IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH, MUMBAI
COURT NO I
Appeal No. E/85253/14-Mum

Arising out of Order-in-Original No. 94-95/MAK(94-95)/COMMR/RGD/13-14, Dated: 12.11.2013

Passed by Commissioner of Central Excise, Raigad

Date of Hearing: 10.6.2015
Date of Decision: 6.10.2015

CORAM: P K Jain, Member (T)
S S Garg, Member (J)

ORDER NO A/3339-3344/15/EB

Per: P K Jain:

Common issue is involved in all the five appeals and, therefore, these appeals are being taken up together. The first three appeals are filed by the Revenue against dropping of the demands while the remaining two are filed by the assessees against confirmation of demands. In all the cases, the assessees are manufacturers of excisable goods which are being cleared on payment of duty under Section 4 of the Central Excise Act, 1944. All the five manufacturer-assessees availed sales tax incentive scheme known as Package Scheme of Incentives 1993 declared by Government of Maharashtra. The scheme is Sales Tax Incentives by way of Deferral. Under the said incentive scheme, the manufacturer-assessees are entitled to collect sales tax at the normal rate applicable to the goods manufactured from its customers and pay the same to the Sales Tax Authorities after a period of time say from 11th to 15th year in five equal instalments. Thus, though the manufacturer assessees collect the sales tax from their customers in a particular year, the payment of the same to the State Government is deferred. In the meantime, money so collected is used by the manufacturer assessees in their business. In November 2002, the Bombay Sales Tax Act, 1959 was amended so as to provide an optional scheme for payment of sales tax so deferred in advance on its net present value (NPV). Thus the said amendment in the Act provided an option to prematurely pay in place of the deferred tax amount, an amount equal to the NPV of the deferred tax. This option could be exercised anytime between the normal due date for payment of sales tax to the final deferred date. NPV amount will, of course, vary with the date of payment as also the final deferred date. On making payment of NPV, the deferred tax is deemed to have been paid.

2. All the manufacturer-assessees in these appeals have availed benefit of deferred sales tax scheme and thereafter opted to pay the deferred tax in advance. Amount paid was equal to NPV and not the originally deferred amount. With this payment, total liability to pay sales tax extinguished.

3. At the time of clearance of the goods, the excise duty was paid based upon the sale price excluding the sales tax payable. The sales tax payable was computed based upon the normal rate of sales tax. However, since the sales tax amount was later on paid as per NPV and not as per the originally projected sales tax amount payable, the Revenue is of the view that the manufacturer-assessees are eligible only to deduct the NPV amount from the selling price. Thus the differential between the deferred sale tax payable and NPV paid would form part of the assessable value and the demands have been raised on the said amount. The manufacturer-assessees, on the other hand, are of the view that the sales tax amount payable was as per the sales tax rate applicable on the goods or the deferred amount of sales tax and thus they are liable to pay excise duty on the price excluding the deferred sales tax payable. Exercising the option to wipe out the deferred tax liability on NPV will not make any difference in their liability

to pay excise duty.

4. In all the five appeals, the main issue is as above though there are certain variations in facts like years when they availed the deferral scheme and the years when they availed prepayment facility based upon Net Present Value.

5. **Appeal No. E/85253/14 Uttam Galva Steels Ltd.**

The case was extensively heard. Learned senior counsel, Shri V.S. Nankani, appeared on behalf of the respondent-assessee and made various submissions which in brief are,-

(i) The transaction value at which duty is paid by them is correct as the amount retained after payment made at NPV under the Sales Tax deferral Scheme cannot form part of Transaction value as the same under Section 38(4) of the Bombay Sales Tax Act 1959 is treated as deemed payment of Sales Tax;

(ii) The demand is contrary to clarifications issued by the CBEC from time to time and the Hon'ble Commissioner has rightly dropped the same;

(iii) Judgement of the Hon'ble Supreme Court in the case of Super Syncotex and Maruti Suzuki is not applicable to the facts of the present case;

(iv) Demand is barred by limitation as the Respondent is not guilty of any fraud, wilful misstatement or suppression of fact with an intention to evade payment of duty.

5.1 On the first submission i.e. duty paid on correct transaction value, learned senior counsel submitted that for determining Transaction value, amount of sales tax actually paid or payable on the goods is not includable. It is not in dispute that sales tax "actually payable" is to be allowed as deduction under Section 4 of the Act. The amount of sales tax shown in the invoices raised on the customer is the amount "actually payable" and the same is not paid due to an incentive given by the State Government. Under the said Incentive Scheme, there is no "exemption" from payment of sales tax. By immediately paying the sales tax collected, on the NPV, the assessee is "deemed" to have paid the entire amount of sales tax collected by it. Under the deferment scheme, the assessee would have paid the sales tax to the State Government after the deferred period, say, 15 years. However, the State Government came out with an immediate payment scheme stating that after 15 years, the member would have paid sales tax to the State Government amounting to say, Rs.100/-, however, the NPV of the said Rs.100/- to be paid after 15 years as on a day, is Rs.25/-. Hence, upon payment of Rs.25/- now, the entire Rs.100/- which is supposed to be paid after15 years, is deemed to be paid. Proviso to Section 38 of Bombay Sales Tax Act 1959, clearly states that upon payment of sales tax payable on NPV, the assessee would be discharged from the entire sales tax liability. In other words, the assessee is entitled to retain the balance amount of sales tax collected from the customer as an incentive under the said scheme, without causing any shortage of payment to the Government. The above deeming provision created by Section 38 of Bombay Sales Tax Act 1959 is a legal fiction created by law. The effect of the same cannot be ignored even for the purpose of determining the assessable value under Section 4 of the Act. The statutory fiction created by these provisions of law has to be given full effect. Reliance is placed upon the judgement of the Hon'ble Supreme Court in the matter of *Industrial Supplies Pvt. Ltd. Vs. UOI 1980 4 SCC 341*, wherein it was held that after ascertaining the purpose, full effect must be given to the statutory fiction and it should be carried to its logical conclusion. Learned senior counsel further submitted that there cannot be two separate yardsticks for levy of Sales Tax and Levy of Central Excise and further the Legislature never intends to give from one hand and take from the other. Hence, both terms "actually paid" and "actually payable" used under Section 4 of the Act have to be read together in tandem. One cannot lead to redundancy of the other. Therefore, payment of sales tax at net present value is in compliance with the incentive scheme which would deem to discharge entire sales tax liability under law and cannot be included in the Transaction Value.

5.2 Learned senior counsels next submission is that the demand contrary to clarifications issued by CBEC. The question of determination of assessable value for levy of excise duty where an incentive is provided by the State Government in the form of retention of sales tax by the manufacturers was considered by the CBEC in consultation with the Ministry of Law and vide Circular No. 378/11/98-CX dated 12/03/98 and it was clarified that sales tax is deductible from the wholesale price for determination of assessable value for levy of Central Excise Duty in the case of deferment of payment of sales tax for a particular period i.e. situation in present case.

5.3 Learned senior counsel further submitted that Section 4 of the Central Excise Act was amended w.e.f 1st July 2000. While interpreting the new Section 4, CBEC had issued instructions vide Circular No.**354/81/00-TRU dated 30/06/2000** explaining the provisions of new Section 4 which would come into force from 01/07/2000. In the said instructions in Paras 10 & 11, it was clarified 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 amount 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 from price. The assessee cannot claim that the excise duty or tax payable at the "normal rate" should 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.

5.4 Similarly, the issue of abatement in respect of set-off on sales tax was again considered by the CBEC and the Board vide Circular No.671/62/2002-CX dated 09/10/2002, after taking into consideration the new Section 4, inter alia, clarified as follows:

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

Learned senior counsel submitted that a combined reading of the above clarifications issued by CBEC makes it clear that the consistent stand and understanding of the Revenue has always been that the amount of sales tax paid or payable is permissible to be deducted.

5.5 The next submission of the learned senior counsel was that the transaction value declared at the time of removal is relevant. A careful reading of Section 4 clearly indicates that the value for the purposes of levy of excise duty has to be determined at the time and place of removal for delivery. It was submitted that while determining the value at the time and place of removal, the permissible deductions in arriving at the value are also required to be determined at that point of time. In other words, if sales tax is permitted to be abated while determining the assessable value, the deduction towards sales tax will be in respect of sales tax actually paid or actually payable at the time and place of removal of the goods. Learned senior counsel further submitted that

the word "payable" means to be paid or liable to be paid as per ordinary dictionary meaning. Liable to be paid means liability in accordance with the law. Therefore, what is permissible to be abated in respect of sales tax is the sales tax, actually paid or actually payable in accordance with the law at the time of removal of the goods. Transaction value determined by the Respondent is therefore correct and proper in law as at the time of clearance of goods the sales tax was payable under the deferment scheme and the question of making payment of any differential duty does not arise.

5.6 Learned senior counsel further submitted that Section 43B of the **Income Tax Act, 1961** allows deduction from full amount of sales tax and not for the amount of NPV paid. CBDT vide Circular No.496 dated 25.8.1987 clarified that if the Sales Tax Act provides that the sales tax deferred under the scheme shall be treated as actually paid, then such a deeming provision will meet the requirements of section 43B. Consequently, the Government of Maharashtra have, by the Bombay Sales Tax (Amendment) Act, 1987, made the amendment accordingly and the statutory liability is treated to have been discharged for the purposes of section 43B of the Act. The aforesaid issue was also the subject matter of dispute and consideration in the case of *Sulzer (India) Ltd. Vs. Jt. CIT reported in* **- 2010-TIOL-670-ITAT-MUM-SB** which has been upheld by the Hon'ble Bombay High Court in Income Tax Appeal No. 450 of 2013. The said Judgment laid down the principle that the fact of payment of tax on NPV does not mean any benefit has been derived by the assessee.

5.7 Learned senior counsel submitted that the judgments of Hon'ble Supreme Court Passed in the case of *Super Synotex reported in 2014 (301) ELT 273 (SC)* **= *2014-TIOL-19-SC-CX*** *and Maruti Suzuki India Limited* **- 2014-TIOL-74-SC-CX** are not applicable to the facts of the present case. In support, learned senior counsel submitted that the Hon'ble Supreme Court in the case of Super Synotex (India) Limited (supra) considered the Rajasthan Sales Tax Incentive Scheme which is a completely different scheme than the Sales Tax deferment scheme of Maharashtra. It was submitted that under the scheme impugned before the Supreme Court the assessee was entitled to retain with it 75% of the sales tax collected and pay only 25% to the Government. So the Hon'ble Supreme Court treated 75% of the sales tax collected as Sales Tax, neither paid nor payable. Whereas in the present case there is no exemption from payment of sales tax. By immediately paying sales tax collected, on the NPV, the assessee is deemed to have paid the entire amount of sales tax collected by it. It was further submitted that the working of the deferment scheme has been discussed by the Hon'ble Bombay High Court in the case of Sulzer (India) Ltd. (supra) and thereafter Hon'ble Bombay High Court held that where a liability payable in the future is settled at NPV, no benefit or remission arises since the NPV represents the equivalent value of the future liability. In Super Synotex (supra), the assessee was specifically aware of the quantum of the amount to be retained and the balance to be paid. Whereas in the present case, the Respondent was not aware of the amount to be paid and retained but was subject to the calculation of NPV of the deferred tax. The respondent had actually collected the sales tax for paying it to the Government after a period as specified in the scheme. This amount had become "actually payable" after a specified term. However, due to the subsequent introduction of the provision for paying tax at NPV, the Respondent actually paid up the proportionate sales tax as per the NPV which would eventually sum up to become the actually payable amount of deferred sales tax as mentioned above. Since the scheme dealt with by the Hon'ble Supreme Court was different than the scheme availed by the Respondent, the judgment passed in the case of Super Synotex (supra) is not applicable to the facts of the present case. For similar reasons the judgment of the Hon'ble Supreme Court passed in the case of Maruti Suzuki India Limited (supra) cannot be made applicable to the facts of the present case. In Maruti Suzuki India Limited (supra) the Hon'ble Supreme Court dealt with the provisions of Haryana General Sales Tax Rules and held that the entitlement certificate granted to the

assessee does not give any indication of deferment of Tax or capital subsidy and infact the same permitted the Assessee to retain the 50% Sales Tax Collected which was neither paid nor payable to the State Government. It was further submitted that without prejudice to the aforesaid, it can be seen that the judgement of Maruti (supra) is in favour of the Respondent, since it categorically held that where the tax is not paid at the time of the transaction, but is paid subsequently, as for example, sales tax payable under a deferment scheme, then too the benefit of exclusion would be allowed since the amount would be actually payable. Ab initio, the facts of the two cases are different. In any event the Hon'ble Supreme Court has not discussed the deferment scheme and the same is evident from the text of the order itself.

5.8 Learned senior counsel submitted that a case is only an authority for what it actually decides and not what may seem to follow logically from it. Further, a decision is a precedent on its own facts and is an authority only for what it actually decides. The real essence in a decision is its ratio and not every observation found therein nor what logically flows from the various observations made in the judgment. It is also submitted that the facts of the case must be identical or similar for it to become a precedent for another case. Reliance is placed on the decision of the Hon'ble Supreme Court in the matter of:

- Uttaranchal Road Transport Corpn. Vs. Mansaram Nainwal (2006) 6 SCC 366 para 13.

- Ramesh Singh @ Photti Vs. State of AP decided by the Hon'ble Supreme Court on 25.03.20104.

- A.K. International Vs. UOI 2002 (144) ELT 241 (Del)- para 19 & 20

- Haryana Financial Corporation Vs. Jagdamba Oil Mills (2002) 3 SCC 496- Para 19-22

5.9 The judgment of the Hon'ble Supreme Court in the matter of Super Syncotex (supra) does not discuss about the deferment/ incentive scheme introduced by the state of Maharashtra and the said case is *sub-silentio* in respect of the Maharashtra Incentive Scheme. It was submitted that a decision in which a particular matter is not discussed upon is said to be passed *sub-silentio* in respect of that particular mater and cannot be relied as a precedent for that specific matter which is not discussed upon. Learned counsel relied upon the following decisions:-

- Municipal Corporation of Delhi Vs. Gurnam Kaur (1989) 1 SCC 101 para 8 12

- State of U.P. vs. Synthetics and Chemicals and Anr. (1991) 4 SCC 139 - Para 3, 39-42. **= *2002-TIOL-723-SC-CT***

5.10 Learned senior counsel submitted that incentive granted to the respondent is in the form of subsidy flowing from the State Government. The true intention behind introducing the Sales Tax Incentive Scheme is not grant "exemption" from payment of sales tax. By immediately paying sales tax collected, on the NPV, the assessee is "deemed" to have paid the entire amount of sales tax collected by it. The said amount is in a form of subsidy flowing from the State Government and not from the customers and as such the same is not includible in assessable value for the purpose of payment of excise duty. The judgement of the Hon'ble Supreme court in the case of *Commissioner v. Mazagon Dock Ltd. 2005 (187) E.L.T. 3 (S.C.) 7 =* ***2005-TIOL-111-SC-CX***is applicable to the facts of the present case. "Additional consideration" should flow directly or indirectly from the buyer to the seller. The interest earned, on deferred sales tax, by the manufacturer is not a benefit extended by the buyer to the seller but is an incentive, accruing in pursuance of State Government policy. Therefore, this amount cannot be treated as "additional consideration".

5.11 Learned senior counsel lastly submitted that the matter ought to be remanded back to the Commissioner to decide the issue of limitation as the same was not decided by him, as he held in favour of respondent on merit itself.

6. **Appeal No. E/85251/14 Bhushan Steel Ltd.**

Ms. Padmavati Patil appeared on behalf of this respondent assessee. The learned counsel made the submissions which were broadly in line with what was submitted by

the learned senior counsel, Shri V.S. Nankani. The learned counsel explained why the judgment of the Hon'ble Supreme Court in the case of *Super Synotex reported in 2014 (301) ELT 273 (SC)* = ***2014-TIOL-19-SC-CX*** is not applicable to the facts and circumstances of the case and how various clarifications issued by the Board from 1998 to 2002 on the subject as also the position under Section 43B of the Income Tax Act, 1962 are applicable in this case. She also referred to the circular issued by CBDT dated 25.9.1987 and 29.12.1993 to put forward that the sales tax deferred under the scheme shall be treated as actually paid. A lot of emphasis was given on the limitation point. It was submitted that the issue of limitation has not been discussed in the order of the Commissioner and also in the memorandum of appeal. The same has not been raised and in view of the Hon'ble Supreme Courts judgment in the case of *SACI Allied Products vs. CCE reported in 2005 (183) ELT 225 (SC)* **=** ***2005-TIOL-73-SC-CX-LB***, the same cannot be taken up at this stage and would required to be remanded to the Commissioner. It was also submitted that if for some reason the Tribunal decides to give judgment on the limitation, then the following submissions may be taken into account,-

(i) The respondent had bona fide belief that the entire sales tax collected under the incentive scheme was not an additional consideration.

(ii) The Tribunal in the case of *Jayaswal Neco Industries vide order No. 52257-52258 dated 7.5.2014*, in similar circumstances had taken the view that extended period is not applicable.

(iii) There was no suppression or any intention to evade duty.

(iv) There is no provision either under ER-1 return to inform the department specifically of availment of any sales tax deferral scheme.

(v) The Hon'ble Supreme Courts decision in the case of Super Synotex (India) Ltd. (supra) was delivered on 28.2.2014 and in such a situation, it cannot be said that there was wilful intention to evade duty. Before that, there were number of judgments of the Tribunal in favour of the assessee.

(vi) In any case, the whole issue is relating to interpretation of law and, therefore, extended period cannot be invoked.

7. **Appeal No. E/85252/14 JSW Ispat Steel Ltd.**

Learned counsel, Shri Vipin Jain, appeared on behalf of the appellant and submitted that he is adopting all the arguments made by senior counsel, Shri V.S. Nankani, as also various arguments to be made by Shri V. Sridharan, learned senior counsel. In addition to these submissions, he made the following additional submissions:-

(i) That the issue as to whether the sales tax which was collected under a deferral scheme which was to be paid after the expiry of a specified period could be excluded from the transaction value, has specifically been considered and dealt with by the Hon'ble Apex Court in the case of *CCE v Maruti Udyog Ltd reported in 2014 (307) ELT 625 (SC)* = ***2014-TIOL-74-SC-CX***. A perusal of the said decision would make it clear that even as per the Revenue, in a case of deferment, deduction was available in respect of the deferred sales tax from the transaction value. In support of the said contention, attention was drawn to the issue which was framed for decision of the Hon'ble Apex Court, i.e.

"Whether the CESTAT was right in holding that the High Powered Committee constituted under the provision of Rule 28C of the Haryana General Sales Tax Rules, 1975 merely deferred the payment of sales tax by Maruti and had not granted it any tax concession."

The Hon'ble Apex Court referred to the provisions of Rule 28C which applied both to Section 13B as also Section 25A of the relevant sales tax Act. While Section 13B dealt with grant of exemption. Section 25A on the other hand provided for that if the state government was satisfied, it may defer the payment of tax for such class of industries, for such period, either prospectively or retrospectively, and subject to such conditions

as may be prescribed. Learned counsel further submitted that the Apex Court observed that the CESTAT had proceeded on the premise that Maruti was working under the deferral scheme under Section 25A read with sub-rule (5)(a) of Rule 28C which reads as under:

"(5)(a) Subject to other provisions of this rule, an eligible industrial unit (except a prestigious unit) holding a valid entitlement certificate shall be entitled to the concession of deferment of payment of sales tax including central sales tax and conversion of the same to capital subsidy, computer on the sale of goods (including by-products and waste) manufactured by the unit of arising from the process of manufacturer and declared in the sales tax returns filed by the unit, without taking into account the rebate admissible under Section 15A or the rules framed under the Act, at the scale, subject to the time limit and the extent related to the fixed capital investment (FCI) and the unit shall be required to pay only the balance of tax after deducting the rebate and the capital subsidy plus any purchase tax payable at its hands but no refunds of any amount of tax paid shall accrue to the unit by operation of these provisions.

Explanation. I - xxxxxxxxx

Illustration. - xxxxxx

The Apex Court in its judgment held that Maruti, being a prestigious unit, was specifically excluded from the purview of sub-rule (5)(a) of Rule 28C, and therefore the CESTAT was in error in relying upon the said sub-rule. In fact, what applied to a prestigious unit were provisions of Rule 28C(5)(b) which provided that the decision about grant of tax concession to prestigious unit was to be taken by the High Powered Committee on the basis of various parameters. It further provided that a prestigious unit shall not, as a matter of right, be entitled to benefits available to other units. The Hon'ble Apex Court therefore held that **since 50% of the sales tax collected was retained by Maruti and was not actually paid to the exchequer, nor was it actually payable since the High Powered Committed permitted the assesse to retain the said amount, it was not eligible for the deduction of the same from the transaction value.**

(ii) Learned counsel submitted that in para 26, the Apex Court observed as, -

"26.The circular brought to the notice of all concerned that in view of the amended Section 4 of the Excise Act, any amount actually paid or actually payable by way of excise, sales tax and other taxes shall be excluded from the transaction value. It was made clear that if tax is paid at a concessional rate, that amount may be deducted from the transaction value. But, where the tax is not paid at the time of the transaction, but is paid subsequently, as for example, sales tax payable under a deferment scheme, then too the benefit of exclusion would be allowed since the amount would be actually payable. The relevant paragraphs of the circular, namely, paragraphs 10 and 11 read 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, sale tax and other taxes, such amount 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 from price. The assessee cannot claim that the excise duty or tax payable at the "normal rate" should 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."

With reference to the ratio laid down in the case of Maruti, it was submitted by the learned counsel that the Hon'ble Apex Court had in no uncertain terms laid down that if an assessee is working under a deferred scheme of sales tax, it would be eligible for deduction of the sales tax payable from the assessable value and that the judgment was an authority on the proposition that in case of a sales tax deferment scheme, deduction of the sales tax actually payable would be available from the assessable value. Had the Apex Court not come to the conclusion that deduction of the sales tax actually payable under a deferral scheme was not available as deduction from the assessable value, it would not have taken the pains of dealing with the entire sales tax incentive scheme of Haryana and pointing out that Maruti was not covered under the deferral Scheme as envisaged in Section 25A read with Rule 28C(5)(a) of the relevant sales tax rules. Learned counsel submitted that after coming to the conclusion that Maruti was not covered by the said deferral scheme, it was held that to the extent of sales tax collected by it which was neither paid nor was actually payable, the deduction of the same from the assessable value was not permissible.

(iii) Learned counsel further submitted that the decision of the Apex Court in the case of *CCE v Super Synotex reported at 2014 (301) ELT 273 (SC)* **= *2014-TIOL-19-SC-CX*** and also that in the case of *CCE v Shree Rajasthan Syntex* **- 2015-TIOL-49-SC-CX**, both dealt with Sales Tax incentives schemes of 1989 issued by the Government of Rajasthan. The said Scheme was operationalized vide Notification No. F. 4(35) FD/Gr. IV/87-38 dated 06.07.1989 which was issued under Section 4(2) of the Rajasthan Sales Tax Act, 1954, which provides that notwithstanding anything contained in the Act, where the State Government is of the opinion that it is necessary so to do in public interest, it may **by Notification in the official gazette exempt, fully or partially, from the tax**, the sale or purchase of any goods or class of goods or any person or class of person, without any condition or with such condition as may be specified in the Notification. The said incentive scheme was in the nature of an exemption from the levy of sales tax. Thus, under the said sales tax incentive Scheme of 1989, exemption was granted from the levy of sales tax in excess of 25% of the sales tax leviable, and consequently the balance 75% of the sales tax in respect of certain industries was neither to be paid nor was it payable.

(iv) It was submitted that the Hon'ble Apex Court had in the case of Shree Rajasthan Syntex taken note of this fact, while recording the facts in the following terms:

"the Respondent herein are engaged in the manufacture of yarn and waste of manmade fiber. It was availing sales tax exemption under the sales tax incentive scheme of 1989 on the yarn and waste, as issued by the State of Rajasthan. Under this incentive scheme, thought the Respondent was collecting the full incidence of sales tax from its buyer, 75% thereof was retained by the Respondent and only 25% of the said sales tax was payable and paid to the state government in terms of the incentive scheme....."

(v) It was submitted that Section 25(3) of the Rajasthan Sales Tax Act 1994, deals with the provision regarding deferment of sales tax and that the Sales Tax incentive scheme of 1989 was not a scheme for deferral of sales tax but was one for exemption of sales tax.

(vi) Learned counsel further submitted that the distinction between a sales tax exemption and a sales tax deferral has been considered and dealt with by the Apex Court in the case of *Voltas v State of Andhra Pradesh reported at 2004 (11) SCC 569* wherein it was held that concession of deferral does not mean that payment has not become due. Payment became due with the filing of the return. The deferral was granted as the payment had become due. Thus, unlike an exemption where the sales tax is exempted and not payable at the threshold, under the deferral scheme the sales tax payment is statutorily due but is deferred by way of incentive granted in terms of

the statute.
(vii) It was submitted that in the case of Super Synotex, the Apex Court in para 22 thereof specifically recorded that what is not payable or to be paid as sales tax/ VAT should not be charged from the third party/customer, but if it is charged and is not payable or paid it is a part and should not be excluded from the transaction value. These findings which have been arrived at by the Hon'ble Apex Court in the context of the Sales Tax Incentive Scheme, 1989 of Rajasthan, have to be read in the context of the facts of that scheme as applicable in the State of Rajasthan and cannot be applied to a deferral scheme in which, sales tax on clearance of goods, though not actually paid at the time of such clearance, is actually payable, albeit on a future date. The definition of transaction value in Section 4 of the Central Excise Act, 1944 clearly provides for exclusion of the sales tax actually paid or actually payable from the transaction value.
(viii) It was submitted that Section 94(2) of the MVAT Act, 2002 categorically provides for an option for premature payment of the deferred sales tax, by paying an amount equal to the NPV of the deferred tax, and that on making such payment the deferred tax shall be deemed in public interest to have been paid. It was submitted that not only was the amount of sales tax in respect of which deduction has been claimed actually payable, but also by virtue of Section 94(2) of the MVAT Act, 2002, it was also actually paid.
(ix) It was further submitted that payment on the NPV basis did not have the effect of altering the actual sales tax payable, or for that matter what was actually paid, and that if the stand taken by the Revenue was taken to its logical conclusion, it would result in the entire machinery provision of Section 4 of the Central Excise Act, 1944 being rendered unworkable, as then, in no case of a unit working on a deferral scheme, could the transaction value ever be determined, as only after the sales tax liability is actually paid after 15-20 years, depending upon the scheme, would the assessable value crystallize. This is clearly impermissible and would result in the entire provision for computation of the assessable value becoming unworkable and redundant. It is settled law that when the machinery provision fails, tax cannot be levied and that the only way to harmonize the machinery provision is to imply that the legislature never intended to tax or cover such a situation. Reliance in this regard is placed on the judgment of the Apex Court in the case of *CIT v B.C. Srinavasa Shetty reported at (1981) 2 SCC 460* **= *2002-TIOL-587-SC-IT-LB***.
(x) The aspect of limitation had not been considered or dealt with by the adjudicating authority and that if for any reason on merits the assessee's contention did not find favour, the matter would have to be remitted back for a decision on the aspect of limitation. In support of this contention, reliance is being placed upon the decision of the Apex Court in the case of *CCE v. Carrier Aircon Ltd. 2005 (184) ELT 113 (SC)* = ***2005-TIOL-84-SC-CX***.
8. **Appeal No. E/85799/15 Balkrishna Industries Ltd.**
Learned counsel, Shri Prasad Paranjape, appeared for the appellant. His line of argument was similar to that of senior counsel, Shri V.S. Nankani, and he also submitted that the arguments advanced by Shri V.S. Nankani may be taken for him also. Learned counsel further submitted that in their case, the period involved is from April 1994 to March 2004. Thus a substantial part of the demand is for period prior to 2000 when the new Section 4 was introduced. Learned counsel submitted that even the Hon'ble Supreme Court in the case of Super Synotex (India) Ltd. has held that demands are not sustainable for period prior to 1.7.2000. In view of the said position, approximately 2/3rd of the demand is not sustainable on merits itself. It was also submitted that the scheme of pre-payment or deferred tax was introduced by the Government of Maharashtra in December 2002 and the appellant could not have known about such a scheme from 1994 to December 2002. It was also submitted that they have made payment on 15.7.2004 and the show cause notice has been issued on

10.6.2009. Thus the entire demand is beyond the normal period of limitation. It was also submitted that for raising of the demand, Explanation 1(b)(iii) to Section 11A is relevant and since in this case, the relevant date will be the date of payment i.e. 15.7.2004, hence the entire demand is beyond the normal period of limitation and on this ground also, the appeal is required to be allowed. It was further submitted that sales tax deemed to have been paid is to be excluded from the transaction value for the purpose of calculation of the central excise duty. Another submission was that the buyer and seller are not related. Therefore, this is not an additional consideration flowing from buyer to seller. The decision of the apex court in the case of Super Synotex (India) Ltd. (supra) is distinguishable from the facts of the present case. Learned counsel also referred to Section 43B of the Income Tax Act, 1961 and the position there. He also referred to the decision in the case of CIT vs. Suzler (India) Ltd. which has been upheld by the Hon'ble Bombay High Court. The Tribunals decision in the case of *Jayaswal Neco Industries vide order No. 52257-52258 dated 7.5.2014* was referred. It was also submitted that no penalty is imposable in the facts and circumstances of the case and similarly no interest can be levied under Section 11AA of the Act.

9. **Appeal No. E/85201/13-Essel Propack Ltd.**

Learned senior advocate, Shri V. Sridharan appeared on behalf of the above appellant and made the following submissions:-

(i) Explanation to Section 4(1) of the Central Excise Act, 1944 added by Finance Act, 2003 has no bearing on the issue involved in the present matter.

(ii) Section 4 as introduced in 1944 and Section 4 as amended by Finance Act, 1955 did not provide for exclusion of sales tax. Still, the Board Circular clarified that no excise duty is payable on sales tax element.

(iii) The appellant has shown and collected sales tax as separate and distinct item in the invoices issued by it.

(iv) The sales tax collected by appellant from purchaser is not even part of sale price. Where relevant taxing statute permits seller to collect tax from purchaser, amount so collected is not part of price Law laid down in *Spencer and Company 36 STC 188 (S.C)* and *Anand Swarup vs. CST 1980 (4) SCC 451.* Law laid down by Bombay High Court in *Bata case - (1965) 53 STC 132* following Anand Swarups case (supra).

(v) Since the appellants are registered dealer under relevant provision of sales tax law, it has collected sales tax from buyer as a distinct and separate item. Hence, sales tax is not even part of price. Hence, there is no need to rely on exclusion contained in the definition of transaction value.

(vi) Exclusion clause in definition of transaction value relevant where price charged from buyer is inclusive of sales tax. Sales tax collected by dealer would never form a part of the price.

(vii) Distinct and separate provisions exist in the Bombay Sales Tax Act for deferment of sales tax liability and exemption from payment of sales tax same position exists in Maharashtra Value Added Tax Act also.

(viii) Benefit granted to eligible units registered under the Bombay Sales Tax Act is qua unit and not qua goods.

(ix) In view of fourth proviso to Section 38(4) read with third proviso thereto, of Bombay Sales Tax Act, 1959, the appellants has indeed satisfied the condition of 'actually paid'.

(x) Circular dated 25.09.1987 issued by the Central Government in the context of section 43B of Income Tax Act, 1961 cover the present dispute.

(xi) There is no machinery in the Central Excise Act including Section 11A of the Central Excise Act, 1944 to cover situation of the present case.

(xii) Relevant date cannot be calculated from date of NPV payment of sales tax. Proviso to Section 11A cannot apply in the present case. Future event of opting to pay as NPV

method can never be relevant fact for the assessment of goods at the time of removal. Hence, non- intimation of the same to department cannot be called as suppression of the facts in order to invoke proviso to Section 11A of the Central Excise Act, 1944.
(xiii) The principle of *Res judicata* shall not apply to the present matter.
(xiv) Section 63 of the Contract Act 1872 - principle of accord and satisfaction - whole Debt stands discharged. If creditor accepts lesser sum of money from the debtor, debt payable to creditor continues to be same sum. Debt is not wiped out. It is only unenforceable. Provisions of Contract Act are in nature of general principles of law, hence the same will apply to all the taxing statutes.
(xv) No suppression by the appellants in the present matter- Declarations duly filed by the appellants as required under Rule 173C of the Central Excise Rules, 1944.
(xvi) Disintegration of the definition of "transaction value" into various portions will show that entire definition including the last leg deals with money flowing from buyer to seller only.
(xvii) The last portion of the definition of transaction value deals 'non-inclusion clause'. The last portion provides for non-inclusion of sales tax, excise duty or other taxes from the price actually paid or payable by the buyer to the seller in relation to sale of goods from the transaction value. Obviously, the last portion of the transaction value providing for non-inclusion of sales tax, excise duty or other taxes actually paid or payable by the buyer to the seller from the price for sale of goods by the seller to buyer. From perusal of last portion also there is no doubt that the money is to flow from buyer to seller only. The exclusion clause also in transaction value also deals with transaction between buyer and seller only.
(xviii) The amount of sales tax collected by the appellants under the Bombay Sales Tax Act from the buyer could not be part of the price for arriving at the transaction value under Central Excise Act.
(xix) Sales tax collected in previous years has nothing to do with the assessable value of clearances made during the succeeding years.
(xx) Expenses in relation to post manufacturing are not includible in the transaction value.
10. Learned Commissioner (AR), Shri Hitesh Shah, made the following submissions:-
(i) The issues relating to the Package Scheme of Incentives under the BST Act, 1959 and MVAT Act, 2002 involved in the present Appeals were considered by the CESTAT in *Kinetic Engineering Vs CCE 2012 (283) E.L.T. 229 (T)* **= *2012-TIOL-508-CESTAT-MUM*.** The Department had appealed to the Hon'ble Supreme Court and the Civil Appeals no. 8095-8103 of 2013 were allowed as reported at *CCE Vs. Super Syncotex Ltd. 2014 (301) E.L.T. 273 (S.C.)* **= *2014-TIOL-19-SC-CX*** Similar is the position in the case of Gala Precision Techh Pvt. Ltd. F.O. no. A/261/12/EB/C II in Appeal no. E/1056/11-Mum. In view of the fact that Hon'ble Supreme Court has already decided the issue, nothing remains.
(ii) Explanation to sub section (1) of Section 4 declares that the entire amount collected by the assessee from the buyer excluding Sales tax and other taxes if actually paid shall be the price cum duty. The amount of Central Excise duty shall be arrived at from this amount only. Hence, Central Excise duty has to be levied on such amount of monies which are collected as sales tax but not actually paid.
(iii) Clause (d) of Sub section (3) of Section 4 uses the expressions:
- 'price actually paid or payable
- 'any amount the buyer is liable to pay'
- 'whether payable at the time of sale or at any other time'
- 'any amount charged for or to make provision for'
- 'actually paid or actually payable'

Learned Commissioner (AR) submitted that the legislature has while making inclusions in the concept of 'transaction value" included amounts which may not have been

actually paid by the buyer to the assessee but while making exclusions therein only excluded ' amount of sales tax actually paid or actually payable. Hence, even in case taxes are payable at the time of removal of goods, deduction thereof from the transaction value is allowable only if:
the amount payable by buyer as sales tax, or charged from buyer as sales tax, or charged from buyer to make a provision for payment of sales tax is actually paid as sales tax. The term 'actually paid or actually payable' mandates that the amount allowed as deduction on account of tax should be an amount which is really/in fact payable and is actually paid up.
(iv) Regarding the claim of the appellants that Section 38 of the Bombay Sales Tax Act, 1959 (Section 94 of the MVAT Act 2002) and similar provisions provide that in case the Sales Tax payable, which is deferred, is partially paid under the Package Scheme of Incentives, it shall be deemed to be full discharge of the Sales Tax liability and hence, the Sales tax should be deemed to have been actually paid, learned Commissioner (AR) submitted that a non obstante clause or a deeming provision in the State Act is applicable to and useful only for the purposes of the State Act. It has no application to the provisions of the Central Act, i.e. Central Excise Act 1944. In this case, the proviso to the said Section 38 (Section 94 of the MVAT Act 2002) clearly states that both the non obstante clause and the deeming provision apply only for the purpose of the State Act and rules made thereunder. In any case, the use of the words 'actually paid or payable' in the definition of transaction value and 'actually paid' in the Explanation to Section 4(1) of the CEA 1944, forbid us from applying this deeming provision while arriving at the assessable value under Section 4 of the CEA 1944.
(v) Regarding the claim that premature payment of the deferred Sales Tax at Net Present Value (NPV) is a full discharge of the whole debt of the assessee to the Sales Tax Department in view of Section 63 of the Contract Act, 1872, learned Commissioner (AR) submitted that tax is levied, assessed and collected in exercise of a sovereign power and hence the analogy of a creditor and debtor or promisor and promisee cannot be admissible and consequently the provisions and considerations of either the Contract Act, 1872, common law or equity are not applicable as has been held by the High Court of *A.P. in Delta Paper Mills Ltd. Vs. CCE 1995 (77) ELT 544 (A.P.)*
(vi) Learned Commissioner (AR) submitted that, Section 4 allows deduction only of the 'amount' actually paid as Sales Tax and nothing more. If the entire amount collected as Sales Tax is not actually paid as Sales Tax to the Sales Tax Authority, the amount not so paid shall form part of the assessable value for the levy of Central Excise duty under Section 4. The arrangement between the Sales Tax Authority and the assessee by virtue of the 'deeming' proviso to the said Section 38 of the BST Act, 1959 (Section 94 of the MVAT Act 2002) or 'accord and satisfaction' of the these two parties for discharge of debt/fulfillment of promise as per the said Section 63 are not criteria relevant for arriving at the amount deductible as 'tax actually paid or actually payable' under Section 4 of the CEA 1944.
(vii) Learned Commissioner (AR) further submitted that the Larger Bench of CESTAT has held in the case of Gopal Industries Ltd. Vs. CCE that meanings given to words and phrases used in the Income Tax Act and Sales Tax statutes are not applicable to Central Excise Law. The Supreme Court has in *Mafatlal Industries Vs. UOI 1997 (89) ELT 247 (SC)* **= *2002-TIOL-54-SC-CX-CB*** at para 68 held that The Central Excise Act 1944 is a comprehensive, self contained statute and provides for levy, assessment and collection of tax and all ancillary provisions. The provisions of the Contract Act, 1872 and other general laws shall not apply for its interpretation or enforcement or for other matters relating to Central Excise duty.
(viii) The amount of money collected as tax by the assessee from his buyer, is a cost to the purchaser and the purpose and intention of Section 4 is to levy Central Excise duty on the entire cost to the purchaser. However, if the amount collected as tax is actually

paid up as tax, only then is it excludible from the transaction value. Any amount collected as tax but not so paid up, forms part of the profit of the assessee and forms part of the assessable value as observed by Hon'ble Supreme Court in para 22 and 23 of CCE Vs. Super Syncotex (I) Ltd. (supra). The Court has held that CBEC Circular dt. 12.3.1998 is not applicable to the period from 1.7.2000, after Section 4 was substituted. There is no relief from the rigour of actually paying the entire amount collected as Sales Tax to the sales tax authority. Even if the amount collected as sales tax and retained by the assessee, is deemed as payment of sales tax under the State Act or such partial payment is considered as full discharge of debt under Section 63 of the Contract Act, such amount collected but not paid as tax shall not be excludible from the price for the purpose of Central Excise duty (para 16 , 23 & 26 of the Judgement). There is no scope for any exclusion from the price, on account of any book adjustments done under the State Act, of amounts retained by the assessee, as loans or incentives from the State Authority to the assessee.

(ix) Learned Commissioner (AR) submitted that it is possible that the seller/assessee may be satisfied with no payment or fractional payment from his buyer for the price of goods sold, and in terms of the Contract Act it may be a full discharge of the debt of the buyer to the assessee. However, the satisfaction of such contract between the assesse and his buyer cannot in anyway affect the assessable value of the goods under the CEA 1944. Liability to pay tax is governed by statute and not by terms of any contract. In case a contract is assumed to exist for payment of sales tax, a contract should also be assumed to exist for payment of Central Excise duty. In that case, the contract which allowed the assessees to claim deduction of amount collected as Sales Tax/VAT, from the transaction value, at the time of removal of goods, is satisfied only when the entire amount so collected is actually paid to the sales tax Authority. And in case it is not so paid, the contract is not satisfied and demand may be made of the Central Excise duty payable on such amount collected as tax and retained by the assessees. So also, the accounting of the Sales Tax authority of the sums due to it as tax from the assessee is of no relevance for the purpose of the said Section 4. All that is required to be seen is whether the full amount of money claimed as deduction on account of Sales Tax/VAT is actually paid tax or not. If not actually paid, it shall be part of transaction value.

(x) The Supreme Court in its decision in the case of Super Syncotex at para 19 to 23 held that:

'On perusal of the assessment orders brought on record, it is quite clear that in pursuance of the Scheme 75% of the sales tax amount was credited to the account of the State Government as payment towards sales tax by the manufacturer. 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. In this factual backdrop, it has to be held that circular entitles an assessee to claim deduction towards sales tax from the assessable value.

.....

20.The question that would still remain alive is that what would be the effect of

amendment of Section 4 which has come into force with effect from 1-7-2000. The Section 4(3)(d) which defines "transaction value", reads as follows:-

.....

23. In view of the aforesaid legal position, unless the sales tax is actually paid to the Sales Tax Department of the State Government, no benefit towards excise duty can be given under the concept of "transaction value under" Section 4(4)(d), for it is not excludible. As is seen from the facts, 25% of the sales tax collected has been paid to the State exchequer by way of deposit. The rest of the amount has been retained by the assessee. That has to be treated as the price of the goods under the basic fundamental conception of "transaction value" as substituted with effect from 1-7-2000. Therefore, the assessee is bound to pay the excise duty on the said sum after the amended provision had brought on the statute book.'

and allowed the Appeals of the Department for the period from 1.7.2000 onwards. It can be appreciated from the above that, as per the Supreme Court, whether the scheme of Sales Tax/VAT may be one of exemption or incentive, whether by waiver of payment or otherwise, in case any amount is collected as Sales Tax/VAT and retained by the assessee, such retained amount shall be part of the transaction value and chargeable to Central Excise duty w.e.f. 1.7.2000.

(xi) Learned Commissioner (AR) submitted that various courts have consistently held that the term 'duty payable' means the duty actually paid:

UOI Vs Alembic Glass Industries 1992(61) ELT 193 (kar)
TELCO 1990(48) ELT 182 (Bom)/1997 (94) ELT A141 (SC)
Someshwar SSK Ltd. Vs UOI 1988 (34) E.L.T. 522 (Bom.)
Pravara Pulp and Paper Mills 1997 (96) ELT 497 (SC)
(Followed in Srichakra Tyres Ltd. Vs CCE 1999 (108)ELT 361 (T-LB)/2002(142)ELT A279(SC)) **= *2002-TIOL-140-CESTAT-DEL-LB***
GTC Industries Ltd 2004 (164) ELT 230 (SC)
ACCE Vs Bata India Ltd. 1996 (84) ELT 164 (SC) **= *2002-TIOL-207-SC-CX***
Orient Weaving Mills (P) Ltd. v. U.O.I. 1978 (2) E.L.T. (J 311) (S.C.) **= *2002-TIOL-315-SC-CX-CB***
Orient Paper Mills Ltd. 1982 (10) E.L.T. 247(Del.) Orient Paper Millls Vs UOI 1997 (96) E.L.T. 15 (S.C.) **= *2003-TIOL-73-HC-DEL-CX***
*CCE Vs Hindustan Pharmaceuticals Ltd. 2004 (167) E.L.T. 161 (Tri. - LB) = **2004-TIOL-268-CESTAT-DEL-LB***

(xii) Learned Commissioner (AR) quoted the following judgments to support his contention of actual payment.

(1) Modipon Fiber Co. Vs. CCE 2007 (218) ELT 8(SC) **= *2007-TIOL-188-SC-CX***
(2) CCE Vs. Sujata Textile Mills Ltd. 2005 (181) ELT 379 (SC) **= *2005-TIOL-62-SC-CX-LB***

(xiii) It has been submitted by the Appellant that in case the amount of Sales Tax is shown separately in the invoice then such amount does not form part of the price and hence the question of its exclusion or inclusion in the assessable value does not arise. Reliance has been placed on the decision in *Anand Swarup 1980 (4) SCC 451 (SC)* and other judgements. Learned Commissioner (AR) submitted that in all the decisions pertaining to Central Excise enumerated above, the Supreme Court has clearly laid down with respect to Sales Tax, Central Sales Tax and Turnover Tax, that they are part of the consideration received by the manufacturer, from the buyer for sale of goods, and shall form part of the assessable value for levying Central Excise duty, in case they are not actually paid to the concerned Tax Authority. Moreover, the decision in Anand Swarups case has been distinguished by a Constitution Bench of the Supreme Court in the case of *McDowell and Co. Ltd. Vs. CTO AIR 1986 SC 649* **= *2002-TIOL-40-SC-CT-CB***. The definition of the term 'turnover' in the Andhra Pradesh General Sales Tax Act, 1957, considered in that case, was similar to the definition of 'transaction value'. The

Court held that 'turnover, for the purpose of Sales Tax, shall include the Excise Duty paid under the Andhra Pradesh Excise Act, 1968, even if such Excise duty was paid to the Government account by the buyer and that the amount of such duty was not billed by the dealer to the buyer. Yet, Sales Tax shall be payable on the turnover which includes the amount of such Excise duty. The decision in McDowell's case (supra) was followed by the Supreme Court in *Central Wines Hyderabad Vs. Special CTO 1987 AIR 611, 1987 SCR (1) 945.*

(xiv) This Tribunal had in the case of *SAIL Vs. CCE 1997 (90) E.L.T. 502 (T)* relied on the decision in Anand Swarup's case (supra) and was upheld by its Larger Bench in the case of *SAIL Vs. CCE 2000 (119) E.L.T. 249 (Tribunal - LB)*. Both, the decision of the Division and the Larger Bench of CESTAT, were overruled by the Supreme Court in *Tata Iron & Steel Co. Ltd. Vs. CCE 2002 (146) E.L.T. 3 (S.C.)* = ***2002-TIOL-32-SC-CX***. The Supreme Court held at para 25 of the said decision that:

'Principles on which "income" is to be determined under the Income-tax Act cannot apply when determining "value" for purposes of Excise Duty. Under the Income-tax Act, tax is payable on income which reaches the assessee. On the other hand, Section 4 of the said Act shows that excise is payable on the price at which goods are ordinarily sold to the buyer.'

Learned Commissioner (AR) further submitted that reliance placed on the decision in *Bata India Ltd Vs. State of Maharashtra (1983) 53 STC 132 (Bom)* is misplaced because the then definitions of 'sale price' and 'turnover of sales' in the BST Act, 1959 are limited and not similar to 'transaction value'. The judgment also turned on the reason that Sections 37,46 & 63 of the BST Act, 1959 would be rendered otiose in case it was held that the term 'sale price' included the sales Tax paid. In any case the said decision relies heavily on the decision in the case of Anand Swarup (supra).

(xv) It is submitted by the Appellant in the case of Essel Propack that, deferred payment of Sales Tax is covered by the 3rd proviso to Sec 38 (4) of the BST Act, 1959 and repayment at NPV under the 4th proviso thereof. It was also emphasized that under the Package Scheme of Incentives, this deferred tax amount is converted to a loan liability and the tax is deemed to have been paid once such loan is raised by SICOM. The payment at NPV is the repayment of the loan and not of the deferred tax because the tax is already deemed to have been paid. It may be appreciated that in the case of Super Syncotex (supra) a similar situation existed. The assesse could collect the amount of tax but pay only 25% of it to the State Government under the Incentive Scheme. The CESTAT allowed their appeal relying on para 4 of CBEC Circular dt. 12.3.1998 wherein it was said that in case, the tax collected and retained by the assesse, is accounted and adjusted as a cash incentive by the State to the assessee in the accounts of the State then the entire amount of tax collected is deductible from the price to arrive at the assessable value. The Supreme Court held that such deduction is allowable only uptil 1.7.2000 and not after it. This is because such adjustment is not allowable under the amended Section 4 and the entire amount of Sales Tax collected should be actually paid.(para 16 to 19,23 and 26 of CCE Vs. Super Syncotex (India) Ltd. (supra).

(xvi) The decision of the Supreme Court in the case of *CCE Vs. Maruti Suzuki India Ltd. 2014 (307) E.L.T. 625 (S.C.)* = ***2014-TIOL-74-SC-CX*** pertains to demands for the period 2001-02. Hence, the said decision does not consider the Explanation added to Sub section (1) of Section 4 by the Finance Act, 2003 w.e.f. 14.5.2003. The Explanation clarifies that transaction value is the 'price actually paid' and 'excluding sales tax and other taxes, if any, actually paid. The reference to 'actually payable' in the dictionary clause of 'transaction value' is limited by this Explanation. The demands in the impugned Appeals are for the period after 14.5.2003.

(xvii) CBEC Circular M.F.(D.R.) F. No. 354/81/2000-TRU dt. 30.6.2000 which clarified the position after insertion of the amended Section 4 w.e.f 1.7.2000 is not relevant

after the insertion of the aforesaid Explanation.
(xviii) The Budget Circular/Letter of TRU explaining the provisions of Budget 2003-04 and the Explanation to Section 4(1) does not say that the said 'Explanation' has the limited purpose of arriving at transaction value in cases of non levy of duty only. The said letter cites some examples of arriving at transaction value and very clearly states that sales tax and other taxes are deductible only if actually paid. In any case the Circular/letter cannot control the plain meaning of the said Explanation when read as a part of Section 4(1).
(xix) The extended period of limitation is invocable because:
The goods are removed from the factory under an invoice as per the provisions of Rule 11 (2) of the CER 2002 which prescribes inter alia that value is to be mentioned. The value to be mentioned is the value as defined in Section 4 and duty is to be paid thereon. Only the amount of sales tax and other taxes actually paid at the time of removal is excludible from the price cum duty for arriving at the value. On each invoice the assessee has declared that they have paid or shall pay the amount collected as sales tax under such invoice to the sales tax authority. Even in cases where the Package Scheme of Incentives is mentioned, it is solemnly stated that they are availing of facility of deferred payment of sales tax. It has never been declared to the Department that they shall be retaining parts of the amount collected as sales tax and not paying the same to the sales tax authority. On the other hand they have willfully misstated that they shall pay the amounts collected as sales tax to the sales tax authority. In their periodical ER1 returns they have mentioned the 'Value' of goods after deducting the entire amount collected as sales tax/ not included the entire amount collected as sales tax.
They have not mentioned the amounts collected as sales tax. They have not informed the Department about the deductions made towards sales tax/ the amounts collected as sales tax. They have not informed the Department about the retention of amounts collected as sales tax but not paid to the sales tax authority.
(xx) The Hon'ble Supreme Court has in the following cases, upheld the demands for extended period in identical/similar cases. Remand, if any, is only for the purpose of excluding the demands for the period prior to 1.7.2000 and for the purpose of computation of penalty after reworking out of the demand post 1.7.2000:
CCE Vs. Super Syncotex(India) Ltd. 2014 (301) ELT 273(SC) = ***2014-TIOL-19-SC-CX***
CCE Vs Shree Rajasthan Syntex 2015 (318) ELT 626 (SC) **=** ***2015-TIOL-49-SC-CX***
Maruti Suzuki Ind 2014 (307) ELT 625 (SC) **=** ***2014-TIOL-74-SC-CX***
Modipon Fiber Co. Vs. CCE 2007 (218) ELT 8(SC) **=** ***2007-TIOL-188-SC-CX***
CCE Vs Pepsi Foods (2007) 213 ELT 321(SC) **=** ***2007-TIOL-106-SC-CX***
CCE Vs National Engg. Industries Ltd. **2015-TIOL-108-SC-CX**
(xxi) In the case of *Bharat Roll Industries 2008 (229) ELT 107 (T)*, the CESTAT had confirmed the invocation of extended period because the assessee had collected CST and not paid it to the Government. Appeal against this decision was dismissed by the Supreme Court on merits and limitation as reported at *CCE Vs. super Syncotex (India) Ltd. 2014 (301) ELT 273(SC) =* ***2014-TIOL-19-SC-CX*** and Review Petition was also dismissed as reported at *Bharat Roll Industry (Pvt.) Ltd. v. Commissioner - 2015 (317) E.L.T. A187 (S.C.)*
The Department also relies on the following decisions for invocation of the extended period of limitation:
-CCE Vs Steel Industries 2005(188) ELT 33 (T)
-Ajmer Industries Gases Pvt 2014(310) ELT 872 (Raj) = ***2014-TIOL-771-HC-RAJ-CX***
-Syncom Foundations (India) Ltd. 2008 (221) ELT 206 (T) **=** ***2007-TIOL-425-HC-MP-CX***
-Burn Standard Co. Ltd. 2000 (119) ELT 650 (T)
-Dewas Metal Sections Ltd. 2015 (319) ELT 104 (T) **=** ***2015-TIOL-599-CESTAT-DEL***

-Concept Pharmaceuticals Ltd. 2015 (310) ELT 129 (T).

(xxii) In the decision of *CCE Vs Shree Rajasthan Syntex 2015 (318) ELT 626 (SC)* **=** ***2015-TIOL-49-SC-CX***, at para 5 thereof, the Court states that it has gone through the Order of the Commissioner and are of the opinion that he has rightly held that the extended period of limitation as per proviso of Section 11A(1) of the CEA 1944 would be applicable in the given circumstances. A copy pf the said Order no. 03/CE/JP II/2003 dt. 10.3.2003 issued from F No. V(55)15/5/Off/Acts-II/135/20/800-804 of the CCE Jaipur II was placed on record to support that facts are exactly same. This has been upheld by the Apex Court.

(xxiii) Learned Commissioner (AR) submitted that in the impugned Appeals the facts are similar. The assessee has made a solemn declaration on the invoices issued under Rule 11 of the CER 2002 that the value is the correct and true value and that there is no additional consideration. The assessee has made a solemn declaration that the sales tax/VAT is paid or shall be paid. The assessee has in their ER1 Returns, submitted to the Department, declared as Value of clearances, an amount excluding the entire amount collected as Sales Tax, whereas they have not paid this entire amount to the Sales Tax Authority. Hence, there is wilfull misstatement of facts and suppression thereof with an intent to evade payment of duty. Hence, the extended period of limitation is invocable.

(xxiv) In any case, the goods were self assessed to duty and cleared under Self Removal procedure. It was not mentioned on the ER 1 Returns that the assessee is collecting more Sales Tax than actually paid. At the time and place of removal of goods there was no levy or assessment by the Department. The assessee assessed the duty after claiming deduction of Sales Tax at the rate prevalent and stating on the invoice (not submitted to the Department) that such amount is/ shall be actually paid. Hence, as per the assessees averment there was no short levy or non levy or short payment or non payment of Central Excise duty at that instant. The liability to pay duty arose at the point in time when it was found that they had not actually paid the amount collected and claimed as deduction on account of Sales Tax. In such cases, the provisions of Section 11A do not apply and demands can be made of the amount of Central Excise duty not paid. Reliance is placed on he following decisions of CESTAT, High Court and Supreme Court:

CCE Vs Smithkine Beecham Consumer Health Care Ltd. 2003 (151) ELT 5(SC)

Bombay Hospital Trust Vs CC 2005 (188) ELT 374 (T-LB) **=** ***2005-TIOL-996-CESTAT-MUM****/ Upheld 2006 (201) ELT 555 (Bom)* **=** ***2006-TIOL-170-HC-MUM-CUS*** *And Civil Appeal no. 1397/2008 dismissed as reported at 2015 (315) ELT A 26 (SC)*

11. One of the contentions of the Commissioner (AR) is that the issues relating to the Package Scheme of Incentive under the Bombay Sales Tax Act, 1959 and Maharashtra Value Added Tax Act, 2002 involved in the present appeals and the arguments made by the assessees were considered by the CESTAT in nine appeals decided by a common judgment reported at *Kinetic Engineering Ltd. vs. CCE 2012 (283) ELT 229 (T)* = ***2012-TIOL-508-CESTAT-MUM***. It was submitted by the learned Commissioner (AR) that the department has appealed to the Hon'ble Supreme Court and the Hon'ble Supreme Court in the case of Super Synotex (supra) has allowed all the appeals and hence according to the Commissioner (AR) that there is nothing to be decided in these appeals as the matter is already decided by the Hon'ble Supreme Court in the case of Super Synotex.

12. On the other hand, all the counsels on behalf of various assessees have opposed the said contention on various grounds. The foremost ground is that a reading of the Super Synotex case would indicate that the Package Scheme of Incentive which leads to deferment of payment of sales tax was not at all discussed in the case of Super Synotex, even though the said decision of the Hon'ble Supreme Court disposes of the Revenues appeal in the case of Kinetic Engineering Ltd. (supra).

13. Learned senior counsel, Shri V.S. Nankani, has also submitted that even if it is presumed that the Hon'ble Supreme Court has disposed of the appeals of the Revenue relating to Kinetic Engineering Ltd. but that is only by way of remand and Tribunal has to decide it keeping in view principles laid down by Hon'ble Supreme Court. Moreover, since the Hon'ble Supreme Courts judgment is sub silentio on the issue involved in these appeals, the judgment of the Hon'ble Supreme Court will not be automatically applicable to the present set of appeals.

14. We have gone through the judgment of the Hon'ble Supreme Court in the case of Super Synotex. A perusal of the order would indicate that what was being considered by the Hon'ble Supreme Court was that when a part of the sales tax collected which was permitted to be retained by the manufacturer will form part of the transaction value for determination of excise duty or not. Thus the issue was that the law permits Rs.100/- to be collected as sales tax which was collected by the manufacturer but law also provided that Rs.75/- will be retained by the manufacturer and only Rs.25/- will be paid to the Government. The question was whether Rs.75/- will form part of the transaction value or not. The issue in all the appeals here is not this but a different. Here the issue involved is that the manufacturer assessees were required to collect certain amount as sales tax which was collected by them. The said amount of sales tax was to be paid after a specified period say 11 to 15 years and in the meantime, was allowed to be retained by the law with the assessees. In 2002, the law was amended by which it became optional for the manufacturer assessees to pay the amount either at the end of stipulated period or at any point of time earlier on the basis of net present value (on the date of prepayment) of the amount of sales tax to be paid at the end of deferral period. We also note that there is no discussion about such a scheme in the Super Synotex judgment of the Hon'ble Supreme Court. The obvious conclusion is that none of the parties who were appearing before the Hon'ble Supreme Court pointed out to the Hon'ble Supreme Court that the issue involved in other appeals is different. It also appears to us that none of such affected appellants/respondents have argued issue involved in their cases as we do not find any arguments which have been advanced before us or which were discussed in the case of Kinetic Engineering by this Tribunal as recorded or discussed in the Hon'ble Supreme Courts judgment. It does not appear that the counsels for the various respondents in the case of Kinetic Engineering were present in the Hon'ble Supreme Court and did explain the differentiating aspect and after hearing them, the Hon'ble Supreme Court dismissed their pleas and passed the said judgment. We also note that the Hon'ble Supreme Court has not finally allowed the appeal of the Revenue but has set aside all the orders passed by the original authority as also the Tribunal and remanded the matter to this Tribunal to decide the issues keeping in view the principles laid down in the said order. In view of the above factual position, we are of the considered view that the issue involved in the present appeals is not decided by the Hon'ble Supreme Court in the case of Super Synotex. However, the principles laid down by the Hon'ble Supreme Court in the case of Super Synotex have to be taken into account while deciding the present set of appeals.

15. We have also gone through the case of Rajasthan Syntex Ltd. (supra). The said case was exactly as that of Super Synotex and was again pertaining to the scheme under Rajasthan Sales Tax Act and the same scheme as discussed in the case of Super Synotex and therefore Hon'ble Supreme Court has followed the judgment of Super Synotex. Another case cited is that of Maruti Suzuki. We find that in this case scheme is under Haryana Sales Tax Act and the scheme is different from the scheme of Super Synotex or the deferral scheme which is the subject matter of the present set of appeals. In the case of Maruti Suzuki, the manufacturer assessee was permitted under the law to collect the normal sales tax applicable on the vehicles manufactured by it but was allowed to retain the sales tax amount upto a specified value and within a specified period. Here, therefore, the question was when the appellant has collected certain

amount as sales tax but was not required to pay the same to the Government due to incentive scheme pertaining to the prestigious units, whether or not would be excluded for computing the transaction value for excise duty purpose. Here again, the Hon'ble Supreme Court has taken the view that it is not the sales tax collected that is excludible but it is the sales tax actually paid or actually payable to the State Government that can be excluded. We therefore agree with the submissions of the learned senior counsel Shri V.S. Nankani as also all other counsels and do not find substance in the submission made by the learned Commissioner (AR) that issue is already decided by Hon'ble Supreme Court in the case of Super Synotex.

16.0 While coming to the above conclusion, we note that the Hon'ble Supreme Court in the case of *CC(Port), Chennai vs. Toyota Kirloskar Motor (Pvt.) Ltd. reported in 2007 (213) ELT 4 (SC)* **= *2007-TIOL-94-SC-CUS***, has observed as under:-

"30.The observations made by this Court Essar Gujarat Limited (supra) in Paragraph 18 must be understood in the factual matrix involved therein. ***The ratio of a decision, as is well-known, must be culled out from the facts involved in a given case. A decision, as is well-known, is an authority for what it decides and not what can logically be deduced therefrom.*** *Even in Essar Gujarat Limited (supra), a clear distinction has been made between the charges required to be made for pre-importation and post-importation. All charges levied before the capital goods were imported were held to be considered for the purpose of computation of transaction value and not the post-importation one. The said decision, therefore, in our opinion, is not an authority for the proposition that irrespective of nature of the contract, licence fee and charges paid for technical know-how, although the same would have nothing to do with the charges at the pre-importation stage, would have to be taken into consideration towards computation of transaction value in terms of Rule 9(1)(c) of the Rules."*

16.1 Similarly, the Hon'ble High Court of Calcutta in the case of *Bipin M. Pujara vs. CC reported in 1999 (107) ELT 298 (Cal.)* has observed as under:-

"19. It is now a well settled principle of law that each and every decision of the Apex Court cannot be followed without considering the factual background and/or the argument advanced before it.

20. In Union of India v. Dhanwanti Davi, reported in 1996 (6) SCC 44, the Apex Court held as under:

It is not everything said by a Judge while giving judgment that constitutes a precedent. The only thing in a Judges decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendy. According to the well settled theory of precedents, every decision contains three basic postulates- (i) findings of material facts, direct and inferential. An inferential finding of fact is the inference which the Judge draws from the direct or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above. A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in the judgment. Every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there, is not intended to be exposition of whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found.

21. Therefore, in order to understand and appreciate the binding force of a decision it is always necessary to see what were the facts in the case in which the decision was given and what was the point which had to be decided. No judgment can be read as if it is a statute. A word or a clause or a sentence in the judgment cannot be regarded as a full exposition of law. Law cannot afford to be static and, therefore, Judges are to

employ an intelligent technique in the use of precedents."
22. The said decision has recently been followed by a. learned Judge of the Patna High Court in Union of India v. Kashinath Mahto, AIR 1998 Patna 100.
23. Yet again, a Division Bench of this Court, in Jaya Sen v. Sujit Kumar Sarkar, AIR 1998 Calcutta 288, of which I was a member, inter alia, held as under:
"27. It is now well known that a decision is an authority for what it decides and not what can logically be deduced therefrom. It is also well known that even a slight distinction in fact or an additional fact may make a lot of difference in decision making process. See Quinn v. Lealham (1900-1903) AER (Rep) 1, Krishna Kumar v. Union of India, 1990 (4) SCC 207: (AIR 1990 SC 1782), Commissioner of Income-tax v. Sun Engineering Co. Ltd. reported in AIR 1993 SC 43: (1993 Tax LR 58), Regional Manager v. Pawan Kumar Dubey, reported in AIR 1976 SC 1766, and Municipal Corporation of Delhi v. Gurnam Kaur reported in 1988 (1) SCC 101 = AIR 1989 SC 38.
28. It is also a settled law that a decision is not an authority on a point which was not argued. See Mittal Engineering Works (P) Ltd. v. Collector of Central Excise, reported in 1997 (1) SCC 203 = ***2002-TIOL-201-SC-CX*** *."*
24. As indicated hereinbefore, the questions raised in this application were not raised before the Apex Court in CIT Limited (supra) and Pankaj Jain Agency (supra); and in this view of the matter this Court is bound to follow the decisions wherein the Apex Court had relied on the law after considering the rival contentions on the point at issue."
16.2 We also note that the Hon'ble Supreme Court in the case of *CCE, Calcutta vs. Alnoori Tobacco Products reported in 2004 (170) ELT 135 (SC) =* ***2004-TIOL-85-SC-CX***, has observed as under:-
"11. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclids theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. In London Graving Dock Co. Ltd. v. Horton (1951 AC 737 at p. 761), Lord Mac Dermot observed:
"The matter cannot, of course, be settled merely by treating the ipsissima vertra of Willes, J as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished judge."
12. In Home Office v. Dorset Yacht Co. [1970 (2) All ER 294] Lord Reid said, Lord Atkins speechis not to be treated as if it was a statute definition. It will require qualification in new circumstances. Megarry, J in (1971) 1 WLR 1062 observed: One must not, of course, construe even a reserved judgment of Russell L.J. as if it were an Act of Parliament. And, in Herrington v. British Railways Board [1972 (2) WLR 537] Lord Morris said:
"There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances made in the setting of the facts of a particular case."
13. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.
14.The following words of Lord Denning in the matter of applying precedents have become locus classicus:

"Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect, in deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive.

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Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it."

16.3 Keeping in view the observations made by the Hon'ble Supreme Court as also of the Hon'ble High Court in the above mentioned cases, the fact that we are of the considered view that the issue about the includibility of deferral payment of sales tax has not been discussed by the Hon'ble Supreme Court in the case of Super Synotex (supra) and the facts of the case and issue involved in Super Synotex was very different and therefore the conclusions drawn in the case of Super Synotex cannot be straight away applied to the facts of the present cases which involve scheme of deferral payment of sales tax and thereafter prepayment on the basis of net present value.

17. Before we examine the issue with reference to provisions of law and common contentions made by almost every counsel, we shall examine the contentions which were peculiar to learned senior counsel Shri V. Sridharan.

18. One of the submissions made by the learned senior counsel, Shri V. Sridharan, is that the Explanation to Section 4(1) of the Central Excise Act, 1944 which was inserted by Finance Act, 2003, has no bearing on the issue involved in the present matter. During the hearing, learned senior counsel took pain to explain about the situation what was happening before the said Explanation was inserted. In nutshell, there were differing decisions of various courts relating to cum duty price and in order to sort out the matter, the said Explanation was inserted. It was the contention of the learned senior counsel that this Explanation had no application as far as deductibility or includibility of excise duty or sales tax in the value is concerned. On the other hand, learned Commissioner (AR) argued that this Explanation very clearly provides that all that can be excluded is sales tax, if any, actually paid. If the sales tax collected is more than actually paid, then the same will form part of the price cum duty and the value and duty liability will have to be computed based upon the Explanation.

18.1 We have given considerable thought to the propositions made by both the sides. The relevant Explanation which was introduced is as under:-

"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, flowing 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 taxes, if any, actually paid, shall be deemed to include the duty payable on such goods."

A reading of the said Explanation would indicate that price-cum-duty of the excisable goods shall be the price actually paid to the assessee for the goods sold (we are leaving the part relating to money value of additional consideration as that is not relevant to the present dispute) and such price-cum-duty excluding sales tax and other taxes, if any, actually paid shall be deemed to include the duty payable on such goods. While we agree with the learned senior counsels detailed description of circumstances under which the Explanation was added, but we are not agreeable to the contention that the application of the Explanation has to be limited to the examples quoted by the learned senior counsel. There can be a situation where particular goods manufactured may attract sales tax of Rs.50/- but a manufacturer may be collecting Rs.75/-instead of

Rs.50/-. Then as far as excise law is concerned, the differential amount of Rs.25/- will be taken into account while determining the duty liability on the said goods. This may be in addition to any action that Sales Tax authorities may be taking against such manufacturer for higher collection of sales tax which may not be permitted by law. In our view, from the Explanation, it is very clear that the total price i.e. total amount actually collected by a manufacturer from the customer has to be taken into account and only the actually paid sales tax and other taxes are required to be excluded for determining the assessable value for the excise duty liability. Learned senior counsels proposition that the said explanation has application only in situation explained in Boards circular issued in 2003 is rejected as even circular no where says so.

19. Another submission made by the learned senior counsel, Shri V. Sridharan, that Section 4 as introduced in Central Excise Act in 1944 and Section 4 as amended by Finance Act, 1955 did not provide for exclusion of sales tax. Still the Board clarified that no excise duty is payable on sales tax element. We are not able to appreciate how the above position helps the cause of the assessees. Even now it is not as if the sales tax is required to be included for assessment of value and hence duty liability. All that is being said (and which is matter of dispute) is the sales tax and other taxes actually paid or payable are only required to be excluded and not any amount purported to be sales tax. Further, since the new Section 4 specifically provides for exclusion of sales tax actually paid or actually payable, no other interpretation can be taken. Even earlier circular nowhere provided that if a manufacturer is collecting Rs.100/- in the name of sales tax as against Rs.60/- actually leviable or to be paid to the Sales Tax Department, then reduction will be Rs.100/-. In nutshell, we do not find this contention of the learned senior counsel helps in resolving the issue or the cause of the appellant.

20. Another submission of the learned senior counsel is that the assessee has shown and collected sales tax as a separate and distinct item in the invoice issued by them and hence cannot be even considered as price. Here again, the fact that sales tax is being shown separately in the invoices as a distinct item does not imply that a manufacturer or an assessee can collect any amount and that amount cannot be part of the assessable value. Collection of sales tax is one aspect and the amount actually paid or actually payable is different aspect. The law does not provide exclusion for the amount collected. It provides the exclusion for the sales tax and other taxes actually paid or actually payable. In view of the said position, the fact that the assessee has shown and collected sales tax as a separate and distinct item in the invoices is of no consequence in determining the assessable value and hence excise duty liability. The learned senior counsel has also submitted that sales tax collected by the assessee from purchaser is not even part of sales price and in support of that, he has quoted the Hon'ble Supreme Courts judgment in the case of *George Oakes Pvt. Ltd. reported in 1961 (12) STC 476 (SC)*. We are not impressed with this argument. The said judgment of the Hon'ble Supreme Court is in the context of Madras sales tax and not with reference to Section 4 of the Central Excise Act, 1944. In fact, if the senior counsels submissions are accepted, then all the judgments of the Hon'ble Supreme Court in the case of Super Synotex (I) Ltd., Rajasthan Syntex Ltd. and Maruti Suzuki Ltd. have to be considered as wrong. The Hon'ble Supreme Court in these three judgments has gone to the definition of the value as it exists in Section 4 of the Central Excise Act w.e.f. 1.7.2000 and then has come to the conclusion that part of the sales tax which was retained in all the cases i.e. Super Synotex (I) Ltd., Rajasthan Syntex Ltd. and Maruti Suzuki Ltd will form part of the assessable value. In all the cases what the Hon'ble Supreme Court has held is that the sales tax which was collected but not required to be paid and hence not paid to the Sales Tax authority will form part of the assessable value. It may be mentioned that in all the three earlier mentioned cases, retention of part of the sales tax was permitted under sales tax law. Even in that condition, the Hon'ble Supreme Court keeping in view the language of Section 4 of the

Central Excise Act, has held that only the sales tax which has been paid to the State Government can be excluded from the assessable value. We also note that the learned senior counsel also has submitted that where relevant taxing statute permits seller to collect tax from purchaser, the amount so collected is not a part of price as held by the Hon'ble Supreme Court in the case of *Joint Commissioner of Sales Tax reported in 1975 (36) STC 188 (SC)*. It is also submitted that the same principle has been followed in the case of *Anand Swarup vs. CST reported in 1980 SCC 451*. Learned AR, on the other hand, has argued how and why these judgments are not applicable. We have gone through these judgments. These are for purpose of computing value for sales tax purpose or turnover for sale tax or turnover tax and are with reference to those Acts. We note that the question here is the value for purpose of excise when the sales tax collected from the purchaser is higher than what has been paid to the Sales Tax authority and in view of the very clear definition of the same under Section 4 of the Central Excise Act, only the sales tax which is actually paid or payable to the Sales Tax Authority/State Government can be excluded. It is not the collection of sales tax but sales tax actually paid or payable is the criteria. In view of the said position, the decisions mentioned by the learned senior counsel are not applicable for the purpose of Central Excise law. The learned senior counsel also submitted that in the case of *Bata India Ltd. reported in 1965 (53) STC 132 (Bom.)*, it has been held that under the Bombay Sales Tax Act, registered dealer is authorised to collect tax from purchaser and hence it is not part of price. In fact, similar notification exists in excise. Even in excise, excise duty is not considered as part of transaction value or price or even for computing the turnover, say for SSI purpose. As mentioned earlier, every law has its own purpose and its own definition. When the Central Excise law very clearly states that sales tax actually paid or payable only is required to be excluded, the case law mentioned will not be applicable for the purpose of Section 4 of the Central Excise Act. We therefore dismiss the contention of the senior counsel.

21. Another submission of the learned senior counsel was that the assessees are registered dealer under the relevant provisions of the Sales Tax law. It has collected sales tax from buyer as a distinct and separate item. Hence sales tax is not even part of the price. Hence there is no need to rely on the exclusion contained in the transaction value. We are not agreeable to the proposition made by the learned senior counsel as there is no authority or basis to make such a plea. There is no provision under the Central Excise Act to support his contention. A cursory reading of Section 4 of the Central Excise Act, particularly the definition of the transaction value, even in clause (d) of Section 4(3) makes it very clear that the transaction value means price actually paid or payable for the goods. The definition itself excludes only the amount of excise duty, sales tax and other taxes, **if any, actually paid or actually payable on such goods.** Therefore whether the sales tax is collected as a separate or distinct item or invoice shows a consolidated figure is of no consequence whatsoever for determining the transaction value under Section 4. The learned senior counsel also has submitted that the exclusion clause in definition of transaction value is relevant when price charged from buyer is inclusive of sales tax. We do not find any authority to make such a claim. In fact the transaction value as defined in the Act includes 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 sale or at any other time including, but not limited to, any amount charged for, or to make provision for, advertising or publicity, marketing or 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**. If in the definition of the transaction value, the words if any, actually paid or actually payable on such goods

were not there, then perhaps the learned senior counsels submission would have some weight but once the definition provides exclusion of only actually paid or payable, the argument of the learned senior counsel holds no water. We accordingly reject it.

22. Another submission made by the learned senior counsel is that the benefit granted to eligible units registered under the Bombay Sales Tax Act is qua unit and not qua goods. Benefits given are to units satisfying the criteria specified by the Government from time to time, however, such benefits are for the goods produced or manufactured in such unit. Thus the benefit is finally with reference to goods manufactured by a unit satisfying the eligibility entitlement criteria. The excise duty is with reference to the goods and as per the law, one has to see how much sales tax is actually paid or payable by the manufacturer to the Sales Tax authorities. This contention of the senior counsel is therefore rejected.

23. Another submission of the learned senior counsel was that there is no machinery in the Central Excise Act including Section 11A of the Central Excise Act, 1944 to cover situation in the present case. We are not impressed with this argument of the learned senior counsel. The Central Excise Act/Rules provides scheme of provisional assessment which is a definite machinery where assessment for any reason cannot be finally made at the time of clearance. In case a manufacturer is not resorting to the provisional assessement, it is his bounden duty to suo motu pay the duty liability as soon as it arises under the self assessment procedure. We are therefore of the view that the Central Excise Act already has a machinery provision to take care of the situation. Just because a provisional assessment will be pending finalisation for years does not mean that there are no machinery provisions under the Central Excise Act. The contention is therefore rejected.

24. Learned senior counsels another submission is that the relevant date cannot be calculated from the date of NPV payment of sales tax but should be calculated from 16.11.2002 i.e. the date of notification issued by the Government of Maharashtra to insert Rule 31(b) in the Bombay Sales Tax Act. We do not find any strength in the assessees contention and is without any supporting authority of law. The insertion of Rule 31(b) is not relevant for determining the relevant date under the Central Excise Act. In our view, it has no relevance and hence rejected.

25. Another submission of the learned senior counsel was that Section 63 of the Contracts Act, 1872 which provides principle of accord satisfaction whole debt stands discharged. The learned senior counsel has also submitted that if the creditor accepts lesser sum of money from the debtor, debt payable continues to be the same. Debt is not wiped out. It is only unenforceable. These pleas are relevant between the creditor and debtor. Section 63 of the Contracts Act is also in the same context. These submissions are not relevant for determining the sales tax actually paid or actually payable and thereafter determining the transaction value and thereafter duty liability under the Central Excise Act. We agree with the submissions of the learned Commissioner (AR) in this context, particularly para 10(v), 10(vi), 10(vii) and 10(ix). Contention of the learned senior counsel is therefore rejected.

26. Another submission of the learned senior counsel was that disintegration of the definition of the transaction value into various portions will show that the entire definition including the last lag, deals with money flowing from buyer to seller only. We have gone through the definition of the transaction value. While it is true that the said definition including the last lag deals with money flowing from buyer to seller but this includes all taxes such as excise, sales tax and other taxes and the said definition for purpose of determining the transaction value excludes only the excise duty, sales tax and other taxes, if any, actually paid or payable on such goods. Thus the money flowing from buyer to seller is total amount which includes all taxes. It is different matter that taxes are to be paid by seller to various authorities. In any case, for computing transaction value exclusion is only of the sales tax actually paid or actually

payable on such goods. Thus this submission is rejected.
27. Another submission was that the amount of sales tax collected by the assessee under the Bombay Sales Tax Act from the buyer could not be part of the price for arriving at the transaction value under the Central Excise Act. We have already discussed this issue earlier also. The Central Excise Act does not provide that the amount of sales tax **collected** by the assessee will not form part of the price for arriving at the transaction value but the definition of the transaction value excludes the sales tax **actually paid or payable**. Exclusion is not with reference to collection but with reference to actually paid or actually payable. This contention is also rejected.
28. Another submission made by the learned senior counsel was that the sales tax collected in previous years has nothing to do with the assessable value of clearances made during the succeeding year. While the proposition as such appears to be alright but in the present case the Revenue has not made a case that the assessable value of clearances is related to the sales tax collected in the earlier year. This submission is also rejected.
29. The learned senior counsels another submission was that the expenses in relation to post manufacturing are not includible in the transaction value. We are not impressed with such an argument. Such an argument in year 2015 does not make any sense. The Hon'ble Supreme Court in various landmark judgments including *Bombay Tyres International and MRF* has taken the view. In fact the definition of the transaction value in Section 4 would indicate that a lot of post manufacturing expenses are part of the transaction value. We do not even consider it necessary to discuss such a contention and is outrightly rejected.
30. Another submission made by the learned senior counsel was that the provisions of the contract are in nature of general principles of law. Hence the same will apply to all the taxing statute. We are not impressed with such a proposition. The general principles of law may be taken help only when a specific law is silent on the issue. When things are specific in a particular law and certain things have to be done in a specified manner, the general law is irrelevant. Contention is therefore rejected.
31. Now we proceed to examine the issue with reference to Section 4. Section 4 of the Central Excise Act, 1944 as it stood before 1.7.2000 read as under:-

*"**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 value, such value, shall, subject to the other provisions of this section, be deemed to be-

(a) the normal price thereof, that is to say, the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal, where the buyer is not a related person and the price is the sole consideration for the sale:

Provided that-

(i) where, in accordance with the normal practice of the wholesale trade in such goods, such goods are sold by the assessee at different prices to different classes of buyers (not being related persons) each such price shall, subject to the existence of the other circumstances specified in clause (a), be deemed to be the normal price of such goods in relation to each such class of buyers;

(ia) where the price at which such goods are ordinarily sold by the assessee is different for different places of removal, each such price shall, subject to the existence of other circumstances specified in clause (a), be deemed to be the normal price of such goods in relation to each such place of removal;

(ii) where such goods are sold by the assessee in the course of wholesale trade for delivery at the time and place of removal at a price fixed under any law for the time being in force or at a price, being the maximum, fixed under any such law, then, notwithstanding anything contained in clause (iii) of this proviso, the price or the

maximum price, as the case may be, so fixed, shall, in relation to the goods so sold, be deemed to be the normal price thereof;
(iii) where the assessee so arranges that the goods are generally not sold by him in the course of wholesale trade except to or through a related person, the normal price of the goods sold by the assessee to or through such related person shall be deemed to be the price at which they are ordinarily sold by the related person in the course of wholesale trade at the time of removal, to dealers (not being related persons) or where such goods are not sold to such dealers, to dealers (being related persons), who sell such goods in retail;
(b) where the normal price of such goods is not ascertainable for the reason, that such goods are not sold or for any other reason, the nearest ascertainable equivalent thereof determined in such manner as may be prescribed.
2. Where, in relation to any excisable goods the price thereof for delivery at the place of removal is not known and the value thereof is determined with reference to the price for delivery at a place other than the place of removal, the cost of transportation from the place of removal to the place of delivery shall be excluded from such price.
3. The provisions of this section shall not apply in respect of any excisable goods for which a tariff value has been fixed under sub-section (2) of section 3.
4. For the purposes of this section,
(a) "assessee" means the person who is liable to pay the duty of excise under this Act and includes his agent;
(b) "place of removal" means-
(i) a factory or any other place or premises of production or manufacture of the excisable goods;
(ii) a warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty;
(iii) a depot, premises of a consignment agent or any other place or premises from where the excisable goods are to be sold after their clearance from the factory and, from where such goods are removed;
*(ba) "**time of removal**", in respect of goods removed from the place of removal referred to in sub-clause (iii) of clause (b), shall be deemed to be the time at which such goods are cleared from the factory;*
(c) "related person" means a person who is so associated with the assessee that they have interest, directly or indirectly, in the business of each other and includes a holding company, a subsidiary company, a relative and a distributor of the assessee, and any sub-distributor of such distributor.
Explanation.-In this clause "holding company", "subsidiary company" and "relative" have the same meanings as in the Companies Act,1956 (1 of 1956);
*(d) **"value", in relation to any excisable goods**,-*
i. where the goods are delivered at the time of removal in a packed condition, includes the cost of such packing except the cost of the packing which is of a durable nature and is returnable by the buyer to the assessee.
Explanation.-In this sub-clause, "packing" means the wrapper, container, bobbin, pirn, spool, reel or warp beam or any other thing in which or on which the excisable goods are wrapped, contained or wound;
ii. does not include the amount of the duty of excise, sales tax and other taxes, if any, payable on such goods and, subject to such rules as may be made, the trade discount (such discount not being refundable on any account whatsoever) allowed in accordance with the normal practice of the wholesale trade at the time of removal in respect of such goods sold or contracted for sale.
Explanation.-For the purposes of this sub-clause, the amount of the duty of excise payable on any excisable goods shall be the sum total of -
a. the effective duty of excise payable on such goods under this Act; and

b. the aggregate of the effective duties of excise payable under other Central Acts, if any, providing for the levy of duties of excise on such goods, and the effective duty of excise on such goods under each Act referred to in clause (a) or clause (b) shall be-
i. in a case where a notification or order providing for any exemption (not being an exemption for giving credit with respect to, or reduction of duty of excise under such Act on such goods equal to, any duty of excise under such Act, or the additional duty under section 3 of the Customs Tariff Act, 1975 (51 of 1975), already paid on the raw material or component parts used in the production or manufacture of such goods) from the duty of excise under such Act is for the time being in force, the duty of excise computed with reference to the rate specified in such Act, in respect of such goods as reduced so as to give full and complete effect to such exemption; and
ii. in any other case, the duty of excise computed with reference to the rate specified in such Act in respect of such goods."
32. With effect from 1.7.2000, the new Section 4 of the Central Excise Act, 1944 underwent a major change inasmuch as instead of concept of the normal value of the goods, the concept of transaction value was introduced. The relevant portions of the new Section 4 are as under:-
"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 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, flowing 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 taxes, if any, actually paid, shall be deemed to include the duty payable on such goods.*
(2) The provisions of this section shall not apply in respect of any excisable goods for which a tariff value has been fixed under sub-section (2) of section 3.
(3) For the purpose of this section,-
(a) "assessee" means the person who is liable to pay the duty of excise under this Act and includes his agent;
(b) persons shall be deemed to be relatedif -
(i) they are inter-connected undertakings;
(ii) they are relatives;
(iii) amongst them the buyer is a relative and a distributor of the assessee, or a sub-distributor of such distributor; or
(iv) they are so associated that they have interest, directly or indirectly, in the business of each other.
***Explanation**.-In this clause -*
(i) "inter-connected undertakings" shall have the meaning assigned to it in clause (g) of section 2 of the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969); and
(ii) "relative" shall have the meaning assigned to it in clause (41) of section 2 of the Companies Act, 1956 (1 of 1956);
(c) "place of removal" means (i) a factory or any other place or premises of production or manufacture of the excisable goods;
(ii) a warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty;
(iii) a depot, premises of a consignment agent or any other place or premises from

where the excisable goods are to be sold after their clearance from the factory; from where such goods are removed;
*(cc) "**time of removal**", in respect of the excisable goods removed from the place of removal referred to in sub-clause (iii) of clause (c), **shall be deemed to be the time at which such goods are cleared from the factory**;*
*(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**."*
33. The Section 4 mentioned above is for the period prior to 1.7.2000 as also w.e.f. 1.7.2000 as in the appeals before us, in some cases demands are pertaining to period beginning prior to 1.7.2000 and in other cases after 1.7.2000.
34. From the above definition of value it is seen that the concept of time and place of removal has always (i.e. before 1.7.2000 and from 1.7.2000) been an integral part of the definition for computation of the value of the goods. As per old Section 4, normal value has to be determined for delivery at the time and place of removal and as per new Section 4, the transaction value has to be determined for delivery at the time and place of removal.
35. As per old Section 4, normal value was defined under Section 4(4)(d)(ii) and **excluded sales tax payable.** The transaction value has been defined in new Section 4(3)(d) to mean **the price actually paid or payable** for the goods when sold and includes.. (not relevant for present case) 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**. Thus under old section, sales tax payable was to be excluded while under new section sales tax actually paid or actually payable to be excluded. But both the normal value and the transaction value are at the time of removal. A combined reading of the definition of time of removal, place of removal and normal value or transaction value would indicate that the normal value or transaction value is required to be determined keeping in view the situation/factors prevailing at the time and place of removal.
36. The Hon'ble Supreme Court in the case of *Purolator India Ltd. vs. CCE, Delhi-III reported in* - **2015-TIOL-193-SC-CX**, has examined the concept of time and place of removal in Section 4 of the Central Excise Act. In the said case in para 18, 23 and 24, the Hon'ble Supreme Court has observed as under:-
*"18. It can be seen that Section 4 as amended introduces the concept of "transaction value" so that on each removal of excisable goods, the transaction value of such goods becomes determinable. Whereas previously, the value of such excisable goods was the price at which such goods were ordinarily sold in the course of wholesale trade, post amendment each transaction is looked at by itself. However, transaction value as defined in sub-clause (3)(d) of Section 4 has to be read along with the expression for delivery at the time and place of removal. It is clear, therefore, **that what is paramount is that the value of the excisable goods even on the basis of transaction valuehas only to be at the time of removal, that is, the time of clearance of the goods from** the appellants factory or depot as the case may be. The expression actually paid or payable for the goods, when sold only means that whatever is agreed to as the price for the goods forms the basis of value, whether such price has been paid, has been paid in part, or has not been paid at all. The basis of transaction value is therefore the agreed contractual price. Further, the expression when sold is not*

meant to indicate the time at which such goods are sold, but is meant to indicate that goods are the subject matter of an agreement of sale. Once this becomes clear, what the learned counsel for the assessee has argued must necessarily be accepted inasmuch as cash discount is something which is known at or prior to the clearance of the goods, being contained in the agreement of sale between the assessee and its buyers, and must therefore be deducted from the sale price in order to arrive at the value of excisable goods at the time of removal.

23. It only remains to discuss the sheet anchor of revenue's case, namely, the judgment of this Court in Commissioner of Central Excise, Jaipur-II v. Super Synotex (India) Ltd. and Ors. (supra). The said judgment was concerned with sales tax incentives that were given under the Rajasthan Sales Tax Incentives Scheme. On the facts of that case, 25% of the sales tax was paid to the Government, and 75% of the said amount of sales tax was retained by the assessee and became the assessees profit. Under the earlier Board's circulars that were issued by the Central Board of Excise and Customs, the amount of 75% of sales tax that was never paid to the Government but retained by the assessee was also liable to be deducted from "price" under the old Section 4, that is, Section 4 before its amendment in the year 2000. This Court held that the amended Section 4 would require that such amount of 75% is not deductible as sales tax because, according to this Court, only sales tax that is "actually paid" could be deducted post Section 4 as amended in 2000. This Court said:-

"It is evincible from the language employed in the aforesaid circular that set off is to be taken into account for calculating the amount of sales tax permissible for arriving at the "transaction value" under Section 4 of the Act because the set off does not change the rate of sales tax payable/chargeable, but a lower amount is in fact paid due to set off of the sales tax paid on the input. Thus, if sales tax was not paid on the input, full amount is payable and has to be excluded for arriving at the "transaction value". That is not the factual matrix in the present case. The assessee in the present case has paid only 25% and retained 75% of the amount which was collected as sales tax. 75% of the amount collected was retained and became the profit or the effective cost paid to the assessee by the purchaser. The amount payable as sales tax was only 25% of the normal sales tax. Purpose and objective in defining transaction value or value in relation to excisable goods is obvious. The price or cost paid to the manufacturer constitutes the assessable value on which excise duty is payable. It is also obvious that the excise duty payable has to be excluded while calculating transaction value for levy of excise duty. Sales tax or VAT or turnover tax is payable or paid to the State Government on the transaction, which is regarded as sale, i.e., for transfer of title in the manufactured goods. The amount paid or payable to the State Government towards sales tax, VAT, etc. is excluded because it is not an amount paid to the manufacturer towards the price, but an amount paid or payable to the State Government for the sale transaction, i.e., transfer of title from the manufacturer to a third party. Accordingly, the amount paid to the State Government is only excludible from the transaction value. What is not payable or to be paid as sales tax/VAT, should not be charged from the third party/customer, but if it charged and is not payable or paid, it is a part and should not be excluded from the transaction value. This is the position after the amendment, for as per the amended provision the words "transaction value" mean payment made on actual basis or actually paid by the assessee. The words that gain signification are actually paid. The situation after 1-7-2000 does not cover a situation which was covered under the circular dated 12-3-1998. Be that as it may, the clear legislative intent, as it seems to us, is on "actually paid". The question of "actually payable" does not arise in this case.(at para 22)"

24. It will be noticed that this Court did not deal with Section 4(1)(a) as amended in the year 2000 insofar as it speaks of delivery of goods at the time and place of removal. This Court was only concerned with whether sales tax is to be deducted from

"transaction value" as newly defined. We have already seen that "transaction value" specifically states that it will not include sales tax "actually paid oractually payable on such goods". ***On the facts of that case, this Court was not concerned with the expression actually payable as it did not arise in that case.*** *This Court was only concerned with sales tax not actually paid to the Rajasthan Government, and therefore held that since 75% of sales tax was retained by the assessee, the said amount could not be deducted as only amounts payable to the State Government as sales tax can be deducted. This was so held on an interpretation of the last part of the definition of transaction value. The facts of the present case are concerned with the first part of the definition of 'transaction value' which has to be read with Section 4(1)(a) as has been stated above."*

It will thus be seen even the Hon'ble Supreme Court has discussed the case of Super Synotex in the above mentioned case and has observed that the time and place of removal is an important criteria while determining the transaction value and time and place of removal was not discussed in the case of Super Synotex as in that case that was not a material factor and everything was known and happening at the time of removal. Hon'ble Supreme Court has also observed that in Super Synotex case, the Court was concerned with actually paid and not actually payable.

37. Thus one has to first of all examine what is the overall price of the goods which is actually paid or payable for the goods by the buyer and exclude from it excise, sales tax and other taxes, if any, actually paid or actually payable on such goods. Thus to determine the transaction value for purpose of excise duty, one will have to find out the price actually paid or payable for the goods as also the sales tax which is actually paid or actually payable on such goods.

In the situation in hand, when the goods are sold, the sale price which includes excise duty, sales tax etc. is already known. However, for computing the transaction value, one has to exclude the sales tax actually paid or actually payable in addition to excise duty. In the case of Package Scheme of Incentives relating to deferral of the sales tax, the manufacturers/assessees are collecting the normal sales tax chargeable on such goods but the same is not deposited within the normal period (which may be monthly or quarterly) but is permitted to be retained with the assessee for a very long period say 10 to 15 years and after the expiry of the said period, the assessee is required to deposit the said sales tax amount to the Sales Tax authority. When the goods are being cleared (i.e. time of removal) actual sales tax paid is nil but sales tax actually payable is the normal sales tax or what has been collected by the assessee from its customers. Among the terms "actually paid or actually payable" used in transaction value, actually paid is not relevant in the present set of appeals. What is relevant is "actually payable". Actually payable at the time of clearance is the deferral sales tax. Thus, in our view, the amount of deferral sales tax will require to be excluded.

38. Now we examine what is the Boards understanding about the treatment of deferment of sales tax. The Central Board of Customs and Excise vide circular No. 378/11/98-CX dated 12.3.1998, has examined the issue with reference to the old Section 4 and observed as under:-

"Subject: Determination of assessable value for levy of excise duty where an incentive is provided by the State Govt. in the form of retention of Sales-tax by the manufacturers - Regarding.

The undersigned is directed to refer to Board's Circular No. 4/85 (F.No. 6/ 15/85-CX.I), dated 14-3-1985 regarding addition and exclusion of Sales-tax in the assessable value. The trade has raised a doubt about the deductions given in respect of sales tax leviable by State Government, while determining the Assessable value. The following three situations arise as a result of incentive schemes formulated by some of the State Governments for ensuring rapid industrialisation in the backward areas of the States:-

(i) Exemption from payment of sales tax for a particular period;

(ii) Deferment of payment of sales tax for a particular period;
(iii) Grant of incentive equivalent to sales tax payable by the units.
2. The matter regarding the above three situations has been examined by the Board in consultation with Ministry of Law.
3. In. category of cases mentioned in Para 1(i) sales tax is not deductible as no sales tax is payable by the assessee in accordance with the Law.
4. In situation (ii), Sales tax is payable by the assessee after a particular period. In situation (iii), the manufacturer collects the sales tax from the buyers and retains the same with him instead of paying it to the State Govt. The State Govt. on the other hand grants a cash incentive equivalent to the amount of sales tax payable and instead of the cash incentive being paid to the manufacturer, is credited to State Govt. account as payment towards sales tax by the manufacturer. In such a situation sales tax is also considered payable by the assessee within the meaning of the provisions of Section 4(4) (d)(ii) of the Central Excise Act, 1944. Therefore, sales tax is deductible from the wholesale price for determination of assessable value for levy of Central Excise Duty in category of cases mentioned in Para 1(ii) & (iii) above.
5. The advice of Ministry of Law in the matter has been accepted by the Board and is enclosed for information."
It is seen that the present situation is covered by (ii) above and for the period prior to 1.7.2000 i.e. under old Section 4, the Board was of the view that sales tax payable is deductible from the whole sale price for the determination of assessable value for levy of central excise duty in category (ii).
38.1 On 1.7.2000 the new section was introduced. At the time of introduction of new Section 4, the Board has issued circular F.No. 354/81/2000-TRU dated 30.6.2000. Para 10 and 11 are relevant for the present issue and the same are reproduced below:-
"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 payble to the Government or the relevant statutory authority by way of excise, sale tax and other taxes, such amount 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 concesssional rate shall only be allowed to be deducted from price. The assessee cannot claim that the excise duty or tax payable at the "normal rate" should 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."
It will be seen that in para 11, the Board has observed that 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 on 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**. Thus even at the time of introduction of new Section 4, the Board recognised the fact that the term actually payable will come into play in the deferment scheme. Thus amount of sales tax which is actually payable under the deferment scheme will be excluded for determining the transaction value.
38.2 We also note that since the assessees who are working under the deferment scheme use the sales tax collected over a long period of time and thus get financially benefited in the above scheme as no interest on such amount is payable by them, the matter was again examined by the Board and the Board vide circular No.679/70/2002-CX dated 4.12.2002, clarified the matter as under:-

"Subject: Inclusion of interest on sales tax in the assessable value.
I am directed to refer to Boards Circular No. 378/11/98-CX., dated 12-3-98 [1998 (99) E.L.T. T5] wherein it has been clarified that in situation where deferment of payment of Sales tax for particular period is allowed by State Government as incentive, Sales tax is deductible from the wholesale price for determination of assessable value for levy of Central Excise duty even though it may not be deposited immediately with the State Government.
(2) Doubts have been raised as to whether in such cases, where sales tax is retained by the assessee, the interest on the money retained, should be treated as additional consideration in terms of Rule 6 of Central Excise (Valuation) Rules, 2000, or not.
(3) The matter has been examined in the Board. As per Rule 5 of the earlier Valuation Rules, 1975 & Rule 6 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, additional consideration should flow directly or indirectly from the buyer to the seller. The interest earned, on deferred sales tax, by the manufacturer is not a benefit extended by the buyer to the seller but is an incentive, accruing in pursuance of State Government policy. Therefore, this amount cannot be treated as additional consideration under the Central Excise Valuation Rules and the same cannot be added to the assessable value in terms of Rule 5 of Central Excise Valuation Rules, 1975 or Rule 6 of the Valuation Rules, 2000.
(4) This circular may be brought to the notice of the field formations.
(5) Suitable Trade Notice may be issued for the benefit of the Trade.
(6) Hindi version will follow.
(7) Receipt of these instructions may be acknowledged."
Thus Board was of the view that interest earned cannot be added to the assessable value in such facts and circumstances both under Valuation Rules, 1975 or Valuation Rules, 2000 i.e. under old Section 4 or new Section 4.
38.3 It would thus be seen from the above three circulars that the Board has all along been of the view that under the deferment scheme of sales tax, the sales tax is payable though after a long period of time and since the sales tax is payable, the same will stand excluded from the normal value or the transaction value.
39. The only issue in the present case is that the manufacturer assessees have availed the 4th proviso to Section 38 of the Bombay Sales Tax Act, 1959 or the corresponding section of the Maharashtra Value Added Tax Act, 2002 and instead of paying the amount on the deferred dates, they have paid the amount on an earlier date and the amount paid was based upon the net present value of the amount actually payable on the due date. The 4th proviso to Section 38 of the Bombay Sales Tax Act reads as under:-
"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."
It will be thus seen that the said section provides for prepayment of the sales tax on net present value and on payment of net present value, it is deemed that the whole of the sales tax amount payable is paid. Thus as far as the Sales Tax Act authorities are concerned, whole of the deferred sales tax amount payable has been paid by the assessee/dealer. The fact that the said amount has been paid after the clearances of the goods and before the deferred date of payment, to our view will not make any difference. Further, the actual amount paid is equal to NPV (which is less than originally

payable), cannot make the amount actually payable at the time and place of removal different, particularly when under Sales Tax Law such a payment is considered as deemed payment of the sales tax payable. Quantum of sales tax payable does not change in the above scheme of pre-payment.

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.

41. One of the contentions raised by the learned counsel, Shri Vipin Jain, was relating to the Hon'ble Supreme Court judgment in the case of Maruti Udyog Ltd. (supra). The learned counsel has tried to argue that the said judgment is authentic declaration by the Hon'ble Supreme Court that in the case of deferral scheme, the same will not be includible in the transaction value. We have gone through the said judgment of the Hon'ble Supreme Court. What the Hon'ble Supreme Court has come to the conclusion in the said case was that the Haryana Sales Tax scheme relating to prestigious unit in that case was considered by the Tribunal as a deferral scheme while the scheme was not a deferral scheme. The Hon'ble Supreme Court was not dealing with the issue whether in the case of deferral of sales tax, the same will be excludible in the transaction value. In any case, it is not even the case of the Revenue that in case of deferral scheme of sales tax, the deferred amount will form part of the transaction value. The case of the Revenue is that the amount paid as per NPV is far less the amount actually payable under the deferral scheme and the difference of the two will form part of the assessable value. The judgment of the Hon'ble Supreme Court has not given any decision on the issue on hand.

42. One of the contentions of various counsels was that Section 43B of the Income Tax Act, 1961 allows deduction from full amount of sales tax and not for the amount of NPV

paid. They have also submitted the CBDT circular dated 25.9.1987 as also dated 29.12.1993. They have also submitted that this issue has been decided by the Income Tax Appellate Tribunal in the case of Sulzer India Ltd. vs. Joint CIT (supra) which in turn has been upheld by the Hon'ble Bombay High Court in Income Tax Appeal No.450 of 2013. We have gone through the said section as also the various submissions. Section 43B of the Income Tax Act, 1961 allows the deduction of taxes paid in a particular year only if taxes are actually paid in that year. The question was whether the taxes under the deferral scheme are to be considered as actually paid in the year when these are deferred or should be considered as paid when they are actually paid in the year of deferral for purpose of computation of the income. The two circulars referred by the senior counsel are in that context. Further, the issue before the Income Tax Appellate Tribunal as also the Hon'ble Bombay High Court in the case of Sulzer India Ltd. vs. Joint CIT was whether to consider the difference between the differential tax payable and the net present value actually paid as revenue receipt or capital receipt in the year of actual payment. Obviously the issue before the Income Tax Appellate Tribunal and the Hon'ble Bombay High Court was very different and not relevant for our purpose. Even the two circulars of the CBDT are in a different context and are for a different Act, and in Section 4 of Central Excise Act, 1944 words used are actually paid or actually payable. For ease of reference, we reproduce below the two circulars:-

a. No. 496 [F. No. 201/34/86-IT(A-II)], dated 25-9-1987

1. Several State Governments have introduced sales tax deferred schemes as a part of the incentives offered to entrepreneurs setting up industries in backward areas. Under these schemes, eligible units are permitted to collect sales tax and retain such tax for a prescribed period. After this period, the sales tax is to be paid to the Government either in lump sum or in instalments.

2. Section 43B of the Income-tax Act, 1961, introduced by the Finance Act, 1983, with effect from 1-4-1984 provides, inter alia, that a deduction in respect of any sum payable by the assessee by way of tax or duty under any law for the time being in force shall be allowed from the income of the previous year in which such sum is actually paid irrespective of the previous year in which the liability to pay such sum was incurred. Since the introduction of this provision, the assessees who collect sales tax, but do not pay the amounts to the Government during the previous year, under the deferral schemes provided by the State Governments are not entitled to the benefit of deduction from their income.

3. Representations have been received from various State Governments and others that cases of deferred sales tax payments should be excluded from the purview of section 43B as the operation of this provision has the effect of diluting the incentive offered by the deferral schemes.

4. The matter has been examined in consultation with the Ministry of Law and the various State Governments. The Ministry of Law has opined that if the State Governments make an amendment in the Sales Tax Act to the effect the sales tax deferred under the scheme shall be treated as actually paid, such a deeming provision will meet the requirements of section 43B.

5. The Government of Maharashtra have by the Bombay Sales Tax (Amendment) Act, 1987, made the amendment accordingly. The Board have decided that where amendments are made in the sales tax laws on these lines, the statutory liability shall be treated to have been discharged for the purposes of section 43B.

b. "CLARIFICATION 2: Circular: No. 674, dated 29-12-1993

1. The scope of application of the provisions of section 43B to the sales tax collected but not actually paid under deferral schemes of the State Governments was considered in Boards Circular No. 496, dated 25-9-1987 [Clarification 2], and it was decided that, where the State Governments make an amendment in the Sales-tax Act to the effect that the sales tax deferred under the scheme shall be treated as actually paid, the

statutory liability shall be treated as discharged for the purposes of section 43B.
2. It has since been brought to the notice of the Board that some State Governments, instead of amending the Sales-tax Act, have issued Government Orders notifying schemes under which sales tax is deemed to have been actually collected and disbursed as loans. Such Government Orders also provide that entries shall be made in the Government accounts giving effect to deemed collections by crediting the appropriate receipt-heads relating to sales-tax collections and debiting the heads relating to disbursal of loans. It has, therefore, been represented that, as such conversion of the sales tax liability into loans have similar statutory effect as can be achieved through amendments of the Sales-tax Act, the amounts covered under the scheme should be allowed as deduction for the previous year in which the conversion has been permitted by the State Governments.
3. The Board have considered the matter and are of the opinion that such deferral schemes notified by the State Governments through Government Orders meet the requirements of the Boards Circular No. 496, dated 25-9-1987 in effect though in a different form. Accordingly, the Board have decided that the amount of sales tax liability converted into loans may be allowed as deduction in the assessment for the previous year in which such conversion has been permitted by or under Government Orders.
A perusal of the two circulars would indicate that the CBDT has clarified in consultation with the Ministry of Law that if the Sales Tax Act provides that the sales tax deferred under the scheme shall be treated as actually paid, such a deeming provision will meet the requirements of Section 43B of the Income Tax Act.
43. There can be a view that since the retention period is very long say 10 to 15 years and the value of the money changes with time. Therefore, the sales tax payable at the time of clearance should be the net present value of the deferred sales tax payable at the time of clearance. In fact such a view cannot be brushed aside because in the normal trade or commerce while it is usual to make payments within a specified period of few weeks or few months and even for taxes like sales tax or excise duty, the period of payment may be one monthly or quarterly but anything beyond that is normally not permitted, the assessee/dealer is required, in addition, to pay the interest on the delayed payment. If we keep in mind that the value of the money changes with time, then it will be appropriate to consider net present value of the sales tax payable after say 10 to 15 years and consider that as the sales tax payable at the time of clearance. However, we note that this is not the understanding of the Central Board of Excise and Customs. Moreover, no rules or any notification has been provided for computing a net present value or how to enforce such a scheme for purpose of excise duty. In Maharashtra, the State Government has specified Net Present Value by way of notification but that may not be so in other States or NPV may be different. In any case there should be legal sanctity to take net present value at the time of clearance for purpose of determination of transaction value under the Central Excise Act. In the absence of such provisions in law, NPV at the time of clearance cannot be taken. In any case the notices in the present appeals do not propose any such demand. What is proposed is to consider the deferred amount of tax minus actual NPV paid as part of assessable value and duty liability on such an amount.
44. In some of the appeals, the period involved is prior to 1.7.2000. Prior to 1.7.2000, the law did not stipulate exclusion of the amount actually paid or actually payable but stipulated the sales tax payable. Thus prior to 1.7.2000, in any case, the demands will not be sustainable. In view of the above position, in our considered view, the transaction values determined by the manufacturer assessees are in order.
45. In addition to the issue on merits, issue relating to limitation has also been raised. Learned counsels for the respondent-assessees have pleaded that since the issue on limitation was not decided by the Commissioner, even though the same was raised in

the show cause notice, the matter must go back to the Commissioner for deciding the issue on limitation in case the manufacturer-assessees fail on merits. Some of the manufacturer-assessees have also argued why the extended period of limitation will not be applicable in their cases. In respect of two appeals filed by the manufacturer-assessees, the Commissioner in the impugned orders has invoked the extended period of limitation and upheld that the extended period of limitation would be invocable in the facts and circumstances of the case. Learned Commissioner (AR), on the other hand, has argued vehemently why the concept of limitation will not be applicable or even if it is applicable, the extended period of limitation would be applicable in all the cases. Normally, the question of extended period of limitation is mixed question of facts and law and depends more on the facts of each case. In the present set of cases, the facts are very clear and in view of this position, in our view, there is no need for sending the matter back to the Commissioner in first three appeals and in the remaining two appeals Commissioner has already given his findings. However, we are holding the matter in favour of the manufacturer-assessees on the merits of the case itself. We therefore do not consider it necessary to go into discussion and give our finding on the question of limitation or interest.

46. Both the sides have quoted large number of judgments in support of various propositions made by them. We have gone through these judgments and also the facts of these cases and relevant laws. Most of these judgments are not in the context of Central Excise Act but some other Act. Even the words used in those Acts are very different. Facts and issues in the present case are totally different. We do not consider it necessary to discuss each one of them.

47. In view of above discussion, all the three appeals filed by the Revenue are dismissed. The two appeals filed by the appellant-assessees are allowed. Cross objection filed in one of the appeals is also disposed of.

(Pronounced in Court on 6.10.2015)