

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
KOLKATA**
REGIONAL BENCH – COURT NO.1

Ex. Appeal No. 75674 of 2017

(Arising out of Order-in-Original No.01-03/Commissioner/CE/Haldia/ Adjn/2017 dated 22/02/2017 passed by the Commissioner of Central Excise, Haldia.)

M/s. Haldia Petrochemicals Ltd.

Appellant (s)

Hpl Link Road, Haldia
Distt. Purba, Medinipur,
Haldia-721602

VERSUS

**Commissioner of Central Excise & Service Tax,
Haldia**

Respondent

15/1, Strand Road,
Kolkata-700001

APPERANCE :

Mr. Harakamal Chakraborty, DGM for the Appellant
Mr. S. S. Chattopadhyay, A. R. for the Respondent

CORAM:

HON'BLE MR. S. S. GARG, MEMBER (JUDICIAL)

HON'BLE MR. P. V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO.75330/2020

Date of Hearing : 06 February 2020
Date of Decision : 02/03/2020

PER P. V. SUBBA RAO :

This appeal is filed against Order-in-Original No. 01-03/Commissioner/CE/Haldia/Adjn/2017 dated 22/02/2017.

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2. Heard both sides and perused the records.
3. The appellant assessee is a manufacturer of various petrochemicals. They cleared them on payment of Central Excise Duty. As per the scheme of the West Bengal VAT Department, they are entitled to invoice for applicable rate of VAT on their clearances and collect the same as VAT from the customers but not pay to the State government. This is referred to as remission under the scheme known as West Bengal Incentive Scheme, 1999.
4. Revenue is of the opinion that the additional amount which has been collected by the appellant from their customers as representing VAT but which has not been deposited as VAT forms an additional consideration for sale and therefore, Excise Duty has to be paid on the same. It is the case of the assessee that they are not liable to pay Excise Duty on this amount.
5. Ld. Counsel for the appellant contests the demand confirmed on the impugned order on the following grounds:-
 - (i) No Excise Duty is payable on the amounts which they have collected as representing VAT, but which they have not paid to the State Government under the Remission Scheme. He would submit that in the impugned Order, the Adjudicating Authority has confirmed the demand relying upon the judgment of the Hon'ble Apex Court in the case of Super Synotex (India) Ltd. [2014 (301) E.L.T. 273 (S.C.)] in which the Hon'ble Apex Court has held that where an amount is collected as the representing VAT/Sales Tax but which has not been paid to the State Government, is includable in the assessable value for the purpose

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of Central Excise Duty. Ld. Counsel would argue that this judgment of the Hon’ble Apex Court has not taken into account the fact that VAT itself is payable on the price plus Excise Duty. Therefore, if VAT is then added to the assessable value, we will get into loop in which the determination of the liability of VAT and Excise Duty become impossible. He also relies on the Order of Tribunal, Mumbai in the case of Welspun Corporation Ltd. 2017 (358) E.L.T. 630 (Tri.-Mumbai) in which that Bench had distinguished that case from the case of Super Synotex (Supra) and held that the Sales Tax actually payable at the time of removal but not paid is not includable in the transaction value for the purpose of Excise Duty.

(ii) The impugned Show Cause Notices were as follows:-

SCN no.	Period of demand	Duty (In Rs. cr.)	Total (Ts. Cr)	Demand raised under
7037/3.5.2011	2006-07	6.88	21.53	Proviso to sec. 11A(1); penalty u/s 11AC
	2007-08	7.03		
	2008-09	5.86		
	2009-10	1.76		
	2010-11	4.11	4.11	
7418/7.5.2012	Apr’11 to Dec’11	3.35	3.35	Sec. 11A(1) & 11A(1)(a); penalty u/r

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				25
2839/8.2.2013	Jan'12 to May'12	2.04	2.04	Sec. 11A(1) & Penalty u/r 25
Total			31.03	

He would submit that the demands up to period 2009-10 were all time barred as there is no evidence of fraud, collusion, willful miss-statement, suppression of facts, etc. In fact, earlier, a demand on exactly the same issue for the period July 2000 to December 2000 was decided in their own case by the Haldia Commissioner by this Order dt. 27/08/2004 in their favour. He held that no Excise duty is payable on such amounts. Revenue has not filed any appeal against the Order of the Commissioner. Therefore, it cannot, be said by any stretch of imagination be said that there was fraud, collusion, etc on the part of the appellant.

- (iii) For the same reasons, no fine and penalty can be imposed upon them.
- (iv) This matter is also a case of "res judicata" as the issue once settled in their favour cannot be opened again and again by the Department even for a different period.
- (v) The quantification of the duty is erroneous. Even if, on merits, the matter is held against them, it is a well-settled legal position that for such cases, the amounts which have been received must be taken as Cum Duty Price.

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6. Ld. Departmental Representative supports the impugned Orders and counters the arguments of the appellant. He would submit as follows:-

- (i) As far as the merits of the case are concerned, the question of law to be decided is whether in any case where the assessee collects from the customers some amount as representing VAT but does not deposit the same with the State Government as per some Scheme and is entitled to keep the amount, the amount so collected and retained can be treated as additional consideration for sale. Accordingly, whether Excise Duty can be charged on such amounts. He would submit that this issue has been discussed at length in batch of civil appeals decided by the Hon'ble Supreme Court in the case of Super Synotex (Supra).
- (ii) Paras 20 to 28 of this judgment read as follows:-

20. *The question that would still remain alive is that what would be the effect of amendment of Section 4 which has come into force with effect from 1-7-2000. The Section 4(3)(d) which defines "transaction value", reads as follows :-*

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

(1) & (2) * *

(3) *For the purposes of this section, -*

(a) to (cc) * * *

(d) *"transaction value" means the price actually paid or payable for the goods, when sold, and includes in addition to the amount charged as price, any amount that the buyer is liable to pay to, or on behalf of, the assessee, by reason of, or in connection with the sale, whether payable at the time of the sale or at any other time, including, but not limited to, any amount charged for, or to make provision for, advertising or*

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publicity, marketing and selling organization expenses, storage, outward handling, servicing, warranty, commission or any other matter; but does not include the amount of duty of excise, sales tax and other taxes, if any, actually paid or actually payable on such goods."

21. *After the substitution of the old Section 4 of the Act by Act, 10 of 2000 as reproduced hereinabove, the Central Board of Excise and Customs, New Delhi, issued certain circulars and vide Circular No. 671/62/2002-CX, dated 9-10-2002 clarified the circular issued on 1-7-2002. In the said circular reference was made to the earlier Circular No. 2/94-CX 1, dated 11-1-1994. It has been observed in the circular that after coming into force of new Section 4 with effect from 1-7-2000 wherein the concept of transaction value has been incorporated and the earlier explanation has been deleted, the circular had lost its relevance. However, after so stating the said circular addressed to the representations received from the Chambers of Commerce, Associations, assessees as well as the field formations and in the context stated thus :-*

"5. The matter has been examined in the Board. It is observed that assessees charge and collect sales tax from their buyers at rates notified by the State Government for different commodities. For manufacture of excisable goods assessees procure raw materials, in some State, by paying sales tax/purchase tax on them (in some States, like New Delhi), raw materials are purchased against forms ST-1/ST-35 without paying any tax). While depositing sales tax with the Sales Tax Deptt. (on a monthly or quarterly basis), the assessee deposits only the net amount of sales tax after deducting set off/rebate admissible, either in full or in part, on the sales tax/purchase tax paid on the raw materials during the said month/quarter. The sales tax set off in such cases, therefore, does not work like the central excise set off notifications where one to one relationship is to be established between the finished product and the raw materials and the assessee is allowed to charge only the net central excise duty from the buyer in the invoice. The difference between the set off operating in respect of central excise duty and that for sales tax can be best illustrated through an example. If the sales tax on a product 'A' of value Rs. 100/- is, say 5% and the set off available in respect of the purchase tax/sales tax paid on inputs going into the manufacture of the product is, say, Re. 1/-, then the sales tax law permits the assessee to

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recover sales tax of Rs. 5/-. But while paying to the sales tax deptt. he deposits an amount of Rs. 5 – 1 = Rs. 4 only. On the central excise duty payable would have been Rs. 5 – 1 = Rs. 4, in view of the set off notification, and the assessee would recover an amount of Rs. 4 only from the buyer as Central Excise duty. Thus, it is seen that the set off scheme in respect of sales tax operate in these cases somewhat like the Cenvat Scheme which does not have the effect of changing the rate of duty payable on the finished product.

6. Therefore, since the set off scheme of sales tax does not change the rate of sales tax payable/chargeable on the finished goods, the set off is not to be taken into account for calculating the amount of sales tax permissible as abatement for arriving at the assessable value u/s 4. In other words only that amount of sales tax will be permissible as deduction under Section 4 as is equal to the amount legally permissible under the local sales tax laws to be charged/billed from the customer/buyer.”

[Emphasis added]

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*

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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 12-3-1998. 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.*

24. *What is urged by the learned counsel for the assessee is that paragraphs 5 and 6 of the circular dated 9-10-2002 do protect them, as has been more clearly stated in paragraph 5. To elaborate, sales tax having been paid on the inputs/raw materials, that is excluded from the excise duty when price is computed. Eventually, the amount of tax paid is less than the amount of tax payable and hence, the concept of "actually paid" gets satisfied. Judged on this anvil the submission of the learned counsel for the assessee that it would get benefit of paragraph 6 of the circular, is unacceptable. The assessee can only get the benefit on the amount that has actually been paid. The circular does not take note of any kind of book adjustment and correctly so, because the dictionary clause has been amended. We may, at this stage, also clarify the position relating to circulars. Binding*

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nature of a circular was examined by the Constitution Bench in CCE v. Dhiren Chemical Industries - (2002) 2 SCC 127 = [2002 \(139\) E.L.T. 3](#) (S.C.), and it was held that if there are circulars issued by C.B.E. & C. which placed different interpretation upon a phrase in the statute, the interpretation suggested in the circular would be binding on the Revenue, regardless of the interpretation placed by this Court. In CCE v. Ratan Melting & Wire Industries - (2008) 13 SCC 1 = [2008 \(231\) E.L.T. 22](#) (S.C.) = [2008 \(12\) S.T.R. 416](#) (S.C.), the Constitution Bench clarifying paragraph 11 in Dhiren Chemical Industries (supra) has stated thus :-

"7. Circulars and instructions issued by the Board are no doubt binding in law on the authorities under the respective statutes, but when the Supreme Court or the High Court declares the law on the question arising for consideration, it would not be appropriate for the court to direct that the circular should be given effect to and not the view expressed in a decision of this Court or the High Court. So far as the clarifications/circulars issued by the Central Government and of the State Government are concerned they represent merely their understanding of the statutory provisions. They are not binding upon the court. It is for the court to declare what the particular provision of statute says and it is not for the executive. Looked at from another angle, a circular which is contrary to the statutory provisions has really no existence in law."

25. *The legal position has been reiterated in the State of Tamil Nadu and Anr. v. India Cement Ltd.- (2011) 13 SCC 247. Therefore, reliance placed on the circular dated 9-10-2002 by the Tribunal is legally impermissible for two reasons, namely, the circular does not so lay down, and had it so stated that would have been contrary to the legislative intention.*

26. *In view of the aforesaid analysis, we are of the considered opinion that the assesseees in all the appeals are entitled to get the benefit of the circular dated 12-3-1998 which protects the industrial units availing incentive scheme as there is a conceptual book adjustment of the sales tax paid to the Department. But with effect from 1-7-2000 they shall only be entitled to the benefit of the amount "actually paid" to the Department, i.e., 25%. Needless to emphasise, the set off shall operate only in respect of the amount that has been paid on the raw material and inputs on which the sales tax/purchase tax has been paid. That being the position the adjudication by the Tribunal is not sustainable. Similarly the determination by the original*

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adjudicating authority requiring the assesseees to deposit or pay the whole amount and the consequential imposition of penalty also cannot be held to be defensible. Therefore, we allow the appeals in part, set aside the orders passed by the Tribunal as well as by the original adjudicating authority and remit the matters to the respective Tribunals to adjudicate as far as excise duty is concerned in accordance with the principles set out hereinabove. We further clarify that as far as imposition of penalty is concerned, it shall be dealt with in accordance with law governing the field. In any case, proceeding relating to the period prior to 1-7-2000 would stand closed and if any amount has been paid or deposited as per the direction of any authority in respect of the said period, shall be refunded. As far as the subsequent period is concerned, the Tribunal shall adjudicate as per the principles stated hereinbefore.

27. *Coming to the appeals preferred by the assesseees, the challenge pertains to denial of benefit of the Central Sales Tax Act, the aforesaid reasoning will equally apply. The submission that the concession of excise duty is granted by the Excise Department of the Central Government is not acceptable. On a perusal of the circulars dated 12-3-1998 and 1-7-2002 we do not find that they remotely relate to any exemption under the Central Sales Tax imposed on the goods. What is argued by the learned counsel for the assesseees is that the benefit should be extended to the Central Sales Tax as the tax on sales has a broader concept. The aforesaid submission is noted to be rejected and we, accordingly, repel the same. In view of the aforesaid, the appeals preferred by the assesseees stand dismissed.*

28. *In the result, both sets of appeals stand disposed of accordingly. There shall be no order as to costs.*

- (iii) He would submit that one of the appellants in that case, namely M/s. Bharat Roll Industry (CA No. 4621/2008) also had their case decided in the matter with respect to the specific scheme of remission of VAT under the West Bengal Government VAT Scheme. Aggrieved by the Order of the Hon'ble Apex Court, M/s. Bharat Roll Industry filed a review petition which was dismissed by the Hon'ble Apex Court with the following words:-

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"Applications for open hearing of the review petitions are rejected.

We have perused the Review Petitions and record of the Civil Appeals and are convinced that the Order of which Review has been sought does not suffer from any error apparent warranting its reconsideration.

The Review Petitions are accordingly, dismissed. (Bharat Roll Industry Pvt. Ltd. V. Commissioner (2015) 317 E.L.T. A 187 (SC)."

He would therefore, urge that the ratio of the judgment of the Hon'ble Apex Court is binding in this Bench and there is no scope for taking any different view.

- (iv) As far as the question of invoking the extended period of limitation, alleging suppression, etc. and imposition of penalty is concerned, he reiterates the impugned order.
- (v) On the argument of the issue being res judicata, he would argue that after the year 2000, valuation of each consignment is a separate assessment in itself. Merely because the Department has not challenged an order passed by the Commissioner for an earlier period, it does not mean that the Department is estopped from raising a demand for a subsequent period. Therefore, there is no force in the argument that the matter is hit by the principle of res judicata.
- (vi) On the argument that the Tribunal Mumbai had in the case of Welspun Corporation Ltd. (Supra) distinguished the case from the case of Super Synotex Ltd. (Supra),

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he would take us through the case and submit that in Para 5.5 of the Order, it is clearly recorded that the Commissioner (Appeals) in that case distinguished that case from the case of Super Synotex. Revenue's proposal to challenge this finding was rejected by the Bench only on the Technical Ground that such refutation was not part of the Review Order/Appeal. Therefore, he would submit that the distinction was not made by the Tribunal on merits of that case but only a technicality which should not bind this bench in this case. He would therefore, urge that the appeal is without merits and needs to be rejected.

7. We have considered the arguments on both sides and perused the records. There are several schemes of State Governments in which, as an incentive, businesses are allowed to collect amounts as representing VAT/Sales Tax but not remit the amount to the State Government. The question is whether in such cases the amounts so retained form part of the assessable value for the purposes of Excise Duty. Since such matters were pending in various States all these appeals or at least many of them were disposed of by the Hon'ble Apex court who held that Excise Duty has to be paid on such amounts which are retained by the assessee.

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8. We note that this judgment was not confined to any particular law of a particular state or a particular scheme but has laid down the law. Review Petitions filed against this judgment were also dismissed by the Hon'ble Apex Court. There is nothing on record to show that a larger Bench of Supreme Court has taken any contrary view. We therefore, find this judgment is binding on us and leaves us with no option but to hold that the assessee in the present case is bound to pay Excise Duty on the amounts collected as representing VAT but which were not paid to the government under the scheme. Ld. Counsel would argue that the Supreme Court's judgment was not correct inasmuch as it had not taken in their account the computational difficulties which would arise. We are not impressed by this argument considering that the Review Petition has also been dismissed by the Supreme Court. It is not for this bench to sit in judgment over the law laid down by the Apex Court. We are bound to follow it.

8. The case of Welspun Corporation Ltd. (Supra) relied upon by the Ld. Counsel is a judgment of the Tribunal Mumbai Bench, where the case law laid down by the Hon'ble Apex Court was not considered on a technical ground that the same was not part of the appeal. Such technicality in that case does not prevail over the judgment of the highest Court of the land. We, therefore, find the case in favour of the revenue and against the appellant on merits.

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9. As far as the argument of res judicata is concerned, it estops either party from raising the same case again and again. In Central Excise Duty, each individual consignment is an assessment by itself and a mistake made in one assessment by either party and not challenged by the other, does not mean that the other party is bound by such decision contrary to law for all subsequent periods. Such a view will lead us to absurd conclusions. For instance, Service Tax was paid by many assessees on Works Contract Service prior to 01/06/2007 although subsequently, it was held by the Hon'ble Apex Court that no such tax is payable. Merely because assesses had paid Service Tax wrongly for an earlier period, it does not mean that they are bound to pay Service Tax for subsequent periods also on the principle of res judicata. In this particular case, when there is a clear ruling by the Hon'ble Apex Court, the assessee cannot be get away from tax liability on the ground that a wrong decision was taken for some earlier period by the Commissioner which was not challenged for that period by the Revenue.

10. As far as the invocation of extended period of limitation is concerned, we find such a suggestion preposterous considering that it is clearly on record that the Revenue is aware of *modus operandi* of the assessee. To allege fraud, collusion, willful misstatement or suppression of fact or violation of Act or rules with an intent to evade payment of duty and invoke extended

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period has no basis. For this reason, we find the demand for extended period of limitation needs to be set aside and we do so. For the same reasons, we also find that the penalty imposed upon the appellant is sustainable.

11. In view of the above, the appeal is disposed of as follow:-

- (a) The demand for the normal period of limitation is upheld and the demand for extended period of limitation is set aside.
- (b) The amounts which have been collected by the appellant as VAT and retained must be taken as cum duty price and Excise Duty are calculated accordingly.
- (c) The penalties imposed upon the appellant are set aside.
- (d) The appeal is remanded to the Adjudicating Authority for the limited purpose of re-computation of duty.

(Pronounced in open Court on 02/03/2020.)

Sd/-

(S. S. Garg)
Member (Judicial)

Sd/-

(P. V. Subba Rao)
Member (Technical)