CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI

REGIONAL BENCH - COURT NO. I

MISCELLANEOUS APPLICATION No. E/MISC/85497/2024
(On behalf of Respondent)

WITH
EXCISE APPEAL No. 86852 of 2015

(Arising out of Order-in-Original No. PUN-EXCUS-004-COM-05/15-16 dated 25.06.2015 passed by the Commissioner of Central Excise, Pune-IV Commissionerate, Pune.)

Fiat India Automobiles Private Limited **.... Appellants**
Plot No.B-19, MIDC Industrial Area
Ranjangaon, Shirur Taluka
Pune District – 412 210.

VERSUS

Commissioner, Central GST & Central Excise **.... Respondent**
Pune-I Commissionerate
2nd Floor, GST Bhavan, 41-A Sasoon Road
Opp to Wadia College, Pune – 411 001.

AND

EXCISE APPEAL No. 86853 of 2015

(Arising out of Order-in-Original No. PUN-EXCUS-004-COM-05/15-16 dated 25.06.2015 passed by the Commissioner of Central Excise, Pune-IV Commissionerate, Pune.)

C. Ramakrishnan **.... Appellants**
Director, Fiat India Automobiles Private Limited
Plot No.B-19, MIDC Industrial Area
Ranjangaon, Shirur Taluka
Pune District – 412 210.

VERSUS

Commissioner of Central Excise **.... Respondent**
Pune-IV Commissionerate
ICE House, 41-A Sasoon Road
Opp to Wadia College, Pune – 411 001.

AND

MISCELLANEOUS APPLICATION No. E/MISC/85507/2024
(On behalf of Respondent)

WITH
EXCISE APPEAL No. 86854 of 2015

(Arising out of Order-in-Original No. PUN-EXCUS-004-COM-05/15-16 dated 25.06.2015 passed by the Commissioner of Central Excise, Pune-IV Commissionerate, Pune.)

Ackash Mital **.... Appellants**
Finance (Head), Fiat India Automobiles Private Limited
Plot No.B-19, MIDC Industrial Area
Ranjangaon, Shirur Taluka
Pune District – 412 210.

VERSUS

Commissioner, Central GST & Central Excise .... Respondent
Pune-I Commissionerate
2nd Floor, GST Bhavan, 41-A Sasoon Road
Opp to Wadia College, Pune – 411 001.

APPEARANCE:

Shri V. Sridharan, Senior Advocate for the Appellants

Shri C. Dhanashekaran, Special Counsel for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)

HON'BLE MR. M.M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/87643-87645/2024

Date of Hearing: 13.12.2024

Date of Decision: 13.12.2024

PER: M.M. PARTHIBAN

These appeals have been filed by M/s Fiat India Automobiles Private Limited, Shirur, Pune District, the appellant company herein; Shri C. Ramakrishnan, Director of the appellant company; and Shri Ackash Mital, Finance (Head) of the appellant company (herein after referred together as 'the appellants' for short) assailing Order-in-Original No. PUN-EXCUS-004-COM-05/15-16 dated 25.06.2015 (referred to, as 'the impugned order') passed by the Commissioner of Central Excise, Pune-IV Commissionerate, Pune.

2. Revenue has filed these miscellaneous applications seeking for change of name and address of the respondent arising on account of change in territorial jurisdiction of the Central Excise authorities after introduction of GST regime vide Notification No.13/2017-C.E. (N.T) dated 09.06.2017 and as the appellants-assessee presently comes under their jurisdiction. As the revised name and address of the respondent Commissionerate correctly reflect the revised jurisdictional departmental authorities, under whose jurisdiction the appellants-assessee is functioning for the purpose of indirect taxes viz., Central Excise/GST, the miscellaneous applications filed by the Revenue is allowed. The prayer made by the Revenue is considered and the revised name and address of the respondent

is duly incorporated for the purpose of disposal of the appeals. Registry is directed to incorporate the following changed name and address of the respondent in the appeal records for the purpose office records.

"Commissioner, Central Goods and Services Tax (CGST) & Central Excise,
Pune-I Commissionerate,
2nd Floor, GST Bhavan,
Sasoon Road, Opp. Wadia College
Pune – 411 001.".

3. The facts of the case, leading to these appeals, are summarised herein below:

3.1 The appellants M/s Fiat India Automobiles Private Limited, is a duly incorporated private limited company registered under Companies Act, 1956 in India and is a 100% subsidiary of Fiat Group Automobiles, S.p.A., Italy (FGA). The appellants are having their factory at M.I.D.C. Industrial Area, Ranjangaon, Shirur Taluka, Pune District of Maharashtra and *inter alia*, are engaged in the manufacture of excisable goods viz. motor vehicles and its parts, falling under Chapter 87 of the First Schedule to the Central Excise Tariff Act, 1985. As a manufacturer of excisable goods, the appellants are duly registered with the Central Excise department vide Central Excise Registration No. AAACF1716DXM001 dated 06.06.2006 and also discharge appropriate duty liability on removal of the said final products out of their factory premises.

3.2 In order to build a competitive advantage in their business, the appellants had entered into a collaboration with M/s Tata Motors Limited, Mumbai (TML) who are also engaged in manufacture of sale of motor vehicles. Accordingly, FGA and TML have entered into a Memorandum of Understanding (MOU) dated 21.09.2005 followed by Heads of Agreement dated 14.12.2006. In implementing such agreements FGA and TML have entered into a Joint Venture (JV) Agreement dated 11.11.2007, by acquiring of 49% of total shareholding in the appellants company by TML from FGA, and the target shareholding of 50% by each was achieved by 02.07.2008. The above JV was intended to fulfil the objective of reducing investment costs relating to machinery and equipment, achieving operational scale synergies, cost efficiency and building competitive advantage in 'Fiat' brand and 'Tata' brand specific vehicles along with its spare parts.

3.3 In this case, the Government of Maharashtra had framed a Scheme, known as "Package Scheme of Incentives, 1993" (PSI), as a part of Industrial, Investment and Infrastructure Policy with objective of promoting fixed capital investment, employment generation and overall industrial growth in the State of Maharashtra, by issue of Government resolution No. IDL/1093(8889)/IND-8 dated 07.05.1993. According to the said PSI scheme, eligible assessee can collect Sales tax/VAT/CST from its purchasers and pay the same to the Government of Maharashtra on the expiry of a deferred period. The appellants were one of the eligible units and granted the benefits of PSI vide Certificate No. DI/PSI/1993/Deferral/ EC-4733 dated 13.09.2007 for a period of fourteen years. Under the said scheme, the eligible unit was permitted to charge sales tax for the sale of the goods and the amount of sales tax so collected was permitted to be retained by the appellants, subject to such sales tax amount should be paid in five equal yearly instalments on expiry of the deferment period, as computed from the last date of filing sales tax return.

3.4 Subsequently, in December 2002, the Sales Tax Department of the Government of Maharashtra introduced a Scheme for pre-mature repayment of deferred sales tax at Net Present Value (NPV) as per proviso to Section 38(4) all the Bombay Sales Tax Act, 1959/ Section 94(2) of the Maharashtra Value Added Tax, 2002 (MVAT). Under such provision, where the sales tax liability is paid by way of pre-mature payment as per NPV, then it would be deemed as if the full Sales tax/VAT/CST liability has been discharged. Accordingly, the eligible unit had an option of either retaining the Sales tax/VAT/CST so collected until expiry of the deferment period and pay it in its full value or to make a pre-mature payment at NPV rates fixed by the Government of Maharashtra. The appellants have opted for NPV scheme, and started paying its sales tax liability on its eligible sales under the deferment scheme as per NPV.

3.5 Directorate General of Central Excise Intelligence, Pune Regional Unit (DGCEI) had conducted an investigation of the records maintained by the appellants, including search of the factory and office premises under panchanama proceedings dated 08.02.2013 and 04.03.2013, recording of statements of persons concerned etc. including Shri C. Ramakrishnan, Director of the appellant company; and Shri Ackash Mital, Finance (Head) of the appellant company. The DGCEI had interpreted that the difference between actual sales tax collected by the appellants from their customers and the payment made towards Sales tax/VAT/CST at NPV i.e., the net gain competent retained by them was in fact an additional consideration for the goods sold and therefore the same was liable to be included in the assessable value for the purpose of determination of Central Excise Duty, under the provisions of Section 4 of the Central Excise Act, 1944 read with Rule 6 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. Further, in respect of minimum Take or Pay (TOP) charges, in terms of supply and distribution agreements entered into by the appellants with TML and FGA, certain amounts have been recovered by the appellants from TML, these would be required to be added to the assessable value in terms of Section 4(1)(b) of the Act of 1944 read with Rule 6 of the Rules of 2000.

3.6 DGCEI had conducted detailed investigations and on conclusion of the same had initiated show cause proceedings, seeking for recovery of the Central Excise duty along with interest by invoking extended period of limitation under Section 11A of the Central Excise Act, 1994 and also proposed for imposition of penalty on the appellants under Section 11AC ibid and under Rules 25, 26 of the Central Excise Rules, 2002. The show cause notices (SCN) dated 28.06.2014, and 06.05.2015 issued by DGCEI and SCN dated 09.06.2014 issues by the Commissioner of Central Excise, Pune-III, in this regard were adjudicated vide the common order dated 25.06.2015, wherein total Central Excise duty demand of Rs.350,62,41,004/- under Section 11A of the Central Excise Act, 1994 by invoking extended period was confirmed along with interest payable under Section 11AA ibid. Further, the excisable goods involved in contravention of the legal provisions were confiscated and redemption fine in lieu of confiscation of 20% on the value of goods i.e., Rs. 37,55,57,57,772/- on the appellant company under Rule 25 of the Central Excise Rules, 2002 and imposed penalty of Rs.50,00,000/- on Shri C. Ramakrishnan and Rs.40,00,000/- on Shri Ackash Mital, other appellants who are the employees appellant company. Feeling aggrieved with the impugned order, the appellants have preferred these appeals before the Tribunal.

4.1 Learned Senior Advocate appearing for the appellants submitted that as per Section 4(1)(a) of the Central Excise Act, 1944, the assessable value of the excisable goods for payment of Excise duty shall be the 'transaction value', where the goods are sold by the assessee for delivery at the time and place of removal, where the assessee and the buyer of goods are not related and where the price is the sole consideration for the sale. The term 'transaction value' has been defined under Section 4(3)(d) ibid and date provides for exclusion of sales tax actually paid or payable i.e., the amount of sales tax collected by manufacturer from buyer and which is actually paid or payable by such manufacturer. He further stated that in the present case, the Appellants have actually paid the entire sales tax liability which was 'actually payable' to the State Government of Maharashtra after the specified periods. As per Section 94 (2) of the Maharashtra VAT Act, 2002, premature payment of sales tax as per NPV prescribed by the State Government is deemed to be payment of entire sales tax collected by the Appellants from the buyers. Therefore, he submitted that sales tax collected by the Appellants under Deferment of sales tax scheme is actually paid in full by the Appellants on each quarter of the period in dispute, as per NPV. Hence, he claimed that the value on which Excise duty was paid by the Appellants is correct, and the amount of sales tax retained after payment made at NPV cannot form part of the transaction value, as the same is treated as deemed payment of sales tax. He further elaborated that NPV is nothing but Net Present Value of the amount payable in future based on the discounting factor of rupee value. It means that the amount paid at NPV is equal to the full amount payable in future date, considering the specific discounting factor. It compares the present value of money today to the present value of money in the future, taking inflation and returns into account, and the prescribed discount rate was 11.3%. Therefore, he claimed that differential amount are arising on account of payment of sales tax liability as per NPV shall not be treated as additional consideration charged over and above the price of the goods from the buyers. Hence, he submitted that Route 6 of the Central Excise (Valuation) Rules, 2000 is not attracted in their case.

4.2 In this regard, he stated that the above issue had already been decided in favour of the appellants in a number of cases. He relied upon the judgements delivered by the Hon'ble Supreme Court and the Tribunal in support of their stand:

(i) *Commissioner of Central Excise, Raigad Vs. Uttam Galva Steels Limited Paper Mills Limited* – 2016 (331) E.L.T. 261 (Tri.-Mumbai)

(ii) *Hardoli Paper Mills Limited* Vs. *Commissioner of Central Excise, Nagpur* – 2024 (5) TMI 1128 – CESTAT Mumbai

(iii) *Gabriel India Limited Vs. Commissioner of Central Excise, Pune-IV* – Final Order No. A/85661/2024 dated 02.07.2024

(iv) *SKG Refractories Limited Vs. Commissioner of Central Excise, Nagpur-I* – Final Order No. A/85662/2024 dated 02.07.2024

(v) *Rational Engineers Private Limited Vs. Commissioner of Central Excise, Thane-I* – 2023 (11) TMI 363 – CESTAT Mumbai

(vi) *Commissioner of Central Excise, Mumbai-I Vs. Welspun Corporation Limited* – 2017 (358) E.L.T. 630 (Tri.-Mumbai)

(vii) *Honda Motorcycle and Scooters India Pvt. Limited Vs. Commissioner of CGST, Customs & Central Excise, Alwar* – 2020 (374) E.L.T. 941 (Tri.-Del)

(viii) *Commissioner of Central Excise, Bangalore Vs. Mazagon Dock Limited* – 2005 (187) E.L.T. 3 (S.C.)

4.3 Learned Senior Advocate submitted in respect of demands confirmed with respect to Take or Pay (TOP) charges that these charges pertain to assurances for specified quantum of clearances to be made by the appellants to Tata Motors Limited (TML) alone; in case of failure to meet the assured quantum, then such TOP charges apply on the TML, and these are in the nature of fixed costs involved in conducting such manufacturing activities and being shared as agreed upon between the JV partners. Therefore, he claimed that these are in no way comparable to consideration for sale of goods or compensation for obligation agreed upon between seller and buyer. Further, these Tata branded vehicles and powertrains were subsequently sold by TML to their independent dealers. Thus, he submitted that there are two transactions, one between the Appellants and TML at the agreed upon transaction value; and the second between TML and their independent dealers, at the price agreed upon between TML and the dealers. The Appellants, out of abundant caution and to avoid any future litigation on account of the relationship between them and TML, had discharged the central Excise duty on the price at which TML sold their goods to independent dealers. The Department's stand is that the price between the Appellants and TML, should be added with TOP charges by considering it as additional consideration. Since the Appellants have discharged the Excise duty on the ultimate Net Dealer price, i.e., transaction value between TML and independent dealers, he stated that there is no further scope of addition of any further amount as additional consideration in such transactions value.

4.4 He further submitted that 65% of the Sales Tax Incentive (STI) benefit was passed on by the Appellants to the buyer, as abatement in the transaction value has been claimed as under valuation of excisable goods with the intent to evade payment of duty in the impugned order. In this regard, he stated that 65% of the STI benefit was passed on by the Appellants purely on account of business arrangement between TML and them, as the agreements entered into. Further such amount does not flow back to the Appellants. The entire transaction serving duly accounted for in the books of accounts maintained by the Appellants; therefore there is no question of any suppression on the part of the Appellants and the confirmation of demands invoking extended period of time is not legally sustainable in terms of various judicial pronouncement given by the Hon'ble Supreme Court.

4.5 In support of their stand, he relied upon the judgements delivered by the Hon'ble Supreme Court and Circular issued by CBIC, as follows:

(i) *Spring Fresh Drinks Vs. Collector of Central Excise* – 1991 (54) E.L.T. 333 (Tribunal) affirmed by Hon'ble Supreme Court in 1997 (92) E.L.T. A70 (S.C.)

(ii) *Commissioner of Central Excise, Belgaum Vs. Praxair India Limited* – 2008 (223) E.L.T. 596 (Tri. -Chennai)

(iii) *Jindal Praxair Oxygen Co. Ltd. Vs. Commissioner of Central Excise, Belgaum* - 2007 (208) E.L.T. 181 (Tri. – Bang.)

(iv) *Inox Air Products Ltd. Vs. Commissioner of Central Excise, Nagpur & Mumbai-I* - 2001 (134) E.L.T. 224 (Tri. – Mumbai)

(v) Skoda Auto Volkswagen India Pvt. Ltd. Vs. *Commissioner of Central Excise, Aurangabad* – (2023) 5 CENTAX 54 (Tri. – Bom.)

(vi) *Star Glass Works Vs. Commissioner of Central Excise, Mumbai* - 2003 (162) E.L.T. 367 (Tri. – Mumbai) affirmed by hon'ble Supreme Court reported in 2004 (163) E.L.T. A46 (S.C.)

(vii) CBIC Circular No. 178/10/2022-GST dated 03.08.2022

(viii) *Pushpam Pharmaceuticals Co. Vs. Collector of Central Excise, Bombay* – 1995 (78) E.L.T. 401 (S.C.)

5. On the other hand, learned Special Counsel submitted that the Appellants had collected full amount of sales tax/VAT from their buyers; instead of paying the collected amount of sales tax to the Government of Maharashtra, the Appellants paid NPV and retained the balance amount. Since the entire amount collected from the buyers had not been paid to the

sales tax authorities, the same cannot be claimed as sales tax actually paid, and the amount retained by the Appellants is an additional consideration to be included in the transaction value. In support of his stand he relied upon the judgement of the Hon'ble Supreme Court in the case of *Commissioner of Central Excise, Jaipur-II Vs. Super Syncotex (India) Limited* – 2014 (301) E.L.T. 273 (S.C.).

6. Heard both sides and perused the records of the case. We have also perused the additional written submissions made in the form of paper book submitted by both sides.

7. The issues for consideration before the Tribunal in these appeals are as follows;

(i) whether the Sales Tax Incentives received by the appellants under PSI/ NPV scheme is includable in the assessable value as per Section 4(1)(a) and Section 4(3)(d) of the Central Excise Act, 1944 read with Rule 6 of the Central Excise (Valuation) Rules, 2000 or otherwise?

(ii) Whether the Take or Pay (TOP) charges collected by the appellants are includable in the transaction value of goods supplied by the appellants to TMIL

(iii) Whether the appellants are liable to penalty and the impugned goods under dispute are liable for confiscation and liable for payment of redemption fine under the Central Excise Rules, 2002 or otherwise.

8.1 We find that in terms of the legal provisions of Section 38 of the Bombay Sales Tax Act, 1959, it is provided that once the amount required to be paid prematurely, in place of the amount of tax deferred by it i.e., an amount, equal to the net present value of the deferred tax as may be prescribed, had been paid and on making such payments, the deferred tax shall be deemed to have been paid. The said provision is as under:-

> ***"Section 38 - Payment of tax and deferred payment of tax, etc.***
> *(1) Tax shall be paid in the manner herein provided, and at such intervals as may be prescribed.*
>
> *(2) A Registered dealer furnishing returns as required by sub-section (1) of section 32, shall first pay into a Government treasury, in such manner and at such intervals as may be prescribed, the amount of tax due from him for the period covered by a return alongwith the amount of penalty or interest or both] payable by him under section 36.*

(3) A Registered dealer furnishing a revised return in accordance with sub-section (3) of section 32, which revised return shows that a larges amount of tax than already paid is payable, shall first pay into a Government treasury the extra amount of tax.

(4) The amount of tax-

(5) due where returns have been furnished without full payment thereof, or

(6) assessed or reassessed for any period under section 33 or section 35 less any sum already paid by the dealer in respect of such period, or

(7) assessed under sub-section (3) of section 41, and

(8) the amount of penalty or interest or both (if any) levied under section 36 or 37, and

(9) the sum (if any) forfeited to the State Government under section 37, and,

(10) the amount of fine (if any) imposed under sub-section (3) of section 53 and

(11) any other dues under this Act,

shall be paid by the dealer or the person liable therefor into a Government treasury within thirty days from the date of service of the notice issued by the Commissioner in respect thereof] :

Provided that, the Commissioner may, in respect of any particular dealer or person and for reasons to be recorded in writing extend the date of payment or allow him to pay the tax or penalty or interest (if any) or the sum forfeited, by instalments but such extension or grant of instalment to pay tax shall be without prejudice to the levy of penalty, interest, or both;

Provided further that, the Commissioner may, in respect of a dealer to whom an Eligibility Certificate has been granted extend the date of payments or grant a moratorium for payment of the dues or provide for payment of the dues thereafter in instalments, subject to such conditions as may be prescribed :

Provided also that, notwithstanding anything contained in this Act or in the rules made thereunder but subject to such conditions as the State Government or the Commissioner may by general or special order specify, where a dealer to whom incentive by way of deferment of sales tax or purchase tax or both under the 1979 Scheme, the 1983 Scheme or, as the case may be the Electronic Scheme falling under the Package Scheme of Incentives designed by the State Government or of the tax under the 1988 or the 1993 Package Scheme of Incentives designed by State Government have been granted by virtue of Eligibility Certificate, and where a loan liability equal to the amount of any such tax payable by such dealer has been raised by the SICOM or the Directorate of industries or the relevant Regional Development Corporation or the District Industries Centre Concerned then such tax shall be deemed in the public interest, to have been paid.

> *Provided also that, notwithstanding anything to the contrary contained in the Act or in the rules or in any of the Package Scheme of Incentives or in the Power Generation Promotion Policy 1998, the Eligible Unit to whom an Entitlement Certificate has been granted for availing of the incentives by way of deferment of sales tax, purchase tax, additional tax, turnover tax or surcharge, as the case may be, may, in respect of any of the periods during which the said certificate is valid, at its option, prematurely pay in place of the amount of tax deferred by it an amount, equal to the net present value of the deferred tax as may be prescribed, and on making such payments, in the public interest, the deferred tax shall be deemed to have been paid."*

8.2 On perusal of the above legal provisions, it transpires that sales tax amount payable under the Sales Tax Incentive schemes of PIS/NPV is nothing but Net Present Value of the sales tax amounts payable in future based on the discounting factor of rupee value. The proviso clause also specifically state that the amount paid at NPV is equal to the full amount payable in future date, that the entire sales tax liability is deemed to have been discharged. Therefore, the differential amount arising on account of payment of sales tax liability as per NPV and total sales tax amount, had it been payable after the deferment period, shall not be treated as additional consideration. Hence, such amounts cannot be include in the transaction value in terms of Rule 6 of the Central Excise (Valuation) Rules, 2000.

8.3 We further find that the issue arising out of the present dispute is no more *res integra*, in view of the judgements relied upon by the appellants in various cases stated in paragraph 4.2 above. The issue decided in those cases was that incentives/subsidy of VAT/Sales Tax refunded by the State Government at a percentage of the tax paid by the assessee, under the PSI, would not be includable in the assessable value for the purpose of payment of central excise duty thereon. Further, the facts of the present case are different from the *Super Syncotex (supra)* relied upon by Revenue as has been explained by the Tribunal in *Honda Motorcycle and Scooters India Pvt. Ltd. Vs. Commissioner of CGST, Cus & C. Ex., Alwar – 2020 (374) E.L.T. 941 (Tri.-Del.).* The relevant paragraph(s) of the above referred case laws are extracted and given below:

<u>Uttam Galva Steel Limited & Others (supra)</u>

> ***"40.*** *One of the contentions of the learned Commissioner (AR) was with reference to Explanation in Section 4(1) of the Central Excise Act. In the said Explanation, the words used are "actually paid" with reference to exclusion of sales tax and other taxes. A lot of emphasis was given by the learned Commissioner (AR) that since in the Explanation, the words used are "actually paid" and not "actually paid*

or actually payable", so all that can be excluded is the amount actually paid. According to the learned Commissioner (AR), in view of the said Explanation, the words "actually payable" have to be read along with 'actually paid' and if the amount actually paid is less than the amount actually payable, then the exclusion can be only of the amount actually paid. In the facts of the present cases, the amount actually paid is far less than the amount actually payable at the time of clearance. We are not impressed with the said argument of the learned Commissioner (AR). The definition of "transaction value" given in Section 4(3)(d) very clearly stipulates exclusion of the amount of sales tax and other taxes actually paid or actually payable on such goods. In the present cases, the goods were cleared excluding the amount of sales tax actually payable. This amount has not been changed by the Sales Tax Authority. All that has been done is the manufacturer-assessees were given an option to make pre-payment of the deferred sales tax based on the Net Present Value. Thus, though the Net Present Value may be less than the actually payable amount but the fact remains the timings have changed. The difference between the amount actually paid and actually payable has arisen due to the time when the amount was paid and originally stipulated date of payment under the deferral scheme. As discussed earlier, the concept of actually paid or actually payable is to be determined at the time of removal. Thus the amount actually paid cannot be determined at some other time. In any case, in the present case, the amount payable has not been varied by the Sales Tax Authorities. Under the facts of the present cases, in our view, the Explanation may not be of any help to the Revenue as at the time of clearance, the term 'actually payable' was relevant and not 'actually paid'. Further, the amount of actually payable sales tax has not been varied by the Sales Tax Authorities. In view of the said factual matrix in the present cases, in our considered view, the Explanation does not help the cause of the Revenue and the contention is therefore rejected."

<u>Welspun Corporation Ltd. (supra)</u>

"5.10 *Thus in our view, once the Sales Tax Department has assessed the Sales Tax as paid, the Central Excise Department cannot contend that since the State Government has remitted the amount back to the appellants as incentive, Sales Tax was not paid by them. Hence, we find that once the Sales Tax Department assessed the Sales Tax as paid, the condition of Section 4(3)(d) of the Central Excise Act, 1944 stands fulfilled.*

5.11 *We also find that remission and exemption was separately considered by the Govt. of Gujarat. While, Section 5 of the Gujarat Value Added Tax Act, 2003 provides in sub-Section (1) thereto that sales and purchase of goods specified in Schedule I shall be exempt from tax, sub-Section (2) empowers the State Government by a notification in the official gazette to exempt any specified class of sales or purchase or sales or purchases by any specified dealer or specified class of dealers from payment of the whole or part of the sales tax. On the other hand, the scheme of remission provided for under Section 41 of the Gujarat Value Added Tax Act, 2003, contemplates that the State Government/Commissioner of Sales Tax may remit the whole or any part of the tax payable in respect of any dealer or class of dealers. It is clear from reading of Section 5(2) as also Section 41 of the Act that* *while Section 5 grants exemption from the levy/payment of sales tax, remission under Section 41 is granted in respect of any part of the tax payable by a dealer. In case of exemption no tax is actually paid or actually payable, whereas in the case of remission, tax is actually payable and paid which is allowed to be remitted by way of retention or by way of refund. In the instant case as already discussed above it is not that Sales Tax was not only payable but in fact it stood actually paid, as the remission was nothing but the incentive or capital subsidy which the State Government granted with respect to the investment made by the appellants in the earthquake ravaged region of Kutch of State of Gujarat. Instead of recovering Sales Tax and then refunding the same as capital subsidy, the State Government had remitted the same to appellants. Consequently like CST since VAT which was payable was actually paid the same is required to be excluded from the transaction value. Hence for this reason also the sales tax remitted by the Government towards incentive of Capital investment cannot be a part of the transaction value."*

<u>Mazagon Dock Limited (supra)</u>

"7. *Thus under Section 4 read with Rule 5 in cases like the present where price was not the sole consideration the amount in money value of any additional consideration is includable in the value. However, the additional consideration must be directly or indirectly from the buyer to the assessee. In this case it is to be seen that the subsidy was as per the policy of the Government. The subsidy of 20% was paid by the Government, 10% was paid by the buyer. In our view the subsidy of 20% from the Government cannot be said to be additional consideration as it is not received from the buyer either directly or indirectly. Therefore, that would not be includable in the price of the goods for the purposes of excise. However, it is an admitted position that 10% subsidy was received by the Respondent from the buyer. It is therefore additional consideration received by the Respondent from the buyer. The fact that it is received under a policy of the Government does not detract from the above position. It is therefore includable. The judgment of the Tribunal holding that the entire subsidy (including the 10%) is not includable, is not correct and is set aside."*

<u>Honda Motorcycle and Scooters India Pvt. Ltd.</u>

"11. *Though Department has given much emphasis upon Super Synotex (supra) [2014 (301) E.L.T. 273 (S.C.)] but we are of the opinion that the facts of present case are absolutely different from the said case in the terms that the Hon'ble Apex Court in the said case was dealing with sales tax incentive scheme. But in the present case, the issue is with respect to the grant of sales tax subsidy. In Super Synotex (supra) case, the assesse was retaining 75% of the sales tax collected from the customers whereas in the present case, the appellant had paid the entire amount of sales tax collected from the customers, with the Sales Tax Department without retaining even a meagre portion thereof. Hence, the benefit granted by RIPS to the appellant herein is not in the nature of exemption or incentive from payment of sales tax but is a remission where nothing was initially retained by the appellant. Thus, the facts of present case are absolutely different from the case decided by the Hon'ble Apex Court.*

12. *Finally coming to the issue of alleged misrepresentation, we are of the opinion that it has already been observed that no amount of Government Exchequer as far as the VAT was concerned, was retained by the appellant. No question of evasion of duty at all arises. As already discussed above, once sales tax stands paid, as per the Sales Tax Department, the Central Excise Department cannot contend and allege a short levy on the ground that some amount thereof has been remitted back to the appellants. Thus, there appears no alleged suppression of facts nor even the misrepresentation. The entire above discussion rather clarifies the misunderstanding on part of the Department about the relevant provisions specially the definition of transaction value. Under Rule 4(3)(d) of CEA. The appellant cannot be held liable for the said wrong on part of the Department. The evidence about any positive act except the allegation of using the VAT Challans for discharging the VAT liability for subsequent period could not be produced on record. As discussed above, discharge of liability by way of VAT 37B Challans has already been held as legally sustainable methodology of discharging tax liability for subsequent period. It is held that Department was not entitled to invoke the extended period of limitation. The demand could be confined only to the normal period of one year. As already held above, the demand as such is not sustainable."*

8.4 We further find that the issue of addition of Take or Pay (TOP) charges arising out of the present dispute is also no more *res integra*, in view of the judgements relied upon by the appellants in various cases stated in paragraph 4.5 above. It was held in these cases that TOP/ Minimum TOP charges cannot be added to the assessable value by treating them as additional consideration. The relevant paragraph(s) of the above referred case laws are extracted and given below:

<u>Spring Fresh Drinks (supra)</u>

"15. *The next contention of Shri Sridharan is that the "Collector treated the liquidated damages recovered by the appellants for non-performance of the contract by the dealers as quality discount." In other words the appellants are collecting from the buyers i.e. customers the notional cost for not lifting the contracted quantity of the aerated water. It is actually compensation for non-performance of the entire contract. This is an income or profit for the manufacturer, but not the price for the manufacture of aerated water. It is not the case of the department that the price of the aerated water is depressed by making a provision for compensation for short lifting the contracted quantity. In the absence of such evidence the profit earned or income cannot be added to the assessable value. In this context we may refer to the observations of the Supreme Court in CCE v. Indian Oxygen [1988 (36) E.L.T. page 730 (SC)] which are to the following effect:*

"It is true that the gas being a commodity of peculiar nature had to be delivered in cylinders but these cylinders might be supplied either by the supplier as an ancillary activity or brought by the consumer or purchasers at their own risk and cost. For purchasers taking it in their own cylinders

supplied by the to there was no charge for them. This is not an activity for the manufacture of gases. This is ancillary to it but not incidental. Any income either in the shape of interest on deposits, notional or real, may be earned on the deposit for the safe return of cylinders, or any rental would be though ancillary but would not be the price for the manufacture. These might be profits or gains, if any, of any ancillary or allied venture."

16. *In view of the above observations the compensation recovered for not lifting the entire contracted quantity of the aerated water cannot be added to the assessable value as they represent profits of an ancillary nature."*

Praxair India Limited (supra)

"3. *After hearing both sides and considering their submissions, we note that, in a similar case, this Tribunal has held that MTOP charges paid by the buyer to the assessee on account of the former's failure to take the minimum guaranteed quantity of the excisable goods [Oxygen, Nitrogen etc.] were not additional consideration for the goods actually sold and hence not to be included in the assessable value vide Jindal Praxair Oxygen Co. Ltd. v. CCE, Belgaum [2007 (208) E.L.T. 181 (Tri. - Bang.)]. In the case of Inox Air Products Ltd. v. CCE [2001 (134) E.L.T. 224 (Tri. - Mum.)] also, it had been held that the compensation paid by the buyer to the assessee at previously agreed rate on account of the former's failure to lift the agreed quantity of excisable goods [Nitrogen etc.] was in the nature of liquidated damages for breach of contract, not includible in the assessable value of the goods. It had been held to the same effect, in respect of oxygen gas, in the case of CCE, Jamshedpur v. Bhagwati Oxygen Ltd. [2000 (117) E.L.T. 647 (Tribunal)]. The ratio of these decisions were also followed by the Tribunal in the case of Faridkod Co-operative Sugar Mills Ltd. v. CCE, Ludhiana [2004 (171) E.L.T. 174 (Tri. - Del.)]."*

Jindal Praxair Oxygen Co. Ltd. (supra)

"6.2 *As regards the MTOP charges, the Commissioner simply makes a statement that it is an additional consideration. The appellants have produced a number of case-laws to show that the MTOP charges cannot be added to the assessable value treating them as additional consideration. These case laws are very relevant for the present case. The Commissioner, in the impugned order, has not at all discussed the case-laws cited by the appellants.*

(i) The CEGAT, in the case of CCE v. Bhagwati Oxygen Ltd (cited supra), has clearly held that compensations were payable when goods were not supplied cannot be included in the assessable value of earlier supplies. The MTOP charges are paid by the JVSL to the appellant when they fail to take the minimum quantity assured by them. It does not stand to common sense that these charges form an additional consideration especially when no goods are supplied. The additional consideration is always in relation to the goods supplied.

(ii) The CEGAT, in the case of CCE v. Hawk Engines (cited supra), has held that the compensation for non-performance paid to the assessee by the principals has no relationship with the assessable value or price

of goods manufactured by assessee and, therefore, the same is not includible in the assessable value.

(iii) In the case of CCE, Bombay v. Ram Decorative & Industries Ltd. (cited supra), it has been held that assessable value cannot include commitment charges since these charges are in the nature of liquidated damages for breach of contract.

There are similar decisions of the Tribunal to support the above view. Therefore, we do not find any reason for inclusion of MTOP charges in the assessable value, as they cannot be considered as additional consideration for the goods supplied by the appellants to JVSL. Hence, the demand of Rs. 76,34,887/- is set aside."

Star Glass works

"5. *As we have noted, the case is against the appellant on merits. What is now required to be considered is the applicability of the extended period of limitation. It is no doubt true that the appellant had declared that no additional consideration was flowing to it from the buyer. The ratio of the judgment of the Supreme Court cited by the appellant for the proposition that unless there is a positive act by the manufacturer justifying the applicability of any of the circumstances specified in the proviso under sub-section (1) of Section 11A of the Act, the extended period will apply. There is nothing to show that the appellant, despite knowing or having reason to believe that these costs were includable, yet stated that they were not. Having regard to the fact that the state of law was unsettled, it was possible for the appellant to come to the conclusion that it did. We are therefore of the view that the facts of the case will not justify applicability of extended period."*

CBIC Circular No. 178/10/2022-GST dated 03.08.2022

"Fixed Capacity charges for Power

10. *The price charged for electricity by the power generating companies from the State Electricity Boards (SEBs)/DISCOMS or by SEBs/DISCOMs from individual customers has two components, namely, a minimum fixed charge (or capacity charge) and variable per unit charge. The minimum fixed charges have to be paid by the SEBs/DISCOMS/individual customers irrespective of the quantity of electricity scheduled or purchased by them during a month. They take care of the fixed cost of generating/ supplying electricity. The variable charges are charged per unit of electricity purchased and increase or decrease every month depending on the quantity of electricity consumed.*

10.1 The fact that the minimum fixed charges remain the same whether electricity is consumed or not or it is scheduled/consumed below the contracted or available capacity or a minimum threshold, does not mean that minimum fixed charge or part of it is a charge for tolerating the act of not scheduling or consuming the minimum the contracted or available capacity or a minimum threshold."

8.5 On careful perusal of factual matrix of the case, it transpires that the Sales Tax Incentives received by the appellants under PSI/NPV scheme were in terms of the policy pronouncements, operation of the scheme as notified by the Government of Maharashtra; and the amount of sales tax incentives were duly accounted for and distributed among the JV partners, as per the agreements entered into between them. Further, the arrangement of assured minimum take over or pay also has been stated very clearly in the agreements entered into and these amounts have also been duly accounted in the books of accounts by the appellants. Furthermore, the appellants have also been filing periodical returns before the jurisdictional Central Excise authorities indicating therein all the details of clearances of goods made from their factory. Therefore, we are of the opinion that there is no grounds for invoking suppression of facts, mis-statement etc. with an intent to evade payment of central excise duty by the appellants arise in this case. In this regard, we find that the Hon'ble Supreme Court have held in the case of *Pushpam Pharmaceuticals Company* (supra) that there shall be sufficient grounds to demonstrate that there was deliberate attempt by the assessee. The relevant paragraph of the said judgement is extracted and given below:

> ***"4.*** *Section 11A empowers the Department to re-open proceedings if the levy has been short-levied or not levied within six months from the relevant date. But the proviso carves out an exception and permits the authority to exercise this power within five years from the relevant date in the circumstances mentioned in the proviso, one of it being suppression of facts. The meaning of the word both in law and even otherwise is well known. In normal understanding it is not different that what is explained in various dictionaries unless of course the context in which it has been used indicates otherwise. A perusal of the proviso indicates that it has been used in company of such strong words as fraud, collusion or wilful default. In fact it is the mildest expression used in the proviso. Yet the surroundings in which it has been used it has to be construed strictly. It does not mean any omission. The act must be deliberate. In taxation, it can have only one meaning that the correct information was not disclosed deliberately to escape from payment of duty. Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression."*

8.6 We further find that in the case of *Mahindra Steel Service Centre Ltd. Vs. Principal Commissioner of CGST & Central Excise, Bhopal* - (2024) 17 Centax 241 (Tri.-Del)**,** the Co-ordinate Bench of the Tribunal have examined the similar set of facts and ordered that the sales tax incentives cannot be added to the assessable value. The relevant paragraphs of the said order of the Tribunal is extracted and given below:

> ***"2.*** *The issue involved in this appeal is whether the incentive/industrial subsidy of 75% of Sales Tax/VAT/CST paid on the sale of goods,*

received from the Government of Madhya Pradesh under the Industrial Promotion Policy, 2010 would be includable in the transaction value under section 4 of the Central Excise Act, 1944 by treating the same as an additional consideration flowing directly or indirectly from the buyers to the assessee, in a case where:

(a) 100% of the sales tax payable, was paid by the appellant to Commercial Tax Department of the State Government and an amount equivalent to 75% of such sales tax paid was remitted as subsidy by the Industrial Department of State Government to the Commercial Department for adjusting against the Tax liability of the subsequent year, on behalf of the appellant; and

(b) Sale tax actually paid or actually payable was specifically excluded from the transaction value in terms of section 4(3)(d) of Central Excise Act.

xxx xxx xxx xxx

…….

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."

(Emphasis Supplied)

***12.** The reference was, accordingly, answered holding that:*

*"32. ** ***

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;

*** ** ***

d- The subsidy amount under the promotion policy does not affect the selling price of the goods;"

***13.** In view of the aforesaid order, the contention of the learned counsel for the appellant that incentive/capital subsidy received from the State Government cannot be included in the transaction value has to be accepted.”*

In contesting the above order of the Tribunal, the department had filed Civil Appeal before the Hon'ble Supreme Court, which was dismissed - (2024) 17 Centax 242 (S.C.). The extract of the said order is given below:

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.   OF 2024
[@ DIARY NO.13005 OF 2024]

PRINCIPAL COMMISSIONER OF CGST AND CENTRAL EXCISE, BHOPAL, M.P. — **APPELLANT(S)**

VERSUS

M/S MAHINDRA STEEL SERVICE CENTRE LTD. — **RESPONDENT(S)**

O R D E R

Delay in filing the appeal is condoned.

We have heard learned senior counsel for the appellant and learned counsel for the respondent-caveator.

We find no merit in this appeal.

Hence, the civil appeal stands dismissed.

Pending application(s), if any, shall also stand disposed of.

. . . .,J
[B.V. NAGARATHNA]

. . . .,J
[AUGUSTINE GEORGE MASIH]

NEW DELHI,
APRIL 05, 2024

9. In view of the settled position of law, as discussed in those referred cases, and in view of the above judgement of the Hon'ble Supreme Court dated 05.04.2024, the issue arising out of the present dispute is no more open for any debate and as such, the impugned order passed by the learned Commissioner of Central Excise cannot stand for legal scrutiny. Since, the

confirmation of Central Excise duty demands in the impugned order is not sustainable, consequential imposition of redemption fine, mandatory penalty on the appellant company and imposition of penalties on the employees of appellant company, who are the other appellants in these appeals are also cannot be sustainable. In view of the above, the impugned order in totality is liable to be set aside.

10. Therefore, the impugned order dated 25.06.2015 is set aside and the appeals are allowed in favour of the appellants, with consequential relief, if any, as per law.

(Operative portion of the order pronounced in open Court)

(S.K. Mohanty)
Member (Judicial)

(M.M. Parthiban)
Member (Technical)

SM