CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. 1

Excise Appeal No. 51011 of 2019

(Arising out of Order-in-Appeal No . 48-57(SM)/CE/JPR/2019 dated 07.03.2019 passed by Commissioner of Central Excise & CGST (Appeals), Jaipur)

M/s Harit Polytech Pvt. Ltd. ..... **Appellant**
G-79 & E-93, RIICO Industrial Area,
Bagru Extension, Jaipur- 303007

VERSUS

Commissioner, Central Excise &
CGST- Jaipur I ..... **Respondent**
NCRB, Statue Circle, Jaipur 302 005.

APPEARANCE:

Shri Naresh Gupta, Advocate for the Appellant

Shri Rakesh Agarwal and Shri Sanjay Kumar Singh, Authorized Representatives of the Department

WITH

Excise Appeal No. 51251 of 2019

(Arising out of Order-in-Appeal No . 48-57(SM)/CE/JPR/2019 dated 07.03.2019 passed by Commissioner of Central Excise & CGST (Appeals), Jaipur)

Ganpati Plastfab Ltd. .....**Appellant**
(Unit-11), A-200, Industrial Area Phase - II,
Bagru Extn., Jaipur-302007

VERSUS

Commissioner, Central Excise , Customs
& CGST- Jaipur I.....**Respondent**
NCRB, Statue Circle, Jaipur 302 005.

WITH

Excise Appeal No. 51252 of 2019

(Arising out of Order-in-Appeal No . 48-57(SM)/CE/JPR/2019 dated 07.03.2019 passed by Commissioner of Central Excise & CGST (Appeals), Jaipur)

M/s Apex Aluminium Extrusion Pvt. Ltd. ..... **Appellant**
Khasra E/JP/170/IV/18 No 1228,
Manda Bhinda Road,
Manda, Jaipur 303801

VERSUS

Commissioner, Central Excise, Customs
& CGST- Jaipur I.....**Respondent**
NCRB, Statue Circle, Jaipur 302 005.

WITH

Excise Appeal No. 52047 of 2019

(Arising out of Order-in-Appeal No. 48-57(SM)/CE/JPR/2019 dated 07.03.2019 passed by Commissioner of Central Excise & CGST (Appeals), Jaipur)

M/s Maha Mayay Steels ..... Appellant
G-1/106-107, RIICO Industrial Area,
Khushkhera, Bhiwadi 301019 Distt. - Alwar

VERSUS

Commissioner, Central Excise, Customs & CGST-Alwar..... Respondent
NCRB, Statue Circle, Jaipur 302 005.

WITH

Excise Appeal No. 52066 of 2019

(Arising out of Order-in-Appeal No. 48-57(SM)/CE/JPR/2019 dated 07.03.2019 passed by Commissioner of Central Excise &CGST (Appeals), Jaipur)

M/s. Tirupati Balaji Furnaces Pvt. Ltd..... Appellant
Plot No. B-35 I & II, RIICO Industrial Area,
Khushkhera, Bhiwadi 301019 Distt. - Alwar

VERSUS

Commissioner of Central Excise, Customs & CGST- Alwar ..... Respondent
NCRB, Statue Circle, Jaipur 302 005.

APPEARANCE:
None for the Appellant
Shri Rakesh Agarwal & Shri Sanjay Kumar Singh, Authorized Representative of the Department

WITH

Excise Appeal No. 52420 of 2019

(Arising out of Order-in-Appeal No. 208-210(SM)/CE/JPR/2019 dated 26.06.2019 passed by Commissioner of Central Excise &CGST (Appeals), Jaipur)

M/s. Trans ACNR Solutions Pvt. Ltd..... Appellant
G-19, 20, 31 & 32, RIICO Industrial Area,
Majarkath, Neemrana, Distt. AlwarVs.

VERSUS

Commissioner of Central Excise, Customs & CGST- Alwar .....Respondent
NCRB, Statue Circle, Jaipur 302 005.

AND

Excise Appeal No. 52487 of 2019

(Arising out of Order-in-Appeal No. 208-210(SM)/CE/JPR/2019 dated 26.06.2019 passed by Commissioner of Central Excise &CGST (Appeals), Jaipur)

M/s. Frystal Pet Pvt. Ltd. **……Appellant**
G1-171 & 172, RIICO Industrial Area,
Neemrana, Dist. Alwar

VERSUS

Commissioner of Central Excise, Customs &
CGST- Alwar ..... Respondent
NCRB, Statue Circle, Jaipur 302 005.

APPEARANCE:

Shri B.L. Yadav, Advocate for the Appellant

Shri Rakesh Agarwal and Shri Sanjay Kumar Singh, Authorized Representative of the Department

CORAM: HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT

DATE OF HEARING: 03.02.2023
DATE OF DECISION: 21.03.2023

INTERIM ORDER NO. 5-11/2023

JUSTICE DILIP GUPTA:

The following questions have been referred on account of difference of opinion having arisen between the two Members constituting the Division Bench:-

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

OR

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

(B) The amount of subsidy under dispute is an independent amount of subsidy received from the Government on the basis

of the capital investment and employment generation/wages paid and thus, is not an additional sales consideration, as held by the Member (Judicial).

OR

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

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

OR

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

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

OR

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

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

OR

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

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

OR

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

2. To examine the aforesaid issues, it would be necessary to first examine facts and for this purpose facts of Excise Appeal No. 51011 of 2019 are being considered. The factual aspect in other appeals are almost similar. It transpires from the records that **M/s Harit Polytech Pvt. Ltd.**[1] received an investment subsidy under the Rajasthan Investment Promotion Policy-2003[2] and the same was adjusted by the appellant towards payment of Value Added Tax[3]. The promotion policy was floated by the State of Rajasthan to promote investments in the State and to generate employment opportunities. The sum total of the capital investment subsidy, in the case of new investments, was subjected to a maximum limit (both for interest component and wage component) of 50% of the tax payable and deposited under the Rajasthan Sales Tax Act, 1994, the Central Sales Tax Act, 1956[4], and the Rajasthan Value Added Tax Act, 2003. In the case of investments made in modernization/ expansion, the amount of capital investment subsidy was subjected to a maximum of 50% of the amount of the CST and VAT payable or deposited by the unit on its additional capacity, so created over and above the installed capacity before expansion/modernization. The capital investment subsidy was to be available to the investors for a period of seven years from the date of first repayment of interest (for interest component) and first payment of wages/employment (for wage component). In the case of expansion/modernizing, the unit would be

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1. the appellant
2. the promotion policy
3. VAT
4. CST

eligible for capital investment subsidy from the date of payment of tax deposited on their additional production after expansion/modernizing. To claim the capital investment subsidy under the promotion policy, a unit was required to submit an application and a Committee was required to issue the Entitlement Certificate in the prescribed format, if the unit satisfied the requirements. The units declared eligible for availing capital investment subsidy were then required to submit an application to the Assistant Commissioner/Commercial Tax Officer for claiming the capital investment subsidy, and the said subsidy was to be provided as per the orders of the State Government. However, the payment of capital investment subsidy (interest component) was to be made only for the period for which the unit deposited the State and/ or Central Sales Tax and/ or made regular payment of loan and interest to the financial institutions.

3. The appellant had been granted subsidy to the extent of Rs. 26,98,304/- during the relevant period by the State of Rajasthan in the form of Sales Tax VAT 37B challan and this amount of subsidy was adjusted by the appellant towards payment of VAT. The Department has included this amount of subsidy in the transaction value for the purpose of levy of central excise duty under section 4 of the Central Excise Act, 1944 [5].

4. Section 4 (1) of the Central Excise Act, therefore, requires examination and is reproduced below:-

> "**4. Valuation of excisable goods for purposes of charging of duty of excise**
>
> (1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to their

5. the Excise Act

value, then, on each removal of the goods, such value shall-

(a) in a case where the goods are sold by the assessee, for delivery at the time and place of the removal, the assessee and the buyer of the goods are not related and the price is the sole consideration for the sale, be the transaction value;

(b) in any other case, including the case where the goods are not sold, be the value determined in such manner as may be prescribed.

(Explanation : For the removal of doubts, it is hereby declared that the price-cum duty of the excisable goods sold by the assessee shall be the price actually paid to him for the goods sold and the money value of the additional consideration, if any, following directly or indirectly from the buyer to the assessee in connection with the sale of such goods, and such price-cum-duty, excluding sales tax and other faxes, if any, actually paid, shall be deemed to include the duty payable on such goods."

5. Transaction value is defined in section 4 (3) (d) of the Excise Act, and is as follows:-

"(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 anv other time, including, but not limited to, any amount charged for, or to make provision for, advertising or 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."

6. It transpires that after the Entitlement Certificate was issued to the appellant, the appellant filed a claim for grant of subsidy for the first quarter and it received the subsidy in the form of Sales Tax VAT 37B

challan. In the subsequent quarter, this VAT 37B challan could be utilized by the appellant to cover a portion of the sales tax liability and the balance tax liability could be paid in cash by the appellant through VAT 37A challan.

7. To explain the method contemplated under the promotion policy, the following illustration has been provided by the department. Supposing an amount of Rs. 1000/- is sanctioned as subsidy for the first quarter, then for the subsequent quarter if the sales tax collected from the customers and payable to the government comes to Rs. 2500/-, the sales tax liability of Rs. 1000/- can be adjusted through VAT 37B challan and the assessee would have to pay the rest of the sales tax liability of Rs. 1500/- in cash through VAT 37A challan. Thus, though the assessee had collected an amount of Rs. 2500/- from the customers towards sales tax, it deposited Rs. 1000/- by utilizing the VAT 37B challan provided to it as subsidy and the remaining amount of Rs. 1500/- was paid in cash through VAT 37A challan.

8. The Department believes that this amount of Rs. 1000/- retained by the appellant from the amount of sales tax collected by the appellant from the customers should be included in the transaction value since the definition of transaction value in section 4(3)(d) of the Excise Act excludes only the amount of sales tax actually paid or payable on such goods. According to the Department, the appellant has deposited only an amount of Rs. 1500/- collected towards sales tax from the customers since the balance amount was adjusted through the subsidy amount of Rs. 1000/-.

9. The learned Member (Technical) examined whether the amount of subsidy can be considered as an additional consideration under rule 6 of

the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000[6] and held that since subsidy is computed with reference to the tax paid and is percentage of the tax paid, it is directly or indirectly related to sale of goods and would be an additional consideration received by the appellant. Thus, according to the learned Member (Technical), when the appellant collects the full amount of sales tax from the customers and deposits only a part of the same towards sales tax and retains the remaining amount, this remaining amount would have to be added to the transaction value. For coming to this conclusion the learned Member (Technical) placed reliance upon the decisions of the Supreme Court in **Commissioner of Central Excise, Jaipur-II** vs. **Super Synotex (India) Ltd.**[7], **Commissioner of Central Excise, Jaipur** vs. **Shree Rajasthan Syntex Ltd.**[8], **Commissioner of Central Excise, Delhi-III** vs. **Maruti Suzuki India Ltd.**[9] and **Commissioner of Central Excise, Jaipur** vs. **National Engineering Industries**[10].

10. The learned Member (Technical) also distinguished the earlier decisions of the Tribunal which had consistently taken a view that the amount of subsidy received by an assessee from the State Government cannot be added to the transaction value. The relevant paragraph of the order passed by the learned Member (Technical) is reproduced below:-

> "**5.13** From the above referred decisions it is observed that all the decision have been rendered by the tribunal distinguishing the Super Synotex of Hon"ble Supreme Court relying on the decision in the case Welspun Corporation. Interestingly in this case tribunal has not dealt with argument based on the decision of Hon"ble Apex

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6. the 2000 Rules
7. 2014 (301) ELT 273 (SC)
8. 2015 (318) ELT 626(SC)
9. 2014 (307) ELT 625 (SC)
10. 2015 (320) ELT 27 (SC)

> Court in the case of Super Synotex, and have brushed aside the same as is evident from para 5.5 of that order. Further Tribunal also did not found the decisions rendered in the case of Uttam Galva Steels [2016 (331) E.L.T. 261 (Tri.-Mum.)], relevant and distinguished the same saying that decision was rendered in facts of that case. We observe that all the subsequent decisions rendered by the Delhi Bench listed above follow Welspun Corporation and not Uttam Galva Steels decision. Kolkata bench has refused to agree that in Welspun Corporation case, the bench has distinguished the decision of Hon"ble Supreme Court in case of Super Synotex (refer para 8). While all the decisions of Delhi Bench say that Welspun Corporation has distinguished. Further while considering the issue Delhi Bench has at no point of time considered the provisions of Section 9 of the Rajasthan VAT Act, 2003."

11. The learned Member (Judicial), however, disagreed with the views expressed by the learned Member (Technical) and the relevant paragraphs of the order passed by the learned Member (Judicial) are reproduced below:-

> "**10.** Thus, it is evident from the salient features of the scheme, that it is not a subsidy scheme directly providing for retention of part/full amount of sales tax collected, as in the case of **Super Synotex India Ltd. (supra)** decided by the Hon"ble Supreme Court. It is also evident that as the State Government is normally in financial difficulty for disbursement of the amount of investment and/or wage subsidy in cash, the disbursement of such subsidy have been done by way of issue of VAT-37 B challan, which the appellant or enterprise can use for discharge of their sales tax liability in subsequent period. Under the facts and circumstances, it is not an amount, which is flowing to the appellant – enterprise or manufacturer, from the buyer of the goods. Thus, it is not an additional consideration (on sale of goods) by any stretch of imagination. Rather it is the amount of subsidy, which is not related to the selling price of the appellant nor flowing directly or indirectly from the Government to the appellant enterprise, by way of price subsidy.

11. Further, in the facts and circumstances of the present case, I find that the capital/wage subsidy has not reduced the selling price of the goods. Thus, there is no case of transfer value being depressed, which may amount to indirect flow from the buyer to the seller/appellant.

12. So far the ruling of the Apex Court in **Indo Rama Synthetic (supra),** the fact was that the selling price or consideration was at a lower price and the difference was being received by **Indo Rama Synthetic (supra),** through Advance Authorization issued by the DGFT against cancelled advance licence of buyer, in favour of **Indo Rama Synthetic (supra).** I find that the capital investment/wage subsidy received by the appellant is on the basis of the capital investment and employment generated (wages payment supported by the ESI/EPF records). Further, the qualifying amount of subsidy is not calculated with reference to the sales tax paid. Once the qualifying amount is calculated, the same is further restricted with reference to the sales tax/VAT paid in the previous period. Thus, there is no direct link with the sales tax collected and paid during the period /financial year under consideration.

13. I further find that the amount of capital investment/wage subsidy received by the appellant is not a VAT subsidy.

14. I further find that such facts are not obtaining in the present case, as mandated under Section 9 of the Rajasthan VAT Act, 2003.

15. The ratio laid in the ruling of the Apex Court in S**uper Synotex India Ltd. (supra)** is - after 01.07.2000, unless the Sales Tax/VAT is actually paid to the Government no benefit towards excise duty can be given in terms of Section 4(3)(d) of Central Excise Act.

This ruling is not applicable in the instant appeals, as admittedly all the appellants have deposited tax or discharged the sales tax liability under the scheme of RVAT Act and the rules thereunder."

12. It is in such circumstances that the difference of opinion was recorded by the learned Members constituting the Bench.

13. Section 4 of the Excise Act, which deals with valuation of excisable goods for the purposes of charging of duty of excise, provides that where the duty of excise is chargeable on any excisable goods with reference to their value, then, on each removal of the goods such value shall, in a case where the goods are sold by the assessee, be the transaction value provided the assessee and the buyer of the goods are not related and the price is the sole consideration. Transaction Value, in terms of section 4 (3) (d) of the Excise Act, means the price actually paid or payable for the goods when sold 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.

14. The illustration which is contained in paragraph 19 of the order dated 21.06.2017 passed by the Deputy Commissioner refers to a hypothetical case where the sales tax collected and payable is Rs. 2500/- and the assessee adjusts the sales tax liability of Rs. 1000/- from the VAT 37B challan issued to him by the State Government towards the subsidy which he is entitled to receive under the promotion policy and deposits the remaining amount of Rs. 1500/- towards sales tax in cash through VAT 37A challan.

15. It has, therefore, to be examined whether out of the amount of Rs. 2500/- which the appellant had collected from the customers towards sales tax, the amount of Rs. 1000/- can be said to be an additional consideration in a situation where out of the total tax liability of Rs. 2500, Rs. 1000/- is paid through VAT 37B challan provided to him by the State Government as a subsidy and the balance amount of Rs. 1500/- is deposited by the appellant through VAT 37A challan. What needs to be noted is that the entire sales tax liability to the extent of Rs. 2500/- has

been discharged by the appellant since Rs. 1000/- was deposited through VAT 37B challan and the remaining Rs. 1500/- was deposited in cash through VAT 37A challan. The Department has considered this Rs. 1000/, which the appellant had received from the customers towards sales tax, to be an additional consideration since this portion of the sales tax was deposited by the appellant through the subsidy received from the State Government.

16. The decision of the Supreme Court in **Super Synotex** has been relied upon, both by the Commissioner in the order impugned in Excise Appeal No. 51011 of 2019 as also by the learned Member (Technical), in coming to a conclusion that the amount of subsidy received by the appellant from the State Government is required to be added to the transaction value. It would, therefore, be necessary to examine this decision to consider the submission advanced by the learned counsel for the appellant that the said decision of the Supreme Court is in respect of an entirely different Scheme and would not be applicable to the present promotion policy.

17. The Scheme that came for consideration before the Supreme Court in **Super Synotex** was "Sales Tax New Incentive Scheme for Industry, 1989[11]". Under the said Scheme, an assessee was entitled to retain 75% of the sales tax collected from the customers and was required to deposit only 25% with the Government. The Commissioner held that the assessee was availing partial sales tax exemption under the Sales Tax Incentive Scheme upto 75% of the tax liability and was paying only 25% of the sales tax, despite collecting the entire consideration from the customers and, therefore, the additional amount collected

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11. Sales Tax Incentive Scheme

under the camouflage of incentive tax would form part of the value for levy of excise duty. The assessee claimed that as there is a difference between grant of incentive and extension of benefit of exemption, the amount retained by the assessee should be treated as an incentive by the State Government and such retention would be deemed payment of sales tax to the State Exchequer. It is in this connection that the Supreme Court observed:-

> "19. xxxxxx On a studied scrutiny of the scheme we have no scintilla of doubt that it is a pure and simple incentive scheme, regard being had to the language employed therein. In fact, by no stretch of imagination, it can be construed as a Scheme pertaining to exemption. **Thus, analysed, though 25% of sales tax is paid to the State Government, the State Government instead of giving certain amount towards industrial incentive, grants incentive in the form of retention of 75% sales tax amount by the assessee. In a case of exemption, sales tax is neither collectable nor payable and if still an assessee collects any amount on the head of sales tax, that would become the price of the goods. Therefore, an incentive scheme of the present nature has to be treated on a different footing because the sales tax is collected and a part of it is retained by the assessee towards incentive which is subject to assessment under the local sales tax law and, as a matter of fact, assessments have been accordingly framed. xxxxxxxxxx "**
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> **(emphasis supplied)**

18. The Supreme Court, thereafter examined the effect of the amendment made in section 4 of the Excise Act w. e.f. 01.07.2000 and in this context examined the Circular dated 09.10.2002 issued by the Central Board of Excise and Customs. The observations made by the Supreme Court for arriving at the transaction value under section 4 of

the Excise Act in the light of the aforesaid Circular dated 09.10.2022 are reproduced below:-

> "**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.** xxxxxxxxxxx
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> 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 01.07.2000.** Therefore, the assessee is bound to pay the excise duty on the said sum after the amended provision had brought on the statute book."
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> **(emphasis supplied)**

19. It is clear from the aforesaid decision of the Supreme Court that since 25% of the amount collected as sales tax from the customers was

paid by the assessee and the remaining 75% of the amount collected was retained, it became profit or the effective cost paid to the assessee by the purchaser and this 75% was, therefore, to be treated as the price of the goods. The Supreme Court emphasised that the amount paid as sales tax was only 25%.

20. Under the promotion policy involved in these appeals, the subsidy does not reduce the sales tax that is required to be paid by the assessee. The entire amount of sales tax collected by the assessee from the customers is required to be paid. A portion is deposited through VAT 37B challan issued to the assessee by the State Government as subsidy under the promotion policy and the balance amount is deposited by the assessee in cash through VAT 37A challan. What has been retained by the appellant is basically the subsidy amount and it is not the case of the Department that subsidy amount has to be included in the transaction value.

21. The learned Member (Technical), after examining the provisions of the promotion policy as also the meaning of subsidy in Wikipedia, in Investopedia, Cambridge Dictionary and Oxford Dictionary, concluded that subsidy provided by the Government as part of the investment policy tends to reduce the sale price of the goods and as such the transaction value is depressed by the amount of subsidy so received.

22. The learned Member (Technical) concluded from the provisions of the promotion policy that since it was computed with reference to the tax paid and was a percentage of the tax paid, it would be an additional consideration received in view of the decision of the Supreme Court in

Commissioner of C. Ex., Nagpur-I vs. **Indo Rama Synthetics Ltd.**[12] In the said decision the Supreme Court relied upon its earlier decision in **Commissioner of Central Excise, Bhubaneswar** vs. **IFGL Refractories Ltd.**[13]. In **IFGL Refractories** the Supreme Court noted that the agreement provided that M/s. Visakhapatnam will surrender its advance licences and in lieu thereof the respondents will get the advance intermediate licences: It is in this context that the Supreme Court pointed out that without the advance licences of M/s. Visakhapatnam Steel Plant being made available to the respondents, the prices would have been as were quoted earlier and it is only because of the advance licences being surrendered by M/s. Visakhapatnam Steel Plant and in lieu thereof advance intermediate licences being made available to the respondents, that the respondents could offer lower prices. The observations of the Supreme Court are as follows:

> "The surrendering of licences by M/s. Visakhapatnam Steel Plant and as a result thereof the respondents getting the licences had nothing to do with any Import and Export Policy. It was directly a matter of contract between the two parties. This resulted in additional consideration by way of "advance intermediate licence" flowing from M/s. Visakhapatnam Steel Plant to the respondents. The value received therefrom is includible in the price. The Tribunal was wrong in stating that such an arrangement can never be placed upon the platform of additional consideration. In so stating the Tribunal has ignored and/or lost sight of the fact that it was in pursuance of the contract of sale between the respondents and M/s. Visakhapatnam Steel Plant that the licences were made available to the respondents. The Export and Import Policy had nothing to do with the arrangements/contract under which the licences flowed from the buyer to the seller. At the cost of repetition it must be mentioned that had the respondents

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12. 2015 (323) E.L.T. 20 (S.C.)
13. 2005 (186) ELT 529 (SC)

had advance intermediate licence on their own i.e. without M/s. Visakhapatnam Steel Plant **having to surrender its licences for the purposes of the contract, then the reasoning of the Tribunal may have been correct. But here, in pursuance of the contract of sale, there is directly a flow of additional consideration from the buyer to the seller. The value thereof has to be added to the price. We are thus unable to accept the broad submission that where parties take advantage of policies of the Government and the benefits flowing therefrom, then such benefit cannot be said to be an "additional consideration**."

(emphasis supplied)

23. In **Indo Rama Synthetics,** the Supreme Court after placing reliance upon the judgment the Supreme Court in **IFGL Refractories,** observed as follows:-

"12. This argument does not convince us at all. **Fact remains that the issuance of advance licence for intermediate supply to the assessee was facilitated as a result of surrender of advance licence in favour or the buyer by the buyer.** Thus, getting the licence invalidated for direct import of items in favour of the buyer was the trigger point for issuance of the advance licence for intermediate supply in favour of the assessee. Possibility of refusal on the part of DGFT to issue licence in favour of the assessee is only in the realm of conjecture. Fact is that the assessee got the licence and it became possible only on account of sacrifice made by the buyers. **Further, what is important is that the buyers got their advance licences for direct import in their favour invalidated with the sole purpose of purchasing the polyester staple fiber from the assessee at lesser price, i.e. 37.50 per kg. Therefore, the argument of the assessee that benefit in the form of imports without payment of duty flows to the assessee only pursuant to and based on licence issued by DGFT to the assessee and does not flow from the invalidation letter received**

by the customer from DGFT is too ingenuous an argument to be accepted."

(emphasis supplied)

24. The aforesaid decisions of the Supreme Court in **Indo Rama Synthetics** and **IFGL Refractories** would not be applicable to the facts of the present case. In the present case subsidy is granted in terms of the promotion policy to promote investment in the State of Rajasthan and to generate employment opportunities. This fact becomes more explicit because the capital investment subsidy was available to the investors only till such time as the Unit deposited the sales tax and made regular payment of the loan amount and interest to the financial institutions. It cannot, therefore, be said that the subsidy so provided by the State Government would tend to reduce the sale price of the goods and, therefore, would be required to be added in the transaction value.

25. Merely because subsidy is computed with reference to the tax paid and is a percentage of the tax paid, will not mean that it is directly or indirectly related to the sale of goods and would be an additional consideration. The amount of subsidy to be provided has necessarily to be a definite amount. It could either be a fixed amount or it could depend on certain factors and one factor can be percentage of the tax paid. This would encourage investors to increase commercial production so that they are able to receive more subsidy, but this can possibly have no bearing on the consideration to be received by the appellant so as to include this value in the transaction value.

26. The learned Member (Technical) has referred to certain decisions of the Tribunal that have relied upon the decision of the Supreme Court in **Super Synotex**. The issue before the Tribunal in **Jayaswal Neco**

Industries Ltd. vs. **Commissioner of C. Ex. & ST, Raipur**[14] was with regard to inclusion of VAT which was exempted and which was retained by the appellant under a Scheme of the State Government. In **Insucon Cables and Conductors Pvt. Ltd.** vs. **Commissioner of Central Excise, Jaipur-I**[15] exemption had been granted by the Sales Tax Department to the extent of tax paid on inputs used in the manufacture of final product and it was this amount that was in dispute for the purpose of valuation. In **Commissioner of Central Excise, Cochin** vs. **Indian Oil Corporation Ltd**.[16] the issue that arose for consideration was whether the differential amount (difference between subsidized price and total price paid for the goods), received separately from Oil Pool Account by IOC Ltd. and paid to the manufacturer of the subject goods, would be part of the value of the goods under section 4 of the Central Excise Act, 1944 and whether duty of Central Excise was chargeable on the said differential amount. It is in this context that the Tribunal, after referring the decision of the Supreme Court in **Super Synotex,** held that:

> 6.7. **We make note again that the additional reimbursement (consideration) is not an empty transaction. This is the transaction which is with reference to the subsidized sale of the subject goods by the assessee to the buyer under Public Distribution System(PDS) and for this sale the additional consideration received from Oil Pool Account has been further reimbursed to the manufacturer** who is M/s Kochi Refineries Ltd. (KRL) in this case. The Tribunal cannot accede to the logic of the Respondents that transaction is complete just by delivery of the goods (SKO) to the buyers when part payment of goods still remains to be paid. In fact

14. 2016 (344) ELT 578
15. 2016 (344) ELT 607 (Tri-Del.)
16. 2017 (357) ELT 197 (Tri.-Bang.)

> because of unique circumstances the payment of transaction value has been split into two parts-
>
> One part paid directly by buyers, other part paid by the Oil Pool Account, which is deemed indirect payment by the buyers. We may be permitted to say that ultimate buyers here are people of India who are receiving SKO on subsidized value/price. The people of India pay their direct/indirect taxes/levies/ duties to National Exchequer. Therefore, money received from Oil Pool Account ultimately can be said to be sourced from people of India, who are the buyers of the subject goods, SKO.
>
> xxxxxxxx
>
> 7. xxxxxxx. Central Excise is chargeable for the additional consideration (reimbursement) received and paid to the manufacturer, KRL by the assessee IOCL.
>
> **(emphasis supplied)**

27. The decisions of the Tribunal rendered in favour of the assessee can now be considered.

28. In **Commissioner of Central Excise, Mumbai** vs. **Welspun Corporation Ltd.[17],** the Scheme that was under consideration was the „Incentive Scheme 2001“ under the Economic Development of Kutch. The assessee was allowed to recover the sales tax amount/VAT amount but it could be retained as an incentive amount. The Tribunal held that the liability to pay sales tax/VAT was not extinguished at the time of removal of goods since it is not exempted from payment of sales tax/VAT and it was clear from the Scheme as well as the eligibility certificate that the amount of sales tax allowed to be remitted to the respondent was towards capital subsidy. Thus, it was not a case where sales tax was not payable but was a case where it stood actually paid as the remission was an incentive or a capital subsidy which the State Government granted

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17. 2017 (358) ELT 630 (Tri.-Mumbai)

with respect to the investment made in the earthquake ravaged region of Kutch in the State of Gujarat. The observations of the Tribunal are as follows:-

> 5.3. xxxxxxxx In the present case we find that the 'sales tax' is 'actually payable to the Government at the time of removal of goods from the 'place of removal". **The liability to pay the sales tax/VAT is not extinguished at the time of removal of goods since it is not exempted from sales Tax/VAT**. It is only after the assessment of the sales tax officer and subject to the condition that the Respondent's liability to the Sales Tax is 'remitted*. Thus when the sales tax/VAT is payable at the time of removal in that case in terms of Section 4d) of the Central Excise Act, the same is not includible in the transaction value. **Further the sales tax amount was adjusted against the remission granted by the sales tax authority under an assessment.**
>
> xxxxxxxxxx
>
> 5.5 **The Apex Court judgment of Super Synotex has already been distinguished by the learned Commissioner (Appeals) as above.** However, the Revenue in the review order/appeal did not refute the above findings, therefore, now the reliance of learned AR on the judgment of Super Synotex (supra) is of no help to the Revenue.
>
> 5.6. **In the case in hand it is very much clear that from the Scheme as well as from the Eligibility Certificate, that the amount of Sales Tax allowed to be remitted to the respondent was towards capital subsidy.** Even the requirement to re-invest 50% of the incentive in projects in the State of Gujarat further emphasizes the point that the amount of Sales Tax retained was only as capital subsidy. We further find from the facts narrated in the impugned order that the incentive receivable as capital subsidy by the appellants was from the Department of Industries, whereas the Sales Tax amount collected was payable to the Department of Sales Tax but allowed to be retained and adjusted against such incentive by their very department which also

granted refund of tax paid on raw materials and CST paid. This scheme was thus operated by Department of Sales Tax and accordingly Commercial tax officer has necessarily to pass order for each tax period. **It implies that the State Government of Gujarat under which both the departments fall, would have put in place some mechanism whereby the incentive paid to the appellants by way of retention of Sales Tax collected from their customers and refund granted on other two items (VAT on purchases and CST) is reimbursed by the Department of Industries to the Department of Sales Tax. Hence for the above reason also we find that such amount, allowed to be remitted to the respondents as incentive which was otherwise payable to the Sales Tax department, cannot form part of the transaction value.**

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.**
>
> **(emphasis supplied)**

29. The aforesaid decision of the Tribunal in **Welspun Corporation** was followed by the Tribunal in **Shree Cement Ltd.** vs. **CCE, Alwar**[18]. The decision rendered by the Tribunal in **Shree Cement** was followed by the Tribunal in **Ultratech Cement Ltd.** vs. **Commissioner**[19]. In **FCC Clutch India Pvt. Ltd.** vs. **Commissioner of Central Excise, Alwar**[20], the Tribunal specifically dealt with the Rajasthan Scheme for payment of VAT using 37B challans and after following **Welspun** held that the subsidy amount paid by the assessee using VAT-37B challan cannot be added to the transaction value.

30. In **Honda Motorcycle & Scooters India Pvt. Ltd.** vs. **Commissioner of CGST, Alwar**[21]**,** the Tribunal followed the earlier decisions of the Tribunal in **Shree Cement, Ultratech Cement Ltd.** and **Welspun Corporation** and held:

> "7. We have perused the terms of MOU, according to which the appellant is required to deposit to State

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18. 2018 (1) TMI 915-CESTAT- New Delhi
19. 2018 (TIOL) 727 CESTAT Delhi
20. 2019 (365) E.L.T. 539 (Tri.-Del.)
21. 2019 (365) E.L.T. 529 (Tri.-Del.)

> Government the amount of VAT/ CST recovered by them from their customers, Out of the said amount, the claim is submitted to the State Government for sanction of subsidy, which after sanction is paid directly to the bank account of the appellant. It is evident that the VAT/ CST paid by the appellant is credited into the State Exchequer.
>
> 8. We have gone through the case laws relied upon by the appellant and we find that Tribunal consistently is taking the view that subsidy amount cannot be included in the transaction value of the product for the purpose of payment of duty. xxxxxxxx".

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

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

a- Subsidy under the promotion policy does not reduce the selling price;

b- The amount of subsidy under the promotion policy is not an additional consideration;

c- The decision of the Supreme Court in **Super Synotex India** would not be applicable to the present case;

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

e- Section 9 of the Rajasthan VAT Act, 2003 would have no application to the facts of the present case; and

f- As neither party raised any objection on this issue, the reference has been answered

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

(Order pronounced on **21.03.2023**)

(JUSTICE DILIP GUPTA)
PRESIDENT

Rekha/JB