SUBSIDY BY GOVERNMENT — SUBSIDY BY EXCISE DEPARTMENT — RETENTION OF SALES TAX

By

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Preface

Transaction value, i.e. the value on which Excise duty is payable, has always been the point of debate between assessees and Department. A number of expenses are there like discount, packing charges, outward freight, etc. which the assessee argues to be excludible from transaction value but the Department objects. A number of such cases have been settled ultimately by the Hon'ble Supreme Court. In this piece of diction, we are going to discuss about one such item namely subsidy received from Government in the form of retention of sales tax.

Relevant Legal provisions

The Excise duty is payable on the "transaction value" which is defined in Section 4(3)(d) of Central Excise Act, 1944. This definition was introduced w.e.f. 1-7-2000 and it reads 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 any 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.* [emphasis supplied]

Thus, the definition of transaction value is wide enough to cover all the costs incurred by the manufacturer and recovered from the buyers. The deduction in form of Excise duty, sales tax or any other tax is allowed provided the same is Actually Paid or Actually Payable.

Board Circular dated 30-6-2000

Section 4 of Central Excise Act, 1944 providing definition of transaction value was substituted by Section 94 of the Finance Act, 2000 (No. 10 of 2000). It came into force from 1-7-2000. At the time of its implementation, Circular No. 354/81/2000-TRU, dated 30-6-2000 [2000 (119) E.L.T. (T22)] was issued to clarify various aspects pertaining to transaction value. The relevant paras from this circular are reproduced as follows :-

> "10. As regards exclusion of taxes while working out assessable value, the definition of transaction value itself mentions that whatever amount is actually paid or actually payable to the Government or the relevant statutory authority by way of excise, sales tax and other taxes, such amounts shall be excluded from the transaction value. In other words, if any excise duty or other tax is paid at a concessional rate for a particular transaction, the amount of excise duty or tax actually paid at the concessional rate shall only be allowed

to be deducted. The words "actually paid" have, therefore, been used to the definition of transaction value to reflect the legislative intention as explained above.

11. The words "actually payable" in the context of the amount of duty of excise, sales tax and other taxes would normally come into play only in those situations where the amount of excise, sales tax or other taxes is not paid at the time of transaction but paid subsequently, for example, sales tax payable under a deferment scheme."

The analysis of above paras makes it clear that while calculating the transaction value, only such amount of sales tax or excise duty will be deducted which is Actually Paid or which is Actually Payable to Government exchequer. It is also clarified that the word 'actually payable' will come into play only in such cases where the excise duty or sales tax are paid subsequent to transaction, like in the case of deferment scheme.

The Issue

The sales tax or VAT is an indirect tax which is collected by the seller of goods from the buyer and deposited to government exchequer. In some States, Government allows the manufacturers to retain a certain percent of sales tax on the goods, which is collected from the buyers. This is a form of subsidy which is allowed by the Government to incentivize the manufacturers and boost the production and sale of goods. However, the Central Excise department does not seem to favour this policy and are raising Central Excise demands on this amount of sales tax retention by including the same in the assessable value of goods.

Department's contention

The word "Actually paid" or "actually payable" in the definition of transaction value are the centre of dispute. Department is raising demand on amount of sales tax retained by the manufacturer. In the given case of sales tax retention, a part of sales tax collected from the buyer is retained by the seller-manufacturer and which is not actually paid to the Government exchequer. As per contention of department, only the sales tax actually paid or payable to the Government is deductible while calculating the transaction value. Since the sales tax so retained is not actually paid/payable to the Government, it will be includible in the assessable value and thus, excise duty is liable to be paid on the same as per Department.

Supreme Court decision favouring Revenue

The Revenue is contending that if the sales tax amount is neither 'actually paid' nor 'actually payable' to the Government; it cannot be excluded from the transaction value. As on date two Supreme Court judgments stand in favour of Revenue which are discussed as follows :-

- *Commissioner of Central Excise, Jaipur-II* v. *Super Synotex India Limited* [2014 (301) E.L.T. 273 (S.C.)]

  In this case, the assessee was allowed to retain 75% of the sales tax collected from the buyer and was required to deposit only the remaining 25% with the State Government. The Supreme Court held that w.e.f. 1-7-2000 when the transaction value concept was implemented, 75% of the sales tax which was neither actually paid nor actually payable was liable to excise duty by including in the transaction value.

- *Commissioner of Central Excise, Delhi-III* v. *Maruti Suzuki India Limited* (2014 VIL 17 SC CE)

  In this case, it was held that 50% of the sales tax collected and retained by the assessee is neither actually paid nor actually payable; thus, it will be included in the transaction value and excise duty will be payable on the same.

Thus, the above two decisions are the major yardsticks of departmental proceedings. But are these two decisions sufficient to levy the excise duty on the sales tax retention? Since the two decisions are more or less passed on the same grounds, we are analyzing one of these two decisions.

Analysis of Supreme Court decision in the case of Maruti Suzuki

The Supreme Court in the case of *Commissioner of Central Excise, Delhi-III* v. *Maruti Suzuki India Ltd.* [2014 (307) E.L.T. 625 (S.C.)] has held that where the amount of sales tax is neither actually paid nor actually payable; it shall form part of the transaction value. The brief facts of this case are given as follows :-

- The assessee is manufacturing and selling vehicles in the State of Haryana.
- Show cause notice was issued to assessee on the grounds that the assessee had retained 50% of the sales tax collected by it from its customers. The retention allegedly was on the strength of an entitlement certificate issued by the Deputy Excise and Taxation Commissioner in Haryana. This certificate mentioned that the assessee would be allowed to retain 50% of the tax collected by it subject to the ceiling of Rs. 564.35 crores and the benefit would be extended to 14 years.
- The basis of issuing the show cause notice was that the retained sales tax was neither actually paid nor actually payable to the State Government, thus it will be included in transaction value. The demand proposed in the show cause notice was confirmed by the adjudicating authority.
- Appeal was filed in the Tribunal on the grounds that they were not exempted from payment of sales tax upto 50%, rather it was the deferment of sales tax. It was also contended by the assessee that the sales tax so deferred was permitted to be converted into capital subsidy to the extent mentioned in the entitlement certificate.
- The appeal of assessee was allowed by the Tribunal and the decision was cited at 2004 (166) E.L.T. 360 (Tri.-Del.). In this decision it was held that Rule 28C prescribed a procedure relating to deferment of tax under Section 25A of the Act and, therefore, what was granted to the assessee was a deferment of payment of sales tax and not a sales tax concession. The deferment was for a period of 14 years during which period the amount was adjusted against capital subsidy due to the assessee, subject to a maximum limit of Rs. 564.35 crores. Instead of the assessee depositing the amount in the Treasury and the State Government giving the amount back to the assessee towards capital subsidy the amount was adjusted and therefore it could not be argued that the assessee was claiming abatement in respect of sales tax not actually paid or payable.

- Aggrieved by the order of Tribunal, Department preferred the appeal before Supreme Court.
- Supreme Court reversed the order of Tribunal on the grounds that the entitlement certificate does not give any indication of deferment of tax or capital subsidy. On the contrary, it only refers to a "tax concession" for the period from 1st August, 2001 to 31st July, 2015 and the quantum of tax concession is mentioned as Rs. 564.35 crores. It was further held that the entitlement certificate issued to the assessee is clearly in line with the decision of the HPC and also does not support the case of the assessee. While deciding the case against the assessee, Circular dated 30-6-2000 was also relied.

Thus, as of now, the decision of Supreme Court is against the issue of subsidy. Accordingly, the amount of subsidy is includible in the transaction value.

Aftermath

As every decision is passed and is applicable only under specific facts and circumstances; the decision of Hon'ble Supreme Court is also applicable under the given conditions. Also, this decision is silent on some issues, i.e. some questions which were not put before Apex Court; have obviously not been answered in the decisions. Some of such areas observed by us are as follows :-

It is reiterated that the contention of the assessee was rejected by the Apex Court on following grounds :-

- The High Powered Committee (HPC) vide its order dated 14-6-2001 had permitted the assessee to retain 50% of the sales tax collected from the customers for a period of 14 years. The ceiling of ₹ 564.35 crores was decided. However, the order of HPC did not mention the fact that this amount can be adjusted against any scheme or any capital subsidy.
- The entitlement certificate issued to the assessee also did not give any indication of deferment of tax or capital subsidy. On the contrary, it only refers to a "tax concession" for the period from 1st August, 2001 to 31st July, 2015. The quantum of tax concession is mentioned as ₹ 564.35 crores.
- Both the order of HPC and the entitlement certificate are the main documents of the case and both of them did not indicate that the 50% of the sales tax retained by the assessee on the sale of its vehicles was liable to be adjusted against any capital subsidy entitlement.
- Since there was no indication of the fact that the retention amount could be adjusted against any subsidy; it was held that the 50% of the sales tax amount was neither actually paid nor it was actually payable to the Government and the HPC permitted the assessee to retain the said amount.

From the analysis of above, it is clear that the Apex Court didn't allow the deduction of 50% of sales tax amount which was retained by the assessee on the grounds that there was no indication on any of the documents which could prove that the said amount was actually payable to the Government, but it was adjusted against the capital subsidy which was due to assessee. On this ground alone, if one is able to prove that the sales tax was actually payable but it was

adjusted against the interest subsidy, this decision can be distinguished and amount of sales tax retention can be claimed as deduction from transaction value.

Also, it is worthwhile to note here that the incentive or amount flowing from the "buyer" is to be added in the transaction value. In this instant case, though the amount is collected from the buyer; but the same is "flowing" at the instance of Government; therefore, it can be contended that there is no additional consideration flowing from buyer, thus, cannot be included in the transaction value. This point was not considered by the Hon'ble Supreme Court.

Good bye words

Every Government plans for and distributes various subsidies/incentives in cash or otherwise in order to boost the industrial development. Here in the given case, the subsidy is not given in cash directly but it is allowed in the form of retention of sales tax amount collected from buyers. Alternatively, Government can collect the sales tax amount in full and can disburse the subsidy in cash. But this process will increase the procedural formalities. Therefore, the Government has adopted the system of sales tax retention. In former case where the entire sales tax is deposited and subsidy is released in cash, the assessee will get full deduction of sales tax from transaction value and there would be no impact on subsidy portion. Also, it is not the intention of Government to levy Excise duty on subsidy. However, intentions of government are not always considered by the Revenue officials and these intentions are defeated anyhow and every now and then.

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When SEZ units can be allowed to avail the benefit of SEIS scheme, there is no reason why EOUs are placed under ineligible categories. Such restriction will place the EOUs on a disadvantageous position as compared to SEZ units.

As per the New FTP, EOUs are placed under the ineligible categories but now a public notice is issued that provides a procedure for availing these benefits by the EOUs as well. The new anomaly is created again vide Public Notice 30/2015-20, dated 26-8-2015. In the said notice, *it has been categorically mentioned that SEZ/EOUs for availing benefit of MEIS and SEIS has to apply to the concerned development Commissioner of SEZ instead of applying to regional authority.*

As per the language of this public notice it is presumed that EOUs are allowed to take benefits of SEIS scheme. However, we all know that unless and until there is suitable amendment in para 3.09 of FTP by deleting word EOUs from ineligible categories, SEIS benefit will never be granted to such EOUs units.

Director General of Foreign Trade (DGFT) should come out with specific clarification and their stand on granting SEIS benefit to EOUs. The clarification is more important so as to solve the anomaly created by DGFT time and again. We hope that the DGFT will take up this matter very soon and will make suitable amendment in Chapter 3 clarifying the status for the EOUs as to whether they are eligible to avail the SEIS scheme benefits or not. As the ultimate aim for granting such benefits is that the country should do more and more exports.
