the Scheme has been issued shall apply quarterly in Form - IX, appended to the Scheme, to Assistant Commissioner/ Commercial Taxes Officer of the area where the enterprise is registered with the Commercial Taxes Department along with proof of deposit of tax and copy of Challan for the amount of contribution of EPF and/or ESI or copy of insurance policy obtained for medical treatment of employees.
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> B. On receipt of the application, the officer concerned shall verify the facts mentioned in the application and shall pass an order for sanction cum disbursement of Subsidy in Form VAT-37B, within 15 days from the receipt of application, subject to availability of Budget provision.
>
> C. The said sanction in Form VAT-37B shall be forwarded to the concerned Treasury Officer for deposit of subsidy amount for the subsequent tax period(s) of the applicant by way of adjustment through treasury Book Transfer (BT).
>
> D. The Treasury Officer shall take necessary steps to pass adjustment order Book Transfer (BT) without any delay and shall forward two copies of duly adjusted Form VAT-37B to the Assistant Commissioner/ Commercial Taxes Officer. A copy of same shall also be forwarded to the office of the Accountant General. The Assistant Commissioner/ Commercial Taxes Officer shall forward a copy of Form VAT-37B to the applicant as a proof of disbursement of subsidy.
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> E. Any order passed under this clause by the Assistant Commissioner/ Commercial Taxes Officer shall be subject to the provisions of the Rajasthan Value Added Tax Act, 2003, the Central Sales Tax Act, 1956, any Act related to SGST (whenever introduced) and rules made there under. The

> provisions of Recovery and Appeal in the said Acts shall mutatis mutandis apply for such orders."

9. The Commissioner (Appeals) has placed reliance on the decision of the Supreme Court in **Super Synotex (India) Ltd.** This decision of the Supreme Court in **Super Synotex (India) Ltd.** was considered by Division Benches of the Tribunal in **Welspun Corp. Ltd., Shree Cement Ltd.** and **M/s Maihar Cement** and distinguished for the reason that the Supreme Court was examining a scheme under which only 25% of VAT was required to be deposited and the remaining 75% was to be retained by the assessee, whereas under the 2004 Scheme, the entire amount collected by the assessee was required to be deposited with the State authorities.

10. It would be pertinent to refer to the relevant portion of the decision of the Tribunal in **Shree Cement Ltd.** and it is as follows :-

> "7. We have heard both sides at length and perused the appeal record. As out lined above, the appellants are covered by the Investment Promotion Schemes of the Rajasthan Government. In terms of the various schemes of the Rajasthan Government, the appellants are required to discharge their VAT liability by making payment of the same. Out of such VAT credited to the Government, a certain portion is disbursed back to them in the form of subsidies. Such disbursement happens in the form of VAT 37 B, challan which can be utilized in subsequent periods to discharge VAT liability. **<u>The crux of the dispute in the present case is whether such subsidy amounts are required to be included in the assessable value of the goods manufactured by the appellants, in terms of Section 4 of</u>**

the Central Excise Act. As per the concept of transaction value outlined in Section 4, with effect from 01/07/2000, any sales tax/VAT actually paid can be deducted from the transaction value for payment of excise duty. Revenue has taken the view that payment of VAT using 37B Challans cannot be considered as actual payment of VAT.

8. Both sides have referred to the decision of the Apex Court in the case of **Super Synotex India Ltd**. In the above decision the Apex Court has categorically held that after 01/07/2000, unless the sales tax/VAT is actually paid to the good, no benefit towards excise duty can be given in terms of Section 4(3)(d). However, we note that the Tribunal in the case of **Welspun Corporation Ltd.** (Supra) has distinguished the decision of the Apex Court in the light of Gujarat VAT Act, 2003. In the **Welspun Corporation Ltd.** case, the assessee had opted for remission of tax scheme under which a portion of the VAT paid was remitted back to the assessee. The Tribunal held that such subsidy amounts are not required to the included in the transaction value.

9. **In the present case we know that for the initial period the assessees are required to remit the VAT recovered by them at the time of sale of the goods manufactured. A part of such VAT is given back to them in the form of subsidy in Challan 37 B. Such Challans are as good as cash but can be used only for payment of VAT in the subsequent period**. In terms of the scheme of the Government of Rajasthan payment of VAT using such Challan are considered legal payments of tax. **In view of the above, Revenue is not correct in taking the view that VAT liability discharged by utilizing such subsidy challans cannot be taken as VAT actually paid**.

10. It is pertinent to reproduce the observations of the Tribunal in the **Welspun Corporation Ltd.** case

> "5.1 The Respondent company opted for "Remission of Tax Scheme" and was thus eligible for the Capital subsidy in the form of remission of Sales Tax subject to the conditions to be fulfilled…. The subsidy in the form of remission of sales tax was in fact a percentage of capital investment… Separate assessment orders were thus issued by the assessing officer of the sales tax department from time to time towards the incentive scheme amount. The Competent Authority was required to necessarily pass order for remission of such tax separately for each tax period. The remission of tax is thus directly related to capital investment in

> fixed asset. There was no option to claim exemption from payment of sales tax. The quantum of remission was based upon the investment made in the fixed assets. The condition of the remission amongst others included to remain in production, employment of certain percentage of persons in assessee unit, and numerous other conditions as brought out in Para 9 of the impugned Order-in-Appeal."
>
> 11. By following the decision of the Tribunal in the **Welspun Corporation Ltd**. case we conclude that there is no justification for inclusion in the assessable value, the VAT amounts paid by the assessee using VAT 37B Challans".

11. The Tribunal in **M/s Maihar Cement** followed the aforesaid decision rendered in **M/s Shree Cement Ltd.** as basically both the Scheme of the Rajasthan Government and Madhya Pradesh Government were identical.

12. In the present case, as noticed above, the Appellants in terms of the Scheme had deposited the entire amount of VAT collected. It is this amount that is used as a measure for granting financial assistance to be subsequently provided.

13. The judgment of the Tribunal in **M/s Maihar Cement** and **M/s Shree Cement Ltd.** would, therefore, apply and the financial assistance granted to the Appellants cannot be included in the Transaction value for payment of excise duty.

14. The learned Authorised Representative has, however, placed reliance on the decision of the Tribunal in **Jayaswal Neco**

Industries Ltd. vs Commissioner of Central Excise & Service Tax, Raipur, reported in **2016 (344) ELT 578 (Tri.-Del.)** and **Honda Motorcycles & Scooters India P. Ltd. vs Commissioner of Central Excise, Delhi-III,** reported in **2017 (357) ELT 828 (Tri.-Chan.),** to contend that the 'Subsidy' should be included in the 'Transaction Value'.

15. It needs to be noted that these two decisions are not connected with the Scheme under consideration in these appeals, but relate to Remission Schemes and the decision of the Supreme Court in **Super Synotex (India) Limited** has been relied upon. The nature of Scheme in the present Appeals are entirely different as 'Subsidy' and not 'remission' has been provided to the Appellants under the Scheme.

16. It is, therefore, not possible to sustain the impugned order which is set aside. The Appeals are, accordingly, allowed.

(Operative portion pronounced in the open Court)

(JUSTICE DILIP GUPTA)
PRESIDENT

(V. PADMANABHAN)
MEMBER (TECHNICAL)

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