IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
EASTERN ZONAL BENCH: KOLKATA

REGIONAL BENCH – COURT NO. 2

Excise Appeal No. 77056 of 2016

(Arising out of Order-in-Appeal No. 61/GHY/CE(A)/GHY/2016 dated 14.10.2016 passed by the Commissioner (Appeals), Customs, Central Excise and Service Tax (NER), Custom House, NilamoniPhukan Path, Christian Basti, Guwahati – 781 005)

M/s.Kamakhya Plastics Private Limited : Appellant
Bonda, Narengi, District: Kamrup,
Guwahati – 781 026, Assam

VERSUS

Commissioner of Central Excise and Service Tax : Respondent
Sethi Trust Building, G.S. Road, Bhangagarh,
Guwahati – 781 005, Assam

APPEARANCE:

Shri Arnab Chakraborty, Advocate, for the Appellant

Shri S.K. Dikshit, Authorized Representative, for the Respondent

CORAM:

HON'BLE SHRI R. MURALIDHAR, MEMBER (JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO. 77741 / 2025

DATE OF HEARING / DECISION: 18.11.2025

ORDER:[PER SHRI K. ANPAZHAKAN]

The present appeal has been filed against the Order-in-Appeal No. 61/GHY/CE(A)/GHY/2016 dated 14.10.2016 whereby the Ld. Commissioner (Appeals), Customs, Central Excise and Service Tax (NER), Custom House, Nilamoni Phukan Path, Christian Basti, Guwahati – 781 005 has upheld the Order-in-Original No. 18/ACG-II/CE/GHY/2015-16 dated 30.03.2016.

1.1. The facts of the case are that M/s. Kamakhya Plastics Private Limited, Bonda, Narengi, District: Kamrup, Guwahati – 781 026, Assam [hereinafter referred to as the "appellant"] is engaged in the business of manufacture of, inter alia, UPVC Pipes,

Water Storage Tanks and allied products falling under Chapter 39 of the First Schedule to the Central Excise Tariff Act, 1985 (hereinafter referred to as the 'said goods). For the said purpose, the appellant has a factory at Bonda, Narengi, Guwahati. The appellant is duly registered in terms of the provisions of the Central Excise Act, 1944 (hereinafter referred to as 'the Act') and the Central Excise Rules, 2002 (hereinafter referred to as 'the Rules') for carrying out the manufacturing activity in the said factory.

1.2. The appellant was granted certificate of eligibility by the Assam State Government under the Industrial Policy of Assam, 2003 and the Assam Industries (Sales Tax Concession) Scheme, 1997 where under it was granted sales tax exemption in the form of remission under the Assam Value Added Tax Act, 2003 for a period of 7 years with effect from May 8, 2008 to May 7, 2015 for a maximum amount of Rs 64.55 lakhs. In terms of the said Eligibility Certificate, the appellant was permitted to avail remission to the extent of 99% of the Sales Tax/VAT payable.

2. The Assistant Commissioner of Central Excise, Guwahati, issued a Show Cause Notice on 26.05.2014, alleging non-inclusion of 99% of the Value Added Tax retained by the appellant as and by way of remission provided under the Assam Industries (Tax Remission) Scheme, 2005 of the Government of Assam (hereinafter referred to as the "2005 Scheme") during the period from May 2009 to March 2010, which had resulted in short payment of central excise duty payable in respect of excisable goods manufactured and cleared by the appellant from the said factory during the period from May 2009 to March 2010 (hereinafter referred to as the "said period") by

way of undervaluation of the said excisable goods, which was allegedly violative of Section 4 of the Act. It was further alleged that the appellant had adopted wrong procedure of valuation and assessment in contravention of the provisions of Section 4 of the Act by way of suppression of material facts with the sole intention to evade payment of central excise duty. On the basis of such allegations, invoking the extended period of limitation under Section 11A of the Act, the Assistant Commissioner called upon the appellant to show cause as to why central excise duty amounting to Rs.3,94,230/- (including education cess and secondary and higher education cess), allegedly short paid during the said period, should not be demanded and recovered from it under Section 11A of the Act, along with interest thereon in terms of Section 11AA of the Act and as to why penalty should not be imposed upon the appellant in terms of Section 11AC of the Act.

2.1. By way of adjudication order dated 30.03.2016, the ld. adjudicating authority confirmed the demand of Rs.3,94,230/- (inclusive of cesses), as proposed in the Notice, along with interest and penalty thereon.

2.2. The appellant challenged the said order before the Ld. Commissioner (Appeals), Customs, Central Excise and Service Tax (NER), Guwahati, who vide the order impugned herein, has rejected the appeal filed by the appellant.

2.3. Aggrieved, the appellant is before us.

3. At the outset, the Ld. Counsel appearing on behalf of the appellant submits that the impugned proceedings were initiated pursuant to the decision of the Hon'ble Supreme Court of India in *Commissioner*

of Central Excise v. Super Synotex (India) Ltd. [2014 (301) E.L.T. 273 (S.C.)] wherein the Hon'ble Supreme Court reversed the decision of the Tribunal, inter alia, in the case of *Super Synotex (India) Ltd. v. Commissioner of Central Excise [2003 (160) E.L.T. 859 (T)];* the said decision of the Tribunal in *Super Synotex (supra)* had also been followed by the Tribunal in various cases. It is submitted that the appellant has bona fide believed and proceeded on the premise that it was eligible for deduction of the entire VAT amount involved, which it had retained as per the remission scheme of the State Government, in determination of the "transaction value" and consequently, the assessable value of the subject excisable goods manufactured and cleared by them during the said period from the factory, basing on the decision of the Tribunal mentioned hereinabove as were in force during the material period. Accordingly, it is argued that it was not the settled position of law that the remitted amounts of sales tax/VAT were to be included in the transaction value of the said goods in terms of Section 4 of the Act, in view of the conflicting decisions being passed by the Tribunal and the Hon'ble Apex Court; thus, he contends that there is no basis to the allegations of fraud, suppression or wilful mis-statement with intent to evade payment of duty, on the part of the appellant.

3.1. He further pointed out that all facts were known to the jurisdictional central excise authorities during or prior to the period concerned and hence, there can be no allegation of wilful mis-statement or suppression of any material fact or contravention of any provision of the Act and/or Rules framed thereunder by the appellant with the intent to evade duty. In addition to the above, it is also the submission

of the Ld. Counsel for the appellant that during the said period not only regular EA-2000 audit of the factory were carried out by the jurisdictional central excise authorities, but also AG audits were conducted, during the course of which the appellant's balance sheets, containing the remission figures of sales tax/VAT, had also been scrutinized; however, no objections were raised by the said authorities.

3.2. In support of their contentions on the ground of limitation, the appellant has cited the decision of the Tribunal in the case of *Jalshakti Plastic Industries v. Commissioner, CGST &C.Ex., NER, Guwhati [(2023) 12 Centax 149 (Tri. – Cal.)],* wherein the extended period provisions have been held to be non-invocable under identical facts and circumstances.

3.3. In view of these submissions, the Ld. Counsel for the appellant argues that there cannot be any justification for invocation of the extended period of limitation in the facts and circumstances of the present case. He thus prayed that their appeal be allowed on the ground of limitation, as canvassed hereinabove.

4. On the other hand, the Ld. Authorized Representative of the Revenue justifies the confirmed demand. He cites the decision of the Hon'ble Apex Court in the case of *Commissioner of Central Excise v. Super Synotex (India) Ltd. [2014 (301) E.L.T. 273 (S.C.)],* which lays down that only those taxes which are actually paid or are payable to the concerned governments or statutory authorities are deductible for the purpose of determination of assessable value; the provision of transaction value under Section 4(3)(d) provides for inclusion of sales tax/VAT in the transaction value which are not paid or not payable to

any statutory authority at any point of time. Thus, he submits that the appellant has failed to follow the correct procedure for assessment of value of their finished goods in terms of Section 4(a)(1) of the Act read with Section 4(3)(d) of the Act. The Ld. Authorized Representative thus justified the confirmed demands and prayed for rejection of the instant appeal.

5. Heard both the sides and perused the documentary evidence available before us.

6. We find that the issue involved in the present appeal as regards includability of the sales tax concession retained by the assessee in the assessable value for the purpose of levy of central excise duty stands settled by the Hon'ble Supreme Court in the case of *Commissioner of Central Excise v. Super Synotex (India) Ltd. [2014 (301) E.L.T. 273 (S.C.)],* wherein it has been categorically held that unless the sales tax/VAT is actually paid to the concerned governments or statutory authorities, no benefit towards excise duty can be claimed under the concept of transaction value as envisaged under Section 4 of the Central Excise Act, 1944 and such, is not excludible. Hence, we find that on merits, the issue stands answered against the appellants.

7. We, however, find force in the submissions advanced by the appellant on the ground of limitation. We take note of the fact that during the relevant period under dispute, regular EA-2000 audits of the factory were carried out by the jurisdictional central excise authorities, apart from AG audits, during the course of which the appellant's balance sheets, containing the remission figures of sales tax/VAT, had been scrutinized, as pointed out by the appellant.

Therefore, it is evident that all the material facts were known to the jurisdictional authorities. Furthermore, the appellant were granted eligibility certificate for availing the incentives in terms of the Assam Industries (Tax Exemption for Pipeline Units) Order, 2005, as per which they were entitled to retain 99% of the VAT collected and pay only 1% o the State Government. The Department was therefore aware that they were availing the said scheme and retaining 99% of the VAT collected. In view of the above, we are of the view that the allegation of wilful mis-statement or suppression of any material fact or contravention of any provision of the Act and/or Rules framed thereunder on the part of the appellant is unsubstantiated.

7.1. Further, we observe that during the relevant period, the issue was mired in litigation and there were various decisions of the Tribunals that the sales tax concession retained by the assesses is not required to be added in the assessable value for the purpose of levy of Central Excise duty. Since the issue was a subject matter of litigation during the material period, we are of the considered view thatno *mens rea* can be attributed to the appellants for not including the same in the assessable value.

7.2. In this context, it is pertinent to refer to Circular No. 1063/2/2018-CX dated 16-2-2018 issued by the Board, clarifying acceptance of some of the orders passed by the Hon'ble Supreme Court, High Courts, etc., wherein no review petition has been filed. In the said clarification, the order passes by the Hon'ble Supreme Court in the case of *Super Synotex* (supra) has also been included and it has been categorically

stated that extended period not invocable in such cases.

7.3. In the present case, the lower authorities have failed to establish any positive act of suppression on the part of the appellant by way of tangible or corroborative evidence. The remission of 99% of VAT is after collection of VAT in the Invoice. There is no tampering of invoices. The remission figures of sales tax/VAT were duly reflected by the appellant in the balance sheet of the impugned period.

7.4. We find that an identical issue came up for consideration before this Tribunal in the case of *Jalshakti Plastic Industries v. Commissioner, CGST &C.Ex., NER, Guwhati [(2023) 12 Centax 149 (Tri. – Cal.)],* wherein the demand raised by invoking the extended period provisions under Section 11A(4) of the Act has been set aside. The relevant observations of the Tribunal in the said case read thus: -

> *"11. In their submissions, the Appellant stated that their unit was audited for the period from January 2012 to March 2014, on 6-7-2014. During the course of audit, the total amount of VAT Remission retained by them was collected by the auditteam, from the documents submitted by them and the Central Excise duty payable thereon was worked out. Also, the entire issue was known to the department. They were granted eligibility certificate for availing the incentives under the Industrial Policy of Assam 2008 and for claiming the exemption of tax under Assam Industries (Tax Exemption) Scheme 2009. As per terms of the above remission scheme they were entitled to retain with it 99% of the VAT collected and pay only 1% to the State government. The department was aware that they were availing the Scheme and retaining 99% of the VAT collected. Thus, they have not suppressed any information from the department. Accordingly, they contended that extended period not invocable in this case and penalty is also not imposable.*

12. We find merit in the argument of the Appellant. The Appellant has not suppressed any information from the department. There were decisions of the Tribunals that the sales tax concession retained by the assesses is not required to be added in the assessable value for the purpose of levy of Central Excise duty. Thus, the appellant cannot be faulted for not including the same in the assessable value.

13. Further, we observe that Board has issued Circular No. 1063/2/2018-CX dated 16-2-2018, clarifying acceptance of some of the orders passed by the Hon'ble Supreme Court, High Courts etc, wherein no review petition has been filed. The para 12 of the said Circular relevant to this appeal is reproduced below:

> *"Decision of the Hon'ble High Court of Punjab & Haryana dated 12-8-2016 in the case of Microtek Forgings CEA No. 32/2016 [2016-TIOL-1866-HC-P&H-CX]. 12.1 Department has accepted the order of the Hon'ble High Court where the Hon'ble Court replying on the judgment of the Apex Court in the matters of 'Maruti Suzuki India Ltd. v. CCE Delhi, 2014 (307) E.L.T. 625 (SC) and Super Synotex (India) Ltd. v. CCE Jaipur, 2014 (301) E.L.T. 273 dismissed the departmental appeal. 12.2 In the case, CESTAT relying on Apex Court decision in the case of 'MarutiSuzuki India Ltd. v. CCE Delhi, 2014 (307) E.L.T. 625 (SC) and Super Synotex (India) Ltd. v. CCE Jaipur, 2014 (301) E.L.T. 273 had held that amount of sales tax concession retained by the respondent is required to be added in the assessable for levy of Central Excise Duty. However CESTAT held that extended period of limitation would not apply. Deciding the departmental appeal, High Court has held that CESTAT in its order has observed that under Circular dated 30-6-2000 CBEC had clarified that such amount retained by the assessee is not required to be added to the assessable value. This view was negated by Apex court in the above said orders. Since there was no clarity on the issue, the assessee cannot be said to be at fault, hence extended period would not be available to raise the demand."*

14. In the said clarification, the order passes by the Hon'ble Supreme Court in the case of Super Synotex has also been included and it has been categorically stated that extended period not invocable in such cases.

15. In the present case, we observe that the Adjudicating Authority and the Appellate Authority has failed to show any positive act of suppression on the part of the Appellant . The remission of 99% of AVAT is after collection of AVAT in the Invoice. There is no tampering of invoices. The Appellant has to charge full amount of AVAT and it cannot charge 1% in the invoices as per the provision of AVAT Act, 2003. The same was reflected in the audited Profit & Loss account and balance sheet of the impugned periods. Therefore, we hold that extended period of limitation as provided under section 11A(4) of the Central Excise Act, 1944 cannot be invoked for recovery of the short paid duties. The Circular issued by the Board also supports this view. Following the above Circular issued by the Board, we hold that extended period cannot be invoked in this case to demand duty. Accordingly, penalty also not imposable in this case."

7.5. In view of the above discussion, we are of the opinion that extended period of limitation as provided under Section 11A(4) of the Central Excise Act, 1944 cannot be invoked for recovery of the short paid duties and consequently, the demand confirmed against the appellant, by invocation of the extended period of limitation, is not sustainable.

7.6. We take note of the fact that as pointed out by the appellant, the period of dispute in this case pertains to the period from May 2009 to March 2010 whereas the instant Show Cause Notice was issued on 26.05.2014. Therefore, it is seen that the entire period falls within the extended period of limitation. Since, in view of our discussion in the preceding paragraphs, we have observed that the Revenue had no case for invoking the extended period of limitation

for demand of duties in this case, we hold that the whole of the demand raised against the appellant in this case is hit by limitation. Accordingly, we set aside the entire demand raised against the appellant, on the ground of limitation.

7.7. For the same reasons as already discussed in the preceding paragraphs, the imposition of penalty on the appellant is found to be legally unsustainable and thus, the penalty imposed on the appellant is also set aside.

8. The appeal is therefore allowed, on the above terms.

(Operative part of the order was pronounced in open court)

Sd/-

(R. MURALIDHAR)
MEMBER (JUDICIAL)

Sd/-

(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

Sdd